

Criminal Case Update

Cases covered include *McElrath v. Georgia* from the Supreme Court of the United States and all published opinions from the North Carolina Appellate Courts from September 16, 2023, to May 23, 2024. These summaries were originally posted on the [North Carolina Criminal Law Blog](#). You may search all of the summaries in the [Criminal Case Compendium](#). To obtain the summaries automatically by email, sign up for the [Criminal Law Listserv](#).

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Criminal Procedure

Appellate Issues

Defendant was not required to give advance notice of his intent to appeal prior to pleading guilty when plea was not part of a plea agreement.

[State v. Jonas](#), 433PA21, ___ N.C. ___ (May 23, 2024). In this Cabarrus County case, the Supreme Court upheld the Court of Appeals decision that defendant was not required to give notice of his intent to appeal the denial of his motion to suppress prior to entering an open guilty plea.

Defendant was charged with possession of a controlled substance and filed a motion to suppress, arguing the officer who stopped and searched him lacked reasonable suspicion. The trial court denied defendant's motion, and defendant subsequently pleaded guilty. Notably, defendant confirmed to the trial court that he was not pleading guilty as part of a plea arrangement. After sentencing, defense counsel gave notice of appeal on the record. The Court of Appeals panel unanimously held that defendant was not required to give notice of intent to appeal prior to entering his plea.

Taking up the State's discretionary petition, the Supreme Court first noted that under *State v. Reynolds*, 298 N.C. 380 (1979), defendant would normally be required to give notice of his intent to appeal to the prosecutor and court "to ensure fundamental fairness in the plea negotiation process." Slip Op. at 1. The Court noted that here, defendant did not receive any benefit from the State, and the issue of fairness was not in play. Concluding it would not advance the interests of justice and fairness to extend the *Reynolds* rule to open guilty pleas, the Court affirmed the Court of Appeals decision.

Chief Justice Newby, joined by Justice Berger, dissented, and would have held that *State v. Tew*, 326 N.C. 732 (1990), controlled and required application of the *Reynolds* rule to open pleas. Slip Op. at 14.

Attorney's Fees

Trial court erred by entering civil judgment for attorney's fees against defendant without allowing defendant to be heard on the issue.

[State v. Simpson](#), COA23-676, ___ N.C. App. ___ (May 7, 2024). In this Rowan County case, defendant appealed a civil judgment for attorney's fees imposed on him after a trial and conviction for assault on a detention employee inflicting physical injury. The Court of Appeals found error and vacated the civil judgment, remanding for proceedings to allow defendant to be heard on the issue of attorney's fees.

After the trial against defendant for the assault against a detention employee, appointed defense counsel raised the issue of fees with the court, noting his fee and requesting the

court take notice that defendant had been on good behavior. The court did not inquire as to whether defendant wanted to be heard regarding the issue of attorney's fees.

Taking up defendant's appeal, the Court of Appeals explained that the trial court should have ensured that defendant was given an opportunity to be heard on the issue of attorney's fees, and pointed to *State v. Friend*, 257 N.C. App. 516 (2018), as controlling. Because nothing in the record indicated defendant was given notice of the attorney's fees issue until the civil judgment was imposed, the court vacated the judgment and remanded.

Judge Griffin dissented by separate opinion, and would have left the civil judgment in place.

Bench Trial

(1) Out-of-court statements were corroborative and not hearsay; (2) closing argument statements were not improper vouching for victim's credibility; (3) during bench trial, trial court is presumed to ignore inadmissible evidence unless evidence is admitted showing otherwise.

[State v. Lindsay](#), COA23-563, ___ N.C. App. ___ (March 5, 2024). In this Gaston County case, defendant appealed his convictions for forcible sexual offense, assault on a female, and sexual battery, arguing error in (1) admitting out-of-court hearsay statements, and (2) failing to intervene *ex mero motu* during the State's closing argument. The Court of Appeals found no error.

In April of 2021, Defendant was staying with a family while visiting from New York, where he forced his way onto the eighteen-year-old daughter while she was sleeping. When the matter came to trial, the State called an officer who had interviewed the victim and her mother after the assault. The officer testified at trial about what the mother and the victim had told her during the interview. The State also offered recorded versions of interviews conducted by the police department. Defense counsel did not object to the testimony or the recorded interviews. Defendant was convicted after a bench trial and appealed.

Beginning with (1), the Court of Appeals explained that the out-of-court statements in question were reviewed under the plain error standard, and noted that "we give the trial court the benefit of the doubt that it adhered to basic rules and procedure when sitting without a jury." Slip Op. at 12. Here, the court did not find the statements inadmissible, as "the out-of-court statements at issue were corroborative and not substantially different from the in-court testimony." *Id.* at 14. Because the statements were corroborating evidence of the testimony from the victim and her mother given during the trial, they did not represent hearsay. Additionally, the court noted the unusual nature of the review, as "the standard in a bench trial is distinct from plain error review and requires that defendant introduce facts showing the trial judge, in fact, considered inadmissible evidence." *Id.* at 15.

Looking to (2), defendant argued that the State improperly vouched for the truth of the victim's testimony during closing argument. The court noted that the statements at issue were simply that the victim "had no reason to lie" about the assault, not direct statements vouching for her truthfulness. *Id.* at 16. Additionally, the court again pointed out that the matter was a bench trial, and "the trial judge presumably disregarded any personal beliefs purportedly inserted into the State's closing argument that pertained to whether [the victim] was telling the truth." *Id.* at 17.

Judge Murphy dissented in part and concurred in the result only by separate opinion, dissenting from the majority's statement regarding plain error review in a bench trial, but agreeing that defendant did not demonstrate prejudice.

Bond Forfeiture

Trial court's order granting relief from bond forfeiture was not supported by evidence of extraordinary circumstances and represented abuse of discretion.

[State v. Mohammed](#), COA23-198, ___ N.C. App. ___ (Oct. 17, 2023). In this Durham County case, the Durham Public Schools Board of Education (Board) appealed an order granting relief from a judgment of bond forfeiture, arguing the bond surety company did not make a showing of extraordinary circumstances to justify relief. The Court of Appeals agreed, reversing the trial court's order for abuse of discretion.

Defendant in the underlying criminal case was arrested in February 2020, and released on a \$5,000 secured bond. At defendant's January 2022 court date, he failed to appear, leading the trial court to issue a bond forfeiture notice with a final judgment date of June 16, 2022. On the same day as the final judgment, the bail agent filed a motion to set aside the forfeiture, arguing that defendant had died. Instead of attaching a copy of the defendant's death certificate to the motion, the bond agent attached a handwritten note stating "[d]efendant died and we are getting a copy of death certificate." Slip Op. at 2. The Board objected and moved for sanctions, pointing out that the motion did not contain actual evidence of defendant's death; the trial court imposed \$2,500 in sanctions and left the final judgment in place. After the State moved to dismiss the charges against defendant, the surety filed another motion for relief from the final judgment of forfeiture, this time attaching a photograph of defendant's death certificate from Cook County, Illinois. The trial court ultimately left the sanctions in place, but granted the surety relief from the bond forfeiture, concluding that extraordinary circumstances justified relief. The Board appealed.

The Court of Appeals found the trial court abused its discretion in granting the motion for relief, as no evidence in the record supported a finding of extraordinary circumstances under G.S. 15A-544.8(b)(2). While the surety's counsel argued that obtaining the death certificate was difficult and required a search for family members, the record contained no

sworn testimony or affidavits supporting this assertion. The court pointed out “[c]ounsel’s arguments were not evidence, and the record is devoid of evidence to support the trial court’s finding” that extraordinary circumstances occurred. *Id.* at 6. Because no evidence in the record supported the trial court’s conclusion, “the trial court’s conclusion that extraordinary circumstances existed could not have been the result of a reasoned decision.” *Id.*

Capacity to Proceed & Related Issues

Defendant’s traumatic brain injury and subsequent memory loss did not render him incompetent to stand trial.

[State v. Bethea](#), COA22-932, ___ N.C. App. ___ (Dec. 19, 2023). In this Scotland County case, defendant appealed his convictions for attempted first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, assault with a firearm on an officer, and carrying a concealed gun, arguing abuse of discretion in finding him competent to stand trial. The Court of Appeals disagreed, finding no error.

In May of 2018, defendant walked up to a crime scene and passed under the police tape into the secured area. Two officers on the scene moved to arrest defendant, and in the ensuing confrontation, defendant drew his firearm and shot at one of the officers. Defendant attempted to flee but was struck by shots from one of the officers. At the hospital, defendant was diagnosed with a traumatic brain injury. Before trial, defendant’s counsel filed a motion for capacity hearing due to his alleged memory loss from the brain injury. The trial court held a competency hearing, where a doctor provided by the defense testified that defendant could not remember the days leading up to the confrontation with police or the events of the day in question, but that defendant had a “rational understanding” of the legal proceedings against him. Slip Op. at 3. The trial court ruled defendant was competent to stand trial, and he was subsequently convicted.

Taking up defendant’s appeal, the Court of Appeals noted that “our Supreme Court has explained that even when a defendant’s ability to participate in his defense is limited by amnesia, it does not per se render him incapable of standing trial.” *Id.* at 6. Although defendant argued his memory loss made him unable to participate in his defense, the court disagreed, explaining “he was able to understand the nature and object of the proceedings against him and able to comprehend his own situation in reference to the proceedings.” *Id.* The court found no abuse of discretion by the trial court when weighing the testimony and concluding that defendant was competent to stand trial.

Counsel Issues

Denial of defense counsel's motion to withdraw did not represent Sixth Amendment structural error.

[State v. Melton](#), COA23-411, ___ N.C. App. ___ (May 21, 2024). In this Forsyth County case, defendant appealed his convictions for possession of methamphetamine and habitual felon status, arguing structural error in denying his court-appointed counsel's motion to withdraw. The Court of Appeals majority found no error.

In July of 2022, defendant was represented by court-appointed counsel, and requested a trial on his charges. A trial date was set for September 12, 2022. On September 9, an attorney who was not the court-appointed counsel contacted the State to negotiate a plea deal or continuance for defendant's case. The State did not agree to the continuance, but offered a plea deal, which defendant rejected. Court-appointed counsel learned of this negotiation on September 11, and subsequently filed a motion to withdraw. The trial court heard and denied the motion to withdraw on September 12. The next day, the case came for trial, and defense counsel informed the trial court (who was a different superior court judge) that defendant wished to be heard on the motion again; after hearing from both parties, the trial court repronounced the motion to withdraw. Defendant was subsequently convicted, and filed notice of appeal.

The Court of Appeals first noted the framing of defendant's argument, that depriving him of his Sixth Amendment right to counsel was structural error, and explored the proper standard for reviewing an indigent defendant's request to substitute appointed counsel with counsel of his choice. Looking to applicable precedent, the court noted that a trial court should only deny a motion like defendant's when "granting the motion would 'result in significant prejudice to the defendant or in a disruption of the orderly processes of justice unreasonable under the circumstances[.]'" Slip Op. at 7, quoting *State v. Goodwin*, 267 N.C. App. 437, 440 (2019). Although the majority opinion noted possible issues with Court of Appeals precedent around the *Goodwin* standard, it proceeded to apply this reasoning to the present case, holding that "the trial court conducted an inquiry which revolved around issues concerning the further disruption and delay of trial." *Id.* at 12. As a result, the court found no structural error with the trial court's initial denial of the motion.

The court then moved to defendant's request for reconsideration of the motion on September 13. Normally a superior court judge is not authorized to overrule another, but when the order is (1) interlocutory, (2) discretionary, and (3) subject to a substantial change of circumstances, an exception to this rule applies. The court held that while the order was both (1) and (2), "the record does not reflect a substantial change in circumstances" and the trial court did not err in repronouncing the denial of the motion. *Id.* at 14.

Judge Stroud concurred by separate opinion, and concurred with the majority opinion except as to the citation of certain unpublished cases that were not argued by the parties.

Judge Thompson dissented, and would have held that the trial court committed a structural error by denying defense counsel's motion to withdraw.

Defendant forfeited his right to counsel after six appointed attorneys and two years of delay to the proceedings.

[State v. Smith](#), COA23-575, ___ N.C. App. ___ (March 5, 2024). In this Stanly County case, defendant appealed the trial court's ruling that he forfeited his right to counsel. The Court of Appeals found no error.

Defendant pleaded guilty to first degree kidnapping, second degree rape, and second degree burglary in December of 2017. However, due to a sentencing error, defendant was brought back before the trial court in July 2020, and there he requested to set aside his guilty plea. At the same time, defendant's first attorney requested to withdraw. This began a series of six appointed attorneys that represented defendant from July 2020 to July 2022. During this time, defendant was also disruptive to the proceedings, and at one point was held in contempt by the trial court. Eventually, due to defendant's disruptions and dispute with his sixth appointed attorney, the trial court ruled that defendant had forfeited his right to court-appointed counsel. Defendant appealed.

The Court of Appeals explained that the trial court was correct in finding that defendant forfeited his right to counsel, pointing to defendant's "insistence that his attorneys pursue defenses that were barred by ethical rules and his refusal to cooperate when they would not comply with his requests[,] along with defendant's conduct that "was combative and interruptive during the majority of his appearances in court." Slip Op. at 10. These behaviors caused significant delay in the proceedings, and justified forfeiture of counsel.

Failure to renew motion to dismiss at close of evidence did not represent ineffective assistance of counsel where substantial evidence supported defendant's conviction.

[State v. Smith](#), COA23-645, ___ N.C. App. ___ (March 5, 2024). In this Robeson County case, defendant appealed his conviction for driving while impaired (DWI), arguing error in denying his motion to dismiss and ineffective assistance of counsel. The Court of Appeals dismissed defendant's argument regarding the motion to dismiss, and found no ineffective assistance of counsel.

In April of 2019, a trooper from the State Highway Patrol arrested defendant after responding to a collision. The trooper observed signs of intoxication and administered field sobriety tests, determining defendant showed signs of intoxication. During the trial at superior court, defendant moved to dismiss the DWI charge for insufficient evidence prior to putting on evidence, but did not renew his motion to dismiss at the close of all evidence.

The Court of Appeals first established that under Rule of Appellate Procedure 10(a)(3), defendant's failure to renew his motion after putting on evidence waived his argument regarding denial of the motion to dismiss. The court dismissed that portion of defendant's appeal, and moved to the ineffective assistance of counsel claim, which was predicated on defense counsel failing to renew the motion to dismiss.

To show ineffective assistance of counsel, defendant had to satisfy the two-part test from *Strickland v. Washington*, 466 U.S. 668 (1984), showing deficient performance and that the deficient performance prejudiced defendant. Here, the court explained that "to prevail on an ineffective assistance of counsel claim in which the defendant argues that his counsel failed to renew his motion to dismiss, the defendant must show that there is a reasonable probability that the trial court would have allowed the renewed motion." Slip Op. at 7. The court did not find that in the current case, as "when viewing the evidence in the light most favorable to the State, there was substantial evidence that Defendant was driving while impaired." *Id.* at 9.

(1) Absolute impasse was not clearly indicated by cold record, and not established as a structural error; (2) defense counsel's statements in closing argument were not *Harbison* error; (3) indictment for habitual misdemeanor assault was not fatally flawed as "serious injury" incorporated concept of "physical injury."

[State v. Jackson](#), COA22-280, ___ N.C. App. ___ (March 5, 2024). In this Wake County case, defendant appealed his convictions for forcible rape, sex offense, kidnapping, various assault charges, and interfering with emergency communication, arguing (1) he was deprived of his right to autonomy in the presentation of his defense, (2) he was deprived of effective assistance of counsel when his attorney admitted guilt during closing argument, and (3) the trial court lacked jurisdiction to sentence him for habitual misdemeanor assault due to a facially invalid indictment. The Court of Appeals majority disagreed, finding no error.

In April of 2020, defendant came to trial for assaulting and raping a woman he was dating at the time. During the trial, defense counsel informed the court that defendant would not testify or present evidence, and the trial court conducted a colloquy to ensure defendant was knowingly waiving this right. During the colloquy, defendant mentioned documentary evidence he wanted to admit, but that his attorney had not admitted. The trial court did not instruct defense counsel to introduce the evidence. During closing argument, defense counsel mentioned that defendant was not guilty of kidnapping, sexual offense, or rape, but did not mention assault. Defendant was subsequently convicted, and appealed.

In (1), defendant contended that he and defense counsel had reached an absolute impasse about the documentary evidence, and the trial court committed a structural error by failing to instruct defense counsel to comply with defendant's wishes to admit the evidence. The Court of Appeals first noted the rule that "where the defendant and his

defense counsel reach an absolute impasse and are unable come to an agreement on such tactical decisions, the defendant's wishes must control." Slip Op. at 5. However, here the court was "unable to determine from the cold record whether there was a true disagreement, which would amount to an absolute impasse." *Id.* at 7-8. Additionally, the court explained that even if there was an error, it was not a type recognized as structural by the Supreme Court, referencing the list identified in *State v. Minyard*, 289 N.C. App. 436 (2023).

Moving to (2), defendant argued his defense counsel committed an error under *State v. Harbison*, 315 N.C. 175 (1985), which would represent ineffective assistance of counsel. However, the court did not see a *Harbison* error, noting "defense counsel here never implied or mentioned any misconduct [by defendant]" while giving closing argument. Slip Op. at 15. Instead, the court held that "[defense counsel's] statements cannot logically be interpreted as an implied concession of Defendant's guilt." *Id.*

Finally, in (3) defendant argued that the indictment was flawed as it failed to state the assault caused "physical injury." *Id.* at 17. The court explained that here, count VIII of the indictment alleged that defendant caused "serious injury" for the assault inflicting serious injury charge. *Id.* at 18. The court determined that the broader term was sufficient, as "it logically follows Defendant was noticed of his need to defend against an allegation that he caused physical injury as 'serious injury' is defined to include physical injury." *Id.* at 21.

Judge Murphy concurred in part and dissented in part by separate opinion, and would have held that the indictment for habitual misdemeanor assault in (3) was insufficient as physical injury and serious injury were not synonymous.

Defendant waived and forfeited his right to counsel through misconduct; admitting expert testimony without foundation was not plain error.

[State v. Jones](#), COA23-647, ___ N.C. App. ___ (Feb. 20, 2024). In this Davidson County case, defendant appealed his conviction for felony fleeing to elude arrest, arguing (1) error in finding he had waived or forfeited his right to counsel and (2) plain error by allowing the State to introduce foundationless expert testimony by a law enforcement officer about sovereign citizens. The Court of Appeals found no error or plain error.

Defendant came to trial for fleeing from police officers on his motorcycle when they attempted to stop him. The trial court attempted a colloquy to determine if defendant desired or waived counsel, but defendant refused to answer and questioned the jurisdiction of the trial court. The trial court concluded that defendant waived his right to counsel and proceeded. Defendant continued to challenge the trial court and delay the proceedings, and was twice found to be in contempt by the trial court. During the testimony of one of the officers, the State asked about sovereign citizens and the officer

offered a brief description of his understanding of a sovereign citizen, to which defendant did not object. Defendant was subsequently convicted, and appealed.

Taking up (1), the Court of Appeals first looked to *State v. Blakeney*, 245 N.C. App. 452 (2016), to summarize the methods in which a defendant may waive or forfeit counsel, including “a mixture of waiver and forfeiture” by misconduct. Slip Op. at 5. The court then considered whether defendant’s actions constituted waiver of counsel, noting the statutorily-required procedure in G.S. 15A-1242. Here, the record did not contain a signed waiver and certification by the trial court judge, but the court noted “[t]his absence in the record does not *per se* invalidate Defendant’s waiver.” Slip Op. at 7. The court found the required elements from G.S. 15A-1242 in the transcript and concluded “[d]efendant clearly waived his right to further court-appointed counsel.” *Id.* at 8. The court then considered whether defendant forfeited his right to counsel, walking through applicable precedent. After reviewing notable cases in the area, the court explained that “[a] defendant may also forfeit their right to counsel by engaging in ‘serious misconduct.’” *Id.* at 15, quoting *Blakeney* at 460. Reviewing the current case, the court concluded that “[i]n addition to a waiver, Defendant forfeited his right to counsel.” *Id.* at 16.

Reaching (2), the court noted that defendant did not object to officer’s testimony defining sovereign citizens at trial, meaning the review was plain error. Defendant failed to show that the testimony had a probable impact on the jury, meaning he could not demonstrate plain error.

Defense counsel’s statements portraying defendant’s actions as voluntary manslaughter instead of murder did not represent *Harbison* error; jury instruction on aggressor doctrine was justified while stand your ground doctrine instruction was not justified; prosecutor’s reference of minimum sentences was not violation of law.

[State v. Parker](#), COA23-90, ___ N.C. App. ___ (Oct. 3, 2023). In this Gates County case, defendant appealed his conviction for first-degree murder, arguing (1) ineffective assistance of counsel, and error in (2) jury instructions and (3) failing to intervene *ex mero motu* during the State’s closing argument. The Court of Appeals found no ineffective assistance and no error.

While entering a barbershop in December of 2018, defendant ran into an acquaintance (the victim) with whom he had a contentious relationship. The two exchanged words about defendant’s newborn daughter, where the acquaintance implied that defendant was not the father. Later that night after a series of phone calls, defendant and several friends went over to the acquaintance/victim’s house. After defendant arrived, he and the victim began arguing in the driveway, leading to a fistfight. After several minutes, defendant walked backwards down the driveway while the victim continued to come towards him with his hands up; defendant then shot the victim five times. Defendant fled the scene but was later apprehended walking on the side of the road. At trial, defendant’s counsel told the

jury that if they found defendant used excessive force to defend himself in the situation, that would be voluntary manslaughter, not murder. Counsel also stated in closing arguments that defendant intentionally went to the victim's house, while defendant had testified that he had fallen asleep in his friend's car and ended up at the house unintentionally. During the State's closing argument, the prosecutor alerted the jury to the fact that the minimum sentence for voluntary manslaughter was 38 months, suggesting the punishment would not be severe enough for the serious crime committed. When providing jury instructions, the trial court instructed the jury on the aggressor doctrine but did not provide an instruction on stand your ground laws; defendant did not object to the instructions.

Taking up (1), the Court of Appeals explained that defendant's first argument regarding his counsel represented conceding guilt without prior consent, a prejudicial error under *State v. Harbison*, 315 N.C. 175 (1985). Defendant argued that his counsel's statements regarding use of excessive force and voluntary manslaughter represented a concession or implication of defendant's guilt. The court disagreed, explaining that defendant was charged with first-degree murder and "the transcript reveals his counsel advocating for the jury to find Defendant either not guilty, or guilty of voluntary manslaughter." Slip Op. at 7-8. The court also disagreed with defendant that defense counsel contradicting his testimony represented ineffective assistance. The court explained that nothing else in the record supported defendant's testimony that he fell asleep in the car and inadvertently ended up at the victim's house. Additionally, the purpose of this contradiction was defense counsel's attempt to convince the jury that defendant "lacked the requisite intent to be found guilty of first-degree murder." *Id.* at 10.

Reaching (2), the court explained that it reviewed the jury instructions for plain error because defendant did not object during the trial; after review, the court concluded "that jury instructions regarding the aggressor doctrine were warranted, and instructions on stand your ground laws were not." *Id.* at 11. Here, testimony in the record suggested that defendant may have initiated the fight with the victim through a phone call prior to his arrival, justifying the use of the aggressor doctrine instruction. In contrast, the court could not find justification for the stand your ground laws instruction, as there was a lack of evidence supporting defendant's lawful right to be at the residence where the conflict took place.

Finding no error in (3), the court explained that the prosecutor's arguments were not grounds for trial court intervention, as "[w]hile suggesting that the minimum sentence would not be severe enough punishment might run afoul of the unspoken rules of courtroom etiquette, it is not, in fact, against the law." *Id.* at 13.

Defendant knowingly and intentionally waived his right to counsel and forfeited his right to counsel through misconduct, justifying denial of his motion to continue to obtain new counsel; testimony regarding an encounter with a prostitute one day after the crime in question was relevant and admissible.

[State v. Moore](#), COA22-714, ___ N.C. App. ___ (Oct. 3, 2023). In this Onslow County case, defendant appealed his conviction for first-degree murder, arguing error in (1) denial of his right to counsel, (2) denial of his motion to continue, and (3) allowing a witness to testify about unrelated allegations against him. The Court of Appeals found no error.

After Thanksgiving in 2017, defendant borrowed his girlfriend's car and drove from Florida to North Carolina, telling her that he was visiting family. After arriving in North Carolina, defendant contacted a prostitute and eventually killed her and buried her body in a remote area at the end of a dirt road. During the same December 2017 time period, defendant met with a different prostitute, who would later testify about how defendant took her to the same area, raped her, and stole all the money from her purse. When defendant indicted for murder in 2018, he was represented by his sister, a Georgia attorney who was admitted *pro hac vice* for the trial. Defendant also had a series of local attorneys represent him, all of whom withdrew due to disputes with defendant and his sister. During these disputes, defendant's sister apparently filed several complaints with the N.C. State Bar against defense counsel and prosecutors. Eventually, the trial court revoked the sister's *pro hac vice* admission due to her lack of experience and interference with other counsels' ability to prepare. When the matter reached trial, defendant had another appointed counsel, but several days after opening statements, the appointed counsel moved to withdraw, explaining that defendant had asked her to stop representing him; she also informed the trial court defendant had implied she should withdraw for her own safety. The trial court conducted a colloquy with defendant, where defendant told the trial court he was not happy with the appointed counsel and understood that he would be forfeiting his right to an attorney. After the trial court allowed counsel to withdraw, the trial went forward with defendant representing himself; he did not present evidence, cross-examine witnesses, or provide a closing argument. Defendant was ultimately convicted, and subsequently filed a motion for appropriate relief (MAR). The trial court denied the MAR, finding that defendant forfeited his right to counsel by misconduct. Defendant's appeals of his conviction and the denial of his MAR led to the current opinion.

Taking up (1), the Court of Appeals first explained the distinction between a knowing and voluntary waiver of counsel under G.S. 15A-1242, and forfeiture of counsel by misconduct, referencing *State v. Blakeney*, 245 N.C. App. 452 (2016). Although the record indicated that defendant signed a written waiver of counsel that was certified by the trial court, the waiver was not included on appeal. Despite this absence, the court explained that the missing waiver and certification document did not invalidate defendant's waiver of his right to counsel. After determining the trial court clearly advised defendant of his rights and the consequences of waiving an attorney, the court found that defendant had "clearly waived and/or forfeited his right to further court-appointed counsel." Slip Op. at 32. The court then

explored the forfeiture ruling, noting that the N.C. Supreme Court had first recognized that a defendant could forfeit counsel in *State v. Simpkins*, 373 N.C. 530 (2020), and had expanded on the analysis in *State v. Harvin*, 382 N.C. 566 (2022), and *State v. Atwell*, 383 N.C. 437 (2022). Slip Op. at 35-36. After examining defendant’s conduct, including the interference from his sister and the seven attorneys representing him through the process, the court concluded defendant had committed “serious misconduct” sufficient to forfeit counsel, in addition to his “knowing and voluntary waivers of counsel.” *Id.* at 42.

Turning to (2), the court explained that defendant filed his motion intending to replace the attorney he had just fired after the jury was already empaneled and the State was presenting its case-in-chief. Because no attorney could have adequately represented him in the middle of his trial, and defendant had waived and forfeited his right to counsel in (1), the court found no error in denial of the motion.

Considering (3), the court established that the objection was not properly preserved for review, and that the review was under a plain error standard. The court then turned to the substance of the second prostitute’s testimony that defendant had raped her and the other details of the encounter, explaining that defendant asserted it was not relevant and inadmissible. Here the court disagreed, explaining that the details were admissible and relevant under Rules of Evidence 401 and 402. The court likewise found the testimony admissible under Rule of Evidence 404(b), explaining that the proximity and similarity of the events along with the prostitute’s testimony identifying defendant “far exceed” simply showing defendant had “the propensity or disposition to commit” the offense. *Id.* at 55. Finally, the court found no error with the trial court’s conclusion that the events described in the testimony were sufficiently similar and not too remote in time from the events of the crime to be considered prejudicial and inadmissible under Rule of Evidence 403.

Defendant’s Right to Testify

Trial court’s error in permitting reference to defendant’s decision not to testify was cured by robust curative instruction to jury.

[State v. Grant](#), COA23-656, ___ N.C. App. ___ (April 16, 2024). In this Mecklenburg County case, defendant appealed his conviction for assault on a female, arguing prejudicial error in overruling his objection to the State’s comment during closing argument regarding his decision not to testify. The Court of Appeals found no prejudicial error.

In May of 2021, defendant came to trial for various charges related to assaulting a female. During closing argument, the prosecutor twice mentioned that the jury should not hold defendant’s decision not to testify against him. After the first reference, defendant objected, but the trial court overruled the objection and let the prosecutor continue. The jury was then dismissed for lunch.

After lunch, but before the jury returned, defendant moved for a mistrial, citing *State v. Reid*, 334 N.C. 551 (1993), and pointing out that the court did not give a curative instruction after the improper statement in closing argument. The trial court denied the mistrial motion but agreed that it should have sustained the objection. When the jury returned, the trial court gave a curative instruction and “explained that the State’s comment was improper, instructed the jury not to consider Defendant’s decision not to testify, and polled the jury to ensure that each juror understood.” Slip Op. at 6. In light of the robust curative instruction, the Court of Appeals concluded that the trial court cured the error of overruling defendant’s objection.

Dismissal of Charges

Pleading to lesser-included offense did not represent dismissal for purposes of expungement under G.S. 15A-146.

[State v. Lebedev](#), COA23-249, ___ N.C. App. ___ (Nov. 7, 2023). In this Orange County case, defendant appealed (1) three orders by the Orange County District Court denying his petition to expunge traffic misdemeanors, and (2) the order of the Orange County Superior Court denying his petition for writ of certiorari. The Court of Appeals affirmed the orders of the district court and superior court.

Between April of 2009 and August of 2011, defendant was charged with speeding three separate times in three unrelated incidents, and each time he pleaded to a lesser-included offense. In November of 2022, defendant filed three separate expungement petitions with the district court, seeking expunction as to each of the traffic charges. The district court denied the petitions because defendant was not charged with “multiple offenses” as required by G.S. 15A-146. Defendant then petitioned for a writ of certiorari from the superior court, which was also denied.

The Court of Appeals noted that defendant’s argument hinged on the statutory interpretation of G.S. 15A-146, citing the relevant language from subsection (a1): “[i]f a person is charged with multiple offenses and any charges are dismissed, then that person or the district attorney may petition to have each of the dismissed charges expunged.” Slip Op. at 4. The court explained that while the statute did not define what constituted a “dismissal,” it was a common word with an unambiguous meaning. Although the court determined no charges were dismissed in this matter, defendant argued that “the legislature nonetheless intended defendants to be able to petition to expunge misdemeanor charges that did not ultimately result in a conviction.” *Id.* at 5. The court found this interpretation to be “imaginative” but ultimately flawed, as “it incorrectly conflates the concept of pleading down to a lesser included offense with that of an actual dismissal.” *Id.* at 6. Having established that amending the charge to reflect a lesser-included offense did not represent dismissal under G.S. 15A-146, the court affirmed the denial of defendant’s various petitions as without merit.

Double Jeopardy

Verdict of Not Guilty by Reason of Insanity is Acquittal for Purposes of Double Jeopardy Clause.

[McElrath v. Georgia](#), 601 U. S. ____ (2024). In this case concerning the Fifth Amendment's Double Jeopardy Clause, Damian McElrath petitioned for relief after the Supreme Court of Georgia held its state's repugnancy doctrine allowed the retrial of McElrath for malice murder after the jury returned a verdict of not guilty by reason of insanity, but found McElrath guilty of related charges. In an opinion authored by Justice Jackson, the Court unanimously rejected Georgia's interpretation and held that McElrath could not be tried for malice murder a second time because the jury's verdict of not guilty by reason of insanity represented an acquittal.

In 2012, McElrath stabbed his adopted mother to death, suspecting that she was poisoning his food. McElrath had been diagnosed with bipolar disorder at a young age, and a few weeks before the killing he began exhibiting delusions, resulting in his commitment to a mental health facility where he was diagnosed with schizophrenia. One week after his discharge from the mental health facility, McElrath killed his mother, then called 911 to report the killing, informing law enforcement that he killed her because she was poisoning his food.

Georgia brought three charges against McElrath: malice murder (effectively first-degree murder), felony murder, and aggravated assault. At trial, McElrath asserted an insanity defense. Georgia law allowed for two special verdicts in this situation, "not guilty by reason of insanity" and "guilty but mentally ill." The jury in this case returned a split verdict, finding McElrath not guilty by reason of insanity for the malice murder charge, and guilty but mentally ill for the felony murder and aggravated assault charges (these charges merged as the assault was the predicate felony). The trial court sentenced McElrath to life imprisonment and he appealed, arguing that the two verdicts were "repugnant" (meaning the jury's findings "are not legally and logically possible of existing simultaneously") under Georgia law and, thus, the felony murder/aggravated assault verdict should be vacated. Slip op. at 4.

The Supreme Court of Georgia agreed that the verdicts were repugnant, but contrary to McElrath's request, the court vacated both the malice murder and felony murder/aggravated assault verdicts, remanding for a new trial. McElrath appealed a second time, arguing the Double Jeopardy Clause prevented retrying him for malice murder when he was acquitted by the jury. The Georgia Court disagreed, holding that because the two verdicts were repugnant, neither held value, and the not guilty by reason of insanity verdict did not operate as a normal acquittal. This holding led to McElrath's petition and the current opinion.

Taking up the Double Jeopardy Clause argument, Justice Jackson first noted the long line of decisions establishing that “[o]nce rendered, a jury’s verdict of acquittal is inviolate.” *Id.* at 6. Importantly, the specific reasoning of the jury is not relevant, as “[w]hatever the basis, the Double Jeopardy Clause prohibits second-guessing the reason for a jury’s acquittal.” *Id.* Here, Georgia argued that the repugnancy of the verdicts meant they were both null, changing the normal calculus for an acquittal. The Court rejected this argument, explaining that “whether an acquittal has occurred for purposes of the Double Jeopardy Clause is a question of federal, not state, law[,]” and state law cannot change the fundamental considerations as to what constitutes an acquittal. *Id.* at 8. Under the Court’s standard, “an acquittal has occurred if the factfinder ‘acted on its view that the prosecution had failed to prove its case.’” *Id.* (quoting *Evans v. Michigan*, 568 U. S. 313, 322 (2013)).

Justice Jackson emphasized that even though the “not guilty by reason of insanity” verdict “was accompanied by other verdicts that appeared to rest on inconsistent findings[,]” this did not impact the Court’s conclusion, as “the Double Jeopardy Clause prohibits second guessing an acquittal for any reason.” *Id.* at 9. Georgia argued that due to the special nature of the verdicts regarding McElrath’s mental state, the normal rules of scrutinizing an acquittal did not apply. Justice Jackson explained that this did not matter, as precedent prohibited speculating as to a jury’s motivations or reasoning even when there are “specific jury findings that provide a factual basis for such speculation,” concluding “[w]e simply cannot know why the jury in McElrath’s case acted as it did, and the Double Jeopardy Clause forbids us to guess.” *Id.* at 12.

Justice Alito joined the unanimous opinion but also wrote a one-page concurrence to clarify that “the situation here is different from one in which a trial judge refuses to accept inconsistent verdicts and thus sends the jury back to deliberate further.” *Id.* (Alito, J., concurring). This echoed Justice Jackson’s clarification in footnote 4 of the main opinion.

Affidavits supporting search warrants were not conclusory; sentencing for first-degree kidnapping and underlying sexual offenses represented double jeopardy.

[State v. Hernandez](#), COA23-832, ___ N.C. App. ___ (April 2, 2024). In this Dare County case, defendant appealed his convictions for statutory rape, statutory sex offense, indecent liberties, and kidnapping, arguing (1) plain error in denying his motion to suppress evidence, (2) ineffective assistance of counsel for failing to object to the introduction of that evidence, and (3) double jeopardy for entering judgment on first-degree kidnapping and the underlying sexual offense charges. The Court of Appeals found no merit in (1)-(2), but vacated and remanded for resentencing regarding (3).

In July of 2020, a law enforcement officer obtained a search warrant for defendant’s address after a thirteen-year-old girl reported that defendant took her from her parents’ home and raped her. After searching defendant’s home and seizing several digital storage

devices, the officer obtained a second warrant in August of 2020 to access the contents of the devices. When reviewing the contents of the devices, the officer found videos of defendant engaging in sexual acts with two other minor girls. Defendant was subsequently indicted for offenses involving all three minor girls. Before trial, defendant moved to suppress the digital evidence, arguing seizure of the digital devices under the July warrant was overbroad, and the contents reviewed under the August warrant were fruit of the poisonous tree and not related to the crime being investigated. When the matter came to trial, the trial court eventually denied the motion to suppress, and defendant was convicted of all eight counts against him.

Regarding (1), defendant argued that the affidavits supporting the search warrants “failed to allege any nexus between the items sought and the crime being investigated.” Slip Op. at 10. The Court of Appeals explored the applicable precedent on conclusory affidavits, determining that “[d]espite its failure to establish an explicit connection between [the officer’s] training and experience and his belief in the existence of probable cause,” the July affidavit was not conclusory and permitted the magistrate to reasonably find probable cause for the search. *Id.* at 23. Moving to the August affidavit, the court reached the same conclusion, and noted that the August affidavit contained an additional attestation regarding the officer’s training and experience related to sex crimes.

Dismissing (2), the court explained that it had already established the adequacy of the affidavits and probable cause supporting the search warrants, and “[h]ad Defendant’s trial counsel objected to the introduction of the challenged evidence, the result of the proceeding would have been the same.” *Id.* at 28.

Arriving at (3), the court explained that “the trial court’s instructions here were such that Defendant could only have been convicted of first-degree kidnapping on the basis of one of the sexual offense charges for which he was also convicted and sentenced.” *Id.* at 31. Imposing sentences for the underlying sexual offense charges and the first-degree kidnapping charge represented double jeopardy, requiring remand to the trial court for resentencing to second-degree kidnapping or arresting judgment on the underlying sexual offense charges.

DWI Procedure

“Interlocutory no-man’s land” justified granting certiorari after district court’s suppression order; officer had reasonable suspicion for DWI arrest.

[State v. Woolard](#), 208PA22, ___ N.C. ___ (Dec. 15, 2023). In this Beaufort County case, the Supreme Court granted certiorari to review the State’s appeal of a district court order suppressing evidence gathered during a DWI traffic stop. The Supreme Court found that the arresting officer had probable cause to arrest defendant and reversed the suppression order, remanding for further proceedings.

In April of 2020, a State Highway Patrol officer stopped defendant after observing him weaving across the centerline. The officer noticed defendant smelled of alcohol and had glassy eyes, and defendant admitted to having a couple of beers earlier in the day. After administering a preliminary breath test (PBT) and horizontal gaze nystagmus (HGN) test, the officer arrested defendant for DWI. When the matter came to district court, defendant moved to suppress the results of the stop. The trial court found that the officer did not have probable cause to suspect defendant of DWI before his arrest, and also that the officer failed to ensure defendant had nothing in his mouth before the PBT, excluding the results. After the trial court's preliminary ruling, the State challenged the determination in superior court under G.S. 20-38.7(a), but that court affirmed the trial court's determination and directed it to enter a final order. The Court of Appeals denied the State's petition for a writ of certiorari.

Taking up the State's petition, the Supreme Court first established its jurisdiction and the lack of other appeal routes, explaining that the final suppression order from district court was interlocutory, and the statute governing appeals from district court, G.S. 15A-1432, provided no other route for the State to appeal because there was no dismissal or motion for new trial. Since there was no vehicle for appeal and the State "would otherwise be marooned in an 'interlocutory no-man's land,'" Rule of Appellate Procedure 21 allowed the State to petition the Court for certiorari. Slip Op. at 8. This also meant that the Court was considering the district court's final order, as there was no Court of Appeals opinion on the matter.

Moving to the suppression order, the Court explained the applicable standard for probable cause in DWI arrests, and noted the extensive facts in the record supporting the officer's suspicion of defendant, including "erratic weaving; the smell of alcohol on his breath and in his truck; his red, glassy eyes; his admission to drinking; and his performance on the HGN test." *Id.* at 23. Based on the totality of the evidence, the Court concluded that "a reasonable officer would find a 'substantial basis' to arrest in this case," and defendant's arrest did not offend the Fourth Amendment. *Id.* at 22.

Habitual Felon

Reclassification of Colorado offense from felony to misdemeanor did not remove factual basis for defendant's plea to habitual felon status.

[State v. Mincey](#), COA23-447, ___ N.C. App. ___ (Feb. 6, 2024). In this Craven County case, defendant appealed her guilty plea to habitual felon status, arguing the reclassification of the offense she was convicted of in Colorado from a felony to a misdemeanor removed the factual basis for her plea. The Court of Appeals majority disagreed, finding no error.

Defendant was convicted by a jury of nine counts of embezzlement and one count of obtaining property by false pretenses in August of 2022. After her conviction, she pleaded guilty to attaining habitual felon status, based in part on a Colorado conviction for second-

degree forgery in 1991. In 1993, Colorado reclassified second-degree forgery as a misdemeanor. During the colloquy required by G.S. 15A-1022(c), the trial court examined evidence showing the felony conviction from 1991, and defense counsel did not object to the factual basis of the conviction, even incorrectly stating that second-degree forgery was still a felony in Colorado.

Taking up defendant's argument, the Court of Appeals first established that it had jurisdiction to review her guilty plea under G.S. 15A-1444(a2), even though habitual felon status is not a crime. Because defendant was challenging "whether her term of imprisonment was authorized by statute[,]" the court concluded that G.S. 15A-1444(a2)(3) granted it jurisdiction to consider the appeal. The court then moved to the substance of defendant's argument and reviewed the text of the habitual felon statute under G.S. 14-7.1. Rejecting defendant's argument that the reclassification removed the factual basis for her plea, the court concluded "there was sufficient evidence for the trial court to properly determine a factual basis existed showing Defendant had committed three prior felonies, including the second-degree forgery felony." Slip Op. at 8.

Judge Arrowood dissented by separate opinion, and would have held that defendant had no right of appeal under G.S. 15A-1444(a2), but would have granted a petition for certiorari and concluded that the reclassification of the felony offense justified remand for resentencing. *Id.* at 11.

Indictment & Pleading Issues

Supreme Court holds that constitutional and statutory defects in indictments do not deprive the trial court of jurisdiction unless the indictment wholly fails to allege a crime.

[State v. Singleton](#), 318PA22, ___ N.C. ___ (May 23, 2024). In this Wake County case, the Supreme Court reversed the Court of Appeals decision vacating defendant's conviction for second-degree rape due to a fatal defect in the indictment. The Court held that a defect in an indictment does not deprive the courts of jurisdiction unless the indictment wholly fails to allege a crime.

In November of 2017, the victim, a college student home for thanksgiving break, went out in downtown Raleigh with her friends and became intoxicated. At some point during the night, the victim blacked out, and woke up in defendant's car with him on top of her. Defendant was subsequently convicted of second-degree forcible rape and first-degree kidnapping. On appeal, defendant argued for the first time that the trial court lacked jurisdiction over the second-degree forcible rape charge because the indictment did not allege that defendant knew or should have known that the victim was physically helpless at the time of the act. The Court of Appeals agreed and vacated the rape conviction, holding that the indictment failed to allege an essential element of the crime.

Taking up the State’s petition for discretionary review, the Supreme Court first gave a broad historical overview of the jurisdictional indictment rule, beginning with common law and walking through North Carolina constitutional and statutory provisions. The Court ultimately concluded that “[o]ur Constitution and General Statutes, not an indictment, confer the general courts of justice with jurisdiction over criminal laws and the defendants accused of violating such laws.” Slip Op. at 40. Having established that constitutional or statutory defects do not deprive the trial court of jurisdiction, the Court explained that “[a]s these species of errors in a charging document are not jurisdictional, a defendant seeking relief must demonstrate not only that such an error occurred, but also that such error was prejudicial.” *Id.* at 42. The Court pointed to G.S. 15A-1443 for the appropriate prejudicial error tests.

The Court then examined the indictment at issue in this case, concluding that “[a] plain reading of [G.S.] 15-144.1(c) demonstrates that the indictment here clearly alleged a crime and was not required to allege actual or constructive knowledge of the victim’s physical helplessness.” *Id.* at 46. Here the Court noted that the language used in the indictment was simply a modern version of the short-form indictment language, and concluded that the indictment was not deficient.

Justice Earls, joined by Justice Riggs, concurred in the conclusion that the indictment in this case was not deficient, but dissented from the holding “that constitutional and statutory defects in an indictment are non-jurisdictional” and provided a lengthy dissent supporting this argument. *Id.* at 49.

Mistaken identification of paramedic as “emergency medical technician” did not represent fatal variance for purposes of G.S. 14-34.6.

[State v. Juran](#), COA23-881, ___ N.C. App. ___ (May 21, 2024). In this Onslow County case, defendant appealed her conviction for assault on an emergency personnel, arguing a fatal variance between the offense charged and the offense proved by the State’s evidence, and the same fatal variance between the indictment and the jury instructions and verdict sheet. The Court of Appeals found no error.

In September of 2019, Defendant called 911 after experiencing chest pains. An ambulance arrived to take defendant to the hospital, but during the trip, defendant became agitated and squeezed a paramedic’s hand so hard that the driver of the ambulance pulled over and police were called. After defendant was released from the hospital, she was arrested. While the indictment identified the victim as an “emergency medical technician” and the jury instruction and verdict sheet likewise identified the victim as an EMT, the victim testified at trial that she was a paramedic.

Taking up defendant's arguments, the Court of Appeals noted that G.S. 14-34.6 makes it an offense to cause physical injury to "(1) An emergency medical technician or other emergency health care provider [or] (2) A medical responder." Slip Op. at 8. The statute does not define "emergency medical technician," but the court explained this was "a distinction without difference for the purpose of the charging statute" and defendant would have been charged under G.S. 14-34.6 regardless of the classification of the victim. *Id.* at 9. The court could not identify any way that defendant was prejudiced in preparing her defense based on this discrepancy, and also noted that double jeopardy would be impossible as the victim and her employer were clearly identified. When considering the jury instruction argument, the court applied the same reasoning, noting there was no danger the jury would have reached a different result if the victim was a different classification of medical professional. The court also rejected defendant's argument that the various terms may have called the jury's unanimity into question, explaining "the inclusion of additional or similar terms in referencing the victim did not create additional theories on which Defendant could be convicted." *Id.* at 15.

Lack of specific dates did not render indictments for rape and sex offense defective under policy of leniency.

[State v. Gibbs](#), COA23-566, ___ N.C. App. ___ (May 7, 2024). In this Watauga County Case, defendant appealed his convictions for three counts of second-degree rape and one count of sex offense in a parental role, arguing four points of error. The Court of Appeals found no error.

In 2020, a sergeant with the Watauga County Sheriff's office discovered a 2004 report prepared by a social worker documenting allegations that defendant was abusing his step-children. The sergeant contacted the victim in this case and conducted an interview, where she recounted two instances of abuse, one involving oral sex after a science fair when the victim was in the seventh grade, and the second where sexually assaulted her in a car in the garage of their house, along with ongoing abuse for several months thereafter. The matter came for trial in 2023, and the victim testified about defendant's abuse consistent with the interview.

The Court of Appeals first took up defendant's argument that the indictments were deficient and fatally defective, finding no merit to the argument. Defendant argued that the indictments did not specifically identify the days on which the alleged offenses occurred, and that the multiple charges of second-degree rape were identical and could not be distinguished by the jury. The court explained that a policy of leniency applies to child sex abuse cases, and noted that this was expressly incorporated into G.S. 15-155 "by expressly providing no stay or reversal of a judgment on an indictment when time is not of the essence of the offense." Slip Op. at 6. The court also noted that the jury was instructed that it "must find separate, distinct incidents of rape for each count." *Id.* at 8.

In defendant's second argument, he contended error for denying his motion to dismiss for insufficient evidence, pointing to the lack of physical evidence and the victim's previous refusal to prosecute the violations. The court disagreed, noting "[o]ur courts have repeatedly held victim statements and testimony alone are sufficient evidence to support a conviction." *Id.* at 10. Here, the victim's testimony established the events in question and the constructive force by defendant necessary to support the convictions.

In the third argument, defendant argued the jury instructions were insufficient, but the court disagreed, noting it had already addressed defendant's arguments regarding the lack of specific dates for the offenses and separate, distinct incidents for each rape charge. The court also dispensed with defendant's final issue, the trial court's decision to impose consecutive sentences, explaining that it was within the trial court's discretion and each sentence was within the presumptive range.

Short form indictment was sufficient for forcible sex offense based on requirements of statute.

[State v. Crowder](#), COA23-833, ___ N.C. App. ___ (May 7, 2024). In this Yancy County case, defendant appealed his conviction for second-degree forcible sex offense, arguing defective language in the indictment deprived the trial court of jurisdiction. The Court of Appeals found the indictment was sufficient and the trial court had jurisdiction.

The Court of Appeals first explained that under G.S. 15-144.2(c), a short-form indictment alleging that the defendant engaged in a sex offense with a physically helpless person is acceptable, and this type of indictment was used in the current case. Defendant argued that under *State v. Singleton*, 285 N.C. App. 630 (2022), the short-form indictment was insufficient. The court disagreed, explaining that the short-form indictment in *Singleton* was for a second-degree rape charge, and the statute in question "differs slightly from its counterpart statute allowing a short-form indictment to be used to charge a *sexual offense* charge" meaning the issues identified in *Singleton* did not support defendant's argument in the current case. Slip Op. at 3.

Indictment for CCE charge was fatally flawed because it did not specify the criminal acts committed; jury verdict was not fatally ambiguous as trafficking by possession or by transportation were both acts supporting conspiracy conviction.

[State v. Guffey](#), COA22-1043, ___ N.C. App. ___ (Jan. 16, 2024). In this McDowell County case, defendant appealed his convictions for conspiracy to traffic in methamphetamine and aiding and abetting a continuing criminal enterprise ("CCE"), arguing (1) the CCE indictment was fatally flawed as it did not specify each of the acts committed under the CCE, and (2) the conspiracy verdict was fatally ambiguous, as it was impossible to determine if the jury unanimously found trafficking by possession or by transportation. The

Court of Appeals majority agreed regarding (1), vacating defendant's CCE conviction, but upheld the conspiracy to traffic methamphetamine conviction in (2).

Defendant was an admitted participant in a drug trafficking enterprise, but was not an organizer or employee of the principal operation, instead being a routine purchaser of drugs for resale. Considering (1), the Court of Appeals noted that G.S. 90-95.1 defines the offense of CCE, and that the federal crime in 21 U.S.C. § 848 has nearly identical wording. This led the court to consult applicable precedent in *Richardson v. United States*, 526 U.S. 813 (1999), for the idea that specificity of illegal conduct is essential in a CCE indictment. The court found no such specificity here, explaining:

The indictment does not allege that the enterprise engaged in any specific conduct, only defining the CCE as “a continuing series of violations of Article 5 of Chapter 90 of the General Statutes” and generally naming the participants and their positions in the trafficking scheme’s hierarchy. A juror would have no way of knowing how many criminal acts were committed within the organization or how Defendant’s acts advanced them; while the indictment specifies that Defendant aided and abetted the CCE “by trafficking in methamphetamine[,]” it says nothing of why the enterprise with which Defendant dealt constituted a CCE.

Slip Op. at 8-9. This led the court to hold that “each underlying act alleged under N.C.G.S. § 90-95.1 constitutes an essential element of the offense” and that “a valid indictment under N.C.G.S. § 90-95.1 requires the state to specifically enumerate the acts alleged.” *Id.* at 9. Because the State did not do so in the current case, the indictment was fatally defective and the court vacated defendant’s CCE conviction.

Moving to (2), the court explained that the core of defendant’s argument was that failing to distinguish between trafficking by possession and by transportation rendered the jury’s verdict fatally ambiguous. The court drew a distinction between disjunctive jury instructions that (a) would allow a jury to find defendant guilty of any one of multiple underlying offenses, or (b) various alternative acts that establish elements of the single offense being charged. Here, the court found (b), as “[w]here a conspiracy charge disjunctively lists multiple offenses . . . each underlying offense does not create a separate conspiracy, but is instead an alternative act by which a Defendant may be found guilty of the singular conspiracy alleged.” *Id.* at 11. This led the court to find no fatal ambiguity for defendant’s conspiracy conviction.

Judge Stroud concurred in part and dissented in part by separate opinion, and would have found no fatal ambiguity (1), allowing the CCE conviction to stand. *Id.* at 13.

Joinder

Defendant failed to renew motion to sever charges at trial, waiving argument.

[State v. Groat](#), COA23-703, ___ N.C. App. ___ (May 7, 2024). In this Jackson County case, defendant appealed his convictions for attempted first-degree kidnapping and additional sexual offenses with two minors, arguing error in (1) joining his attempted kidnapping charge with the sexual offenses for trial, and (2) denying his motion to dismiss the attempted kidnapping charge. The Court of Appeals determined that defendant waived (1) and found no error in (2).

In 2011, defendant began dating the mother of his two sexual assault victims. Over the next few years, defendant sexually assaulted both children, getting one of them pregnant. Eventually, defendant was arrested for the abuse, and during his pretrial release, he was restricted from contacting any minor under sixteen, and was ordered to reside with his parents in Michigan. Defendant violated these terms by contacting one of the victims; police told the victim to set up a meeting between them in Sylva, NC. Defendant was subsequently arrested at this meeting with duct tape, pepper spray, a firearm, and cable ties. Before defendant came to trial, he moved to sever the attempted kidnapping charge from the sexual abuse charges, but the trial court denied the motion. Defendant did not renew the motion at trial.

Taking up (1), the Court of Appeals explained that defendant waived his argument by failing to renew his motion to sever at trial. The court noted G.S. 15A-927 and *State v. Silva*, 304 N.C. 122 (1981), as support for this conclusion, while dismissing the conflicting precedent in *State v. Wood*, 185 N.C. App. 227 (2007), with the explanation that it “cannot overrule our state’s highest court.” Slip Op. at 6. Moving to (2), the court noted the substantial evidence supporting the attempted kidnapping charge, including the circumstances around defendant’s arrest, defendant’s own statements, and the supplies and preparations he made for the attempted kidnapping.

Joining the three defendants’ cases for trial was not error; testimony about complaints referencing defendant’s black car was not hearsay; defendants had constructive possession of drugs found in apartments.

[State v. Clawson](#), COA22-787, ___ N.C. App. ___ (Nov. 7, 2023). In this Haywood County case, three defendants appealed their judgments for various drug-related offenses, arguing error in (1) joining their cases for trial, (2) admission of certain testimony, (3) denying their motions to dismiss. The Court of Appeals found no error.

In October of 2018, the Haywood County Sheriff's Office executed a search warrant on three apartments, finding heroin and cocaine along with drug paraphernalia. The three defendants were found together in one of the apartments, along with drugs and a large amount of cash. The defendants came to trial in August of 2021, and the State moved to join the cases for trial; the trial court allowed this motion over their objections.

For (1), the court noted that G.S. 15A-926 permits joinder in the discretion of the trial court, with the primary consideration being the fair trial for each defendant. Here, no confessions or affirmative defenses were offered by any defendant, and “[b]ecause there were no antagonistic or conflicting defenses that would deprive Defendants of a fair trial,” the court found no error in joining the cases. Slip Op. at 8.

Looking to (2), the court explained that one defendant objected to the testimony by an officer referencing several complaints about a black car driven by the defendant. The court noted that the officer’s testimony was not hearsay under Rule of Evidence 801, as it was not being offered to prove the truth of the matter asserted. Instead, the officer’s testimony explained his subsequent actions in observing the black car, which led to conducting surveillance on the apartments.

Finally, in (3), the court found that two of the defendants had constructive possession of the drugs sufficient to support their convictions for possession despite not having exclusive possession of the apartments, as sufficient evidence of incriminating circumstances linked the defendants to the drugs and paraphernalia. The court noted this constructive possession, along with a rental application for one of the apartments, supported the finding of a conspiracy between the defendants to traffic the drugs. As a result, the trial court did commit error by denying the defendants’ motions to dismiss.

Jury Deliberations

Trial court’s ambiguous statement when denying jury request to review transcripts was not evidence of lack of discretion when considered in context.

[State v. Vann](#), 157PA22, ___ N.C. ___ (May 23, 2024). In this New Hanover County case, the Supreme Court reversed the unpublished Court of Appeals decision granting defendant a new trial on his convictions of first-degree murder, murder of an unborn child, and robbery with a dangerous weapon. The Court determined that the trial court properly exercised its discretion under G.S. 15A-1233 when denying the jury’s request to review partial transcripts.

In August of 2016, Wilmington Police responded to a dead woman at a local hotel. An investigation of the victim’s phone and hotel surveillance determined that defendant came to the hotel looking for sexual services. When police interviewed defendant, he admitted that he had struck the victim but denied killing her. During subsequent testimony, defendant changed his story and no longer admitted he struck the victim. At trial, the jury made multiple requests to review evidence, including one request to review transcripts of a police detective’s testimony, defendant’s testimony, and the medical examiner’s testimony. The trial court denied this request for transcripts, informing the jury that it was their duty to recall the testimony and “[w]e’re not – we can’t provide a transcript as to that.” Slip Op. at 7. After defendant was convicted, he appealed and argued that the

language from the trial court suggested that it had not exercised the discretion granted by G.S.15A-1233 to allow the jury to review transcripts. The Court of Appeals agreed, finding the trial court failed to exercise discretion and that the error was prejudicial, granting a new trial.

Taking up the State’s petition for discretionary review, the Supreme Court first explained that normally the presumption is that a trial court exercised its discretion when ruling on a jury request, unless the trial court makes a statement that expresses it has no discretion as to the request in unambiguous terms. The Court emphasized that appellate courts must review the record to determine the context of statements alleged to show lack of discretion. The court found ambiguity here in the combination of the trial court’s statement’s “we’re not” and “we can’t,” explaining “[w]hile the word ‘can’t,’ if read alone, could be indicative of a lack of discretion, the phrase ‘we’re not’ indicates the exercise of discretion.” *Id.* at 14. This ambiguity plus the trial court’s conduct when considering the previous requests indicated it had exercised the appropriate discretion, and the Court reversed the decision granting a new trial.

Justice Riggs concurred in the result only, and would have held that the trial court erred but the error was not prejudicial. *Id.* at 18.

Justice Earls dissented, and would have held the trial court failed to exercise discretion. *Id.* at 21.

Jury Instructions

Under *State v. McLymore*, defendant was not disqualified from instruction on stand-your-ground by felony of possessing sawed-off shotgun during murder.

[State v. Vaughn](#), COA23-337, ___ N.C. App. ___ (May 7, 2024). In this Lincoln County case, defendant appealed his convictions for first-degree murder and possessing a weapon of mass death and destruction, arguing error in denying his requested jury instructions on stand-your-ground and defense of habitation for murder and justification for the possession of a weapon of mass death charge. The Court of Appeals found error in denying the stand-your-ground instruction, but no error in denying the other two. The court vacated the first-degree murder charge and remanded for a new trial and resentencing.

In August of 2017, defendant became involved in a dispute with the owner of his residence and her son. After an extended argument, defendant retrieved a sawed-off shotgun from the residence. At that point, after further arguing, the landlord’s son charged defendant and defendant shot him in the chest, killing him.

Considering defendant’s arguments, the Court of Appeals explained that the recent decision in *State v. McLymore*, 380 N.C. 185 (2022), altered the analysis of whether defendant could claim stand-your-ground as a defense under G.S. 14-51.3. Previously,

under *State v. Crump*, 259 N.C. App. 144 (2018), a defendant was disqualified from using force in self defense if they were committing a felony, and the State did not have to prove a connection between the felony and the use of force in self-defense. The Supreme Court held in *McLymore* that “the State must prove the existence of an immediate causal nexus between the defendant’s disqualifying conduct and the confrontation during which the defendant used force.” Slip Op at 9, quoting *McLymore* at 197-98.

In this case, *Crump* controlled when the trial was held, as *McLymore* had not been released. After considering the evidence at trial, the court concluded:

[T]here is a reasonable possibility that, had the trial court instructed the jury on the stand-your-ground provision and causal nexus requirement, the jury would have determined that Defendant’s use of deadly force was justified because he reasonably believed that such force was necessary to prevent imminent death to himself and that there was no causal nexus between Defendant’s felonious possession of a weapon of mass death and destruction and his use of force.

Slip Op. at 13. Although the same logic regarding disqualification applied to the requested instruction on defense of habitation, the court found that failing to give this instruction was not error, as the victim was not “*in the process of unlawfully and forcefully entering or had unlawfully and forcibly entered* [defendant’s] home, including the curtilage of the home.” *Id.* at 15. Instead, the victim and defendant had spent time together sitting in the living room just a few hours before the shooting and went for a ride together in a car just before the shooting, ending with the parties coming back to park in front of defendant’s trailer. The victim’s mother was the landlord, who was also present at the scene.

The court also dispensed with the defense of justification instruction, noting that defendant did not provide evidence in the record to support the elements of that claim.

Judge Zachary concurred by separate opinion to comment on the use of defense of habitation.

Trial court’s error in permitting reference to defendant’s decision not to testify was cured by robust curative instruction to jury.

[State v. Grant](#), COA23-656, ___ N.C. App. ___ (April 16, 2024). In this Mecklenburg County case, defendant appealed his conviction for assault on a female, arguing prejudicial error in overruling his objection to the State’s comment during closing argument regarding his decision not to testify. The Court of Appeals found no prejudicial error.

In May of 2021, defendant came to trial for various charges related to assaulting a female. During closing argument, the prosecutor twice mentioned that the jury should not hold defendant’s decision not to testify against him. After the first reference, defendant

objected, but the trial court overruled the objection and let the prosecutor continue. The jury was then dismissed for lunch.

After lunch, but before the jury returned, defendant moved for a mistrial, citing *State v. Reid*, 334 N.C. 551 (1993), and pointing out that the court did not give a curative instruction after the improper statement in closing argument. The trial court denied the mistrial motion but agreed that it should have sustained the objection. When the jury returned, the trial court gave a curative instruction and “explained that the State’s comment was improper, instructed the jury not to consider Defendant’s decision not to testify, and polled the jury to ensure that each juror understood.” Slip Op. at 6. In light of the robust curative instruction, the Court of Appeals concluded that the trial court cured the error of overruling defendant’s objection.

Failure to differentiate between the specific incidents supporting the two first-degree forcible sexual offense charges called into question the unanimity of the jury, and represented plain error justifying new trial.

[State v. Bowman](#), COA23-82, ___ N.C. App. ___ (Feb. 6, 2024). In this Durham County case, defendant appealed his convictions for two first-degree forcible sexual offense charges and five other charges related to the rape and assault of a female, arguing (1) plain error by instructing the jury on only one count of first-degree forcible sexual offense, and (2) clerical errors in the judgment requiring remand. The Court of Appeals majority agreed with defendant, remanding for a new trial on the two forcible sexual offense charges and correction of the clerical errors.

In September of 2019, defendant appeared at the victim’s home heavily intoxicated and armed with a gun. After yelling for the victim to let him inside, defendant accused the victim of sleeping with someone else while brandishing his gun, and proceeded to forcibly rape and sexually assault her. Defendant was indicted on seven charges, including first-degree forcible rape, two counts of first-degree forcible sexual offense, and four other associated charges. When instructing the jury, the trial court read the elements for forcible sexual offense, but did not read separate instructions for each count charged, or notify the jury that defendant was charged with two separate counts of the offense. While the verdict sheets listed two counts, “the two counts were not separated by specific instances of sexual act[,]” and were instead listed as count two and count three. Slip Op. at 3. Defendant did not object to the jury instructions, and he was ultimately convicted of all seven charges against him.

Taking up (1), the Court of Appeals noted that the applicable standard of review was plain error, and looked to *State v. Bates*, 179 N.C. App. 628 (2006), for relevant considerations. Unlike the circumstances in *Bates*, the jury instructions and verdict sheets in the current case did not differentiate the charges by specific sexual act associated with each charge. This called into question the unanimity of the jury, as there was no way to determine if each juror agreed on the same sexual acts supporting the two charges in question. The court

concluded “because it was not ‘possible to match the jury’s verdict of guilty with specific incidents presented in evidence’ without a special verdict sheet[,]” the single instruction on forcible sexual offense was plain error, justifying a new trial. *Id.* at 10, quoting *Bates* at 634.

Moving to (2) the court noted that the State had no objection to remand for correcting the clerical errors. The court identified three errors, (i) defendant’s prior record level being identified as V instead of IV, (ii) the marking of box 12 of the sentencing sheet for committing an offense while on pretrial release, and (iii) not marking the box on the aggravating factors sheet noting that defendant entered a plea to the aggravating factor. The court remanded for correction of these errors.

Judge Thompson dissented in part by separate opinion, and would have found no error by the trial court when failing to provide a second instruction on forcible sexual offense. *Id.* at 14.

Trial court’s inclusion of language on “excessive force” in NCPJI 308.80 represented error justifying new trial.

[State v. Phillips](#), COA22-866, ___ N.C. App. ___ (Oct. 3, 2023). In this Cumberland County case, defendant appealed her conviction for assault with a deadly weapon inflicting serious injury, arguing error in altering a pattern jury instruction to include language on the prohibition of excessive force. The Court of Appeals majority agreed, vacating the judgment and remanding for a new trial.

Defendant and another woman got into a verbal altercation in April of 2021, leading to defendant shooting the victim. Defendant was indicted and came to trial in May of 2022. At trial, witnesses testified that the victim came onto defendant’s front porch, ending with the shooting. Defendant requested the trial court provide North Carolina Pattern Jury Instruction-Criminal (NCPJI) 308.80 on self-defense within a defendant’s home. The trial court modified NCPJI 308.80 by including language “prohibiting the use of ‘excessive force.’” Slip Op. at 2. Defendant objected to the modified instruction but the trial court provided it to the jury, and defendant was subsequently convicted.

Defendant argued on appeal that the state’s “Castle Doctrine” provided a rebuttable presumption that deadly force was necessary, meaning excessive force was impossible unless the presumption that deadly force was necessary was rebutted by the State. Reviewing defendant’s argument, the Court of Appeals noted that in North Carolina, the “Castle Doctrine” in G.S. 14-51.2 does not prohibit the use of excessive force, and “ultimate force is presumed necessary unless the presumption is rebutted.” *Id.* at 4. Likewise, North Carolina’s “Stand Your Ground” law in G.S. 14-51.3 permits the use of deadly force and does not require the defendant to retreat if they are in a legally occupied place. *Id.* Summarizing the two overlapping doctrines, the court noted:

The Stand Your Ground Doctrine overlaps with the Castle Doctrine because the Stand Your Ground Doctrine also applies in Castle Doctrine scenarios, i.e., self-defense situations within the home. So if the Castle Doctrine presumption applies, deadly force is presumed necessary, and you need not retreat. Said differently: If you reasonably believe an intruder is unlawfully entering your home, you have a presumed right to use deadly force under the Castle Doctrine, and you need not retreat under the Stand Your Ground Doctrine

Id. at 5 (citations omitted). The court also made a distinction between *State v. Benner*, 380 N.C. 621 (2022), and the current case, noting that *Benner* concerned excessive force under the Stand Your Ground doctrine, not the Castle Doctrine. *Id.* at 5-6. Summarizing applicable precedent, the court concluded “[u]nder the Castle Doctrine, excessive force is impossible unless the State rebuts the Castle Doctrine presumption, but under the Stand Your Ground Doctrine, excessive force is possible if the defendant acts disproportionately.” *Id.* at 7.

The court moved on to the instruction in this case, explaining that “[h]ere, when the trial court conclusively stated that ‘defendant does not have the right to use excessive force,’ the trial court concluded that the State rebutted the Castle Doctrine presumption.” *Id.* at 8. This was error as it removed the jury’s role in determining whether the Castle Doctrine presumption was rebutted by the State. The court also concluded that the instruction was confusing to the jury, and represented prejudice sufficient to overturn the judgment and order a new trial.

Judge Hampson dissented by separate opinion, and would have held that the instruction was appropriate under applicable North Carolina precedent on the use of force in self-defense scenarios.

Jury Selection

Defendant’s *Batson* claim based upon “newly discovered evidence” did not satisfy the “good cause” exception to the bar of post-conviction proceedings under G.S. 15A-1419, and was properly denied by the MAR court.

[State v. Tucker](#), 113A96-4, ___ N.C. ___ (Dec. 15, 2023). In this Forsyth County case, the Supreme Court affirmed the denial of defendant’s post-conviction motions for appropriate relief (MARs) based upon newly discovered evidence relevant for his *Batson* claim. The Supreme Court held that defendant’s *Batson* claim was properly denied under G.S. 15A-1419.

Defendant was convicted for the murder of a security guard in December of 1994 and sentenced to death; details of the underlying case are in defendant’s appeal of the conviction, *State v. Tucker*, 347 N.C. 235, 239–40 (1997). During jury selection, defendant raised *Batson* objections to the State’s peremptory strikes of two black prospective jurors

and one black prospective alternate juror. Pages 3-9 of the Slip Opinion contain relevant excerpts of the exchanges with these prospective jurors. The trial court allowed the State to provide race-neutral reasons for striking the potential jurors, but “[w]ith each of the three prospective jurors at issue, the trial court never characterized the proceeding as a full *Batson* hearing, nor was pretext argued or ruled upon.” Slip Op. at 15. The trial court overruled defendant’s *Batson* objections.

After defendant’s conviction and the imposition of a death sentence, he appealed, but did not raise a *Batson* issue during his direct appeal or during his first MAR. Defendant filed several subsequent MARs and a petition for writ of habeas corpus in federal court. The current opinion concerns MARs filed and amended in 2017, 2019, and 2020, where defendant raised a *Batson* issue based upon newly discovered evidence: (1) a CLE handout entitled “BATSON Justifications: Articulating Juror Negatives,” and (2) a statistical study by law professors at Michigan State University reviewing data concerning jury selection in North Carolina capital cases between 1990 and 2010. *Id.* at 17-18. Defendant argued that (1) the CLE handout contained language used by one prosecutor when giving race-neutral reasons for striking the three potential jurors, and (2) the study showed a history of discrimination by “establish[ing] a pattern of race-based strikes by both prosecutors in this case.” *Id.* at 19. In August of 2020, the MAR court entered an order denying the three MARs based on the alleged new evidence; this order forms the basis of the current appeal and opinion.

The Supreme Court granted defendant’s petition for writ of certiorari to review the MAR court’s order, and began by examining the procedural bar to post-conviction proceedings in G.S. 15A-1419. To prevail under the exception provided by G.S. 15A-1419(b), defendant needed to show “good cause” as provided under subsection (c) for why he did not raise his *Batson* issue during his previous appeal. The Court then set out the scope of consideration for defendant’s *Batson* claim. After defendant’s *Batson* objection, the trial court ruled that defendant failed to make the required prima facie showing of purposeful discrimination (step one of *Batson*), and “[t]he *Batson* inquiry should have ended at that point, and it was error for the trial court to direct the State to place its race-neutral reasons on the record.” *Id.* at 33. Because the relevant consideration was step one of *Batson*, defendant’s claim of a “good cause” exception had to relate to that first step. The Court explained why this was an issue for defendant:

[T]he bulk of defendant’s argument ignores step one of the *Batson* inquiry and focuses on pretext at step three, which is not the pertinent issue as set forth above. Because defendant offers the CLE handout and the MSU study as “newly discovered evidence” of purposeful discrimination and pretextual reasons proffered by the State in striking [the potential jurors], defendant’s purported “newly discovered” evidence does not address his failure to establish a prima facie case at step one.

Id. at 35.

Parsing the two individual exhibits, the Court looked to (1) the CLE handout, noting “because review of the *Batson* issue here is limited to step one, the CLE handout listing various race-neutral reasons for peremptory challenges at step two is irrelevant.” *Id.* at 37. Observing that the handout was simply a list of relevant caselaw presented during a CLE, the Court pointed out “mere knowledge of the state of the law under *Batson* does not raise any inference of discriminatory intent.” *Id.* at 42. Since defendant and his counsel could have found the cited cases themselves, and information on the handout could not represent discriminatory intent, the Court rejected any “good cause” argument.

Taking up (2) the study, the Court noted the “the MSU study was created to assist capital defendants, including this defendant, preparing to file under the [Racial Justice Act].” *Id.* at 47. This led the Court to observe that “the MAR court correctly concluded that the study was ‘not newly discovered’ but ‘newly created.’” *Id.* at 47. The Court pointed out that the relevant historical data related to cases was already available and could have been compiled by defendant’s counsel. Acknowledging the potential effort involved, the Court pointed out “[t]hat gathering such information may have been difficult or time consuming does not change its character.” *Id.* at 48. The Court also rejected the use of cases decided subsequent to defendant’s trial and flagged other issues with the structure of the study, agreeing with the MAR court that “the MSU study assumed racial animus in cases in which defendants did not make any such claim, or in which the trial court or appellate courts did not make or sustain any such findings.” *Id.* at 50. Concluding that allowing a defendant to wait until a third-party had analyzed evidence in a favorable manner would create never-ending post-conviction proceedings, the Court said:

Here, the raw data used to construct the study could have been discovered by defendant’s exercise of reasonable diligence. To the extent that the MSU study analyzed and presented previously existing data in a manner that defendant now believes is more persuasive for his claim, it fails to qualify as newly discovered evidence. The “factual predicate” contemplated by [G.S.] 15A-1419(c) is either available or unavailable to a defendant—it is not a matter of creative packaging.

Id. at 56. The Court also rejected defendant’s argument that North Carolina caselaw from after his conviction changed the applicable standard for *Batson* claims. Finally, the Court held that *State v. Burke*, 374 N.C. 617 (2020), a case considering a MAR filed under the Racial Justice Act, did not apply to defendant’s current case, as his Racial Justice Act MARs were not before the Court.

Justice Riggs did not participate in the consideration or decision of the case.

Justice Earls dissented and would have held that the procedural bar did not apply to defendant’s claim, allowing remand to the trial court for consideration of the *Batson* claim. *Id.* at 71.

(1) No error when trial court dismissed two jurors for cause during voir dire; (2) circumstantial evidence supported defendant’s DWI conviction; (3) trial court improperly calculated maximum imprisonment term for two misdemeanors.

[State v. Simpson](#), COA 23-562, ___ N.C. App. ___ (Feb. 20, 2024). In this Alamance County case, defendant appealed his convictions for driving while impaired (DWI), resisting a public officer, and being intoxicated and disruptive, arguing error in (1) excusing potential jurors for cause, (2) denying defendant’s motion to dismiss the DWI charge, and (3) calculating the appropriate sentence. The Court of Appeals found no error in (1) and (2), but in (3) remanded for resentencing for the resisting a public officer and intoxicated and disruptive offenses.

In April of 2021, police officers noticed a wrecked vehicle in the middle of the road and saw defendant attempting to hide behind a building nearby. Officers eventually arrested defendant, and found a key fob in his pocket that opened the doors of the wrecked vehicle. When defendant came to trial for the charges at superior court, he pleaded guilty to resisting an officer and being intoxicated and disruptive prior to the jury trial. During voir dire, the trial court dismissed two jurors for cause on its own initiative. Defense counsel did not object to either dismissal. Defendant was found guilty of the DWI charge, and the court sentenced defendant for all three charges.

Taking up defendant’s argument (1), the Court of Appeals noted that the two dismissed jurors “both expressed strong emotions against law enforcement based upon their personal experiences with officers.” Slip Op. at 10. The court noted the defendant also did not use all of his peremptory challenges. Because there was no evidence that the empaneled jury was unfair, the court overruled defendant’s argument.

Moving to (2), defendant argued that no evidence showed he operated or owned the wrecked vehicle involved in the DWI charge. The court disagreed, noting there was no direct evidence of defendant operating the car while impaired, but sufficient circumstantial evidence to support the conviction. The officers observed defendant near the wrecked vehicle, found a key fob corresponding to the vehicle in his pocket, and observed him at the Cook-Out intoxicated and with a fresh cut on his forehead.

Finally, in (3) the court noted that defendant was sentenced to 120 days’ confinement for the resisting a public officer and intoxicated and disruptive misdemeanors, while “the maximum, combined sentence allowed by law is 80 days.” *Id.* at 14. The court remanded to allow resentencing based on the correct calculation of possible confinement.

Defendant failed to properly argue plain-error standard or his objections to admission of text messages, abandoning arguments on appeal; defendant’s fair-cross-section objection to jury pool did not satisfy factors from *Duren v. Missouri*.

[State v. Robinson](#), COA23-365, ___ N.C. App. ___ (Feb. 6, 2024). In this Wake County case, defendant appealed his convictions for two counts of first-degree murder and four counts of discharging a weapon into an occupied vehicle, arguing error in (1) allowing certain text messages into evidence, and (2) denying his challenge to the jury pool. The Court of Appeals found no error.

In May of 2022, trial began on defendant’s charges; during jury selection, defendant challenged the makeup of the jury pool, arguing members of defendant’s race (Black) were underrepresented. Defendant offered statistical evidence to support his argument, but the trial court denied defendant’s challenge. During the trial, the State offered text messages between an accomplice of defendant and a third party, attempting to show motivation for the robbery that eventually led to the murders. Defendant objected to the messages, and the trial court only allowed admission of the accomplice’s text messages, not those from the third party. Defendant was subsequently convicted and appealed.

Before reaching the merits of defendant’s arguments in (1), the Court of Appeals considered the basis for its review. At trial, defendant objected to the text messages “because they were hearsay, were not illustrative, and lacked a proper foundation.” Slip Op. at 6. However, on appeal, defendant did not raise these three issues, but instead argued the text messages were irrelevant, unfairly prejudicial, and violated the Confrontation Clause and defendant’s right to a fair trial. Because defendant attempted to change his arguments on appeal, he was limited to the plain-error standard; however, the court noted that defendant “failed to ‘specifically and distinctly . . . argue plain error.’” *Id.*, quoting *State v. Frye*, 341 N.C. 470, 496 (1995). As a result, defendant was limited to the grounds under which he originally objected to the evidence at trial. But as noted above, defendant did not argue the three issues from trial on appeal. This meant that defendant had no valid arguments on appeal, and the court dismissed issue (1).

Moving to (2), the court explained that under applicable precedent on the fair-cross-section requirement, statistical evidence about the composition of the jury pool alone is not enough to prove systematic exclusion of that group. Here defendant acknowledged that he did not admit sufficient evidence of all three factors under *Duren v. Missouri*, 439 U.S. 357 (1979), but attempted to reference other cases and the pervasive problem of disparity in jury pools across North Carolina. The court was not swayed by this argument, concluding defendant “only offers statistical evidence as proof of systematic exclusion, and without more, he fails to establish a fair-cross-section claim under *Duren*.” Slip Op. at 8-9.

No error in trial court’s denial of *Batson* objection; motion for mistrial properly denied where juror inadvertently discovered information regarding the murder of a witness.

[State v. Dixon](#), COA21-471, ___ N.C. App. ___ (Dec. 5, 2023). In this Buncombe County case, defendant appealed his convictions for first-degree murder, attempted first-degree murder, and malicious maiming, arguing error in overruling his *Batson* objection and denying his motions for mistrial. The Court of Appeals found no prejudicial error.

During voir dire for defendant’s trial in June of 2019, the State used a peremptory strike on a black potential juror who expressed reservations about the death penalty. Defendant raised a *Batson* objection, and the trial court conducted the three-step analysis (this exchange is reproduced on pages 6-11 of the opinion). The trial court found that there had not been a sufficient showing of race as a motivating factor in the third step of the *Batson* analysis, overruling the objection. After the denial but during the trial, one of the State’s witnesses was killed. One juror learned of the killing through a press release issued by the DA’s office, and was excused for cause. Defendant moved for a mistrial, and the motion was denied. After the verdict, defendant learned another juror had heard of the killing, and moved for a mistrial again; the trial court denied this motion as well.

Beginning with the *Batson* issue, the Court of Appeals explained the procedural requirements for a *Batson* objection as clarified by *State v. Hobbs*, 374 N.C. 345, 356 (2020). The court then turned to the scope of review, explaining “we base our analysis on a review of the whole record, engaging in a full, written analysis of all arguments raised by Defendant at trial.” Slip Op. at 19. The court considered and rejected defendant’s argument that striking jurors for their views on race was equivalent to striking jurors for their actual race, but noted that “to the extent Defendant offers [the juror’s] views about race and the views of the three stricken white jurors as context to support an allegation that the strike of [the juror] was pretextual, we consider his argument for that limited purpose.” *Id.* at 21. Moving to the actual *Batson* analysis, the court examined the questioning of white jurors along with the black juror who triggered the *Batson* objection. Although the court noted that “the case is close,” it could not establish clear error in denying the *Batson* objection, pointing out that the black juror who was struck shared many similarities with a white juror who was struck for her views on the death penalty. *Id.* at 32.

Considering the motions for mistrial, the court could not find an abuse of discretion by the trial court in denying either motion. The court noted that the trial court issued a curative instruction about the use of cell phones, and that the juror in question for the second motion only saw a headline and did not express any issue with being fair and impartial. The court likewise rejected defendant’s argument that the trial court should have recused itself from the second mistrial motion, explaining the judge did not act as a witness on the question of whether the juror could perform his duties impartially.

Chief Judge Stroud and Judge Zachary concurred in the result only.

Witness’s testimony regarding the shooting was not inherently incredible; trial court’s ruling on *Batson* challenge was inadequate under *Hobbs* requirements.

[State v. Wilson](#), COA21-34, ___ N.C. App. ___ (Nov. 7, 2023). In this Cleveland County case, defendant appealed his convictions for first-degree murder, attempted first-degree murder, and attempted robbery, arguing (1) error in denying his motion to dismiss for insufficient evidence based upon the impossibility of a witness’s testimony, and (2) inadequate *Batson* findings. The Court of Appeals majority found no error in (1), but remanded to the trial court in (2) for further findings under the guidance of *State v. Hobbs*, 374 N.C. 345 (2020).

In October of 2016, several people were gathered at a home drinking alcohol and taking drugs. Early in the morning, a hooded gunman entered the house, exchanging gunfire with one of the victims and killing two victims while leaving a third paralyzed. One of the witnesses present at the scene identified defendant as the gunman, and defendant came to trial for the charges in March of 2020. After defendant was convicted, he appealed, and the Court of Appeals held this case in abeyance pending the resolution of *State v. Campbell*, 384 N.C. 126 (2023).

In (1), defendant argued that the testimony of the witness identifying him as the gunman was physically impossible. The Court of Appeals first noted that to be “inherently incredible,” the testimony of the witness must be irreconcilable with “basic physical facts or laws of nature.” Slip Op. at 7. The court explained that “evidence is only inherently incredible where the alleged impossibility *fundamentally* undermines the reliability of the evidence as opposed to creating conflicts at the margins.” *Id.* at 10. Here, defendant pointed to three different issues with the witness’s testimony, but only one of those, the vantage point of the witness who saw the gunman shoot a victim in the living room, could have qualified as evidentiary impossibility. Defendant’s interpretation required the gunman to maintain a fixed location in the living room after speaking to the witness and subsequently shooting one of the victims. However, the witness’s testimony did not contain a statement that defendant stayed stationary, and nothing else ruled out the idea that the gunman stepped towards the victim before shooting her. Because nothing in the record fundamentally undermined the witness’s testimony, and a plausible explanation existed for the inconsistencies identified by defendant, the court did not find error in denying defendant’s motion.

Defendant’s *Batson* challenge in (2) was based upon the State using two peremptory challenges on black female prospective jurors. Under *Hobbs*, a trial court must conduct the three-step *Batson* analysis by first deciding whether the defendant has made a prima facie showing of racial discrimination, then proceeding to hear the State’s race-neutral reasons for striking the jurors, and finally ruling on the merits of the *Batson* challenge after weighing the circumstances around the stricken jurors. Here, the trial court immediately requested the State’s input after hearing defendant’s objection and issued a ruling deciding the entire *Batson* challenge, “issuing no preliminary ruling on whether Defendant

had made a prima facie case [of racial discrimination],” and rendering the first *Batson* step moot. *Id.* at 21-22. The trial court ruled after hearing the State’s race-neutral reasons for striking the jurors, “ma[king] the ruling, in substance, a ruling on the third step of *Batson*.” *Id.* at 22. This ruling lacked the analysis required, as “[T]he trial court did not explain how it weighed the totality of the circumstances surrounding the prosecution’s use of peremptory challenges,’ nor did it conduct a comparative analysis between the stricken African-American jurors and the other jurors alleged to have been similarly situated.” *Id.* at 24-25, quoting *Hobbs* at 358. Because defendant did not seek review of the trial court’s substantive ruling, the court did not attempt to perform a comparative-juror analysis, instead reversing and remanding the case for “further proceedings consistent with those set out in *Hobbs*.” *Id.* at 25.

Judge Dillon concurred by separate opinion, noting that the State may be heard during the first step of the *Batson* analysis and that the trial court could still make a ruling on the prima facie showing of discrimination, but that the court here proceeded to step two.

Judge Stading concurred to the holding in (1) and dissented to the holding in (2) by separate opinion, and would have held that the trial court committed no error as the step one *Batson* determination was not moot under the circumstances of the case.

Allowing prosecutor to mention probation as possible sentence during voir dire was not error; defense counsel’s failure to object to jury instructions on self-defense and failure to request a jury poll were not ineffective assistance.

[State v. Lynn](#), COA22-990, ___ N.C. App. ___ (Sept. 19, 2023). In this Mecklenburg County case, defendant appealed his convictions for assault with a deadly weapon and discharging a weapon into a building and vehicle in operation, arguing error by (1) allowing the prosecutor to tell potential jurors that probation was within the potential sentencing range and (2) substituting an alternative juror after deliberations began, and (3) ineffective assistance of counsel. The Court of Appeals found no prejudicial error.

In December of 2019, defendant was involved in an altercation at a Cook Out in Charlotte, eventually firing several shots that hit a car and the exterior wall of the Cook Out. The matter came for trial in March of 2022. On the second day of deliberations, one of the jurors was ill and did not report for jury duty. The trial court substituted an alternate juror and directed the jury to restart deliberations under G.S. 15A-1215(a). Defendant was subsequently convicted and appealed.

Taking up (1), the Court of Appeals explained that it reviewed a trial court’s management of jury selection for abuse of discretion. Here, the State’s choice to mention probation during voir dire was “questionable” as “a probationary sentence under these facts requires the trial judge to find extraordinary mitigation,” but the statement was “technically accurate” as a statement of law. Slip Op. at 5. The court concluded there was no abuse of discretion

in these circumstances as it was not a totally unsupported possibility. Turning to (2), the court explained that defendant argued that “more than twelve persons” were involved in the jury verdict, but defendant failed to preserve the issue for review and the court dismissed it.

Reaching (3), the court explained that defendant’s ineffective assistance of counsel argument contained two points, (a) that defense counsel should have objected to the trial court’s jury instructions on self-defense, and (b) that counsel should have requested a jury poll. Looking at (3)(a), defendant argued that the instruction did not require the jury to consider whether other patrons at the Cook Out had guns. The court explained that the instruction closely tracked the applicable language of the statute and directed the jury to consider whether “defendant reasonably believed that deadly force was necessary,” which would encompass the consideration of whether other people at the scene had guns. *Id.* at 9. The court could not conclude that a different instruction specifically mentioning a gun would have led to a different result, meaning the argument could not support the ineffective assistance claim. The court likewise dispensed with (3)(b), explaining that the trial court was not required to poll the jury unless requested, but “both the jury foreman and the other jurors, as a group, affirmed—in open court—that their verdicts were unanimous.” *Id.* at 10. Because there was no evidence of coercion or inducements to the jury, there was no reasonable probability a jury poll would have created a different result for defendant.

Mistrial

No error in trial court’s denial of *Batson* objection; motion for mistrial properly denied where juror inadvertently discovered information regarding the murder of a witness.

[State v. Dixon](#), COA21-471, ___ N.C. App. ___ (Dec. 5, 2023). In this Buncombe County case, defendant appealed his convictions for first-degree murder, attempted first-degree murder, and malicious maiming, arguing error in overruling his *Batson* objection and denying his motions for mistrial. The Court of Appeals found no prejudicial error.

During voir dire for defendant’s trial in June of 2019, the State used a peremptory strike on a black potential juror who expressed reservations about the death penalty. Defendant raised a *Batson* objection, and the trial court conducted the three-step analysis (this exchange is reproduced on pages 6-11 of the opinion). The trial court found that there had not been a sufficient showing of race as a motivating factor in the third step of the *Batson* analysis, overruling the objection. After the denial but during the trial, one of the State’s witnesses was killed. One juror learned of the killing through a press release issued by the DA’s office, and was excused for cause. Defendant moved for a mistrial, and the motion was denied. After the verdict, defendant learned another juror had heard of the killing, and moved for a mistrial again; the trial court denied this motion as well.

Beginning with the *Batson* issue, the Court of Appeals explained the procedural requirements for a *Batson* objection as clarified by *State v. Hobbs*, 374 N.C. 345, 356 (2020). The court then turned to the scope of review, explaining “we base our analysis on a review of the whole record, engaging in a full, written analysis of all arguments raised by Defendant at trial.” Slip Op. at 19. The court considered and rejected defendant’s argument that striking jurors for their views on race was equivalent to striking jurors for their actual race, but noted that “to the extent Defendant offers [the juror’s] views about race and the views of the three stricken white jurors as context to support an allegation that the strike of [the juror] was pretextual, we consider his argument for that limited purpose.” *Id.* at 21. Moving to the actual *Batson* analysis, the court examined the questioning of white jurors along with the black juror who triggered the *Batson* objection. Although the court noted that “the case is close,” it could not establish clear error in denying the *Batson* objection, pointing out that the black juror who was struck shared many similarities with a white juror who was struck for her views on the death penalty. *Id.* at 32.

Considering the motions for mistrial, the court could not find an abuse of discretion by the trial court in denying either motion. The court noted that the trial court issued a curative instruction about the use of cell phones, and that the juror in question for the second motion only saw a headline and did not express any issue with being fair and impartial. The court likewise rejected defendant’s argument that the trial court should have recused itself from the second mistrial motion, explaining the judge did not act as a witness on the question of whether the juror could perform his duties impartially.

Chief Judge Stroud and Judge Zachary concurred in the result only.

Motions

Trial court’s oral ruling on motion to suppress did not include clearly identified findings of fact to permit appellate review of decision, justifying remand.

[State v. Jordan](#), 124PA22, ___ N.C. ___ (March 22, 2024). In this Mecklenburg County case, the Supreme Court reversed the Court of Appeals decision that denial of defendant’s motion to suppress was error. The Court remanded to the trial court for further findings of fact related to whether defendant had a reasonable expectation of privacy and the appropriate ruling on defendant’s motion based on those findings of fact.

The Court of Appeals opinion ([State v. Jordan, 282 N.C. App. 651 \(2022\)](#)) provides further details of the search and suppression hearing; as a brief summary, in 2017 law enforcement officers were investigating a stolen car when they saw a man flee from them and knock on the door to a home. Defendant opened the door and let the man inside, leaving the door ajar after he entered. Officers followed the man, stepping into the open doorway and observing drug paraphernalia inside the home. There was also a safe sitting in

the living room, and officers saw defendant locking the door of the safe and putting the key in his pocket. The officers tried to identify who was a resident of the home; defendant said that he did not live there, but another occupant, defendant's uncle, was identified as a resident. Defendant's uncle gave the officers consent to search the home. Defendant claimed the safe was not his, and no one present would open the safe for a search. The officers obtained a search warrant, eventually finding cocaine, money, and a firearm. Defendant was charged with trafficking cocaine, possession of drug paraphernalia, and possession of a firearm by a felon.

Before trial, defendant moved to suppress the results of the search, arguing the officers unlawfully entered the home. The trial court denied the motion by oral ruling and did not provide written findings of fact or conclusions of law. The trial court directed the State to prepare a draft order, but this was not done, and no written order was ever entered. On appeal, the Court of Appeals reversed the trial court's denial of the motion to suppress, reasoning that defendant had a reasonable expectation of privacy in the home which gave him standing to challenge the search. The court then concluded that the officers illegally entered the home without a warrant, justifying reversal of the trial court's denial.

Taking up the State's petition for review, the Court noted that G.S. 15A-974(b) requires a trial court to make findings of fact and conclusions of law on the record, and here, "the [trial court's] oral ruling did not include clearly identified findings of fact, with much of the court's discussion being mere recitation of the evidence." Slip Op. at 2. Under *State v. Bartlett*, 368 N.C. 309 (2015), the appellate court cannot infer the required findings of fact when there is "a material conflict in the evidence that the trial court must resolve." Slip Op. at 7. Here, the Court noted several fact questions that needed resolution before the Court could consider whether or not defendant had a reasonable expectation of privacy in the home, justifying his challenge to the search. The Court pointed out that it was unclear whether defendant was staying at the home or was a frequent visitor, as defendant's uncle never told officers the nature of defendant's occupancy. Explaining that many assumptions by the Court of Appeals, and the dissent, were based upon inferences and not facts, the Court held "that the record *could* support the necessary findings, but there are material fact questions that must be resolved by the fact-finder before any legal conclusion can be reached." *Id.* at 10. As a result, the Court remanded to the trial court for appropriate proceedings "to make the necessary findings of fact based on the trial record." *Id.* at 11.

Justice Riggs, joined by Justice Earls, dissented and would have affirmed the Court of Appeals opinion. *Id.* at 12.

Erroneous Finding of Fact and Conclusion of Law did not represent plain error as defendant's Fourth Amendment rights were not violated.

[State v. Williams](#), COA22-914, ___ N.C. App. ___ (Dec. 5, 2023). In this Johnston County case, defendant appealed his convictions for possessing methamphetamine, possessing drug paraphernalia, resisting a public officer, and carrying a concealed weapon, arguing error in denying his motion to suppress because the order contained erroneous findings of fact and conclusions of law. The Court of Appeals disagreed, finding no plain error.

In August of 2018, sheriff's deputies responded to a mobile home park after a service call about drug activity. When they arrived, they observed defendant sitting in the passenger seat of a silver car that was parked next to a black car. After an exchange where one passenger of the vehicle informed a deputy that he was "making a blunt," and they observed marijuana, the deputies began questioning others in the vehicle. Slip Op. at 3. When defendant refused to take his hands out from under his legs or show his hands, a deputy assisted him out of the vehicle. Although at one point defendant fled the scene, he was eventually detained and placed in a deputy's vehicle. After securing defendant, the deputies searched the area and the silver car, finding methamphetamine, marijuana, and drug paraphernalia. In February 2020, defendant's motion to suppress was denied, and he was subsequently convicted in March of 2021. In May of 2022, defendant's first petition for writ of certiorari was granted and the Court of Appeals found that the trial court's order lacked sufficient conclusions of law. On remand, the trial court issued an amended order with additional conclusions of law in August 2022, again denying defendant's motion to suppress. This amended order gave rise to the current opinion.

Taking up the order, the Court of Appeals first pointed out that the standard of review was plain error, as "Defendant filed a motion to suppress the challenged evidence, but at trial, Defendant failed to object to the admission of the evidence." *Id.* at 7. The first remand by the court "did not negate the fact that Defendant failed to preserve the issues raised in his motion to suppress at trial." *Id.* at 8. The court then analyzed the challenged findings of fact and conclusions of law to determine if they represented a violation of defendant's Fourth Amendment rights. The court determined that finding of fact 7 was erroneous, as it referenced a black car being involved in the initial tip but testimony only mentioned a silver car. However, this error did not rise to a Fourth Amendment violation because "the evidence found in the silver vehicle was properly admitted." *Id.* at 11.

Moving to the challenged conclusions of law, numbers 10 and 11, the court noted that these involved the lack of a seizure during the encounter and that the encounter did not trigger Fourth Amendment scrutiny. The court walked through the constitutional analysis applicable to the encounter between the deputies and defendant, concluding that conclusion of law 10 was not error as the encounter between the deputies and defendant was initially consensual, and defendant and the other occupants of the car were not seized. However, the court noted that conclusion of law 11 was erroneous, as "[c]ontrary to the trial court's conclusion, 'Fourth Amendment scrutiny' was 'triggered' when [a

deputy] assisted Defendant out of the vehicle because no reasonable person would have felt free to leave at that point.” *Id.* at 14. However, although the conclusion of law was erroneous, “it was not plain error because the deputies did not violate Defendant’s Fourth Amendment rights.” *Id.* at 14-15. Because the evidence was “properly admitted,” it did not “seriously affect the fairness, integrity, or public reputation of judicial proceedings,” and the trial court appropriately denied the motion. *Id.* at 15.

Sentencing

Prior record level calculation improperly included previous convictions.

[State v. Bivins](#), COA23-550, ___ N.C. App. ___ (March 19, 2024). In this Cleveland County case, defendant petitioned for a writ of certiorari, arguing error in sentencing him at an inflated prior record level. The State conceded the error. The Court of Appeals vacated the judgment and remanded for resentencing with the appropriate prior record level.

In March of 2021, a jury convicted defendant of two charges related to controlled substances; after the verdict but before sentencing, defendant entered a plea agreement to two additional charges and attaining habitual felon status. During the sentencing hearing, the State submitted a worksheet showing sixteen points assigned to defendant based on his seven prior misdemeanors and three prior felonies, along with defendant being on probation at the time of the offenses. The court sentenced defendant as a level V offender.

Taking up defendant’s argument, the Court of Appeals explained that the trial court improperly calculated defendant’s prior record level, which should have been level IV. The State conceded that defendant was improperly assigned additional points based on previous convictions that should have been excluded. The court walked through the appropriate calculation, noting that the highest total that could be assigned to defendant was thirteen points, justifying level IV. As a result, the court remanded for resentencing.

No abuse of discretion when sentencing defendant to life without the possibility of parole after weighing mitigating factors from G.S. 15A-1340.19B and *State v. Kelliher*.

[State v. Golphin](#), COA22-713, ___ N.C. App. ___ (Feb. 6, 2024). In this Cumberland County case, defendant appealed the superior court order sentencing him to life in prison without the possibility of parole (LWOPP) for two counts of first-degree murder committed while he was a juvenile. The Court of Appeals affirmed the lower court’s order.

In 1998, defendant was convicted of murdering two law enforcement officers and was sentenced to death. Defendant was 17 years old at the time of the murders. Defendant’s convictions were upheld on direct appeal in *State v. Golphin*, 352 N.C. 364 (2000). After defendant was convicted, the U.S. Supreme Court issued *Roper v. Simmons*, 543 U.S. 551

(2005), holding death sentences for juveniles violated the Eighth Amendment; *Miller v. Alabama*, 567 U.S. 460 (2012), holding that a mandatory sentence of LWOPP was unconstitutional for a juvenile; and *Montgomery v. Louisiana*, 577 U.S. 190 (2016), holding that *Miller*'s prohibition on mandatory LWOPP must be applied retroactively to those already sentenced to mandatory LWOPP. Defendant was initially resentenced to mandatory LWOPP in December of 2005, after filing a motion for appropriate relief (MAR) under *Roper*. In the current case, defendant filed a MAR in July of 2018, alleging his sentence was unconstitutional under *Miller* and *Montgomery*. A sentencing hearing was held in 2022, where the MAR court reviewed the nine mitigating factors from G.S. 15A-1340.19B and sentenced defendant to consecutive sentences of LWOPP.

The Court of Appeals first explained the scope of its review was abuse of discretion, and that the relevant considerations were the mitigating factors from G.S. 15A-1340.19B(c), along with the additional factor from *State v. Kelliher*, 381 N.C. 558 (2022), that the sentencing court must make an express finding of “a juvenile’s permanent incorrigibility” before imposing LWOPP. Slip Op. at 12. The court then grouped defendant’s arguments in two categories, (1) that defendant’s sentence of LWOPP should be reversed based on *Kelliher* because he was capable of reform, and (2) the MAR court incorrectly weighed the mitigating factors of G.S. 15A-1340.19B. Taking up (1), the court quickly dispensed with defendant’s arguments, as defendant did not challenge the findings of fact as unsupported by the evidence and they were binding on his appeal.

Because defendant did not challenge the findings of fact, the court moved to (2), and specifically the weight the MAR court gave to each of the nine mitigating factors and the express finding of incorrigibility under *Kelliher*. A significant portion of the opinion (pages 15 to 30) were spent examining the factors and the weight given by the MAR court to each. The court ultimately concluded that “the Sentencing Order properly addressed each factor as required by [G.S.] 15A-1340.19A and *Kelliher*.” *Id.* at 31. After noting the possible differing views on the mitigating impact of the factors, the court found no abuse of discretion and affirmed the order.

Juvenile defendant’s life without parole sentence complied with G.S. 15A-1340.19B, and did not violate U.S. or N.C. constitutions.

[State v. Borlase](#), COA22-985, ___ N.C. App. ___ (Jan. 2, 2024). In this Watauga County case, defendant appealed his convictions for first-degree murder for killing his parents one month before he turned eighteen years old, arguing error in sentencing him to two consecutive life sentences without parole. The Court of Appeals majority found no error.

On one day in April of 2019, defendant attacked and killed both of his parents in separate attacks, using a large knife to stab both of them to death. He then spent several hours cleaning the crime scene and attempting to conceal his crimes. Then defendant picked up his younger brother from his grandmother’s house, dropped him off in the home, and

stayed with a friend that night. The next day defendant attempted to flee but was caught after crossing into Tennessee. Defendant was found guilty of both counts of first-degree murder by a jury, and the judge sentenced him to consecutive life sentences without parole.

The Court of Appeals explained that defendant’s argument rested upon G.S. 15A-1340.19B, the statute providing appropriate procedure for sentencing a juvenile to life without the possibility of parole, and that his sentencing violated the Eighth Amendment of the federal constitution and Article 1, Section 27 of the state constitution. The court first looked at the Eighth Amendment issue and applicable U.S. Supreme Court precedent, concluding “[t]he procedure employed by the sentencing judge met the requirements of the Eighth Amendment as articulated by the United States Supreme Court in [*Jones v. Mississippi*, 141 S. Ct. 1307 (2021)] and was at least as robust as the procedure employed by the Mississippi judge in *Jones*.” Slip Op. at 7.

Moving to the North Carolina statute and constitutional concerns, the court noted that G.S. 15A-1340.19B provides the defendant with the opportunity to offer evidence towards eight specific, non-exclusive mitigating factors. Here the court reviewed six factors provided by defendant in his brief and concluded “the sentencing judge considered the evidence presented concerning mitigating factors, including those enumerated in the sentencing statute” and complied with G.S. 15A-1340.19B. *Id.* at 13. Finally, looking at the North Carolina constitution’s prohibition on cruel and unusual punishment and applicable caselaw, applying *State v. Kelliher*, 381 N.C. 558, (2022), for the concept that the North Carolina constitution offers broader protection of juvenile offenders than the federal constitution. *Id.* at 14. Despite this broader protection, defendant was not entitled to reversal, as “the trial court expressly found that ‘it did not believe that there is a likelihood of rehabilitation in confinement’ and that Defendant’s crimes ‘demonstrate a condition of irreparable corruption and permanent incorrigibility.’” *Id.*

Judge Arrowood provided a lengthy dissent discussing the applicable constitutional requirements and caselaw precedent, and would have vacated and remanded for resentencing because the trial court violated G.S. 15A-1340.19B, the Eighth Amendment, and Article 1, Section 27.

Probation violation report contained sufficient allegations to prepare defendant for possible revocation at hearing; evidence supported finding that defendant committed new offense of exploitation of a minor.

[State v. Bowman](#), COA23-384, ___ N.C. App. ___ (Nov. 21, 2023). In this Forsyth County case, defendant appealed the revocation of his probation, arguing (1) he did not receive notice that his probation could be revoked at the hearing, and (2) that the State did not prove he committed a new criminal offense. The Court of Appeals disagreed, finding no error.

While on probation for 15 counts of third-degree exploitation of a minor, defendant admitted to looking at child abusive materials during a group therapy session. This led to an investigation by defendant's probation officer; defendant eventually admitted to looking at child pornography on his girlfriend's phone. The probation officer filed a report, and the matter came for a hearing in September 2022, where defendant's probation was revoked and his sentence was activated.

Taking up (1), the Court of Appeals rejected defendant's argument that he was not given adequate notice that his probation could be revoked at the hearing. Here, the report filed by defendant's probation officer described conduct that could be criminal, specifically viewing child pornography. Although the report did not explicitly allege defendant violated probation by committing this criminal offense, the court explained that "[t]he Report's description of Defendant's alleged behavior was sufficient to give Defendant notice of possible probation revocation." Slip Op. at 8.

Considering (2), the court explained that while the trial court did not explicitly reference the new crime that defendant committed (third-degree exploitation of a minor), the evidence admitted at the hearing was sufficient to support the trial court's determination that defendant committed the offense when revoking his probation. The court noted that defendant's admissions, along with the evidence gathered from his girlfriend's phone, were sufficient to support the conclusion that defendant "possessed material containing a visual representation of a minor engaging in sexual activity and committed third-degree exploitation of a minor." *Id.* at 11.

Judge Collins concurred in the result only.

Defendant was erroneously convicted of altering court documents where she altered a copy of a child support statement; restitution and probation term were properly ordered.

[State v. Hussain](#), COA22-1024, ___ N.C. App. ___ (Nov. 7, 2023). In this Brunswick County case, defendant appealed her convictions for forgery, uttering forged paper, altering court documents, residential mortgage fraud, and obtaining property by false pretense, arguing error in (1) denying her motion to dismiss the charges of altering court documents and obtaining property by false pretense, (2) ordering restitution, and (3) imposing an extended probation term. The Court of Appeals found error in denying the motion to dismiss the charge of altering court documents and remanded for resentencing, but otherwise affirmed the trial court.

Defendant applied for a home loan in 2016, and submitted documentation showing her income from a full time job, a part time job, and from child support payments under a Florida court order. After the bank granted the loan, defendant applied for several

forbearances, claiming a hardship due to losing her part-time job. The bank suspected fraud after her third application for forbearance, and an investigation determined there were many inconsistencies in the documentation; the bank eventually foreclosed on defendant's home. Defendant eventually came to trial for submitting altered and forged documents to the bank, and the jury convicted defendant on all charges. The trial court imposed a 6 to 17 month imprisonment sentence, suspended for 30 months probation, but then extended the probation to 60 months to allow defendant to pay \$25,061 in restitution.

Considering (1), the Court of Appeals noted that the State had conceded it did not present evidence to show defendant altered the child support records from Florida. Under G.S. 14-211.2, evidence that the defendant altered official court records is required for a conviction, but at trial the State only admitted evidence the defendant altered a copy of an order showing income. Because the court could not determine "what weight, if any, the trial court gave to each of Defendant's convictions, and because Defendant was sentenced at the top of the presumptive range of sentences rather than the lowest," the court vacated the conviction and remanded for resentencing. Slip Op. at 7. The court did not find error with the obtaining property by false pretense charge, as the bank funded defendant's loan based upon the false information she submitted.

Turning to (2) the order of restitution, the court disagreed with defendant's argument that the record did not contain evidence showing the banks' monetary loss, as the record showed the bank relied on defendant's statements to fund the loan and grant the forbearances. Additionally, the court noted that the trial court was aware of defendant's marital and employment status, and gave her an extended term of probation to allow her more time to pay, indicating that it properly considered defendant's ability to pay restitution.

Finally, reviewing (3) the court explained that G.S. 15A-1343.2(d) permits a trial court to extend the term of probation when necessary for payment of restitution. Because the court found that the order of restitution was appropriate in (2), defendant's argument that the probation term was improperly extended due to an erroneous restitution award also failed.

Trial court erred by extending probationary term without a finding of good cause, and by imposing an additional 45-day active term beyond the statutory deadline.

[State v. Jackson](#), COA22-984, ___ N.C. App. ___ (Oct. 17, 2023). In this Perquimans County case, defendant appealed the trial court's finding that he violated the terms of his probation, arguing the trial court extended his probation after the probationary term had expired without a finding of good cause. The Court of Appeals agreed, vacating the order and remanding to the trial court to determine if good cause exists.

Defendant, a town council member, was placed on probation for striking another council member in October 2018. After entering an *Alford* plea to assault of a government official, defendant was sentenced in December 2019 to 60 days of imprisonment, suspended for

24 months supervised probation with 15 days of active term, and a curfew from 7pm to 6am. Defendant's probation officer filed violation reports alleging that defendant violated the curfew and left the county without prior approval. The matter was initially set for an August 2020 hearing, but after continuances, the matter did not reach a hearing until February of 2022. By that time, defendant's probationary term had expired, ending in December 2021. After the February 2022 hearing, the trial court entered an order extending defendant's probation for another 12 months and ordering a 45-day active term as a condition of special probation. Defendant appealed.

The Court of Appeals looked first to G.S. 15A-1344(f), which allows a trial court to extend probation after the expiration of the term in certain circumstances. Relevant for this case, a trial court must find that the defendant violated a condition of probation, and then make a finding under (f)(3) that "for good cause shown and stated the probation should be extended." Slip Op. at 4. The court explained that "A finding of good cause 'cannot simply be inferred from the record.'" *Id.*, quoting *State v. Morgan*, 372 N.C. 609, 617 (2019). Because the hearing here occurred after defendant's probation term expired, and the record contained no finding of good cause to satisfy G.S. 15A-1344(f)(3), the court remanded for further determination by the trial court.

The court also vacated the 45-day active term imposed after the expiration of defendant's probation, finding error by the trial court for two reasons. First, under the calculation required by G.S. 15A-1351(a), "the maximum period of confinement that could have been imposed as a condition of special probation was 15 days," which defendant had served at the beginning of his sentence. *Id.* at 6. Second, because the statute sets an outer deadline of "the end of the probationary term or two years after the date of conviction, whichever comes first," defendant's additional 45-day active term was outside the acceptable period. *Id.* at 7.

Federal carjacking offense was substantially similar to North Carolina common law robbery for purposes of prior record level calculation.

[State v. Daniels](#), COA23-22, ___ N.C. App. ___ (Oct. 17, 2023). In this Mecklenburg County case, defendant appealed his convictions for attempted first-degree murder and various assault and firearms charges, arguing error in the determination of his prior record level by finding his federal carjacking conviction was substantially similar to common law robbery. The Court of Appeals found no error.

In 2018, defendant fired multiple shots during an altercation, one of which struck a child waiting at a bus stop, attracting the attention of an off-duty sheriff's deputy. Defendant jumped into a vehicle, and as the driver sped away from the deputy, defendant fired multiple shots at the deputy's vehicle. Defendant was eventually caught, and was convicted of all charges against him at trial. During the sentencing phase, the trial court considered whether defendant's conviction for carjacking under 18 U.S.C. § 2119 was substantially similar to the North Carolina common law offense of robbery. After hearing

from the parties, the trial court concluded that the State had proven by a preponderance of the evidence that the two offenses were substantially similar, increasing defendant's prior record level by four sentencing points.

The Court of Appeals began by noting the similarities between the two offenses, as “[b]oth the federal carjacking statute and North Carolina’s common law robbery require the forceful and violent taking of property.” Slip Op. at 9. Defendant raised four arguments on appeal. First, defendant argued that the similarity between the two offenses failed the test from *State v. Sanders*, 367 N.C. 716 (2014). The Court of Appeals disagreed, explaining “[h]ere, unlike in *Sanders*, the elements of carjacking and common law robbery require similar conduct, and no elements are mutually exclusive.” Slip Op. at 11. In defendant’s second argument, he pointed to the connection to interstate commerce requirement for the federal offense, an element not present in common law robbery. The court dismissed this argument, pointing to a similar determination in *State v. Riley*, 253 N.C. App. 819 (2017), and explaining that the additional federal element of “interstate commerce” did not distinguish the two crimes. Slip Op. at 13.

Defendant pointed to the sentencing enhancements of the federal statute not present in the North Carolina offense for his third argument. The court again disagreed, noting the N.C. Supreme Court has explained “the test in *Sanders* does not ‘require identicalness between compared statutes from different states and mandate identical outcomes between cases which originate both in North Carolina and in the foreign state.’” *Id.* at 15, quoting *State v. Graham*, 379 N.C. 75, 84 (2021). Finally, defendant argued that the North Carolina offense was broader than the federal offense, as the federal offense is limited to theft of motor vehicles. This final argument also failed, as the court referenced *State v. Key*, 180 N.C. App. 286 (2006), and concluded that the two offenses were substantially similar as “both the federal carjacking statute and North Carolina common law robbery require a non-consensual taking of property under threat, force, or intimidation.” Slip Op. at 17.

Testimony of probation officer and arrest warrants were sufficient evidence to revoke probation; defendant’s inability to cross examine a probation officer who filed reports against her was not prejudicial error.

[State v. Singletary](#), COA22-1068, ___ N.C. App. ___ (Sept. 19, 2023). In this Wilson County case, defendant appealed the revocation of her probation, arguing (1) insufficient evidence to support the finding she committed a new crime on probation and (2) violation of her right to confront the probation officer who filed the violation reports against her. The Court of Appeals found no error.

Defendant’s probation officer “W” filed two probation violation reports against her from November and December 2021. The reports alleged defendant was committed new crimes while on probation as she was charged with obtaining property by false pretenses and uttering a forged instrument. When the matter came before the trial court in May 2022, probation officer W was replaced by probation officer “H,” who testified regarding the two

2021 reports, as well as a third report from February 2022 that officer H prepared alleging a second uttering a forged instrument offense. Defendant objected to the absence of officer W, as she wished to cross-examine the officer who filed the 2021 reports against her. The trial court noted the objection in the record but otherwise proceeded with the hearing. At the conclusion of the hearing the trial court revoked defendant's probation and activated her prison sentences.

For (1), defendant argued "the State needed to call law enforcement witnesses to present evidence about the investigations relating to the crimes, civilian victim witnesses, or [bank] employees" to support the alleged crimes committed by defendant. Slip Op. at 10. The Court of Appeals disagreed, explaining that the violation reports, arrest warrants, and testimony from officer H supported the conclusion that defendant was the person on security camera footage committing the crimes. The court explained "[a] probation revocation hearing is not a trial, and the State need not present evidence sufficient to convict Defendant nor call as witnesses the investigating officers of the crimes alleged." *Id.* at 12.

Turning to (2), the court noted that the Sixth Amendment did not apply to a probation revocation hearing, and that G.S. 15A-1345(e) was the basis for confrontation rights in the proceeding. Because G.S. 15A-1345(e) controlled, the issue before the court was "whether the trial court committed prejudicial error by not making an explicit finding that good cause existed for not allowing Defendant to confront [officer W]." *Id.* at 14. The court referenced *State v. Terry*, 149 N.C. App. 434 (2002), explaining that failure to require an adverse witness to testify is not error if "(1) the adverse witness's testimony would have been merely extraneous evidence in light of other competent evidence presented through the probation officer's testimony and (2) defendant failed to request the professor be subpoenaed." Slip Op. at 14. Here, the court found the testimony of officer W would have been extraneous in light of the other evidence in the record supporting defendant's commission of the crimes. Additionally, defendant did not subpoena officer W. This led the court to conclude the trial court did not abuse its discretion in allowing the hearing to proceed without officer W. Finally, the court noted that if any error occurred, it was not prejudicial, as sufficient competent evidence before the trial court supported the revocation of defendant's probation without the testimony from officer W.

Sex Offenders

Out-of-state sex offender registration did not count towards 10-year registration requirement for early termination petition.

[State v. Fritsche](#), 344PA21, ___ N.C. ___ (Dec. 15, 2023). In this Wake County case, the Supreme Court affirmed the Court of Appeals decision that defendant's petition for early termination of his sex offender registration was properly denied.

In November of 2000, Defendant pleaded guilty to sexual exploitation of a child in Colorado. After completing his sentence in 2008, he registered as a sex offender in Colorado. Defendant moved to North Carolina in October 2020, and petitioned under G.S. 14-208.12B for a determination as to whether he must register as a sex offender. The trial court determined that defendant must register, and he did in April 2021. Subsequently, defendant filed a petition under G.S. 14-208.12A, arguing that his registration should be terminated as it had been over ten years from the date he initially registered in Colorado. The trial court denied this petition, relying on *In re Borden*, 216 N.C. App. 579 (2011), for the proposition that the statute only allows removal of defendant’s registration after he has been registered for ten years in North Carolina. The Court of Appeals affirmed the trial court’s denial of the petition, holding that the plain meaning of the statute required ten years of registration in North Carolina.

The Supreme Court granted discretionary review to take up defendant’s argument that the Court of Appeals improperly interpreted G.S. 14-208.12A. Specifically, the Court considered whether the word “county” as used in the statute meant any county or only North Carolina counties, concluding that “[b]ecause the definitions under Article 27A refer specifically to counties in North Carolina, ‘initial county registration’ in section 14-208.12A must mean the first registration compiled by a sheriff of a county in the state of North Carolina.” Slip Op. at 6. The Court noted this conclusion was supported by “the General Assembly’s silence since the Court of Appeals decided *In re Borden* in 2011.” *Id.* at 7.

Justice Barringer, joined by Justice Dietz, concurred by separate opinion and would not have adopted the General Assembly’s acquiescence from its silence after *In re Borden*. *Id.* at 9.

Justice Earls dissented and would have allowed defendant’s petition for termination of his registration. *Id.* at 11.

A final conviction for a New York crime that requires sex offender registration under the laws of that state falls within the definition of a reportable conviction in North Carolina, regardless of whether it is substantially similar to a North Carolina crime requiring registration.

[In re Laliveres](#), COA23-742, ___ N.C. App. ___ (Feb. 20, 2024). In this Wake County case, the petitioner appealed from the trial court’s order requiring him to register as a sex offender in North Carolina based on his out-of-state conviction from New York. The Court of Appeals concluded that the petitioner is required to register as a sex offender in North Carolina and affirmed the trial court’s order.

The petitioner was convicted of attempted first-degree rape in New York in 1993. In 2022, after the petitioner moved to North Carolina, the Wake County Sheriff’s Office notified him that he was required to register as a sex offender based on the New York conviction. The

petitioner filed for a judicial determination under G.S. 14-208.12B. The trial court concluded that the New York conviction was substantially similar to second-degree forcible rape under G.S. 14-27.22, and therefore required registration.

On appeal, the petitioner argued that his New York conviction was not substantially similar to a North Carolina crime requiring registration, because it was for an attempt, and thus not included within the definition of a reportable offense in North Carolina. The Court of Appeals concluded that substantial similarity was irrelevant. The New York conviction required registration in North Carolina based on the second pathway to reportability set out in G.S. 14-208.6(4)(b): that the offense requires registration under the law of the state of conviction. That pathway, initially enacted in 2006 and amended in 2010 to apply to all individuals with qualifying out-of-state convictions regardless of the date they move to North Carolina, applied to the petitioner. Therefore, because his attempted rape conviction required registration in New York, it requires registration here “independent of any substantial similarity analysis.” Slip op. at 8.

State’s failure to provide 2003 copy of federal statute justified vacating order to register as sex offender and remanding for new hearing.

[In re: Alcantara](#), COA22-795, ___ N.C. App. ___ (Dec. 5, 2023). In this Guilford County case, defendant appealed the order requiring him to register a sex offender, arguing the federal statute he pleaded guilty under was not substantially similar to North Carolina’s statute. The Court of Appeals vacated the order and remanded to the trial court for a new hearing.

In April of 2003, defendant pleaded guilty to violating 18 U.S.C. 2252(a)(4)(a) in Puerto Rico. Defendant completed his 40-month sentence and three years of supervised release. In October 2021, the Guilford County Sheriff’s Office informed defendant he must register as a sex offender, and defendant filed a petition for a judicial determination of sex offender registration requirement. During the June 2022 hearing, the State offered a copy of defendant’s 2003 conviction along with a copy of the 2021 version of 18 U.S.C. 2252(a)(4)(a), arguing it was substantially similar to G.S. 14-190.17A(a), third-degree sexual exploitation of a minor. The trial court ultimately ordered defendant to register, finding the statutes substantially similar.

Taking up defendant’s argument, the Court of Appeals noted that “we have ‘consistently held that when evidence of the applicable law is not presented to the trial court, the party seeking a determination of substantial similarity has failed to meet its burden of establishing substantial similarity by a preponderance of the evidence.’” Slip Op. at 5, quoting *State v. Sanders*, 367 N.C. 716, 718 (2014). Here, the State did not offer any evidence related to the 2003 version of the federal statute or that the statute was unchanged since defendant’s plea. As a result, “[t]he State failed to provide to the trial court such evidence as to allow it to determine that 18 U.S.C. § 2252(a)(4)(A) remained unchanged from 2003 to 2021 and that the federal statute is substantially similar to the

North Carolina statute.” *Id.* at 6. This failure justified vacating the order and remanding for a new hearing.

Pending appeal of SBM order did not remove trial court’s jurisdiction to consider Rule 60(b)(6) motion under *Bell* exception.

[State v. Harvey](#), COA23-542, ___ N.C. App. ___ (Dec. 5, 2023). In this Columbus County case, defendant appealed the denial of his motion for relief from the order imposing lifetime Satellite-Based Monitoring (SBM) for his second-degree rape conviction. The Court of Appeals reversed the denial and remanded to the trial court.

In August of 2021, the trial court entered an order imposing lifetime SBM on defendant after he completed his sentence for second-degree rape; defendant subsequently appealed the order. In September of 2021, the General Assembly amended the SBM statutes to alter the findings required to impose SBM and to allow an offender to petition for termination or modification if they were sentenced to a term of SBM longer than 10 years before December 1, 2021. After this amendment, defendant filed a motion under Rule of Civil Procedure 60(b)(6) with the trial court to set aside the order imposing lifetime SBM, “arguing the change to the SBM law mere weeks after he was ordered to submit to a lifetime of SBM constituted an extraordinary circumstance warranting relief.” Slip Op. at 2. The trial court held a hearing on the motion, during which the judge expressed the opinion that the pending appeal removed jurisdiction from the trial court. However, in the written order denying the motion, the trial court included a conclusion of law that “Rule 60(b)(6) does not apply because extraordinary circumstances do not exist.” *Id.* at 4.

Taking up the Rule 60(b) issue, the Court of Appeals found error in the conclusion that an appeal removed the trial court’s jurisdiction. The court explained that normally, an appeal removes the jurisdiction of the trial court, but there is an exception under *Bell v. Martin*, 43 N.C. App. 134 (1979), for Rule 60(b) motions. The *Bell* exception procedure allows the trial court to consider the Rule 60(b) motion and indicate on the record how it would rule:

Should the trial court indicate it would be in favor of granting the motion, the appellant would “be in position to move the appellate court to remand to the trial court for judgment on the motion.” If, on the other hand, the trial court indicated it would deny the motion, that indication “would be considered binding on that court and [the] appellant could then request appellate court review of the lower court’s action.”

Id. at 7, quoting *Bell* at 142 (cleaned up). Here, the trial court’s statements and order were “at odds with each other,” as it appeared the trial court did not think it had jurisdiction, but subsequently concluded that extraordinary circumstances did not exist to grant the Rule 60(b) motion. *Id.* at 9. This led the court to reverse and remand for a new hearing consistent with the *Bell* procedure.

Verdict

Substitution of alternate juror after jury began deliberation violated defendant’s right to properly constituted jury of twelve, requiring new trial.

[State v. Chambers](#), COA22-1063, ___ N.C. App. ___ (Feb. 20, 2024). In this Wake County case, defendant appealed his convictions for first-degree murder and assault with a deadly weapon, arguing his right to a properly constituted jury was violated when the trial court substituted an alternate juror after the jury began deliberations. The Court of Appeals agreed, vacating his convictions and remanding for a new trial.

Defendant came to trial in August of 2018 for a shooting at a Raleigh motel. After jury deliberations began, a juror informed the trial court that he had a doctor’s appointment and could not return the next day. The trial court replaced the juror with an alternate juror and ordered the jury to restart deliberations; defendant was not present in the courtroom when the substitution was made. Defendant subsequently appealed.

Turning to defendant’s arguments, the Court of Appeals concluded that the trial court’s substitution of an alternate juror was error. The court referenced *State v. Bunning*, 346 N.C. 253 (1997), and explained that the N.C. Supreme Court has interpreted the unanimous verdict requirement of the North Carolina Constitution in Article I, § 24 “to preclude juror substitution during a trial after the commencement of jury deliberations.” Slip Op. at 3. Because the substitution meant that thirteen jurors participated in the deliberations for defendant’s convictions, “[d]efendant’s constitutional right to a properly constituted jury of twelve was violated when the trial court substituted an original juror with an alternate juror after the commencement of jury deliberations.” *Id.* at 4. The court reached this conclusion despite the text of G.S. 15A-1215(a), noting that “where a statute conflicts with our state constitution, we must follow our state constitution.” *Id.* at 5.

Evidence

[Alcohol Tests, Generally](#)

Analyst did not follow applicable DHHS regulations for observation period before administering Intoximeter test, but additional evidence supported defendant’s conviction.

[State v. Forney](#), COA23-338, ___ N.C. App. ___ (Jan. 16, 2024). In this Buncombe County case, defendant appealed his convictions for driving while impaired, arguing error in denying his motion to exclude an Intoximeter chemical analysis as well as his subsequent objections to the admission of the analysis at trial. The Court of Appeals majority found error as the officer performing the analysis did not conduct an observation period after ordering defendant to remove gum from his mouth, but did not find that defendant was prejudiced by the error, upholding his conviction.

In March of 2021, an Asheville police officer observed defendant roll through a stop sign. The officer pulled over defendant, and observed the smell of alcohol, glassy eyes, and slurred speech. The officer conducted field sobriety tests, determining that defendant was likely intoxicated. After defendant was arrested and taken to the Buncombe County Jail, a certified chemical analyst conducted a 15-minute observation period of defendant, followed by an Intoximeter breath analysis. After this first breath test, the analyst noted that defendant had gum in his mouth and had him spit it out, then conducted a second breath test two minutes after the first. Both tests resulted in 0.11 BAC readings. Both parties offered expert testimony about the possible effects of the gum, but no studies were admitted using the type of Intoximeter in question, and no evidence established the type of gum defendant had in his mouth at the time of the test.

Taking up defendant's argument, the Court of Appeals first explained that G.S. 20-139.1(b)(1) makes breath tests admissible if they are "performed in accordance with the rules of the Department of Health and Human Services." Slip Op. at 8. The applicable rules are found in 10A NCAC 41B.0101, which requires an observation period to ensure the person being tested does not ingest alcohol, vomit, or eat or drink other substances. The State argued that chewing gum did not represent "eating" for purposes of the rules, a position the court's opinion rejected:

In sum, we believe the intent of both the legislature and DHHS in the provisions pertinent here is clear: to ensure that the chemical analysis of a subject's breath is accurate in measuring BAC and not tainted by the presence of substances in the mouth during testing. And in our view, to adopt the State's position that the observation period requirement is not violated when a subject "chews" something during the period would lead to absurd results and have bizarre consequences because it would mean, for example, that a subject could engage in the following activities not listed in 10A NCAC 41B.0106(6) moments before the taking of breath samples: *chewing* gum—presumably including nicotine gum—or tobacco or food that is spit out before swallowing, *dipping* snuff, *sucking* on a medicated throat lozenge or a hard candy, *using* an inhaler, and *swallowing* a pill.

Id. at 13. Despite finding that the test was improperly admitted, the court did not see prejudice for defendant, noting the overwhelming evidence of defendant's performance on the field sobriety tests, his glassy eyes and slurred speech, and the smell of alcohol observed by the officer.

Judge Arrowood concurred in the result only.

Judge Wood concurred in the result only by separate opinion, and also would have held that the admission of the breath test results was not error. *Id.* at 19.

Character Evidence

Trial court failed to exercise gatekeeping function under Rule 702 but error did not rise to plain error standard; prosecutor’s improper comment during closing argument did not represent error.

[State v. Figueroa](#), COA23-313, ___ N.C. App. ___ (Dec. 19, 2023). In this Guilford County case, defendant appealed her conviction for trafficking methamphetamine, arguing (1) plain error in admitting testimony from an expert without a sufficient foundation for reliability under Rule of Evidence 702, and (2) error in failing to intervene *ex mero motu* when the prosecutor made improper remarks during closing argument about her past convictions. The Court of Appeals found no plain error in (1), and no error in (2).

In November of 2018, law enforcement officers set up an undercover investigation of a suspected drug dealer. At a meeting set up by an undercover officer to purchase methamphetamine, defendant was the driver of the vehicle with the drug dealer. After officers found methamphetamine in the vehicle, defendant was charged and ultimately convicted of trafficking methamphetamine by possession.

Looking to (1), the Court of Appeals found error in admitting the State’s expert testimony under Rule 702, as “the court failed to exercise its gatekeeping function” when admitting the expert’s testimony. Slip Op. at 7. Although the expert offered testimony about the type of analysis she performed to identify the methamphetamine, “she did not explain the methodology of that analysis.” *Id.* However, the court noted that this error did not rise to the level of plain error as the expert “identified the tests she performed and the result of those tests,” and she did not engage in “baseless speculation.” *Id.*

Turning to (2), the court noted that defendant testified on her own behalf and opened the door to character evidence about her past convictions, and that she did not object at trial to the improper argument. The court found the majority of the closing argument to be unobjectionable, but did agree that the prosecutor “improperly suggested that Defendant was more likely to be guilty of the charged offenses based on her past convictions.” *Id.* at 9. However, this improper suggestion was only “a few lines of the prosecutor’s eighteen-page closing argument” and “was not so grossly improper that it warranted judicial intervention.” *Id.*

Competency of Witnesses

Trial court took appropriate steps after being informed victim was drinking alcohol before her testimony, and did not abuse discretion in denying defendant’s motion for mistrial.

[State v. Thompson](#), COA22-1036, ___ N.C. App. ___ (Jan. 2, 2024). In this Chatham County case, defendant appealed his convictions for first-degree forcible rape, first-degree

kidnapping, sexual battery, and assault of a female, arguing the trial court abused its discretion by denying his motion for a mistrial. The Court of Appeals found no error.

In April of 2019, defendant came to the victim's house and offered her drugs and alcohol. The two consumed the drugs and defendant eventually forced himself upon the victim, forcibly raping her while punching her repeatedly. When defendant came to trial, the victim took the stand to testify about the events. During her testimony, defense counsel took issue with the victim's "streamed sort of consciousness" testimony, and the State requested to be allowed more leading questions on direct examination. Slip Op. at 2. The trial court allowed voir dire to determine whether the victim's mental health issues necessitated more leading questions, and during this voir dire it was revealed that the victim had either bipolar or borderline personality disorder, PTSD, and a substance use or abuse disorder, and the victim had recently relapsed and was released from rehab the week before her testimony. She was also on medication for certain medical conditions. On the fourth day of the trial, the State informed the trial court that the bailiffs believed the victim had consumed alcohol that morning, and the victim took a portable breathalyzer, which resulted in a 0.0 BAC reading. However, the victim admitted she had "a sip of vodka" because of her nerves. *Id.* at 3. Later on recross, "[the victim] disclosed to the jury that she took a shot of alcohol that was in her purse upon arriving to the courthouse." *Id.* at 4. She also admitted to having a beer at lunch the day before.

Considering defendant's argument, the Court of Appeals noted "given the trial court's knowledge and consideration of the result of the breathalyzer test, we cannot conclude the trial court abused its discretion." *Id.* at 7. Instead, the trial court took "immediate and reasonable steps" to address the victim's behavior, and the trial court's decision to deny defendant's motion for a mistrial was a reasonable decision. *Id.* at 8.

Crawford Issues & Confrontation Clause

Limitation on cross-examination related to *Sell* hearing was not error; trial court properly denied defendant's request for special instruction on insanity.

[State v. Gregory](#), COA22-1034, ___ N.C. App. ___ (Dec. 19, 2023). In this Wake County case, defendant appealed his convictions for first-degree murder, rape, kidnapping, robbery, and associated crimes, arguing error in (1) the limitation of his cross-examination of the State's psychiatry expert, and (2) denial of his request for a special jury instruction on insanity. The Court of Appeals majority found no error.

During a violent period in August of 2015, defendant stole two vehicles, robbed and shot a man at a motel, robbed and shot another man at a pawn shop, kidnapped and raped a fifteen-year-old girl, and robbed a food store. Defendant was ultimately arrested in New York driving one of the stolen vehicles, and extradited back to North Carolina, where he was committed to Central Regional Hospital for an examination on his capacity to proceed

to trial. Initially defendant was found incapable of proceeding, and he was involuntarily committed in February of 2018. In February of 2020, the State moved to have defendant forcibly medicated, and the trial court held a hearing under *Sell v. United States*, 539 U.S. 166 (2003). At the *Sell* hearing, the State's expert testified about defendant's mental illness and whether he should be forcibly medicated, but the hearing was continued, and defendant began voluntarily taking his medication again before the hearing was concluded. Defendant came to trial in July 2020 and presented the defense of insanity. Defense counsel sought to cross-examine the State's expert on her testimony during the *Sell* hearing. The State objected under Rule of Evidence 403, and the trial court directed defense counsel to avoid any questions related to the *Sell* hearing or forcible medication. When the parties met for the charge conference, defense counsel requested an addition to N.C.P.I. – Crim. 304.10 (regarding insanity), referring to commitment procedure if he was found to be not guilty by reason of insanity. The State objected to this addition, and agreed to avoid misrepresenting how quickly defendant might be released during closing argument. Defense counsel went on to provide the same argument requested in the special jury instruction during closing argument. Defendant was found guilty of all charges, and appealed.

Taking up (1), the Court of Appeals noted that defendant's argument was focused on "[the expert's] testimony that defendant needed to be forcibly medicated to regain his capacity to proceed." Slip Op. at 13. The State used this expert's testimony to rebut defendant's defense of insanity, and defense counsel had attempted to impeach the expert with her testimony from the *Sell* hearing that defendant needed forcible medication. The court rejected defendant's argument that excluding this line of questioning violated defendant's Confrontation Clause rights, pointing out the jury was aware of defendant's mental illness and the expert's history of evaluating defendant, and "defendant was not limited in attacking [the expert's] credibility or asking about the differences between her previous testimony at the hearing and her subsequent testimony at trial." *Id.* at 16. The court went further, explaining that even if the *Sell* hearing and forcible medication were relevant, the risk of unfair prejudice substantially outweighed its probative value.

Reviewing (2) defendant's special jury instruction request, the court again disagreed, noting "[h]ere, the pattern jury instruction on commitment procedures, N.C.P.I. – Crim. 304.10, sufficiently encompasses the substance of the law." *Id.* at 18. Holding that defendant's situation did not justify altering the instruction, the court explained "[d]efendant's case is neither so exceptional nor extraordinary such that the pattern jury instruction on commitment procedures fails to adequately encompass the law or risks misleading the jury." *Id.*

Judge Hampson dissented and would have allowed cross-examination on the *Sell* hearing.

Admission of hearsay cellphone records without authenticating witness testimony violated defendant's Confrontation Clause rights.

[State v. Lester](#), COA23-115, ___ N.C. App. ___ (Dec. 5, 2023). In this Wake County case, defendant appealed his convictions for statutory rape, statutory sexual offense, and indecent liberties with a child, arguing the admission of hearsay cellphone records violated his rights under the Confrontation Clause of the Sixth Amendment. The Court of Appeals agreed, vacating the judgment and remanding for a new trial.

In 2022, defendant came to trial for having sex with a thirteen-year-old girl during the summer of 2019. At trial, the State offered cellphone records showing calls between a number associated with defendant and a number associated with the victim as Exhibits #2 and #3. Defendant was subsequently convicted of all charges, and defendant appealed. The Court of Appeals issued an opinion on October 17, 2023, which was subsequently withdrawn and replaced by the current opinion.

Considering defendant's Sixth Amendment argument, the court quoted *State v. Locklear*, 363 N.C. 438 (2009), for the concept that the Confrontation Clause "bars admission of direct testimonial evidence, 'unless the declarant is unavailable to testify and the accused had a prior opportunity to cross-examine the declarant.'" Slip Op. at 7-8. When determining whether a defendant's Confrontation Clause rights were violated, courts apply a three-part test: "(1) whether the evidence admitted was testimonial in nature; (2) whether the trial court properly ruled the declarant was unavailable; and, (3) whether defendant had an opportunity to cross-examine the declarant." *Id.* at 8. Here, "[t]he trial court's findings answered the first and second factors . . . in the affirmative and the third factor in the negative," meaning "the evidence should have been excluded." *Id.* at 9.

The court went on to explain why the admission of the two exhibits was improper under the residual exception in Rule of Evidence 803(24), noting that "[t]he primary purpose of the court-ordered production of and preparation of the data records retained and provided by Verizon was to prepare direct testimonial evidence for Defendant's trial." *Id.* at 13. Because defendant was "not given the prior opportunity or at trial to challenge or cross-examine officials from Verizon, who had purportedly accumulated this evidence . . . their admission as such violated Defendant's rights under the Confrontation Clause." *Id.*

After establishing that admission of the exhibits was error, the court explained that the State could not meet the burden of showing the error was "harmless beyond a reasonable doubt" as required for constitutional errors. *Id.* at 14. As a result, the court vacated the judgment and remanded for a new trial.

Cross-Examination, Impeachment, Corroboration & Related Issues

Defense counsel elicited similar testimony during cross-examination, barring challenge to statement about defendant's unavailability.

[State v. McLawhon](#), COA23-814, ___ N.C. App. ___ (March 19, 2024). In this Pitt County case, defendant appealed his convictions for statutory sexual offense with a child by an adult, sexual act by a substitute parent or custodian, and indecent liberties with a child, arguing plain error in admitting a detective's testimony that she could not interview defendant during the investigation. The Court of Appeals found no plain error.

Defendant came to trial for sexual offenses with his adopted daughter. During the trial, the detective who interviewed the victim/daughter testified about her investigation. During this testimony, the detective testified that she had spoken with defendant's attorney "and was unable to get [defendant] to come in for an interview." Slip Op. at 6. Defendant did not object to this testimony.

The Court of Appeals rejected defendant's argument that admitting the detective's statement was plain error, noting that defense counsel elicited similar testimony on cross-examination. Because defense counsel inquired about the timeline of the investigation and prompted similar testimony from the detective, defendant could not establish plain error from the direct testimony admitted.

(1) Defense counsel's blindness did not justify granting defendant's motion for new counsel; (2) prosecutor's inappropriate cross-examination was not plain error; (3) failure to provide instruction on lesser-included offense of robbery was plain error justifying new trial.

[State v. Hamilton](#), COA22-847, ___ N.C. App. ___ (Nov. 21, 2023). In this Davidson County case, defendant appealed his convictions for two counts of robbery with a dangerous weapon, arguing error in (1) denying his motion for new counsel because his appointed attorney was blind, (2) failing to intervene *ex mero motu* during his cross examination, and (3) failing to instruct the jury on the lesser-included offense of common-law robbery for defendant's second count. The Court of Appeals found no error with (1) or (2), but found plain error in (3), vacating the second count of robbery and remanding for a new trial.

In December of 2016, defendant and an associate entered a gaming business and proceeded to rob the business, the manager on duty, and a patron. Defendant pulled a firearm and pointed it at the manager, demanding money, while his associate, who did not have a firearm, demanded money from the patron. When the matter came for trial in May 2022, defendant requested new appointed counsel because his attorney was blind. The trial court denied the motion and defendant proceeded with his appointed counsel. During

the State’s cross-examination of defendant, the prosecutor repeatedly questioned defendant about exchanges he had with the court outside the presence of the jury, including profanity and accusations of racism, while defense counsel did not object to the questioning. At the conclusion of trial, defendant did not request an instruction on the lesser-included offense of common law robbery.

Considering (1), the Court of Appeals first explained the two-part test for whether to grant new appointed counsel from *State v. Thacker*, 301 N.C. 348 (1980), and grappled with *State v. Jones*, 357 N.C. 409 (2003), ultimately determining that it would “purely review the trial court’s denial of Defendant’s motion for new counsel for abuse of discretion.” Slip Op. at 7. Noting that the only issue identified by defendant was that his counsel was blind, the court concluded “[d]efendant’s counsel is licensed to practice law in this state, and we cannot say the trial court abused its discretion by failing to replace him because of an immutable physical condition—a physical condition that is not limited to this case.” *Id.* at 9.

Moving to (2), the court noted that it agreed with defendant that “the State’s cross-examination of him was inappropriate,” but that the issues did not rise to plain error. *Id.* at 10. Because ample evidence supported defendant’s guilt, including video and eyewitness testimony, the court could not conclude that the failure to intervene impacted the jury’s findings of guilt or the fairness of the trial.

Finally, in (3), the court agreed with defendant, explaining that “a rational jury could have reasonably inferred that neither Defendant nor [his associate] used a dangerous weapon to threaten [the patron].” *Id.* at 15. Because this meant that a rational jury could have convicted defendant for common-law robbery instead of robbery with a dangerous weapon, the failure to provide an instruction for the lesser included charge was plain error, and this error justified a new trial on the second count of robbery.

Limits on Relevancy

Rule of Evidence 412 bars admission of prior nonconsensual sexual activity.

[State v. Washington](#), 34PA22, ___ N.C. ___ (May 23, 2024). In this Orange County case, the Supreme Court affirmed an unpublished Court of Appeals decision upholding defendant’s convictions for sexual offense and indecent liberties with a child. The Court determined that Rule of Evidence 412 bars admission of prior nonconsensual sexual activity.

In October of 2018, the victim told her mother that defendant, her stepfather, was sexually abusing her. During the investigation, the victim was interviewed by a SAFEChild social worker. In this SAFEChild interview, the victim recounted another incident where she was sexually abused by a teenager. At trial, defendant moved to admit the portion of the SAFEChild interview that referenced the teenager. The trial court denied this motion under

Rule 412. At the Court of Appeals, defendant argued prejudicial error by excluding the interview as “sexual abuse does not fall within the definition of sexual behavior under Rule 412.” Slip Op. at 4 (cleaned up). The Court of Appeals disagreed, upholding the conviction in an unpublished decision.

Considering defendant’s argument, the Supreme Court noted that “[s]exual activity . . . is not defined in Rule 412 or elsewhere in the North Carolina Rules of Evidence.” *Id.* at 6. However, the Court concluded that when looking at the relevant definition of “sexual behavior” in Rule 412, it was clear the intent was to differentiate between the sex acts at issue and all other activity, and “the definition does not differentiate between consensual and nonconsensual sex acts, nor does it tend to exclude nonconsensual sex.” *Id.* This led the Court to determine that “generally, all evidence of a complainant’s sexual behavior, other than the sexual act at issue, is irrelevant regardless of whether that sexual behavior was consensual or nonconsensual.” *Id.* at 7.

Defendant’s actions before and after the murder supported premeditation and deliberation; admission of numerous gruesome photographs of the body did not represent prejudice; allowing prosecutor’s comments during closing argument did not rise to prejudicial error.

[State v. Branche](#), CO22-768, ___ N.C. App. ___ (Nov. 7, 2023). In this Carteret County case, defendant appealed his conviction for first-degree murder, arguing (1) insufficient evidence, (2) error in admitting numerous gruesome photos of the body, and (3) error in allowing several statements by the prosecutor during closing argument. The Court of Appeals found no prejudicial error.

At trial, defendant admitted through counsel that he shot the victim, the mother of his son, on August 14, 2018. Evidence showed that earlier that day, the two were seen fighting in the front yard of their residence, and later the victim was seen walking down the road. Defendant eventually picked up the victim and brought her back to their home. Sometime after the victim and defendant were back home, defendant shot and killed the victim, wrapped her in a tarp, then buried her body at a burn pit in his grandfather’s back yard. Defendant also called the victim’s mother, who lived with them, to tell her juice had been spilled on her sheets and he had to launder them. After burying the victim, defendant told others that the victim had left him, and put up flyers trying to find her. Eventually defendant was charged with the murder; while in custody, he had conversations with another inmate about how he “snapped” and shot the victim after she described performing sex acts with other men, and where he hid the body.

Taking up (1), the Court of Appeals explained that the State argued first-degree murder under two theories, premeditation and deliberation, and lying in wait. The court looked for sufficient evidence to support premeditation and deliberation first, noting that defendant’s actions before and after the murder were relevant. Although defendant and the victim

fought before the killing, the court did not find evidence to support the idea that defendant was acting under “violent passion,” and defendant seemed to deliberately choose a small-caliber handgun that was not his usual weapon for the murder. Slip Op. at 10-11. Additionally, the court concluded that “Defendant’s actions following the murder demonstrate a planned strategy to pretend Defendant had nothing to do with the murder and to avoid detection as the perpetrator.” *Id.* at 12. The court dispensed with defendant’s argument that it should not consider acts after the killing as evidence of premeditation, explaining the case cited by defendant, *State v. Steele*, 190 N.C. 506 (1925), “holds flight, and flight alone, is not evidence of premeditation and deliberation.” Slip Op. at 14. Because the court found sufficient evidence to support first-degree murder under premeditation and deliberation, it did not examine the lying in wait theory.

Turning to (2), the court explained that under Rule of Evidence 403, photos of a body and its location when found are competent evidence, but when repetitive, gruesome and gory photos are presented to the jury simply to arouse the passion of the jury, they may have a prejudicial effect, such as in *State v. Hennis*, 323 N.C. 279 (1988). Here, the court did not find prejudice from the photographs, as “[t]he photographs presented at trial depicted the culmination of the investigation to locate [the victim’s] body and provided evidence of premeditation and deliberation.” Slip Op. at 20.

The court found error in (3), but not prejudicial error, when examining the prosecutor’s closing argument. First, the prosecutor mentioned the punishment for second-degree murder; the trial court sustained defendant’s objection but did not give a curative instruction. The court found no prejudice as previous instructions directed the jury to disregard questions to sustained objections, and not to acquit or convict based on the severity of punishment. Second, the prosecutor mentioned that defendant did not have to testify; the trial court initially sustained the objection but then overruled it to allow the prosecutor to make an argument about defendant not calling witnesses. The court found that this error was harmless beyond a reasonable doubt due to “the evidence of Defendant’s motive for planning to kill [the victim], his confession, his use of the .22 caliber handgun, and his acts subsequent to the killing.” *Id.* at 25. Third, while the prosecutor misstated the applicable precedent regarding provocation, the court explained that a proper instruction by the trial court to the jury on “the required state of mind for premeditation and deliberation” cured the misstatement. *Id.* at 27. Finally, the court concluded that the prosecutor’s statements referencing defendant’s admission that he killed the victim were “directed at what was and was not at issue for the jurors to decide rather than an improper statement regarding Defendant’s failure to plead guilty.” *Id.* at 28.

Opinions

Overwhelming evidence against defendant meant no prejudice from excluding testimony regarding truthfulness.

[State v. Ramirez](#), COA23-965, ___ N.C. App. ___ (May 7, 2024). In this Mecklenburg County case, defendant appealed his convictions for second-degree sexual offense and rape, arguing (1) error in excluding testimony from a detective regarding defendant’s truthfulness and (2) clerical errors in the judgment. The Court of Appeals found no error with (1), but remanded for correction of the clerical errors.

In December of 2019, the victim went out for drinks with her friends and became intoxicated. She woke up the next morning in her apartment with a head wound and various other injuries; at the hospital the nurse determined she had been sexually assaulted. Detectives determined defendant used the victim’s credit card at several locations, tracked him down and found items from the victim in his car. DNA evidence obtained from the victim at the hospital matched defendant.

Taking up (1), the Court of Appeals assumed *arguendo* that it was inappropriate to exclude the testimony, and explained that the overwhelming evidence against defendant meant that he could not demonstrate prejudice from the excluded testimony. Moving to (2), the court explained that the written judgments contain the term “forcible” even though this was omitted from the indictments and jury instructions during trial. The court remanded for correction of this error in the judgments.

Victim’s testimony was admissible where she did not specifically reference repressed memories.

[State v. Heyne](#), COA23-224, ___ N.C. App. ___ (May 7, 2024). In this Davie County case, defendant appealed his conviction for first-degree rape, arguing error in (1) admitting lay testimony about repressed memories without expert support, (2) allowing lay opinion testimony, and (3) allowing improper statements during the State’s closing argument. The Court of Appeals found no prejudicial error.

In 2017, the victim called law enforcement to report a rape that occurred in 2003, when she was in sixth grade. The victim told law enforcement she was raped by defendant while spending the night at his house visiting his daughter. Although the victim did not tell her parents about the incident at the time, she later discussed the events in therapy and testified at trial about the events at defendant’s house.

Taking up (1), the Court of Appeals explained that under *State v. King*, 366 N.C. 68 (2012), a witness may testify about the content of repressed memories without expert support, but “unless qualified as an expert or supported by admissible expert testimony, a witness ‘may not testify that the memories were repressed or recovered.’” Slip Op. at 7, quoting *King* at

78. Here, the victim did not testify about repressed memories at any point, and a family friend's statement referencing a repressed memory was not offered as substantive evidence but as evidence of the victim's consistent statements.

Moving to (2), defendant argued that testimony from a victim's advocate that failing to remember details from long ago was "normal" represented improper lay opinion testimony. The court disagreed, explaining that it was reasonable to conclude the witness's testimony "was based on her rational perception that memories fade with time." *Id.* at 13.

Reaching (3), defendant objected to statements by the prosecutor that the victim's eating disorder and behavioral issues were responses to rape. However, the court explained that the prosecutor merely recounted issues the victim experienced, "then argued a reasonable inference from these facts that [the victim's] behaviors may have been responses to a rape." *Id.* at 15. These statements were also a small part of the closing argument, leading the court to conclude they were not prejudicial even if improper.

Testimony from girlfriend and forensics expert were properly admitted in first-degree murder case.

[State v. Fernanders](#), COA23-837, ___ N.C. App. ___ (May 7, 2024). In this Polk County case, defendant appealed his convictions for first-degree murder and possession of a stolen vehicle, arguing error in six areas of evidentiary rulings by the trial court. The Court of Appeals found no error.

In March of 2016, defendant, along with his girlfriend and another man, drove a stolen car from Greenville, SC, to Polk County. Defendant first tried to rob a gas station, but was held back by his girlfriend. Afterwards, defendant pulled up next to a stopped truck and asked the driver for directions. After the exchange became heated, defendant shot and killed the driver. Defendant fled the scene, but was eventually arrested in Tallahassee, FL, and came to trial.

The Court of Appeals took up each of defendant's six issues in turn. First, defendant argued that admitting testimony related to a robbery in Gainesville, FL, after the murder was prejudicial; presuming *arguendo* that admitting the evidence was error, the court held that overwhelming evidence still supported defendant's conviction. In the second issue, defendant argued that admitting lay opinion testimony from his girlfriend identifying a gun used in the murder was error, and again the court found that even if it was error, it was not prejudicial due to the overwhelming evidence. In the third issue, defendant argued that admitting ten videos and five photographs of him stealing the vehicle in South Carolina was improper under Rule of Evidence 403; the court again disagreed, noting that the evidence was probative to the elements of possessing a stolen vehicle and not unduly prejudicial. Taking up the fourth issue, the court rejected defendant's argument that the murder and possession of a stolen vehicle charges lacked a transactional connection and should have

been severed. The court noted that defendant possessed the stolen vehicle when he shot the victim, and used the same gun in both crimes.

In the fifth issue, defendant challenged the State's expert testimony regarding the shell casing found at the scene under Rule of Evidence 702. The court noted "[t]he State's expert not only explained the standards she had followed, but also explained how she had applied these standards within the context of the cartridges in the present case." Slip Op. at 14. Defendant also argued that the testimony was "inherently subjective," but the court rejected this as a reason to exclude the testimony, noting that defense counsel was able to extensively cross examine the expert and the ultimate determination of weight and credibility was for the jury. *Id.* at 15. Finally, the court considered defendant's argument that the trial court's decisions represented cumulative error, explaining that the decisions were "not demonstrated to be abuses of discretion nor prejudicial," and thus did not deprive defendant of a fair trial. *Id.* at 16.

Judge Stroud concurred in the result only.

Defendant's restraint of victim was separate from rape and supported kidnapping conviction; expert testimony regarding sexual assault examination did not violate Confrontation Clause.

[State v. Ball](#), COA 22-1029, ___ N.C. App. ___ (Jan. 16, 2024). In this Macon County case, defendant appealed his convictions for forcible rape, kidnapping, burglary, assault on a female, and interfering with an emergency communication, arguing error in (1) denying his motion to dismiss the kidnapping charge, (2) allowing expert testimony about a sexual assault nurse examination ("SANE") from a nurse who did not conduct the examination, and (3) failing to intervene *ex mero motu* in response to the prosecutor's statements during closing argument. The Court of Appeals found no error.

In May of 2019, defendant appeared at the door of the victim's home, telling her that his car was stuck in a ditch and he needed a place to stay for the night. Defendant was known to the victim through previous employment, and she offered her guesthouse to defendant for the night. According to the victim's testimony, defendant then reappeared at her door asking for a cigarette lighter, barged in when she opened the door, and raped her on her bed. The victim eventually escaped and found officers from the sheriff's department, who arrested defendant as he slept in the victim's bed. The victim underwent a SANE the next morning. At trial, defendant moved to dismiss the kidnapping charge, arguing the State did not admit evidence he confined the victim separate from his alleged sexual assault; the trial court denied the motion. The State called a forensic nursing supervisor to testify regarding the SANE report, although she was not the nurse that performed the SANE. Defendant did not object to the nurse expert's testimony, and he was subsequently convicted of all charges.

Finding no error in (1), the Court of Appeals explained that “[i]n rape cases, this Court has previously determined a separate charge of second-degree kidnapping requires a defendant’s restraint or confinement of the victim to be separate from that necessary to accomplish the rape.” Slip Op. at 10. The court found just such evidence here, noting that the struggle between defendant and the victim began as she fled from him at the door, then moved to the bedroom, where defendant restrained her on the bed prior to the sexual assault.

Moving to (2), the court first gave an overview of the applicable Confrontation Clause issues, noting “an expert witness may properly base her independent opinion ‘on tests performed by another person, if the tests are of the type reasonably relied upon by experts in the field,’ without violating the Confrontation Clause.” *Id.* at 15, quoting *State v. Fair*, 354 N.C. 131, 162 (2001). Here, the nurse expert’s qualifications were established, and she testified about her independent conclusions after reviewing the SANE, subject to cross-examination by defendant. The court found no error in admitting the SANE and expert testimony under these circumstances.

Finally, the court found no error in (3), explaining “the Prosecutor’s closing statements were consistent with the record, as his arguments highlighted the differences between Defendant’s statements to the police two days after the incident, which were properly admitted at trial, and Defendant’s own testimony during his trial.” *Id.* at 20. Because the prosecutor’s statements were simply a credibility argument against defendant’s testimony, the court did not find an error prejudicing defendant.

State’s circumstantial evidence was sufficient to sustain conviction; evidence of State’s expert making a mistake in a previous trial did not justify granting MAR; evidence of defendant previously removing his electronic monitoring device was properly admitted.

[State v. Burnett](#), COA23-246, ___ N.C. App. ___ (Dec. 19, 2023). In this New Hanover County case, defendant appealed his conviction for first-degree murder, arguing error in (1) denying his motion to dismiss for lack of evidence he was the perpetrator; (2) overruling his objection that the trial court did not make necessary findings on reliability for expert testimony; (3) denying his post-conviction motion for appropriate relief (MAR) based upon newly-discovered evidence; (4) admitting evidence of his prior removal of an electronic monitoring device; and (5) overruling his objections to the State’s closing argument. The Court of Appeals found no error.

In January of 2016, officers responded to a call about a fourteen-year-old being shot. While accompanying the ambulance to the hospital, they received a report of additional shots fired, and diverted to the scene, where the officers found defendant running from the area. After arresting defendant, officers found he was carrying a 9mm handgun. The State Crime Laboratory later matched the bullet that killed the victim to this handgun. Defendant was subsequently convicted and appealed.

Taking up defendant's argument (1), the Court of Appeals explained that because the evidence that defendant was the perpetrator was circumstantial, proof of motive, opportunity, and means were necessary to support the inference that defendant committed the crime. Here, the State admitted evidence that the shooting was in retaliation for a previous shooting two weeks prior, and that the shell casing found at the scene, the bullet in the victim, and defendant's statements to police all tied him to the murder. As a result, "[a] reasonable juror could find Defendant had the opportunity and means to commit the murder." Slip Op. at 8.

Turning to (2), the court noted that trial courts enjoy wide latitude when determining admissibility of expert testimony. Here, defendant argued that the State's firearm expert did not utilize "reliable principles and methods" in violation of Rule of Evidence 702, as the State's expert utilized a micro-analysis test instead of a lands and grooves test on the projectile, a method disputed by the defense's expert. *Id.* at 10. The court found no abuse of discretion as "[t]he superior court made supported findings to resolve purported contradictions between the competing experts."

Reviewing (3), the court explained defendant's newly discovered evidence concerned the history of the State's expert receiving a complaint from a superior court judge as well as a mistake during a firearm examination in a previous case. The court noted that the State was not in possession of the expert's personnel records and was not aware of the purported mistake, and under *Brady v. Maryland*, 373 U.S. 83 (1963), the State had not suppressed material evidence. The court further noted that defendant was not entitled to a new trial as the newly discovered evidence "merely questions the expert witness' past, not the State's evidence at this trial." *Id.* at 14.

Arriving at (4), the court explained that the trial court's decision to admit evidence of defendant removing his electronic monitoring device fifteen days before the shooting under Rule of Evidence 404(b) was not error. Defendant "disabled his electronic monitoring device approximately an hour after another murder was committed two weeks earlier in the same area of Wilmington . . . [t]he evidence and timing of these incidents and Defendant's actions are part of the chain of events that contextualize the crime." *Id.* at 16.

Finally, the court dispensed with (5), explaining that the prosecutor's closing argument did not shift the burden onto defendant, as the statements merely referenced defendant's failure to refute the evidence admitted at trial. Likewise, the prosecutor's reference to a link between the murder and retaliation for a previous murder was not an improper reference to "gangs" and was supported by evidence and testimony admitted at the trial.

Prior Acts--404(b) Evidence

Rule 404(b) testimony was admissible where alleged sexual assault was sufficiently similar and shared unique facts with the crime in question; trial court’s statement regarding “choice” during sentencing hearing was not obviously referencing defendant’s choice for a jury trial.

[State v. Pickens](#), 276A22, ___ N.C. ___ (Oct. 20, 2023). In this Wake County case, the Supreme Court (1) affirmed the Court of Appeals holding that Rule 404(b) testimony was properly admitted, but (2) reversed the Court of Appeals decision vacating defendant’s sentence for improper consideration of the choice to pursue a jury trial, reinstating defendant’s original sentence.

From August-September of 2015, defendant, a middle-school chorus teacher, repeatedly raped and assaulted an eleven-year old student in the bathroom of the middle school as the student took her daily trips to the school nurse for medication. The student eventually reported the details of the assaults, leading to defendant’s trial for statutory rape and statutory sexual offense with a child in October of 2019. At trial, defendant filed a motion in limine to prevent the State from admitting testimony under Rule of Evidence 404(b) regarding defendant’s alleged rape of a previous student, but the trial court denied his motion. After the jury found defendant guilty of all charges, he was sentenced to three consecutive active sentences. During sentencing, the trial court addressed defendant regarding the testimony of the two victims and the traumatizing nature of the proceedings. At the end of this statement, the trial court said “[t]hey didn’t have a choice and you, [defendant], had a choice.” Slip Op. at 16. Defendant appealed, and the Court of Appeals majority found no error in admitting the Rule 404(b) testimony, but did find that the trial court improperly considered defendant’s choice to pursue a jury trial when imposing his sentence. The State subsequently appealed based upon the divided panel, leading to the current opinion.

Taking up (1), the Supreme Court explained that “Rule 404(b) has been characterized as a rule of inclusion, and evidence of prior bad acts is admissible unless the only reason that the evidence is introduced is to show the defendant’s propensity for committing a crime like the act charged.” *Id.* at 8. However, prior acts must be sufficiently similar and contain “some unusual facts that go to a purpose other than propensity” common to both crimes to be admissible under Rule 404(b). *Id.* at 13, quoting *State v. Beckelheimer*, 366 N.C. 127, 132 (2012). Here, the State offered testimony from a victim who was one of defendant’s chorus students in February of 2015. The victim testified that defendant raped her in his apartment while he was taking her to practice for a competition. The State offered this Rule 404(b) testimony to show defendant’s “intent, motive, plan, and design to sexually assault middle school students from schools where he was a teacher.” *Id.* at 10. Analyzing seven similarities and unique facts shared by assaults, the Court noted the age of the children, defendant’s use of his position as a teacher to gain access, and the style of intercourse defendant attempted with the children. The Court explained the proper analysis “involves

focusing on the similarities and not the differences between the two incidents,” and concluded that admission of the Rule 404(b) testimony was not error. *Id.* at 13.

Turning to (2), the Court first noted the strong protection for an accused’s right to a trial by jury, and the necessity of a new sentencing hearing if the trial court imposed a sentence “at least in part because defendant . . . insisted on a trial by jury.” *Id.* at 15, quoting *State v. Boone*, 293 N.C. 702, 712 (1977). The issue in the current case was whether the “choice” referenced in the sentencing hearing was defendant’s decision to plead not guilty and pursue a jury trial. The Court examined relevant precedent and explained that the statement must be reviewed with the entire record. Here, reviewing the entirety of the trial court’s statement, it was unclear if the trial court was referring to defendant’s choice to pursue a jury trial or to “the egregious nature of [defendant]’s crimes and his decision to commit those crimes.” *Id.* at 20. The Court concluded that this ambiguity did not overcome the “presumption of regularity” enjoyed by the trial court’s sentence. *Id.* This led the Court to reinstate defendant’s original sentence.

(1) Failure to raise constitutional objection to blood draw at trial waived right to appeal; (2) no Confrontation Clause issue where testifying expert assisted in lab analysis and reviewed results; (3) previous DWIs admitted as Rule 404(b) evidence did not fail Rule 403 balancing test.

[State v. Taylor](#), COA23-423, ___ N.C. App. ___ (April 2, 2024). In this Columbus County case, defendant appealed her conviction for second-degree murder based on driving while impaired (DWI) and reckless driving, arguing error in (1) denying her motion to suppress the results of a blood sample, (2) admitting a lab report prepared by an expert who did not testify, and (3) admitting evidence under Rule of Evidence 404(b) of previous DWIs and bad driving. The Court of Appeals found no error.

In February of 2018, defendant caused a tractor-trailer to crash because she was driving very slowly in the right-hand lane of a highway. The driver of the tractor-trailer was killed when the cab caught fire after the accident. Several witnesses noted defendant’s slow responses and movements, and a State Highway Patrol trooper noticed cans of aerosol duster in her purse. The trooper took defendant to a hospital and she consented to a blood draw. Before trial defendant filed a motion to suppress the blood draw based on violations of G.S. 20-16.2, and a motion to limit Rule 404(b) evidence of prior DWIs and bad driving, but the trial court denied both motions. During the trial, the State offered two lab reports based on the blood sample, showing defendant had Difluoroethane (a substance from aerosol dusters), Xanax, and several other prescription drugs in her blood. Defense counsel objected to the lab reports on Sixth Amendment grounds as the testifying expert was not the scientist who authored the reports, but the trial court admitted them into evidence.

Reviewing (1), the Court of Appeals first noted that defendant’s objection to the blood sample at trial was based upon G.S. 20-16.2 (implied consent to chemical analysis), not on Fourth Amendment constitutional grounds. Here, the court pointed to *State v. Davis*, 364 N.C. 297 (2010), for the proposition that defendant’s failure to raise the constitutional issue by objection at trial resulted in her waiving the argument. Because defendant also did not renew the statutory argument on appeal, the court declined to address either issue.

Moving to (2), the court explained “this case is not one in which the expert witness testifying in court did not personally participate in the testing.” Slip Op. at 14. Instead, the expert witness called by the State had participated in the lab analysis even though she was not listed as the author of the report, and she had reviewed the results as if she had conducted the tests herself. The court held that defendant’s Confrontation Clause rights were not violated because “[a]s an expert with personal knowledge of the processes involved and personal participation in the testing, [the State’s expert] was the witness whom Defendant had a right to cross-examine, and she was indeed subject to cross-examination at trial.” *Id.* at 15.

Reaching (3), the court explained defendant’s argument rested upon the Rule 404(b) evidence failing the Rule of Evidence 403 balancing test, arguing the probative value did not outweigh the prejudicial nature of the evidence. The court noted each of the incidents were probative of malice and knowledge of the danger of defendant’s actions. When considering prejudice, the court explained that “[n]one of the prior incidents related to any particularly shocking or emotional facts that would have inflamed the jurors” and held the trial court properly denied defendant’s motion. *Id.* at 18.

[Vouching for the Credibility of a Victim](#)

Testimony by lead detective vouching for victim’s credibility was improperly admitted, justifying new trial.

[State v. Aguilar](#), COA23-556, ___ N.C. App. ___ (March 5, 2024). In this Mecklenburg County case, defendant appealed his convictions for sexual battery, assault on a female, and false imprisonment, arguing error in allowing the State’s witness to vouch for the alleged victim’s credibility. The Court of Appeals agreed, ordering a new trial.

In October of 2019, defendant allegedly assaulted the victim at a Mexican restaurant where they both worked. At trial, the State called the lead detective to testify regarding her investigation of the case. During direct examination, the State asked the detective if she questioned the validity of the victim’s story; defense counsel objected, but the trial court overruled the objection and allowed the questioning to proceed. The State asked the detective several more questions regarding the credibility of the victim’s statements, and defense counsel renewed their objection, which was again overruled. Defendant was subsequently convicted, and appealed.

Taking up defendant's argument, the Court of Appeals noted that "a detective or other law enforcement officer may testify as to why they made certain choices in the course of an investigation, including their basis for believing a particular witness[,] but here "the challenged testimony was clearly unrelated to [the detective's] investigatory decision-making." Slip Op. at 8-9. The court pointed to *State v. Taylor*, 238 N.C. App. 159 (2014), and *State v. Richardson*, 346 N.C. 520 (1997), as examples of testimony related to investigatory decisions, and contrasted these with the current case. The State argued that Rule of Evidence 608(a) permitted bolstering the victim's testimony, but the court rejected this argument, explaining that defendant's cross-examination of the victim did not implicate Rule 608(a). The court concluded defendant was prejudiced by the admission of the detective's testimony, and remanded for a new trial.

Arrest, Search, and Investigation

Arrests & Investigatory Stops

Independent reasonable suspicion supported stopping defendant after he drove out of the road in front of a traffic checkpoint.

[State v. Alvarez](#), 278PA21, ___ N.C. ___ (Dec. 15, 2023). In this Rowan County case, the Supreme Court reversed and remanded an unpublished Court of Appeals decision that officers did not have reasonable suspicion to stop defendant's vehicle, concluding the officers had independent reasonable suspicion to stop defendant.

In June of 2018, defendant drove towards traffic checkpoint operated by the Rowan County Sheriff's Office; as defendant neared the checkpoint, his passenger-side wheels left the roadway and went into the grass. Based on the erratic driving along with defendant's demeanor and glassy eyes, the deputies searched his vehicle, discovering cocaine, buprenorphine, marijuana, and drug paraphernalia. Defendant moved to suppress the search, and the trial court concluded that the sheriff's office did not have a valid primary programmatic purpose for the checkpoint, granting the motion to suppress. The Court of Appeals agreed, affirming the order in an unpublished opinion issued July 20, 2021. The opinion did not address whether the officers had independent reasonable suspicion to stop defendant, although a concurrence to the opinion suggested the opinion should have considered that issue.

Taking up the unpublished opinion on discretionary review, the Supreme Court explained that reasonable suspicion supported the deputies' decision to stop defendant. The record showed "three officers testified that they observed defendant's vehicle veer out of its lane and 'basically run off the road.'" Slip Op. at 4-5. The Court further noted that no testimony "support[ed] the inference that placement of the checkpoint contributed to defendant's failure to maintain lane control." *Id.* at 5. Because the officers had independent reasonable suspicion to stop defendant, they did not violate his Fourth Amendment rights, and the

Court did not need to reach the issue of the traffic checkpoint's constitutionality. The Court disavowed the Court of Appeals' "broad statements on traffic stop constitutionality" and remanded to the trial court for appropriate proceedings. *Id.* at 6.

Sight and smell of possible marijuana represented reasonable suspicion to extend traffic stop.

[State v. George](#), COA22-958, ___ N.C. App. ___ (March 5, 2024). In this Sampson County case, defendant appealed his convictions for trafficking heroin by possession and by transport, possession with intent to sell or deliver heroin and cocaine, and resisting a public officer, arguing (1) insufficient findings of fact, and (2) error in denying his motion to suppress the results of a traffic stop. The Court of Appeals found no error.

In July of 2017, an officer pulled defendant over for driving 70 mph in a 55 mph zone. When the officer approached defendant's car, he noticed the smell of marijuana and what appeared to be marijuana residue on the floorboard. After a long search for registration, defendant finally produced his documents; when the officer returned to his vehicle, he called for backup. After checking defendant's registration and returning his documents, the officer asked defendant if any illegal drugs were in the vehicle, and defendant said no. Defendant declined the officer's request to search the vehicle, but during a free-air sniff around the vehicle, a canine alerted at the driver's side door. A search found various narcotics. Defendant filed a pre-trial motion to suppress the results of the search, but the trial court denied the motion after a suppression hearing.

Both of defendant's points of appeal depended upon the underlying argument that the officer unconstitutionally prolonged the traffic stop. Beginning with (1) the findings of fact to support the trial court's conclusion of law that the traffic stop was not unconstitutionally extended, the Court of Appeals explained that "our de novo review examining the constitutionality of the traffic stop's extension shows that the challenged legal conclusion is adequately supported by the findings of fact." Slip Op. at 8.

The court then proceeded to (2), performing a review of the traffic stop to determine whether the officer had reasonable suspicion to extend the stop. Because defendant argued that the legalization of hemp in North Carolina meant the smell and sight of marijuana could not support the reasonable suspicion required to extend the stop, the court looked to applicable precedent on the issue. The court noted several federal court decisions related to probable cause, and the holding in *State v. Teague*, 286 N.C. App. 160 (2023), that the passage of the Industrial Hemp Act did not alter the State's burden of proof. Slip Op. at 13. After considering the circumstances, the court concluded "there was at least 'a minimal level of objective justification, something more than an unparticularized suspicion or hunch' of completed criminal activity—possession of marijuana." *Id.* at 13, quoting *State v. Campbell*, 359 N.C. 644, 664 (2005). Because the officer had sufficient justification for extending the stop, the trial court did not err by denying defendant's motion to suppress.

Testimony from police officer that he smelled marijuana in defendant’s vehicle was not “inherently incredible” and supported reasonable suspicion for traffic stop.

[State v. Jacobs](#), COA22-997, ___ N.C. App. ___ (Sept. 19, 2023). In this New Hanover County case, defendant appealed the denial of his motion to suppress the results of a search of his vehicle, arguing error in finding reasonable suspicion for the traffic stop leading to the search. The Court of Appeals found no error.

In March of 2019, a Wilmington police officer was following defendant on a city street when he smelled the strong odor of marijuana coming from defendant’s vehicle. The officer eventually pulled defendant over, based solely on the smell coming from the vehicle. During the stop, the officer continued to smell marijuana, and asked defendant to step out of the vehicle; when defendant stepped out, the officer saw white powder and an open alcohol container. A search of the vehicle found heroin, MDMA, cocaine, and marijuana. At trial for possession and trafficking charges, defendant moved to suppress the results of the search, arguing he was not smoking marijuana while driving, and all the windows of his vehicle were closed, suggesting the officer could not have smelled marijuana coming from his vehicle and had no reasonable suspicion to initiate a stop. The trial court denied the motion, defendant pleaded guilty and appealed.

Taking up defendant’s arguments, the Court of Appeals first noted that normally the appeals court defers to the trial court’s determination of witness credibility when looking at testimony establishing reasonable suspicion. However, when the physical circumstances are “inherently incredible” the deference to a trial court’s determination will not apply. Slip Op. at 8, quoting *State v. Miller*, 270 N.C. 726, 731 (1967). Relevant to the current matter, applicable precedent held that “an officer’s smelling of unburned marijuana can provide probable cause to conduct a warrantless search and seizure, and that an officer’s smelling of such is not inherently incredible.” *Id.* Because the circumstances here were not “inherently incredible,” the court deferred to the trial court’s finding that the officer’s testimony was credible, which in turn supported the finding that the officer had reasonable suspicion to initiate the traffic stop.

[Dog Sniff](#)

Sight and smell of possible marijuana represented reasonable suspicion to extend traffic stop.

[State v. George](#), COA22-958, ___ N.C. App. ___ (March 5, 2024). In this Sampson County case, defendant appealed his convictions for trafficking heroin by possession and by transport, possession with intent to sell or deliver heroin and cocaine, and resisting a

public officer, arguing (1) insufficient findings of fact, and (2) error in denying his motion to suppress the results of a traffic stop. The Court of Appeals found no error.

In July of 2017, an officer pulled defendant over for driving 70 mph in a 55 mph zone. When the officer approached defendant's car, he noticed the smell of marijuana and what appeared to be marijuana residue on the floorboard. After a long search for registration, defendant finally produced his documents; when the officer returned to his vehicle, he called for backup. After checking defendant's registration and returning his documents, the officer asked defendant if any illegal drugs were in the vehicle, and defendant said no. Defendant declined the officer's request to search the vehicle, but during a free-air sniff around the vehicle, a canine alerted at the driver's side door. A search found various narcotics. Defendant filed a pre-trial motion to suppress the results of the search, but the trial court denied the motion after a suppression hearing.

Both of defendant's points of appeal depended upon the underlying argument that the officer unconstitutionally prolonged the traffic stop. Beginning with (1) the findings of fact to support the trial court's conclusion of law that the traffic stop was not unconstitutionally extended, the Court of Appeals explained that "our de novo review examining the constitutionality of the traffic stop's extension shows that the challenged legal conclusion is adequately supported by the findings of fact." Slip Op. at 8.

The court then proceeded to (2), performing a review of the traffic stop to determine whether the officer had reasonable suspicion to extend the stop. Because defendant argued that the legalization of hemp in North Carolina meant the smell and sight of marijuana could not support the reasonable suspicion required to extend the stop, the court looked to applicable precedent on the issue. The court noted several federal court decisions related to probable cause, and the holding in *State v. Teague*, 286 N.C. App. 160 (2023), that the passage of the Industrial Hemp Act did not alter the State's burden of proof. Slip Op. at 13. After considering the circumstances, the court concluded "there was at least 'a minimal level of objective justification, something more than an unparticularized suspicion or hunch' of completed criminal activity—possession of marijuana." *Id.* at 13, quoting *State v. Campbell*, 359 N.C. 644, 664 (2005). Because the officer had sufficient justification for extending the stop, the trial court did not err by denying defendant's motion to suppress.

Drug dog's alert represented probable cause for search, despite legalization of hemp in North Carolina; convictions for trafficking by possession and trafficking by transportation were both valid.

[State v. Guerrero](#), COA23-377, ___ N.C. App. ___ (Feb. 6, 2024). In this Union County case, defendant appealed his convictions for trafficking in heroin by possession and by transportation, arguing error by (1) denying his motion to suppress based on insufficient

probable cause, and (2) sentencing him for both convictions as possession is a lesser-included offense of trafficking. The Court of Appeals found no error.

In November of 2020, a lieutenant with the Union County Sheriff's Office received a call from a confidential informant regarding a man driving a Honda Accord who had recently left a known heroin trafficker's house. Another officer received the report and initiated a traffic stop of defendant after observing him run a red light. A canine officer responded to the stop and conducted a search around the vehicle; the dog alerted at the passenger side door. A search of the vehicle found a plastic bag with brownish residue. Defendant moved to suppress the results of this search before trial, but the trial court denied the motion, finding the dog's alert and the confidential informant's tip supported probable cause.

Taking up (1), the Court of Appeals outlined defendant's arguments challenging both the reliability of the dog's alert and the reliability of the confidential informant. Concerning the dog's alert, defendant argued due to the legalization of hemp, the alert did not necessarily indicate illegal drugs, and thus could not represent probable cause. The court rejected this argument, explaining that caselaw supported a drug dog's alert as probable cause to search the area where the dog alerted, and "[t]he legalization of hemp does not alter this well-established general principle." Slip Op. at 7. The court noted that this argument also did not fit the facts of the case, as no officer noticed the smell of marijuana, and the confidential informant referenced heroin, which was also the substance found in the car. Because the dog's alert alone formed sufficient probable cause, the court did not reach the confidential information argument.

Arriving at (2), the court explained that "[d]efendant was sentenced for trafficking in heroin by transportation and possession, not trafficking *and* possession." *Id.* at 11. The court pointed to *State v. Perry*, 316 N.C. 87 (1986), for the principle that a defendant could be convicted for trafficking in heroin by possession and by transporting "even when the contraband material in each separate offense is the same." *Id.*, quoting *Perry* at 103-04. Based on this precedent, the court rejected defendant's arguments, and also rejected his "challenge" to create "a hypothetical where a defendant transports drugs without possessing drugs." *Id.*

Exclusionary Rule

Evidence of contraband found during search was admissible under inevitable discovery doctrine.

[State v. Jackson](#), COA23-727, ___ N.C. App. ___ (March 19, 2024). In this Avery County case, defendant appealed his conviction for possession of methamphetamine, arguing error in denying his motion to suppress the results from a search. The Court of Appeals disagreed, finding no error.

Defendant was pulled over for driving while his license was revoked. The officer who pulled defendant over asked him to step out of the vehicle so that he could pat him down for weapons. During the pat down, the officer found a pill bottle, and the defendant told the officer the pills were Percocet. The bottle was not a prescription pill bottle. The officer handcuffed defendant and told him he was being detained for having the Percocet pills in a non-prescription bottle. The officer then searched defendant's person, finding a bag of methamphetamine in defendant's boot. After defendant was indicted for felony possession of methamphetamine, he moved to suppress the results of the search, arguing no probable cause. The trial court denied the motion, and defendant was subsequently convicted.

Considering defendant's argument, the Court of Appeals first noted the "plain feel doctrine" allows admission of contraband found during a protective frisk if the incriminating nature of the contraband is immediately apparent to the officer. Slip Op. at 7. The State pointed to *State v. Robinson*, 189 N.C. App. 454 (2008), as supporting the officer's actions in the current case; the court rejected this comparison, noting that the supporting circumstances of location and nervousness of the suspect from *Robinson* were not present here. Slip Op. at 8. The court also rejected the assertion that the unlabeled pill bottle gave the officer probable cause to seize it. However, even if the search and seizure violated defendant's constitutional rights, the court concluded "the methamphetamine found in defendant's boot was still admissible because the contraband's discovery was shown to be inevitable." *Id.* at 9. Testimony from the officer at the suppression hearing supported the assumption that he would have arrested defendant for driving with a revoked license if he had not found the contraband. This triggered the "inevitable discovery doctrine" and justified admission of the contraband evidence despite the lack of probable cause for the search. *Id.* at 10.

Judge Stading concurred in the result only.

Searches

Warrantless search of vehicle for driver's identification after he fled the scene did not fall into any Fourth Amendment warrantless exception; search incident to arrest exception requires a contemporaneous arrest; automobile exception did not apply to immobilized vehicle.

[State v. Julius](#), 95A22, ___ N.C. ___ (Oct. 20, 2023). In this McDowell County case, the Supreme Court reversed the Court of Appeals decision affirming the denial of defendant's motion to suppress the results of a warrantless vehicle search. The Supreme Court held that the search and seizure were not justified under any applicable warrantless search exception and remanded the case to the trial court.

In May of 2018, sheriff's deputies responded to the scene of a hit-and-run where a vehicle was partially submerged in a ditch. The driver fled the scene before deputies arrived due to

outstanding warrants against him, but defendant was present and spoke to the deputies about the accident, explaining that it was her parents' car but she was not the driver. Because defendant could identify the driver only by his first name, one of the deputies began searching the vehicle for his identification without consent from defendant. Eventually the deputy discovered a box that contained methamphetamine and drug paraphernalia, defendant was arrested, and a search of her backpack found additional contraband. At trial, defendant moved to suppress the results of the search, arguing it violated the Fourth Amendment; the trial court denied the motion and she was convicted of possession and trafficking in methamphetamine. On appeal, the Court of Appeals majority affirmed the denial of defendant's motion, finding that the warrantless search was incident to arrest and permitted. The dissent disagreed, noting the driver was not arrested, and pointed out the automobile was immobile meaning the automobile exception also did not apply. Defendant appealed based upon this dissent, leading to the current case.

The Supreme Court noted that "the Court of Appeals held that the search incident to arrest exception justified the warrantless search and merely noted without further explanation that the search still could have been justified as 'an inventory [search] or for officer safety.'" Slip Op. at 8. For (A) search incident to arrest, the Court explained that this exception is motivated by officer safety and preservation of evidence. Under applicable precedent, officers may search the area of a vehicle within reaching distance of a suspect being arrested, and may conduct a search before an arrest, if the arrest occurs contemporaneous with the search and probable cause existed. Here, the driver fled the scene and could not reach any part of the vehicle. Additionally, "the State presented no evidence at the suppression hearing that [the driver] was ever arrested, let alone arrested contemporaneously with the search of the vehicle." *Id.* at 11. Moving to defendant, who was a bystander outside the vehicle, "[t]here was no evidence presented at the suppression hearing that the interior of the vehicle was accessible to defendant or that there were any safety concerns for the officers." *Id.* Under these circumstances, the Court held that the search incident to arrest exception was inapplicable.

The Court then turned to (B) the automobile exception, and explained "[m]obility of the vehicle is a fundamental prerequisite to the application of the automobile exception." *Id.* at 12, quoting *State v. Isleib*, 319 N.C. 634, 637 (1987). Here, this essential principle was missing, as the vehicle was stuck in a ditch. The Court observed that "[i]n fact, [a deputy] testified that he called a tow truck to remove the vehicle from the ditch." *Id.* at 13. The Court held this exception was also inapplicable to the case, and no other exceptions plausibly applied.

After determining the evidence was gathered in violation of the Fourth Amendment, the Court moved to whether the exclusionary rule, which would exclude the results of the search, should apply. Because the trial court previously concluded a valid search occurred, it never considered whether the exclusionary rule was an appropriate remedy. As a result, the Court remanded the matter for consideration of whether to exclude the evidence.

Chief Justice Newby concurred in part and dissented in part by separate opinion, and would have held that the deputies acted reasonably and did not violate the Fourth Amendment while searching the vehicle for the driver's identification. He concurred that the appropriate resolution if the defendant's Fourth Amendment rights were violated was to remand to the trial court. *Id.* at 18.

Justice Riggs did not participate in the consideration or decision of the case.

Odor of marijuana plus a cover scent provided adequate probable cause to search vehicle.

[State v. Dobson](#), COA23-568, ___ N.C. App. ___ (April 16, 2024). In this Guilford County case, defendant appealed after his guilty pleas to possession of a firearm by a felon and carrying a concealed firearm, arguing error in denying his motion to suppress because the smell of marijuana could not support probable cause. The Court of Appeals disagreed, finding no error.

In January of 2021, Greensboro police received a report that a handgun was in plain view inside a parked car. Police officers observed a group of people getting into the car, and eventually pulled the car over for going 55 mph in a 45-mph zone. When the officers approached the vehicle, they smelled what they believed was marijuana, along with a strong cologne scent. Officers asked the driver about the smell of marijuana, and she explained that they were recently at a club where people were smoking outside. After that answer, officers conducted a probable cause search of the vehicle for narcotics. During the search, officers noticed what appeared to be marijuana next to where defendant was sitting, and conducted a *Terry* frisk of defendant, discovering a firearm in his waistband. Before trial, defendant filed a motion to suppress the results of the search, arguing the smell of marijuana could not support probable cause due to the recent legalization of hemp. The trial court denied the motion, and defendant subsequently pleaded guilty to the firearms charges through a plea agreement.

Taking up defendant's arguments, the Court of Appeals explained that defendant's challenges fell into two areas. First, defendant challenged the trial court's findings of fact that officers smelled marijuana, arguing the legalization of hemp made identifying marijuana by smell alone impossible. The court noted that "contrary to Defendant's arguments, the legalization of industrial hemp did not eliminate the significance of detecting 'the odor of marijuana' for the purposes of a motion to suppress." Slip Op. at 7. The court then considered defendant's argument that the trial court misquoted the driver, writing that she said they were "in a club where marijuana was smoked" as opposed to at a club where people were smoking outside, with no mention of marijuana. *Id.* at 8. The court explained that even if the quotation was error, it did not undermine the finding of probable

cause. Instead, the officers “detected the odor of marijuana *plus* a cover scent,” providing a basis for probable cause to search the vehicle. *Id.* at 9.

Failure to observe Rules of Appellate Procedure led to sanction taxing costs of appeal against the State; additional circumstances beyond the odor of marijuana justified the search of defendant’s vehicle and personal belongings.

[State v. Springs](#), COA23-9, ___ N.C. App. ___ (Jan. 16, 2024). In this Mecklenburg County case, the State appealed an order granting defendant’s motion to suppress evidence seized during a traffic stop. The Court of Appeals reversed the trial court’s order and remanded for additional proceedings.

In May of 2021, defendant was pulled over by a Charlotte-Mecklenburg Police officer due to suspicion of a fictitious tag. When the officer approached the vehicle, he noticed defendant was fumbling with his paperwork and seemed very nervous, and the officer noted the smell of marijuana in the car. After the officer determined defendant was driving on a revoked license, he asked defendant about the marijuana smell, and defendant denied smoking in the car, but said he had just retrieved the car from his friend and speculated that was the source of the smell. The officer asked defendant to step out of the car and defendant did so, bringing cigarettes, a cellphone, and a crown royal bag with him. The officer put the belongings on the seat and patted defendant down for weapons. Finding no weapons, the officer then searched a crown royal bag and found a green leafy substance along with a digital scale, baggies of white powder, and baggies of colorful pills. Defendant was indicted for Possession of Drug Paraphernalia, Trafficking in Drugs, and Possession with Intent to Sell or Deliver a Controlled Substance, and he filed a motion to suppress the evidence from the bag, arguing the officer did not have probable cause for the search. The trial court orally granted defendant’s motion, referencing *State v. Parker*, 277 N.C. App. 531 (2021), and explaining “I just think in the totality here and given the new world that we live in, that odor plus is the standard and we didn’t get the plus here.” Slip Op. at 4.

The Court of Appeals first reviewed its basis for appellate jurisdiction based on the State’s notice of appeal, explaining that the State’s appeal violated Rule of Appellate Procedure 4 by incorrectly identifying the motion to suppress as a “motion to dismiss,” failed to reference G.S. 15A-979(c) as support for its appeal of an interlocutory motion to suppress, and failed to include the statement of grounds for appellate review required by Rule of Appellate Procedure 28(b)(4). *Id.* at 6-7. Despite the defects with the State’s appeal, the majority determined that the appropriate outcome was to issue a writ of certiorari, but “given the substantial and gross violations of the Rules of Appellate Procedure, we tax the costs of this appeal to the State as a sanction.” *Id.* at 10.

After establishing jurisdiction for the appeal, the court turned to the issue of probable cause for the warrantless search of the vehicle and ultimately the crown royal bag. The court declined to consider whether the odor of marijuana alone justified the search, as

“[i]n this case, however, as in *Parker*, the Officer had several reasons in addition to the odor of marijuana to support probable cause to search the vehicle and, consequently, the Crown Royal bag.” *Id.* at 13. The court pointed to (1) the “acknowledgement, if not an admission” that marijuana was smoked in the car, and that defendant did not assert that it was hemp, (2) defendant was driving with a fictitious tag, and (3) defendant was driving with an invalid license. *Id.* at 14. Then the court established that the officer also had probable cause to search the Crown Royal bag, quoting *State v. Mitchell*, 224 N.C. App. 171 (2012), to support that probable cause authorizes a search of “every part of the vehicle and its contents that may conceal the object of the search.” *Id.* at 15. Although defendant tried to remove the bag as he left the vehicle, the court explained that was “immaterial because the bag was in the car at the time of the stop.” *Id.* Because the totality of the circumstances supported the officer’s probable cause in searching the vehicle, the trial court’s order granting the motion to suppress was error.

Judge Murphy concurred in part and dissented in part by separate opinion, and would have found that the State did not adequately invoke the court’s jurisdiction. *Id.* at 17.

Sufficient evidence supported conclusion that defendant consented to search of his vehicle; evidence of other incriminating circumstances supported constructive possession of cocaine.

[State v. Michael](#), COA22-846, ___ N.C. App. ___ (Dec. 19, 2023). In this Davidson County case, defendant appealed his conviction for possession of a controlled substance, arguing error in (1) denying his motion to suppress the evidence obtained from a search of his vehicle, and (2) denying his motion to dismiss for insufficient evidence that he knowingly possessed cocaine. The Court of Appeals found no error.

In July of 2019, defendant was driving with two passengers when he was pulled over for failing to yield. After the officers had returned ID cards to defendant and his passengers, one officer asked for permission to search the vehicle. Defendant told the officer that he was on probation and had to allow the search. The officers discovered cocaine and drug paraphernalia during a search of the vehicle. Before trial, defendant filed a motion to suppress, which was denied. Defendant failed to object during trial when the State admitted evidence obtained through the search.

Taking up (1), the Court of Appeals noted the standard of review was plain error as defendant did not object to the admission of evidence during the trial. Here, the search of the vehicle occurred after the traffic stop had concluded. Because defendant was on probation, he is presumed to “have given consent to a search where an officer has reasonable suspicion of a crime.” Slip Op. at 5. The trial court did not provide justification in writing, but in open court stated that she concluded the officer “had reasonable suspicion to conduct the search.” *Id.* at 6. The court noted that, although the trial court did not consider defendant freely giving consent in the absence of reasonable suspicion,

“there was sufficient evidence from which the trial court could have found as fact *at trial* that Defendant voluntarily consented to the search had Defendant objected when the evidence was offered by the State.” *Id.* at 7. As a result, defendant could not show plain error from the failure to suppress.

Dispensing with (2), the court noted that the State presented “evidence of other incriminating circumstances, including the placement of the cocaine in the driver’s door, as well as the Defendant’s nervous behavior,” to support the inference that defendant constructively possessed the cocaine. *Id.* at 8.

Judge Arrowood concurred by separate opinion, writing to address the analysis of the trial court related to the officer’s reasonable suspicion to extend the stop and conduct a search.

Search Warrants

Officers had probable cause for search warrant prior to unsuccessful knock-and-talk, and did not linger too long in the curtilage of defendant’s residence.

[State v. Norman](#), COA23-471, ___ N.C. App. ___ (May 7, 2024). In this Henderson County case, defendant appealed after pleading guilty to injury to real property, felony breaking and entering, safecracking, and related offenses, arguing error in denying his motion to suppress because officers remained too long in the curtilage of his residence after an unsuccessful knock and talk. The Court of Appeals majority found no error.

In February of 2021, police officers responded to a report of a break-in to an ATM along with theft of several cartons of cigarettes, alcohol, and lottery tickets. Soon thereafter, an employee from the State Lottery Commission informed police that someone attempted to redeem one of the stolen tickets at a general store. Police obtained surveillance from the store, showing a black dodge Durango with a missing front bumper and distinctive rims. An officer spotted the vehicle nearby, and performed a knock and talk at the residence. No one answered the door, but officers observed cigarettes and a lottery ticket matching the stolen items sitting on the front seat. After running the VIN, officers determined the vehicle was displaying fake Maryland plates but was actually registered to defendant, who was on supervised probation. Eventually officers noticed someone emerge from the residence and take things from the Durango, finding the cigarettes and lottery ticket on the ground. The officers performed a sweep of the house, finding defendant inside, and searched the house based on defendant’s probation status. They later obtained a search warrant for the Durango, finding cigarettes and tools related to the break-in.

Considering defendant’s argument, the Court of Appeals noted that the officer had probable cause to seek the search warrant before the knock and talk occurred based on the description of the vehicle and the fake plates, along with the cigarettes and lottery ticket he observed inside. The court also pointed to *State v. Treece*, 129 N.C. App. 93

(1998), for the proposition that officers may secure a scene to protect evidence. Slip Op. at 11. Here, the nexus of the vehicle matching the description, the fake plates, and the proximity to the store where the attempt to redeem the lottery ticket occurred established probable cause for the search regardless of the outcome of the knock and talk. The court also noted that defendant was under supervised probation and subject to warrantless searches, meaning the items inside would have been discovered and admissible under the inevitable discovery doctrine.

Judge Wood dissented, and would have found error in denying defendant's motion to suppress.

Search warrant for residence was supported by evidence connecting occupant of the residence to drug trafficking.

[State v. Boyd](#), COA23-984, ___ N.C. App. ___ (May 7, 2024). In this Durham County case, defendant appealed after he pleaded guilty to two counts of attempted drug trafficking after denial of his motion to suppress the results of a search warrant for lack of probable cause. The Court of Appeals found no error.

In April of 2019, Durham Police obtained an anticipatory search warrant for defendant's residence based upon information from a confidential informant and surveillance of a vehicle associated with drug trafficking in the Durham area. After a controlled buy, police observed defendant and another man go to the property identified in the anticipatory warrant, and seized large amounts of currency, cocaine, marijuana, and drug paraphernalia.

The Court of Appeals took up defendant's argument, first referencing *State v. Bailey*, 374 N.C. 332 (2020), while explaining that a nexus between the illegal activity and the residence being searched must be established when a search warrant is sought in connection with illegal activity observed outside the residence. Here, the court walked through the facts in the affidavit and application for the search warrant, concluding that "[a]s in *Bailey*, these facts support a reasonable inference that Defendant was engaged in drug trafficking and establishes a nexus between the drug trafficking and Defendant's residence." Slip Op. at 9.

Officers' search of defendant's substance abuse recovery journals while looking for passwords or passcodes did not exceed the scope of search warrant.

[State v. Hagaman](#), COA22-434, ___ N.C. App. ___ (Jan. 16, 2024). In this Watauga County case, defendant appealed after pleading guilty to indecent liberties with a child, arguing error in denying his motion to suppress the evidence obtained from a search of his notebooks. The Court of Appeals found no error and affirmed the trial court.

In May of 2018, officers from the Boone Police Department were investigating child pornography distribution when they discovered files uploaded to a sharing network from defendant's IP address. The officers obtained a search warrant for defendant's residence, and during a search of notebooks found at the home for passwords or passcodes related to the child pornography, the officers discovered a reference to a "hands-on sexual offense involving a minor." Slip Op. at 4. Officers obtained additional search warrants and eventually defendant was indicted for additional counts of sexual exploitation of a minor and sexual offense. Defendant moved to suppress the evidence seized in excess of the scope of the initial search warrant, and to quash the subsequent search warrants. The trial court denied defendant's motions and he pleaded guilty, reserving his right to appeal the order denying his motion to suppress and motion to quash.

Examining defendant's motion to suppress, the Court of Appeals noted that defendant's challenge was divided into two issues, (1) that many of the findings of fact were not actual findings or were not supported by competent evidence, and (2) that searching defendant's notebooks went beyond the scope of the initial search warrant. While the court rejected the majority of defendant's challenges to the findings of fact in (1), the court did agree several were not appropriately categorized, but explained that it would review them "under the appropriate standard depending on their actual classification, not the label given by the trial court." *Id.* at 14.

After walking through defendant's objections to the findings of fact, the court reached (2), whether the officers exceeded the scope of the search warrant by searching through defendant's substance abuse recovery notebooks. Defendant argued "the agents were allowed to cursorily look in the notebook but immediately upon discovering it was a substance abuse journal, they should have looked no further, not even for passwords or passcodes." *Id.* at 17. The court noted this would lead to the absurd result of requiring officers to trust the label or classification of a defendant's records when performing a search, and rejected defendant's argument.

Criminal Offenses

Animal Cruelty

A single kick to a dog constituted "cruelly beat" for felony cruelty to animals.

[State v. Doherty](#), COA23-820, ___ N.C. App. ___ (May 7, 2024). In this Davie County case, defendant appealed his conviction for felony cruelty to animals, arguing error in (1) denying his motion to dismiss because a single kick to a dog could not constitute "cruelly beat" and (2) failing to instruct the jury on the lesser-included offense of misdemeanor cruelty to animals. The Court of Appeals found no error.

In November of 2019, a woman was walking her dog on the street in front of defendant's house, when a car approached. Because there were no sidewalks, the woman and her dog

stepped into defendant's yard to let the car pass; the car stopped because the occupants knew the woman, and they chatted about her husband's health issues. As this conversation took place, defendant ran out of his home and kicked the dog in the stomach, then ran back into his house. The dog had serious internal injuries and required emergency veterinary treatment, including an overnight stay in the veterinary hospital.

Taking up (1), the Court of Appeals explained that the statute did not define "cruelly beat" for purposes of cruelty to animals, making this a matter of first impression. The court first looked to the meaning of "beat" and whether it required repeated strikes, determining that it "could be understood to mean both a hard hit or strike, or repeated strikes." Slip Op. at 9. Taking this understanding and combining it with the intent of the General Assembly to protect animals from unnecessary pain, the court concluded "under the plain meaning of the words, 'cruelly beat' can apply to any act that causes the unjustifiable pain, suffering, or death to an animal, even if it is just one single act." *Id.*

Moving to (2), the court explained that defendant was not entitled to the instruction on a lesser-included offense as, after establishing the "cruelly beat" element of the charge, "there was no dispute as to the evidence supporting felony cruelty to animals." *Id.* at 15.

Abuse Offenses

Sufficient evidence supported defendant's convictions and assaults were distinct and separate in time; prior evidence of defendant's conduct towards victim was properly admitted under Rule 404(b).

[State v. Martin](#), COA23-190, ___ N.C. App. ___ (Feb. 20, 2024). In this Rutherford County case, defendant appealed his convictions for various assault charges, first-degree kidnapping, obstructing justice, and violations of a domestic violence order, arguing (1) error in denying his motion to dismiss for insufficient evidence, (2) ineffective assistance of counsel, (3) failure to intervene ex mero motu during the State's opening statement and closing argument, and (4) error in admitting Rule 404(b) evidence. The Court of Appeals found no error and dismissed defendant's ineffective assistance of counsel claim without prejudice.

In January of 2021, defendant and his girlfriend smoked methamphetamine together, and defendant became paranoid that his girlfriend was wearing a wire. He began ripping off her clothes, and eventually used a Sawzall to cut off her hoodie. Defendant also struck her in the head with a flashlight, causing bleeding. Defendant eventually dragged her into the bathroom and put her in the shower, but also struck her again with the showerhead and punched her. Defendant then dragged her into the living room and choked her until she passed out. After coming to trial, defendant was convicted of the charges and admitted to attaining habitual felon status.

Taking up (1), the Court of Appeals noted that defendant presented the evidence in the light most favorable to him, not to the State, but the court conducted a review of the evidence under the proper standard regardless. The court walked through each charge on pages 6-12 of the Slip Opinion, including a discussion of the specific elements of each charge. The court spent significant time distinguishing between each assault charge with a distinct interruption between the assaults. Ultimately, the court concluded that there was no error in denying defendant's motion to dismiss.

Moving to (2), defendant's argument was predicated defense counsel conceding his guilt during closing argument. The court found the record was not developed adequately to address this claim, dismissing it without prejudice. Reaching (3), defendant argued the State "deliberately appeal[ed] to the jurors' sense of passion and prejudice" in its opening statement and closing argument. Slip Op. at 14. The court did not share this interpretation, noting "[w]hile the State argued passionately, it was within the bounds of decorum and propriety." *Id.*

Finally, in (4) the court considered the admission of evidence under Rule of Evidence 404(b), specifically testimony about defendant's previous abusive behavior towards his girlfriend during 2020. The court explained "[b]ecause Defendant's conduct was admissible as proof of motive, intent, manner, and common scheme, [the witness's] testimony was relevant for a purpose other than showing Defendant's propensity for violence." *Id.* at 18. The trial court also "carefully deliberated and made a well-reasoned decision" when admitting the evidence, showing no issue with admission under Rule of Evidence 403. *Id.*

(1) Circumstantial evidence supported a finding of defendant's intent to commit felony child abuse; (2) defendant was not entitled to jury instruction on defense of accident; (3) no conflicting evidence to support giving jury instructions on lesser-included offenses.

[State v. Buchanan](#), COA23-517, ___ N.C. App. ___ (Feb. 6, 2024). In this Mitchell County case, defendant appealed his conviction for felony child abuse inflicting serious bodily injury, arguing (1) error in denying his motion to dismiss, (2) plain error in failing to instruct the jury on the defense of accident, and (3) error in denying his requested jury instructions on lesser-included offenses. The Court of Appeals found no error or plain error.

In October of 2019, defendant brought his daughter to the emergency room with a head injury. During an interview with DSS at the hospital, defendant said the injury occurred when he tripped carrying his daughter and her head hit the bar on a Pack'n Play. Expert testimony disputed defendant's version of the events, as the child "had significantly more and significantly more severe injuries than would be expected from a short fall, from falling from the father's arms into a Pack 'N Play, or even onto the floor." Slip Op. at 6. The child suffered permanent brain damage and loss of mobility on the left side of her body.

The Court of Appeals considered (1), defendant’s argument that the State presented insufficient evidence of his intent to inflict the child’s injuries. The court pointed out that intent is normally proven by circumstantial evidence. Here, the medical reports reflected significant injuries to the child’s brain, and expert testimony found those injuries “were consistent with physical abuse.” *Id.* at 10. These represented substantial evidence that defendant “intentionally inflicted serious bodily injury to [the child,]” justifying the denial of defendant’s motion. *Id.*

Moving to (2), the court noted that defendant did not object to the jury instructions, meaning the review was for plain error. Assuming arguendo that it was error that the jury was not instructed on the defense of accident, the court could not find prejudice, as the elements of felony child abuse inflicting serious bodily injury required the jury to find defendant intentionally injured the child. The court explained that the jury heard testimony from defendant that the events were an accident, and from the State’s expert that the injuries were indicative of child abuse. After hearing the two competing explanations, “[t]he jury thus found beyond a reasonable doubt that Defendant’s testimony was not credible by finding him guilty of felony child abuse inflicting serious bodily injury.” *Id.* at 14. Providing an instruction on the defense of accident would not have impacted the outcome.

Finally, in (3), the court explained that instruction on lesser-included offenses is not required “when the State’s evidence is positive as to each and every element of the crime charged and there is no conflicting evidence relating to any element of the charged crime.” *Id.* at 15, quoting *State v. Millsaps*, 356 N.C. 556, 562 (2002). Here, the distinguishing element between the charge and lesser offenses was “the level of harm inflicted upon the child.” *Id.* The court concluded that “[h]ere, there was no evidence presented at trial from which the jury could have rationally found that Defendant committed the lesser offense[s] . . . because the State’s evidence is positive as to the element of serious bodily injury and there is no conflicting evidence.” *Id.* at 16.

Assaults

“In operation” has a common meaning, when a person is in the driver’s seat of vehicle and engine is running, and jury did not need specific instruction on that meaning.

[State v. Shumate](#), COA23-256, ___ N.C. App. ___ (Dec. 19, 2023). In this McDowell County case, defendant appealed his conviction for discharging a firearm into an occupied vehicle in operation and possessing a firearm as a felon, arguing error in (1) not instructing the jury on the lesser included offense of discharging a firearm into an occupied vehicle; (2) not defining “in operation” during the jury instructions; and (3) denying defendant’s motion to dismiss. The Court of Appeals disagreed, finding no error.

In June of 2022, defendant's ex-girlfriend and two accomplices drove a vehicle onto his property to take a puppy from his home. Testimony from the parties differed, but a firearm was discharged into the rear passenger side window of the vehicle as the ex-girlfriend and her accomplices attempted to drive away with the puppy. The engine of the vehicle was running, but it was stopped when the shot was fired through the window. Defendant did not object to the jury instructions during the trial.

Reviewing (1) for plain error, the Court of Appeals noted that "in operation" is undefined in G.S. 14-34.1, but looking to the plain meaning of the words and consideration from a previous unpublished case, the court arrived at the following: "A vehicle is 'in operation' if it is 'in the state of being functional,' i.e., if it can be driven under its own power. For a vehicle to be driven, there must be a person in the driver's seat, and its engine must be running." Slip Op. at 6. Because all the evidence indicated someone was in the driver's seat of the vehicle and the engine was running, the trial court did not err by not instructing on the lesser included offense. Likewise, this dispensed with (2), as the trial court did not need to provide instruction on the meaning of "in operation" due to the phrase carrying its common meaning. Resolving (3), the court noted that testimony in the record would allow a reasonable juror to conclude defendant fired a shot into the vehicle, representing substantial evidence to survive a motion to dismiss.

Trial court properly instructed jury that knife was a deadly weapon, and properly declined to provide instruction on lesser-included offense of assault inflicting serious injury.

[State v. Webster](#), COA23-68, ___ N.C. App. ___ (Nov. 21, 2023). In this Forsyth County case, defendant appealed her conviction for assault with a deadly weapon inflicting serious injury, arguing error in (1) instructing the jury that the knife was a deadly weapon per se, and (2) declining to instruct the jury on the lesser-included offense of misdemeanor assault inflicting serious injury. The Court of Appeals found no error.

At a Father's Day cookout in 2021, defendant and the victim, a woman who was serving macaroni and cheese, began to argue. Over the course of the day, the two had several confrontations about whether defendant was entitled to be served any of the macaroni and cheese. The confrontations led to a fight, where defendant slashed the victim several times with a small pocketknife, causing injuries to her face, arms, and torso. At trial, defense counsel requested that the jury be instructed on lesser included offenses and that the knife did not constitute a per se deadly weapon, but the trial court overruled this request and did not instruct on lesser included offenses.

Reviewing (1), the Court of Appeals noted that the knife in question was not admitted into evidence at trial. Defendant argued that without the knife in evidence and without testimony of its character and appearance, it was improper to instruct the jury that it was a deadly weapon. The court disagreed, explaining "although the State bears the burden of

proving, *inter alia*, the use of a deadly weapon, the State is not required to *produce* the alleged weapon to obtain a conviction for an assault involving a deadly weapon.” Slip Op. at 12. The court also disagreed with defendant about the evidence of the knife, as body-cam footage of defendant describing the knife was in the record, as well as evidence of the injuries sustained by the victim. After determining the trial court properly instructed the jury that the knife was a deadly weapon, the court concluded that (2) was also properly decided, explaining that the State’s evidence supported every element of the crime charged and “there was no conflicting evidence relating to any element of the charged crime.” *Id.* at 15 (cleaned up).

(1) Failure to hold pretrial release hearing was not flagrant violation of defendant’s constitutional rights; (2) there was a distinct separation between defendant’s assaults; (3) defendant’s acts of confining and removing the victim justified his kidnapping conviction.

[State v. Tucker](#), COA22-865, ___ N.C. App. ___ (Nov. 21, 2023). In this Durham County case, defendant appealed his convictions for first-degree kidnapping, three counts of assault, and interfering with emergency communications, arguing (1) he was prejudiced by not receiving a pretrial release hearing under G.S. 15A-534.1, (2) double jeopardy for his multiple assault convictions, (3) his conviction for assault by strangulation was improper, and (4) insufficient evidence to support his kidnapping conviction. The Court of Appeals found no prejudicial error.

In January of 2020, defendant and a woman he was living with began arguing, culminating in defendant headbutting the woman several times. Eventually defendant began beating the woman and dragged her by her hair, then throwing her and choking her in the bedroom. The woman eventually hid her child in a closet and jumped out of a window on the third-floor to escape defendant. The woman’s mother attempted to intervene but defendant struck her in the mouth, busting the mother’s lip. Defendant also took the mother’s phone and threw it away, but she retrieved it to call police. After defendant was arrested, the magistrate did not set bond on his kidnapping charge, determining it to be a domestic violence act, and ordered the State to produce defendant for a hearing on conditions of pretrial release. The State did not comply with this order, and defendant remained in custody, not posing bond on any of the charges. After remaining in custody from March to September of 2020, defendant filed a motion to dismiss his kidnapping charge, arguing G.S. 15A-534.1 required dismissal. Defendant’s charges were consolidated the next day with pretrial release conditions and a bond of \$250,000; defendant did not post bond and remained in custody. The trial court also denied defendant’s motion to dismiss. Defendant reached trial in November 2021, and was convicted after a bench trial, receiving credit for time served.

Considering (1), the Court of Appeals noted that the State admitted it did not hold the pretrial release hearing but explained the failure as inadvertent due to the onset of COVID-

19. Analyzing the impact, the court explained “[t]he inadvertence does not excuse the State; rather, it is relevant to show the absence of a flagrant constitutional violation.” Slip Op. at 11. The court also noted defendant did not post bond after his initial arrest, and “even if the State had held a timely pretrial release hearing on the kidnapping charge, Defendant would not have been released.” *Id.* at 11. As a result, defendant could not show irreparable prejudice to the preparation of his case.

Next the court considered (2), as defendant argued the events constituted one long assault. The court disagreed, explaining there was an “interruption in the momentum” and “a change in location” between the events of the three assaults. *Id.* at 14-15. The court held each offense was separate and distinct, and found no merit in defendant’s argument. The court applied the same analysis for (3), pointing to “a distinct interruption in the assaults” to justify defendant’s convictions for assault inflicting serious bodily injury as well as assault by strangulation. *Id.* at 16.

Finally, the court took up (4), noting that defendant’s acts of confining and removing the victim represented separate and distinct acts from the underlying assaults, justifying the kidnapping charge. The court explained that “Defendant’s confinement of [the victim] by pulling her by the hair back into the bedroom, confining her in there by kicking at the locked door, and forcing her to escape by jumping from the third floor window, were separate, complete acts apart from Defendant’s other assaults upon her.” *Id.* at 19.

Drug Offenses

Jail phone calls supported constructive possession of drugs and firearm when defendant instructed another to find and hide the contraband; no requirement for trial court to instruct jury that it must consider all evidence when allowing review of a specific portion of testimony.

[State v. Montgomery](#), COA23-720, ___ N.C. App. ___ (May 7, 2024). In this Rutherford County case, defendant appealed his convictions for possession of a firearm by felon, possession of methamphetamine, and attaining habitual felon status, arguing error in (1) denying his motion to dismiss based on insufficient evidence he possessed the firearm and drugs, (2) failing to instruct the jury on theories of attempt, and (3) permitting the jury to hear recordings of defendant’s calls from jail a second time without appropriate jury instruction. The Court of Appeals found no error.

Beginning with (1), the Court of Appeals explained that at trial, the State offered testimony from a police officer that defendant made several phone calls while in jail. The substance of these calls were that defendant left something in his coat and that he would pick it up later. Police later met with the woman defendant was calling, and found the coat with two bags of methamphetamine, as well as a firearm hidden at another acquaintance’s house. The court noted that defendant’s instructions and knowledge of where these items were

hidden, and the instructions he gave to those on the outside through the phone calls, represented constructive possession to support the conviction. The court explained the “jail calls reflect that [defendant] sought to control the disposition and use of both the gun and the methamphetamine by directing [the woman] to remove them from the scene of his arrest.” Slip Op. at 6. The court also pointed out that this evidence could support the jury concluding defendant actually possessed the items.

In (2), defendant argued that he did not successfully convince the woman to move the items, warranting a jury instruction on attempted possession as a lesser alternative. The court disagreed, explaining “the State’s evidence actually demonstrated that [the woman] had, in fact, moved the items by the time she was approached by law enforcement . . . [t]here was therefore no evidence tending to show an attempted possession.” *Id.* at 8.

Dispensing with (3), the court noted that the statement defendant relied on in *State v. Weddington*, 329 N.C. 202 (1991), was dicta, and no caselaw required the trial court to instruct the jury to remember all the previous evidence when allowing review of a specific part of testimony. The court concluded “[t]he jury was appropriately instructed that it should consider all the evidence during the jury charge, and the trial court scrupulously observed the requirements of [G.S.] 15A-1233(a) during the replay.” *Id.* at 10.

Opioids were properly included in the definition of “opium or opiate” for purposes of trafficking conviction; no evidence of improper sentencing where the State referenced defendant’s failure to accept plea bargain.

[State v. Miller](#), COA22-689, ___ N.C. App. ___ (Feb. 20, 2024). In this Henderson County case, defendant appealed his convictions for trafficking in methamphetamine by possession and trafficking in opium by possession, arguing error in (1) denying his motion to dismiss the opium charge; (2) instructing the jury that opioids were included in the definition of “opium or opiate” at the time of the offense; and (3) considering evidence of improper factors at sentencing. The Court of Appeals majority disagreed, finding no error.

In November of 2018, the Henderson County Sheriff’s Office executed a search warrant at defendant’s residence, and relevant to the current appeal, discovered a bottle of white pills later determined to be hydrocodone. At the trial, defendant moved to dismiss all charges, and the trial court denied defendant’s motion. During jury instructions, the trial court explained “that opioids were included in the definition of ‘opium or opiate’ under [G.S.] 90-95(h)(4)” over defendant’s objection. Slip Op. at 2. At the sentencing hearing after defendant’s conviction, the State mentioned that defendant rejected a plea deal and conducted additional drug activity at his home. Defendant subsequently appealed.

Looking to (1), the Court of Appeals disagreed with defendant’s argument that hydrocodone was not a prohibited substance under G.S. 90-95(h)(4) at the time of the alleged offense. In *State v. Garrett*, 277 N.C. App. 493 (2021), the court held that opioids “qualify as an opiate within the meaning of the statute.” Slip Op. at 5, quoting *Garrett* at

497-98. The court explained that the same language from the 2016 statute interpreted in *Garrett* applied in to the 2017 version considered in the current case, and substantial evidence showed defendant possessed the opioid, supporting denial of his motion. This conclusion also addressed (2), as the court explained it was not error to provide a jury instruction that “opium or opiates” included “opioids” for purposes of the statute. *Id.* at 10.

In (3), the court found no evidence of improper sentencing, explaining “[a]lthough the State mentioned Defendant’s failure to accept a plea offer, there is no evidence in the record that the trial court specifically commented on or considered the refusal.” *Id.* at 12.

Judge Murphy dissented by separate opinion, and would have held that the court was not bound by the opinion in *Garrett* because the General Assembly subsequently defined “opioids” in the 2017 version of G.S. 90-87(18a). *Id.* at 14.

State admitted sufficient evidence to support conviction under death by distribution statute; testimony regarding previous drug sales was admissible under Rule 404(b).

[State v. McCrorey](#), COA23-592, ___ N.C. App. ___ (Dec. 19, 2023). In this Cabarrus County case, defendant appealed his death by distribution conviction, arguing error in (1) denial of his motion to dismiss, and (2) improperly admitting Rule of Evidence 404(b) evidence. The Court of Appeals found no error.

In March of 2020, defendant sold drugs, purportedly heroin and cocaine, to two women. After taking the drugs, one of the women died, and toxicology determined she had both cocaine and fentanyl in her bloodstream. The level of metabolites for both cocaine and fentanyl were determined to be in the fatal range. When defendant came to trial on charges of death by distribution, the trial court allowed the surviving woman to testify about defendant’s prior sales of drugs to her as Rule 404(b) evidence to show defendant’s “intent, identity, and common scheme or plan.” Slip Op. at 5.

Considering (1) defendant’s motion to dismiss, the Court of Appeals addressed defendant’s arguments in relation to the elements of G.S. 14-18.4(b), the death by distribution statute. The court explained that circumstantial evidence supported the conclusion that defendant sold fentanyl instead of heroin to the victim. The court also noted “[w]hile the evidence does not foreclose the possibility that fentanyl may not have been the sole cause of [the victim’s] death, there is ample evidence to support a conclusion that it was, in fact, fentanyl that killed [the victim].” *Id.* at 9. Rejecting defendant’s argument that he could not foresee that the victim would consume all the drugs at once, the court found sufficient evidence to submit the question of proximate cause to the jury.

Moving to (2) the Rule 404(b) evidence, the court noted that the trial court engaged in a lengthy analysis of whether to admit the testimony related to previous drug sales. Here, the testimony “demonstrate[d] not only the common plan or scheme of Defendant’s drug sales, but also his intent when transacting with [the woman],” and also served to confirm his identity. *Id.* at 13. Because the court could not establish a danger of unfair prejudice outweighing the probative value of the testimony, it found no error.

Defendant constructively possessed hidden methamphetamine in vehicle for knowing possession, trafficking, maintaining a vehicle for controlled substances.

[State v. King](#), COA23-322, ___ N.C. App. ___ (Nov. 7, 2023). In this Haywood County case, defendant appealed his convictions for trafficking and conspiracy to traffic methamphetamine and maintaining a vehicle for controlled substances, arguing he did not knowingly possess or traffic methamphetamine. The Court of Appeals disagreed, finding no error.

Based on a tip from a known drug dealer, detectives from the Haywood County Sheriff’s Office monitored a hotel room in April of 2021. They observed two individuals leaving, and after a traffic stop with a K-9 unit, found methamphetamine. The officers continued monitoring the hotel room, and observed defendant and another person leave. After stopping defendant, they located marijuana and a large amount of currency in his vehicle, but no further meth. While defendant was in jail, he called an associate and gave her instructions on where to remove a portion of his vehicle to find hidden methamphetamine; law enforcement monitored the calls and intercepted the associate after she had removed the meth from the hiding places. This associate cooperated with the detectives and provided what she obtained from the vehicle, which was a large amount of meth. A search of the car taillight turned up additional meth. Defendant was subsequently convicted on all charges.

The Court of Appeals took up each of defendant’s convictions in turn, beginning with the trafficking by possession charge. Defendant argued that he did not “knowingly possess” the methamphetamine. At trial, the State offered evidence that defendant constructively possessed the meth to show knowing possession. The court explained that to establish constructive possession, the evidence must show defendant’s non-exclusive possession of property where drugs are found, along with “other incriminating evidence ‘connecting the defendant to the drugs.’” Slip Op. at 9, quoting *State v. Lakey*, 183 N.C. App. 652, 656 (2007). Previous cases established that a “large amount of currency” and conduct showing “knowledge of the presence of a controlled substance” support a finding of constructive possession. *Id.* Here, evidence showed defendant regularly operated the car where the meth was found, he was driving it when he was arrested and it was impounded, and in the trunk officers found a large amount of currency and digital scales. This evidence combined with the instructions provided in the jailhouse phone call supported the conclusion that defendant had constructive possession of the meth.

The court then turned to the trafficking by transportation charge, and rejected defendant's argument that he did not knowingly transport the meth. The court noted transportation "requires a 'substantial movement' of contraband. . .[e]ven very slight movement may be real or substantial enough." *Id.* at 10, quoting *State v. McRae*, 110 N.C. App. 643, 646 (1993). Here, detectives observed defendant drive the car with the meth from the hotel to a parking lot where he was arrested and the car was impounded. Although the meth was not immediately discovered, "[t]he fact that all the containers were not discovered until days later does not suggest a lack of knowledge given the hidden location of the packages and the Defendant's knowledge of the location of and extraction method for the packages." *Id.* at 11.

Moving to defendant's argument that the State presented insufficient evidence he kept or maintained a vehicle for controlled substances, the court explained that "[w]hether sufficient evidence was presented of the 'keeping or maintaining' element [of G.S. 90-108(a)(7)] depends upon a totality of the circumstances, and no single factor is determinative." *Id.* at 12. Here, the court pointed to the evidence initially found inside the car along with defendant's "knowledge and actions to access and dispose of the methamphetamine" later found inside the car as sufficient to support the conviction. *Id.* at 13.

Finally, the court noted the evidence showing all the alleged co-conspirators found with meth after leaving the hotel, along with the currency and scales found with defendant, as supportive of the conspiracy to commit trafficking charge.

Trial court's finding of credibility for deputy's testimony resolved conflicting accounts between the deputy and defendant; defendant's actions of cupping his hand and throwing away a marijuana blunt supported constructive possession of the drugs in question.

[State v. Burluson](#), COA23-212, ___ N.C. App. ___ (Oct. 17, 2023). In this McDowell County case, defendant appealed his convictions for drug-related crimes and attaining habitual felon status, arguing error in (1) denial of his motion to suppress the results of a search and (2) denial of his motion to dismiss the charges. The Court of Appeals found no error.

In April of 2021, defendant and an acquaintance drove up to a driver's license checkpoint operated by the McDowell County Sheriff's Department. A sheriff's deputy approached the truck and asked the two men if either of them were on probation; the driver told the deputy he was, while defendant, as the passenger, told the deputy he was not. The deputy subsequently asked if there was anything illegal in the vehicle, and if he had their consent to search the vehicle. The driver gave verbal consent to the search, and the deputy asked him to step out of the vehicle for a pat down. After checking the driver, the deputy moved to defendant, and asked him to exit for a pat down. While patting down defendant, the deputy noticed defendant cup his hand and make a throwing motion; when asked what he threw away, the defendant admitted it was a marijuana blunt. A subsequent search of the vehicle

turned up bags of marijuana and methamphetamine. At trial, defendant moved to suppress the results of the search, arguing that it was conducted without valid consent of the owner or occupants, and without reasonable suspicion. Defendant also moved to dismiss the charges for insufficient evidence. Both motions were denied, and defendant was convicted.

Taking up (1), the Court of Appeals explained defendant's argument hinged on conflicting testimony from the deputy and himself about the truck and any illegal contents. Defendant argued that the trial court should have made findings regarding this discrepancy and whether defendant was improperly detained without a *Miranda* warning. The court disagreed, explaining that "the trial court found [the deputy's] testimony was credible and, in doing so, resolved any testimonial conflicts in [the deputy's] favor." Slip Op. at 8. Even assuming the deputy asked defendant about the truck in the manner defendant testified, the court explained that defendant made no incriminating statements in response, and only made an incriminating admission after the search turned up drugs in the vehicle.

In (2), defendant argued that the State failed to present sufficient incriminating circumstances to support his convictions. Because defendant "did not have exclusive possession of the truck in which the drugs were found, the State was required to provide evidence of other incriminating circumstances." *Id.* at 11. The court found just such evidence in the testimony about defendant "cupping his hand, making a throwing motion with his back turned, and admitting to throwing a marijuana blunt" after the deputy asked him to exit the vehicle. *Id.* at 12. This behavior coupled with the drugs found in the center console supported defendant's constructive possession for the convictions.

General Crimes

Defendant formed an additional conspiracy to break or enter victim's apartment after undertaking the original conspiracy to commit armed robbery.

[State v. Beck](#), 264A21, ___ N.C. ___ (Dec. 15, 2023). In this Watauga County case, the Supreme Court reversed the Court of Appeals majority decision vacating defendant's conviction for conspiracy to commit robbery with a dangerous weapon, reinstating his conviction.

In April of 2017, defendant and two associates planned to rob a drug dealer in Boone. After texting to set up a plan, one of defendant's associates agreed to go to the apartment of the drug dealer. The associate went to the apartment in question, but initially did not leave his car in the parking lot; after leaving for about 24 minutes, he returned and then entered the apartment. Meanwhile, defendant and the other associate waited, and broke in to the apartment after the meeting was underway. Defendant was indicted for robbery with a dangerous weapon, felonious breaking or entering, and conspiracy to commit both felonies. Defendant moved to dismiss, arguing the State did not present sufficient evidence of multiple conspiracies, but the trial court denied the motion. The jury found

defendant guilty of all four charges. On appeal, the Court of Appeals vacated defendant's conspiracy to commit robbery charge, reasoning that "the State's evidence established one single conspiracy that continued from on or around 18 April 2017 through the date of the breaking or entering and armed robbery on 27 April 2017." Slip Op. at 4. The State appealed based upon the dissenting judge's opinion.

Taking up the State's appeal, the Supreme Court first noted "the Court of Appeals erred in determining the charge of conspiracy to commit breaking or entering would be the conspiracy charge to remain if there had been sufficient evidence of only one conspiracy." *Id.*, note 1. The Court then explained that "in the course of completing the target crime of an original conspiracy, a defendant may enter into an additional and separate conspiracy to commit a different crime not conspired to originally." *Id.* at 6. Here, the State had the burden of showing that defendant and at least one other person entered into conspiracies for both of the crimes charged. Looking to the record, the Court found adequate evidence of a conspiracy to commit robbery with a dangerous weapon. Additionally, the Court explained that "[i]mportantly, no evidence was produced that the original plan included breaking or entering the apartment." *Id.* at 8. Instead, it appeared that defendant and at least one of his associates reevaluated their plan when it became clear that the meeting would occur inside the drug dealer's apartment, and formed an additional conspiracy to break and enter the apartment on the fly. The Court explained the outcome:

When viewed in the light most favorable to the State, a rational juror could conclude that the original plan was to rob [the drug dealer] in the parking lot. When viewed in the light most favorable to the State, a rational juror could also conclude that, in those twenty-four minutes between [the associate's] first and second appearances at the apartment complex, defendant and at least one other person formed an additional and separate conspiracy—a new plan. In the new plan, [the associate] would enter [the drug dealer's] apartment for the meeting, and defendant and [another associate] would feloniously break into the apartment.

Id. at 9.

Justice Riggs, joined by Justice Earls, dissented and would have affirmed the vacatur of the conspiracy to commit felonious breaking or entering conviction (see note 1 of the Slip Opinion), along with remand for resentencing based on the single conspiracy charge. *Id.* at 11.

Homicide

Prosecutor’s closing argument statements and jury instructions regarding defense of habitation were not misstatements of law; lying-in-wait instruction was erroneous but did not justify new trial where defendant was convicted on two theories of first-degree murder.

[State v. Copley](#), 195A19-2, ___ N.C. ___ (May 23, 2024). In this Wake County case, the Supreme Court modified and affirmed a Court of Appeals decision upholding defendant’s conviction for first-degree murder. The Court held that the trial court erred when providing the lying-in-wait instruction to the jury, but because defendant was convicted on two theories of first-degree murder, his conviction was upheld and no new trial was necessary.

In 2016, the victim attended a party in defendant’s neighborhood. During the night, crowds of people gathered outside defendant’s house, and he became angry, yelling at some of the people outside. Defendant called 911 and claimed the people outside were vandalizing his property, and he went to his garage with a shotgun. Later, as the victim crossed defendant’s yard near the curb, defendant shot and killed him. Defendant was convicted of first-degree murder by premeditation and deliberation, and by lying in wait. He appealed, reaching the Supreme Court for the first time in *State v. Copley*, 374 N.C. 224 (2020), arguing the prosecutor improperly mentioned race in closing arguments. The Court found no prejudicial error and remanded to the Court of Appeals to consider the remaining arguments. The Court of Appeals considered defendant’s three remaining arguments and found no error, leading to the current appeal.

The Supreme Court first considered defendant’s argument that the trial court should have intervened during closing argument when the prosecutor suggested defendant could not invoke the defense of habitation because he was the aggressor. The Court explained the standard of review was gross impropriety because defendant did not object at trial; this standard requires that the remarks be both improper and prejudicial. Here, the Court held that the prosecutor did not misstate the law, as “the prosecutor never labeled him the ‘aggressor’ for purposes of self-defense, but instead characterized discrete actions as ‘aggressive.’” Slip Op.at 11.

The Court then moved to the challenged jury instructions, beginning with defendant’s argument that the trial court erred by instructing the jury that the defense of habitation is unavailable to an aggressor. The Court explained that the instruction came from footnote 4 of N.C. Pattern Jury Instruction 308.80, and dealt with provocation, not with the aggressor doctrine. The Court also noted that defense counsel requested aggressor language in the self-defense instruction, inviting the error defendant then referenced on appeal.

Finally, the Court reached the lying-in-wait instruction for first-degree murder, explaining that the castle doctrine was relevant to the consideration of defendant’s case. The Court explained that “[i]f the statutory castle doctrine applies, it disclaims the elements of lying in wait and displaces that offense.” *Id.* at 20. In the current case, the Court held that “the

trial court’s lying-in-wait instruction distorted the interplay between the crime and the castle doctrine” and deprived defendant of his right to defend his home. *Id.* at 22. However, because defendant was also convicted under the premeditation and deliberation theory, this error did not merit a new trial.

Because the evidence supporting the underlying felony was not “in conflict,” defendant was not entitled to an instruction on second-degree murder under the first part of the *Gwynn* test.

[State v. Wilson](#), 187A22, ___ N.C. ___ (Dec. 15, 2023). In this Mecklenburg County case, the Supreme Court modified and affirmed the Court of Appeals majority opinion that held defendant was not entitled to an instruction on second-degree murder as a lesser included offense while on trial for first-degree murder based on the felony-murder rule.

On Father’s Day in 2017, defendant and an associate arranged to sell a cellphone to a man through the LetGo app. However, during the meeting to sell the phone, the deal went wrong and defendant’s associate shot the buyer. Defendant came to trial for attempted robbery with a dangerous weapon, first-degree murder under the felony murder theory, and conspiracy to commit robbery with his associate. The trial court denied defendant’s request for an instruction on second-degree murder as a lesser-included offense. Defendant was subsequently convicted of first-degree murder and attempted robbery, but not the conspiracy charge. The Court of Appeals majority found no error, applying “the second part of the test” from *State v. Gwynn*, 362 N.C. 334 (2008), to conclude “defendant was not entitled to a second-degree murder instruction because ‘there [was] no evidence in the record from which a rational juror could find [d]efendant guilty of second-degree murder and not guilty of felony murder.’” Slip Op. at 6.

Taking up the appeal, the Supreme Court explained that defendant was only entitled to an instruction on lesser-included offenses if “(1) the evidence supporting the underlying felony is ‘in conflict,’ and (2) the evidence would support a lesser-included offense of first-degree murder.” *Id.* at 9. The Court examined the elements of attempted robbery and found supporting evidence, while rejecting the three issues raised by defendant that attempted to show the evidence was “in conflict.” *Id.* at 15. Applying the first part of the test from *Gwynn*, the Court determined that there was no conflict in the evidence supporting the underlying attempted robbery felony. Modifying the Court of Appeals majority’s analysis, the Court explained that “[b]ecause there was not a conflict in the evidence, we need not proceed to the next step of the *Gwynn* analysis to consider whether the evidence would support a lesser-included offense of first-degree murder.” *Id.* at 17.

Justice Earls, joined by Justice Riggs, dissented and would have found the evidence was “in conflict,” justifying an instruction on second-degree murder under the *Gwynn* analysis. *Id.* at 18.

Robbery committed after killing represented continuous transaction for felony murder charge; defendant could not claim self-defense as a defense to armed robbery or felony murder charges.

[State v. Jackson](#), COA23-636, ___ N.C. App. ___ (March 19, 2024). In this Guilford County case, defendant appealed his convictions for first-degree murder based on felony murder, armed robbery, and possession of a stolen vehicle, arguing error in (1) denying his motion to dismiss the armed robbery charge and (2) not instructing the jury that self-defense could justify felony murder based on armed robbery. The Court of Appeals found no error.

In August of 2018, defendant was staying at the apartment of a female friend when a series of phone calls from another man woke him up. Defendant went to the parking lot to confront the other man (the eventual murder victim), and defendant testified that the man threatened to kill him. At that point, defendant shot the victim four times, then after a few minutes, stole the victim’s car. The victim’s car was found abandoned in a field a day later. Defendant was indicted for first-degree murder based on felony murder, with the underlying felony being armed robbery. Defendant moved to dismiss the murder and robbery charges, arguing there was insufficient evidence the shooting and taking of the vehicle occurred in a continuous transaction. The trial court denied the motion.

Taking up (1), the Court of Appeals noted that temporal order of the felony and the killing does not matter for a felony murder charge, as long as they are a continuous transaction. Here, the time period between the shooting and defendant taking the victim’s car was short, only “a few minutes” after the shots. Slip Op. at 6. The court also noted that “our Supreme Court has repeatedly rejected arguments a defendant must have intended to commit armed robbery at the time he killed the victim in order for the exchange to be a continuous transaction.” *Id.* at 7-8. Here, evidence supported the finding of a continuous transaction, and whether defendant initially intended to steal the car was immaterial.

Moving to (2), the court pointed to precedent that self-defense is not a defense for felony murder, but it can be a defense to the underlying felony. However, the court explained that “[b]ased on our precedents, self-defense is inapplicable to armed robbery[,]” and because armed robbery was the underlying felony in this case, defendant was not entitled to a jury instruction on self-defense. *Id.* at 11.

Defendant was not entitled to a jury instruction on voluntary intoxication or second-degree murder while on trial for first-degree murder.

[State v. Rubenstahl](#), COA23-314, ___ N.C. App. ___ (Dec. 19, 2023). In this Cumberland County case, defendant appealed his first-degree murder conviction, arguing error in failing to instruct the jury on (1) the affirmative defense of voluntary intoxication, and (2) the lesser-included offense of second-degree murder. The Court of Appeals disagreed, finding no error.

Defendant's wife was found dead in their home in February of 2021. Leading up to the discovery, defendant's wife had expressed fears that he would shoot her, and told family and friends that defendant kept a handgun on the nightstand. The wife's pastor and deacon from her church noticed bruises on her neck, and she admitted to them that they came from defendant. Early in the morning on the day defendant's wife was found dead, defendant called his daughter to confess that he had killed her. At trial, an expert testified that the wife was shot ten times with a single-action revolver, which required the shooter to cock the hammer and pull the trigger each time it was fired. The revolver also held only six rounds, requiring a reload for the ten rounds fired into the wife's body. Defendant testified at trial and claimed that his wife's niece had shot her. At the charge conference, defense counsel requested a jury instruction on second-degree murder, but the trial court denied this request. Defendant did not request an instruction on voluntary intoxication.

Considering (1) defendant's defense of voluntary intoxication, the Court of Appeals noted the standard of review was plain error, as "the trial court explicitly asked if Defendant wanted to include voluntary or involuntary intoxication instructions, to which his counsel declined." Slip Op. at 4. The court could not find plain error, as defendant was a heavy drinker and testified that he had consumed a normal amount of alcohol for his tolerance, and "[i]n his own testimony, Defendant said he 'got drunk' after the killing because his wife was dead, indicating he was not already drunk during the killing." *Id.* at 6. Additionally, he recalled the events of the day and night, and was clear-headed enough to attempt to hide the revolver before law enforcement arrived.

Turning to (2), the court explained that a defendant is entitled to an instruction on second-degree murder "where the State's evidence, if believed, is capable of conflicting reasonable inferences either that (1) the defendant premeditated/deliberated a specific intent to kill or, alternatively, (2) the defendant merely premeditated/deliberated an assault." *Id.* at 9. Here, the court found only one possible conclusion, that "Defendant specifically intended to kill his wife." *Id.* The court arrived at this conclusion based on the number of shots fired with a cumbersome weapon, the lack of defensive wounds, the history of defendant's threats, and defendant's history of physical abuse towards his wife.

Defendant's actions before and after the murder supported premeditation and deliberation; admission of numerous gruesome photographs of the body did not represent prejudice; allowing prosecutor's comments during closing argument did not rise to prejudicial error.

[State v. Branche](#), CO22-768, ___ N.C. App. ___ (Nov. 7, 2023). In this Carteret County case, defendant appealed his conviction for first-degree murder, arguing (1) insufficient evidence, (2) error in admitting numerous gruesome photos of the body, and (3) error in allowing several statements by the prosecutor during closing argument. The Court of Appeals found no prejudicial error.

At trial, defendant admitted through counsel that he shot the victim, the mother of his son, on August 14, 2018. Evidence showed that earlier that day, the two were seen fighting in the front yard of their residence, and later the victim was seen walking down the road. Defendant eventually picked up the victim and brought her back to their home. Sometime after the victim and defendant were back home, defendant shot and killed the victim, wrapped her in a tarp, then buried her body at a burn pit in his grandfather's back yard. Defendant also called the victim's mother, who lived with them, to tell her juice had been spilled on her sheets and he had to launder them. After burying the victim, defendant told others that the victim had left him, and put up flyers trying to find her. Eventually defendant was charged with the murder; while in custody, he had conversations with another inmate about how he "snapped" and shot the victim after she described performing sex acts with other men, and where he hid the body.

Taking up (1), the Court of Appeals explained that the State argued first-degree murder under two theories, premeditation and deliberation, and lying in wait. The court looked for sufficient evidence to support premeditation and deliberation first, noting that defendant's actions before and after the murder were relevant. Although defendant and the victim fought before the killing, the court did not find evidence to support the idea that defendant was acting under "violent passion," and defendant seemed to deliberately choose a small-caliber handgun that was not his usual weapon for the murder. Slip Op. at 10-11. Additionally, the court concluded that "Defendant's actions following the murder demonstrate a planned strategy to pretend Defendant had nothing to do with the murder and to avoid detection as the perpetrator." *Id.* at 12. The court dispensed with defendant's argument that it should not consider acts after the killing as evidence of premeditation, explaining the case cited by defendant, *State v. Steele*, 190 N.C. 506 (1925), "holds flight, and flight alone, is not evidence of premeditation and deliberation." Slip Op. at 14. Because the court found sufficient evidence to support first-degree murder under premeditation and deliberation, it did not examine the lying in wait theory.

Turning to (2), the court explained that under Rule of Evidence 403, photos of a body and its location when found are competent evidence, but when repetitive, gruesome and gory photos are presented to the jury simply to arouse the passion of the jury, they may have a prejudicial effect, such as in *State v. Hennis*, 323 N.C. 279 (1988). Here, the court did not find prejudice from the photographs, as "[t]he photographs presented at trial depicted the culmination of the investigation to locate [the victim's] body and provided evidence of premeditation and deliberation." Slip Op. at 20.

The court found error in (3), but not prejudicial error, when examining the prosecutor's closing argument. First, the prosecutor mentioned the punishment for second-degree murder; the trial court sustained defendant's objection but did not give a curative instruction. The court found no prejudice as previous instructions directed the jury to disregard questions to sustained objections, and not to acquit or convict based on the severity of punishment. Second, the prosecutor mentioned that defendant did not have to testify; the trial court initially sustained the objection but then overruled it to allow the

prosecutor to make an argument about defendant not calling witnesses. The court found that this error was harmless beyond a reasonable doubt due to “the evidence of Defendant’s motive for planning to kill [the victim], his confession, his use of the .22 caliber handgun, and his acts subsequent to the killing.” *Id.* at 25. Third, while the prosecutor misstated the applicable precedent regarding provocation, the court explained that a proper instruction by the trial court to the jury on “the required state of mind for premeditation and deliberation” cured the misstatement. *Id.* at 27. Finally, the court concluded that the prosecutor’s statements referencing defendant’s admission that he killed the victim were “directed at what was and was not at issue for the jurors to decide rather than an improper statement regarding Defendant’s failure to plead guilty.” *Id.* at 28.

Kidnapping & Related Offenses

Defendant’s restraint of victim was separate from rape and supported kidnapping conviction; expert testimony regarding sexual assault examination did not violate Confrontation Clause.

[State v. Ball](#), COA 22-1029, ___ N.C. App. ___ (Jan. 16, 2024). In this Macon County case, defendant appealed his convictions for forcible rape, kidnapping, burglary, assault on a female, and interfering with an emergency communication, arguing error in (1) denying his motion to dismiss the kidnapping charge, (2) allowing expert testimony about a sexual assault nurse examination (“SANE”) from a nurse who did not conduct the examination, and (3) failing to intervene *ex mero motu* in response to the prosecutor’s statements during closing argument. The Court of Appeals found no error.

In May of 2019, defendant appeared at the door of the victim’s home, telling her that his car was stuck in a ditch and he needed a place to stay for the night. Defendant was known to the victim through previous employment, and she offered her guesthouse to defendant for the night. According to the victim’s testimony, defendant then reappeared at her door asking for a cigarette lighter, barged in when she opened the door, and raped her on her bed. The victim eventually escaped and found officers from the sheriff’s department, who arrested defendant as he slept in the victim’s bed. The victim underwent a SANE the next morning. At trial, defendant moved to dismiss the kidnapping charge, arguing the State did not admit evidence he confined the victim separate from his alleged sexual assault; the trial court denied the motion. The State called a forensic nursing supervisor to testify regarding the SANE report, although she was not the nurse that performed the SANE. Defendant did not object to the nurse expert’s testimony, and he was subsequently convicted of all charges.

Finding no error in (1), the Court of Appeals explained that “[i]n rape cases, this Court has previously determined a separate charge of second-degree kidnapping requires a defendant’s restraint or confinement of the victim to be separate from that necessary to accomplish the rape.” Slip Op. at 10. The court found just such evidence here, noting that the struggle between defendant and the victim began as she fled from him at the door,

then moved to the bedroom, where defendant restrained her on the bed prior to the sexual assault.

Moving to (2), the court first gave an overview of the applicable Confrontation Clause issues, noting “an expert witness may properly base her independent opinion ‘on tests performed by another person, if the tests are of the type reasonably relied upon by experts in the field,’ without violating the Confrontation Clause.” *Id.* at 15, quoting *State v. Fair*, 354 N.C. 131, 162 (2001). Here, the nurse expert’s qualifications were established, and she testified about her independent conclusions after reviewing the SANE, subject to cross-examination by defendant. The court found no error in admitting the SANE and expert testimony under these circumstances.

Finally, the court found no error in (3), explaining “the Prosecutor’s closing statements were consistent with the record, as his arguments highlighted the differences between Defendant’s statements to the police two days after the incident, which were properly admitted at trial, and Defendant’s own testimony during his trial.” *Id.* at 20. Because the prosecutor’s statements were simply a credibility argument against defendant’s testimony, the court did not find an error prejudicing defendant.

Larceny, Embezzlement & Related Offenses

Defendant’s use of a price label sticker from another product did not represent larceny by product code under G.S. 72.11(3).

[State v. Hill](#), COA22-620, ___ N.C. App. ___ (Dec. 19, 2023). In this Onslow County case, defendant appealed his convictions for larceny from a merchant by product code and misdemeanor larceny, arguing error in (1) denying his motion to dismiss, and (2) ordering him to pay an incorrect amount of restitution. The Court of Appeals found no error with the misdemeanor larceny conviction, but vacated the larceny by product code conviction and remanded for resentencing and a new order of restitution.

In February of 2020, a Walmart manager saw defendant putting a sticker with a product code for a Tupperware container over the product code on a sewing machine box. The manager followed defendant, noticing that he went to the electronics department and several other areas of the store and placed things in his backpack, then headed to the self-checkout. At the self-checkout, defendant scanned the sticker, which resulted in a \$7.98 charge for a \$227 sewing machine. Defendant also had placed electronics into his backpack that he did not scan or pay for, and fled the store when the manager attempted to confront him. At trial, proof of the product code sticker, along with receipts for the merchandise stolen, were admitted into the record.

The Court of Appeals first considered the larceny by product code charge, looking to G.S. 14-72.11(3), specifically the meaning of “created” in the sentence “[b]y affixing a product code created for the purpose of fraudulently obtaining goods or merchandise from a

merchant at a reduced price.” Slip Op. at 6. Explaining that this was a matter of first impression, the court looked to the plain meaning of “create,” as well as its use in context of the section, to weigh whether this language contemplated repurposing an existing product code as defendant had done here. The court pointed out that G.S. 14-72.1(d) seemed to more appropriately reflect the repurposing done by defendant in this case, as it considered transferring a price tag for obtaining goods at a lower price. *Id.* at 15. This led the court to agree with defendant that the charge was not applicable, concluding:

Because the larceny [statutes] are explicit about the conduct which constitutes each level of offense, we conclude the word “created” in Section 14-72.11(3) applies to the specific scenario where (1) an actor (the defendant or another person) created a false product code “for the purpose of fraudulently obtaining goods or merchandise at a reduced price” and (2) the defendant affixed it to the merchandise. Section 14-72.11(3) does not apply where a defendant transfers a legitimate product code printed on the price tag from one product to another, which is already punishable as a misdemeanor under Section 14-72.1.

Id. at 18. However, because the indictment still alleged the essential elements of larceny, defendant’s argument of a fatal variance failed when applied to the misdemeanor larceny charge. Additionally, the court noted that the sewing machine was left behind when defendant fled the store, justifying a reduction in the value of restitution. The court remanded to the trial court for resentencing and recalculation of restitution.

Judge Tyson concurred by separate opinion to address the appropriate charge of shoplifting by substitution of tags under G.S. 14-72.1(d).

Judge Standing concurred in the result only.

Motor Vehicle Offenses

Definition of “crash” for G.S. 20-166 includes intentionally hitting victim with vehicle.

[State v. Buck](#), COA23-606, ___ N.C. App. ___ (May 7, 2024). In this New Hanover County case, defendant appealed his convictions for assault with a deadly weapon with the intent to kill inflicting serious injury (AWDWIKISI), felony hit-and-run with serious injury, and robbery with a dangerous weapon, making several arguments centered around the definition of “crash” under G.S. 20-166, the mutually exclusive nature of the AWDWIKISI and hit-and-run charges, and a clerical error in the judgment. The Court of Appeals found no merit with defendant’s arguments regarding his convictions, but did find that the trial court made a clerical error in the hit-and-run judgment and remanded for correction of that error.

In January of 2021, defendant met the victim to sell him marijuana; instead of paying defendant for the marijuana, the victim grabbed the drugs and ran. Defendant hit the victim

with his car, got out of the vehicle and went through the victim's pockets, then drove away without calling for assistance.

Defendant argued that "crash" as used in the section defining a hit-and-run (G.S. 20-166) could not refer to an intentional action because it was the same as an "accident." To support this argument, defendant pointed to the definition section G.S. 20-4.01(4c), defining "crash" and including the following language: "[t]he terms collision, accident, and crash and their cognates are synonymous." Rejecting defendant's interpretation, the Court of Appeals explained "[t]he General Assembly chose not to discriminate between intended events and unintended events; therefore, so long as there is injury caused by a motor vehicle— intent is irrelevant." Slip Op. at 6-7. After the court established that defendant could be charged with hit-and-run for an intentional action, it dispensed with defendant's argument regarding his AWDWIKISI charge, explaining "[c]onvictions of AWDWIKISI and felony hit and run with serious injury are not mutually exclusive because assault is intentional, and a 'crash' can also be intentional." *Id.* at 10. Based on this reasoning, the court rejected defendant's various challenges to his convictions.

Moving to the clerical error, the court acknowledged that the judgment finding defendant guilty of hit-and-run referenced G.S. 20-166 subsection "(E)" instead of the appropriate "(a)" for his conviction. The court remanded to allow correction of the clerical error.

Because defendant received two concurrent sentences, with longer term assigned to serious injury by vehicle, resentencing was not required for inclusion of DWI lesser-included offense.

[State v. Harper](#), COA23-206, ___ N.C. App. ___ (Nov. 7, 2023). In this Pitt County case, defendant appealed his convictions, arguing double jeopardy as DWI is a lesser included offense of felony serious injury by vehicle. The Court of Appeals arrested judgment on the DWI conviction, but found no prejudicial error justifying remand for resentencing.

Defendant was charged with DWI, felony hit and run, and felony serious injury by vehicle, for a collision in August of 2020. After defendant was convicted of the charges and attained habitual felon status, the trial court consolidated the DWI and felony hit and run convictions, imposing a sentence of 89 to 119 months. The trial court also imposed a 101-to-134-month sentence for the felony serious injury by vehicle conviction and ordered the sentences to run concurrently.

The court first established that "[a]s the State correctly noted at trial, DWI is a lesser included offense of felony serious injury by vehicle." Slip Op. at 7. However, because the sentences were consolidated in separate judgments and ordered to run concurrently, defendant was not forced to serve additional time for the DWI conviction. Normally, the court would arrest judgment and remand for resentencing when it is unable to determine

what weight the trial court gave to the arrested conviction. Here, because defendant's sentences were separated, and he received a longer sentence in the presumptive range for the felony serious injury by vehicle conviction, the arrested judgment would not impact the ultimate length of his sentence.

Obstruction of Justice and Related Offenses

(1) Trial court properly denied jury's request to review transcript of testimony; (2) witness intimidation charge was transactionally related to other offenses; (3) admitting cellphone and geo-tracking evidence was not plain error.

[State v. Hair](#), COA22-987, ___ N.C. App. ___ (Feb. 20, 2024). In this Cumberland County case, defendant appealed his convictions for first-degree murder, robbery with a dangerous weapon, and intimidating a witness, arguing error in (1) denying a jury request to review the trial transcript, (2) joining the witness intimidation charge with his other two offenses, and (3) admitting cell phone and geo-tracking data evidence without proper authentication. The Court of Appeals found no error.

In August of 2019, defendant was indicted for murdering the victim while robbing her of marijuana. Prior to trial, defendant and an accomplice were being transported while in custody, and defendant punched the accomplice in the jaw. When asked why he punched the accomplice, defendant said the other man was "trying to testify on me and give me life in prison." Slip Op. at 2. This led the State to issue a superseding indictment combining the murder and robbery charges with the witness intimidation charge, and the trial court granted a motion to combine the charges over defendant's objection. While the jury was deliberating, they requested to review transcripts of testimony, a request that the trial court denied. Defendant was subsequently convicted of all three charges, and appealed.

In (1), defendant argued that the trial court did not have the necessary knowledge about what circumstances prompted the jury's request before denying it. The Court of Appeals disagreed, explaining that defendant supplied no case law to support this argument. Instead, the request was governed by G.S. 15A-1233(a), and the trial court satisfied the statutory requirements by bringing the jury to the courtroom and explaining the reasoning for denying the request.

Moving to (2), defendant argued that the witness intimidation charge "not transactionally related to the robbery or murder charges." *Id.* at 6. Again, the court disagreed, applying the four factors from *State v. Montford*, 137 N.C. App. 495 (2000), and concluding "the charges were transactionally related as the intimidating a witness charge is predicated on Defendant's beliefs about his robbery and murder trial." Slip Op. at 8. The court also dispensed with defendant's argument that the intimidation charge caused the jury to presume his guilt, explaining "the evidence of Defendant's intimidation of [the witness] would have been admissible in the murder and robbery trial even if the charges had been separately tried." *Id.* at 9.

Arriving at (3), the court noted defendant did not object at trial, so the review of admitting the alleged hearsay evidence was under the plain error standard. Due to the ample evidence that defendant was at the scene and fired the weapon that killed the victim, the court concluded it was not plain error to admit the cell phone and geo-tracking evidence.

Obstruction of justice is a cognizable common law offense in North Carolina, but indictments lacked necessary elements of the offense and were fatally defective.

[State v. Coffey](#), COA22-883, ___ N.C. App. ___ (Feb. 20, 2024). In this Wake County case, defendant appealed his convictions for obstruction of justice, arguing (1) obstruction of justice is not a cognizable common law offense in North Carolina; and (2) the indictments were insufficient to allege common law obstruction of justice. The Court of Appeals disagreed with (1), but in (2) found the indictments were fatally defective, vacating defendant’s convictions.

Defendant was a deputy sheriff in Granville County, where he held instructor certifications that allowed him to teach in-service courses and firearms training for law enforcement officers. In October of 2021, defendant was charged for falsely recording that the sheriff and chief deputy had completed mandatory in-service training and firearms qualifications. After a trial, defendant was found guilty of twelve counts of obstruction of justice.

Beginning with (1), the Court of Appeals explained that G.S. 4-1 adopted the existing common law, and “obstruction of justice was historically an offense at common law, and our courts have consistently recognized it as a common law offense.” Slip Op. at 5.

Reaching (2), the court noted “[o]ur courts have defined common law obstruction of justice as ‘any act which prevents, obstructs, impedes or hinders public or legal justice.’” *Id.* at 8, quoting *In re Kivett*, 309 N.C. 635, 670 (1983). The court then set about determining what constituted an act under this definition, noting examples such as “false statements made in the course of a criminal investigation” and “obstructing a judicial proceeding.” *Id.* However, the court pointed out that “the act—even one done intentionally, knowingly, or fraudulently—must nevertheless be one that is done for the purpose of hindering or impeding a judicial or official proceeding or investigation or potential investigation” *Id.* at 12. That element was missing from the current case, as “there [were] no facts asserted in the indictment to support the assertion Defendant’s actions were done to subvert a potential subsequent investigation or legal proceeding.” *Id.* at 13. This meant the indictments lacked a necessary element of common law obstruction of justice, and were fatally defective.

Chief Judge Dillon, joined by Judge Stading, concurred by separate opinion and suggested that defendant may have committed another offense from common law such as “misconduct in public office.” *Id.* at 15.

Participants in Crime

(1) Defendant acted in concert with others for purpose of producing material showing sexual activity; (2) second-degree sexual exploitation of a minor is not a lesser included offense of first-degree sexual exploitation of a minor; (3) testimony from an officer mistakenly identifying elements of offense did not improperly instruct the jury; (4) trial court's inadvertent misidentification of the charge did not confuse the jury.

[State v. Walker](#), COA23-319, ___ N.C. App. ___ (April 2, 2024). In this New Hanover county case, defendant appealed his convictions for two counts of first-degree sexual exploitation of a minor, arguing error in (1) denying his motion to dismiss for insufficient evidence, (2) failing to instruct the jury on second-degree exploitation of a minor as a lesser-included offense, (3) allowing a detective to provide testimony regarding the elements of the charged offense, and (4) mistakenly identifying the charge as “sexual assault” one time during the jury instruction. The Court of Appeals found no error.

In 2018, defendant and a group of friends attended a Halloween party with the plan to find a girl and have sex with her while filming it. Several members of the group made recordings of defendant and others having sex with a minor girl from the party, and these videos were discovered by law enforcement during an unrelated traffic stop. Defendant filed a motion to dismiss the charges, but the trial court denied the motion, and defendant was subsequently convicted of both counts.

For (1), defendant argued that there was insufficient evidence that he engaged in the sex with a minor for the purpose of producing material showing their sexual activity, an essential element of the charges. The Court of Appeals explained that defendant was guilty of the offense because he acted in concert with others. Even if defendant was not the principal offender, the court concluded that “substantial evidence demonstrates [defendant] acted in concert with his friends by engaging in the sexual activity which they recorded with the knowledge they were recording it.” Slip Op. at 9.

Moving to (2), the court looked to the statutes creating the relevant offenses, noting that under G.S. 14-190.16(a)(1) “[t]he focus of first-degree sexual exploitation is the direct mistreatment of the minor or the production of material for sale or profit.” *Id.* at 13. This contrasted with G.S. 14-190.17(a)(1), where second-degree sexual exploitation criminalized the actions of those “involved in the production or after-the-fact distribution of such material,” without the requirement of producing material for sale or gain. *Id.* The court also pointed to *State v. Fletcher*, 370 N.C. 313 (2017), where the Supreme Court highlighted that the second-degree sexual exploitation did not involve directly facilitating the involvement of a minor victim. This led the court to conclude that second-degree exploitation of a minor was not a lesser-included offense.

In (3), defendant argued that the officer’s testimony instructed the jury that merely being filmed having sex constituted a violation of G.S. 14-190.16(a)(1), and this testimony confused the jury as to the statute’s requirement that defendant must have intent to

produce material. The court disagreed, pointing out that the testimony was during cross-examination related to the questioning of one of the friends who attended the party, and the officer “simply answered why he did not feel compelled to question [one of the friends] regarding the filming of the sexual activity, and he gave a logical, albeit legally incorrect, response.” *Id.* at 16. The court determined this response made sense in context, and was not improperly instructing the jury as to the elements of the offense.

Arriving at (4), the court explained that the trial court’s mistaken statement that the offense was “sexual assault” only occurred once, during the instruction related to acting in concert. This was inadvertent, and the trial court provided the correct instruction on the elements of first-degree exploitation of a minor, as well as the correct charge when providing a second instruction on acting in concert where the trial court did not make the mistake. As a result, the court found no danger that the jury was confused as to the charge.

Robbery

Robbery committed after killing represented continuous transaction for felony murder charge; defendant could not claim self-defense as a defense to armed robbery or felony murder charges.

[State v. Jackson](#), COA23-636, ___ N.C. App. ___ (March 19, 2024). In this Guilford County case, defendant appealed his convictions for first-degree murder based on felony murder, armed robbery, and possession of a stolen vehicle, arguing error in (1) denying his motion to dismiss the armed robbery charge and (2) not instructing the jury that self-defense could justify felony murder based on armed robbery. The Court of Appeals found no error.

In August of 2018, defendant was staying at the apartment of a female friend when a series of phone calls from another man woke him up. Defendant went to the parking lot to confront the other man (the eventual murder victim), and defendant testified that the man threatened to kill him. At that point, defendant shot the victim four times, then after a few minutes, stole the victim’s car. The victim’s car was found abandoned in a field a day later. Defendant was indicted for first-degree murder based on felony murder, with the underlying felony being armed robbery. Defendant moved to dismiss the murder and robbery charges, arguing there was insufficient evidence the shooting and taking of the vehicle occurred in a continuous transaction. The trial court denied the motion.

Taking up (1), the Court of Appeals noted that temporal order of the felony and the killing does not matter for a felony murder charge, as long as they are a continuous transaction. Here, the time period between the shooting and defendant taking the victim’s car was short, only “a few minutes” after the shots. Slip Op. at 6. The court also noted that “our Supreme Court has repeatedly rejected arguments a defendant must have intended to commit armed robbery at the time he killed the victim in order for the exchange to be a continuous transaction.” *Id.* at 7-8. Here, evidence supported the finding of a continuous transaction, and whether defendant initially intended to steal the car was immaterial.

Moving to (2), the court pointed to precedent that self-defense is not a defense for felony murder, but it can be a defense to the underlying felony. However, the court explained that “[b]ased on our precedents, self-defense is inapplicable to armed robbery[,]” and because armed robbery was the underlying felony in this case, defendant was not entitled to a jury instruction on self-defense. *Id.* at 11.

Sexual Assaults & Related Offenses

Failure of indictment to include language on use of force in sexual battery charge did not render the indictment invalid.

[State v. Stewart](#), 23PA22, ___ N.C. ___ (May 23, 2024). In this Mecklenburg County case, the Supreme Court reversed the unpublished Court of Appeals opinion vacating defendant’s conviction for sexual battery. The Court applied the holding in [State v. Singleton](#) when determining that the failure of the indictment to allege defendant used force during the sexual battery did not make the indictment invalid.

In January of 2016, the victim celebrated her birthday by going to a massage therapist in Charlotte. During the massage, the therapist digitally penetrated the victim’s vagina. Defendant was subsequently convicted of sexual battery and appealed. At the Court of Appeals, defendant argued that the trial court lacked subject matter jurisdiction because the indictment omitted that his act was committed “by force.” The Court of Appeals agreed, determining G.S. 14-27.33 required the indictment to allege the act was committed by force and against the will of another.

The Supreme Court accepted the State’s petition for discretionary review, and the Court took the opportunity to apply the reasoning from *Singleton* that the defendant must show “that the indictment contained a statutory or constitutional defect and that such error was prejudicial.” Slip Op. at 6. Walking through the analysis, the Court noted that in the juvenile case *In re J.U.*, 384 N.C. 618 (2023), the Court held the element of force was inferable from the allegation that the act was nonconsensual. This led the Court to conclude “[t]he element of force is inferable from the language of the indictment such that a person of common understanding might know what was intended” and that the indictment was facially valid. Slip Op. at 9.

Justice Earls, joined by Justice Riggs, concurred in the result by separate opinion and explained that the Court’s precedent in *In re J.U.* and *Singleton* bound her to concur in the result. *Id.* at 10.

Lascivious nature of photographs supported conviction for sexual exploitation of a minor.

[State v. Shelton](#), COA23-729, ___ N.C. App. ___ (March 19, 2024). In this Surry County case, defendant appealed his conviction of first-degree sexual exploitation of a minor, arguing error in denying his motion to dismiss for insufficient evidence showing he took photographs of a minor which depicted “sexual activity.” The Court of Appeals found no error.

In 2021, defendant took nude photographs of his girlfriend’s daughter after promising to buy her whatever she wanted for Christmas. The girl eventually told her school guidance counselor, who reported it to the sheriff’s office. Defendant admitted he had taken pictures of the girl during an interview with law enforcement, but said he deleted the pictures the next day. At trial, the State presented testimony from the guidance counselor, law enforcement officers, and a video of defendant’s confession, while defendant did not present any evidence. Defendant moved to dismiss at the close of evidence but the trial court denied the motion.

Defendant argued that the State “failed to present direct evidence that the photographs showed sexual activity” for sexual exploitation of a minor under G.S. 14-190.16. Slip Op. at 4. The Court of Appeals noted the two relevant cases in this area exploring “sexual activity” in photographs of minors, *State v. Ligon*, 206 N.C. App. 458 (2010), and *State v. Corbett*, 264 N.C. App. 93 (2019). The court found the current case more similar to *Corbett* when looking at the “lascivious way” the photographs exhibited the girl’s body. Slip Op. at 8. Although defendant argued that the photographs themselves must be present in evidence, the court disagreed, noting that defendant “failed to show precedent which states the photographs must be available at trial to prove the charge of sexual exploitation.” *Id.* at 11.

(1) Admitting testimony about defendant’s previous conduct towards cousin of sex offense victim was not plain error; (2) Allowing expert to testify generally about grooming and sexual offenses was permissible; (3) defense counsel’s closing argument improperly referenced the severe nature of possible sentence.

[State v. Cox](#), COA23-260, ___ N.C. App. ___ (Feb. 20, 2024). In this Edgecombe County case, defendant appealed his convictions for statutory sex offense with a child under 15, sex offense by a parent, and statutory sex offense with a child by an adult, arguing (1) plain error by failing to exclude evidence of defendant’s prior conduct; (2) an impermissible opinion in the trial court’s qualification of an expert witness; (3) plain error by admitting the expert’s testimony; and (4) error by precluding defense counsel from arguing the possible penalty defendant faced if convicted. The Court of Appeals found no plain error and no error.

Defendant came to trial in September of 2019 for sexual offenses committed against his step-daughter. In addition to the testimony of the victim, the victim’s cousin testified about two incidents where defendant pulled her swimsuit down and commented on her tan line. The State offered the testimony of an expert in interpretations of interviews of children who are victims of sexual abuse, and defense counsel stipulated “to her being an expert in forensic interviewing.” Slip Op. at 4. The expert testified generally about grooming practices and triggering events for disclosure, but did not testify about the victim or offer opinions on the current case. During closing argument, the State objected to defense counsel’s statement that a guilty verdict would be a life sentence for defendant, and the trial court sustained the objection. Defendant was subsequently convicted and appealed.

Taking up (1), the Court of Appeals explained that because defendant did not object at trial, the standard of review was plain error. The court noted the extensive evidence of defendant’s guilt, and determined that even if admitting the evidence was error, it did not reach plain error.

The court also found no error in (2), noting that although the stipulation by the defense did not match the qualifications from the State when tendering the expert, the trial court made a normal ruling admitting the expert. Moving to (3), the court applied Rule of Evidence 702(a) to confirm that an expert is permitted to testify generally if it is appropriate “to give the jury necessary information to understand the testimony and evaluate it.” Slip Op. at 12. Here, the court found relevant testimony from the expert for concepts like grooming that fit the facts of the present case.

Finally, in (4), the court noted that defense counsel was permitted to read the relevant provisions of the statute to the jury, but could not do so in a way that asked the jury to consider punishment as part of its deliberations. Here, “[r]ather than merely informing the jury of the statutory penalties associated with the charges, defense counsel implied Defendant should not be convicted because the punishment would be severe . . . improperly comment[ing] upon the statutory punishment to sway the jury’s sympathies in its substantive deliberations.” *Id.* at 14.

Sexual Exploitation of a Minor & Obscenity

(1) Defendant acted in concert with others for purpose of producing material showing sexual activity; (2) second-degree sexual exploitation of a minor is not a lesser included offense of first-degree sexual exploitation of a minor; (3) testimony from an officer mistakenly identifying elements of offense did not improperly instruct the jury; (4) trial court’s inadvertent misidentification of the charge did not confuse the jury.

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Moving to (2), the court looked to the statutes creating the relevant offenses, noting that under G.S. 14-190.16(a)(1) “[t]he focus of first-degree sexual exploitation is the direct mistreatment of the minor or the production of material for sale or profit.” *Id.* at 13. This contrasted with G.S. 14-190.17(a)(1), where second-degree sexual exploitation criminalized the actions of those “involved in the production or after-the-fact distribution of such material,” without the requirement of producing material for sale or gain. *Id.* The court also pointed to *State v. Fletcher*, 370 N.C. 313 (2017), where the Supreme Court highlighted that the second-degree sexual exploitation did not involve directly facilitating the involvement of a minor victim. This led the court to conclude that second-degree exploitation of a minor was not a lesser-included offense.

In (3), defendant argued that the officer’s testimony instructed the jury that merely being filmed having sex constituted a violation of G.S. 14-190.16(a)(1), and this testimony confused the jury as to the statute’s requirement that defendant must have intent to produce material. The court disagreed, pointing out that the testimony was during cross-examination related to the questioning of one of the friends who attended the party, and the officer “simply answered why he did not feel compelled to question [one of the friends] regarding the filming of the sexual activity, and he gave a logical, albeit legally incorrect, response.” *Id.* at 16. The court determined this response made sense in context, and was not improperly instructing the jury as to the elements of the offense.

Arriving at (4), the court explained that the trial court’s mistaken statement that the offense was “sexual assault” only occurred once, during the instruction related to acting in concert. This was inadvertent, and the trial court provided the correct instruction on the

elements of first-degree exploitation of a minor, as well as the correct charge when providing a second instruction on acting in concert where the trial court did not make the mistake. As a result, the court found no danger that the jury was confused as to the charge.

Weapons Offenses

Going armed to the terror of the public does not require allegation that defendant's conduct occurred on a public highway.

[State v. Lancaster](#), 240A22, ___ N.C. ___ (Dec. 15, 2023). In this Craven County case, the State appealed a Court of Appeals majority opinion holding the indictment charging defendant with going armed to the terror of the public was deficient as it did not allege defendant's conduct occurred on a public highway. The Supreme Court found no error in the indictment and reversed the Court of Appeals.

Defendant was indicted for waving a gun around and firing randomly in two parking lots during September of 2019. After defendant was convicted, his counsel filed an *Anders* brief with the Court of Appeals. After conducting an *Anders* review of the record, the Court of Appeals applied *State v. Staten*, 32 N.C. App. 495 (1977), and determined that defendant's indictment was fatally flawed as it was missing the essential element that defendant committed his acts on a public highway. The State appealed based upon the dissent, which would have held that the allegations were sufficient.

Taking up the appeal, the Supreme Court disagreed that going armed to the terror of the public "includes an element that the criminal conduct occur on a public highway." Slip Op. at 6-7. Because going armed to the terror of the public is a common law crime, the Court examined the long history of the offense in English law and its adoption in North Carolina. After documenting the lengthy history of the offense, the Court explicitly overturned the Court of Appeals interpretation in *Staten*, explaining:

[T]he elements of the common law crime of going armed to the terror of the public are that the accused (1) went about armed with an unusual and dangerous weapon, (2) in a public place, (3) for the purpose of terrifying and alarming the peaceful people, and (4) in a manner which would naturally terrify and alarm the peaceful people.

Id. at 14. After dispensing with the "public highway" argument, the Court confirmed that the indictment in question "adequately alleged facts supporting each element of the crime of going armed to the terror of the public." *Id.* at 16.

Justice Dietz did not participate in the consideration or decision of the case.

Conviction for possession of firearm on educational property was unconstitutional where gun was found in vehicle parked in hospital parking lot.

[State v. Radomski](#), COA23-340, ___ N.C. App. ___ (May 21, 2024). In this Orange County case, defendant appealed his conviction for possession of a firearm on educational property, arguing the application of G.S. 14-269.2 to his case was unconstitutional and that the trial court erred by denying his motion to dismiss for insufficient evidence. The Court of Appeals majority agreed on both grounds, reversing the trial court and vacating defendant's conviction.

In June of 2021, defendant drove his vehicle to UNC Hospital for treatment. Defendant was homeless at the time, and kept all his possessions, including his firearms, inside his vehicle. A UNC Hospital police officer received a report that defendant's vehicle was suspicious, and while investigating, the officer discovered that the vehicle had no license plate or insurance coverage. The officer questioned defendant about the contents of the vehicle, and defendant admitted he had firearms inside, but that he was unaware he was on educational property. The officer cuffed defendant and searched the vehicle, finding several firearms along with ammunition. Defendant was subsequently arrested and charged with one count of possession of a firearm on educational property.

The Court of Appeals first explained that defendant failed to raise the constitutional argument at trial, but that it would invoke Rule of Appellate Procedure 2 to consider his arguments. The court then moved to the substance of defendant's argument, that applying G.S. 14-269.2(b) to defendant under the facts of his case violated his Second Amendment rights under the "historical tradition of firearm regulation" analysis required by *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022). Slip Op. at 9. The court noted that the purpose of the open-air parking lot where defendant's vehicle was located was "not educational in nature" as it was intended to serve the hospital and could not be considered an obvious sensitive place for purposes of *Bruen*. *Id.* at 10. The court also rejected that the hospital's "affiliation" with UNC made it qualify as a sensitive place under *Bruen*. *Id.* at 12. Under these facts, the court held that applying G.S. 14-269.2(b) to defendant would be unconstitutional, regardless of the various signs and administrative links between the hospital and the educational campus.

The court then moved to defendant's motion to dismiss, considering whether evidence supported that defendant was on educational property and whether he knew he was on educational property. Considering the first issue, the court held "Defendant's car was located on the UNC Chapel Hill Campus." *Id.* at 15. However, the majority opinion held that the State did not present sufficient evidence of defendant's knowledge he was on educational property. To support this holding, the court looked to the arresting officer's testimony, concluding "[t]he State failed to present any evidence, direct or circumstantial, as to which path Defendant took, what signs he saw, or any other indication of personal knowledge that he was on educational property." *Id.* at 21.

Chief Judge Dillon concurred by separate opinion as to the Second Amendment holding, but did not agree with the majority's holding regarding insufficient evidence that defendant knew he was on educational property.

Defendant did not supply sufficient evidence of voluntary intoxication; failure to specifically identify the firearm in question for jury instruction was not error.

[State v. Mitchell](#), COA23-270, ___ N.C. App. ___ (Dec. 5, 2023). In this Guilford County case, defendant appealed his convictions for breaking and entering, larceny, possession of a firearm by a felon, and resisting a public officer, arguing error in (1) denying his request for a jury instruction on voluntary intoxication, and (2) not specifically identifying the firearm during the jury instruction for possession of a firearm by a felon. The Court of Appeals disagreed, finding no error.

In May of 2021, defendant and an accomplice broke into a pharmacy; after police responded, the men fled the pharmacy, and defendant dropped a gun in the parking lot while running from the officers. After searching the vehicle left at the scene, police found two more firearms and other stolen goods. After defendant was indicted, he filed a notice of defense asserting that he was too intoxicated to form the necessary specific intent for the offenses. During the charge conference, the trial court denied defendant's request for a jury instruction on voluntary intoxication. Defendant was subsequently convicted, and appealed.

Taking up (1), the Court of Appeals noted “[t]o obtain a voluntary intoxication instruction, a defendant ‘must produce substantial evidence which would support a conclusion by the judge that he was so intoxicated that he could not form’ the specific intent to commit the underlying offenses.” Slip Op. at 5, quoting *State v. Mash*, 323 N.C. 339, 346 (1988). However, the court pointed out that “mere intoxication” was not sufficient, and that evidence had to show the defendant had lost his ability to think and plan due to the overconsumption of intoxicants. *Id.* Here, although defendant testified to consuming a large amount of cocaine over several days, the court highlighted instances of defendant recalling the events of the pursuit and arrest, as well as his interview at the police station. The court concluded defendant failed to produce evidence sufficient to justify the voluntary intoxication instruction.

Turning to (2), the court noted that plain error was the applicable standard as defendant did not object to the jury instruction on possession of a firearm at trial. While the trial court did not specify which firearm defendant possessed in the instruction, the series of events where defendant fled the pharmacy and dropped a gun in the parking lot allowed for only one specific gun to be relevant. The other two firearms found at the scene were inside the vehicle and could not have been possessed by defendant. As a result, defendant could not demonstrate plain error.

Judge Murphy concurred in the result only as to (1), and concurred as to (2).

Proximity and indicia of control supported finding that defendant constructively possessed firearm for possession of a firearm by a felon conviction.

[State v. Livingston](#), COA22-678, ___ N.C. App. ___ (Sept. 19, 2023). In this Brunswick County case, defendant appealed his conviction for possession of a firearm by a felon, arguing error in the denial of his motion to dismiss for insufficient evidence. The Court of Appeals found no error.

In June of 2020, deputies with the Brunswick County Sheriff's Office began observing a vehicle that entered a known drug area. After the vehicle ran a stop sign and went 70 mph in a 55 mph zone, they pulled the vehicle over. Defendant was in the passenger seat when the deputies approached, and they observed marijuana on both the driver and defendant, leading to a search of the vehicle. The search found a bag containing a gun and a smaller crown royal bag containing three identification cards with defendant's name and picture on them. Defendant admitted to the police he was a felon, and he was arrested for possessing a gun. At trial, defendant moved to dismiss, arguing the evidence had not established the gun was his. The trial court denied the motion and defendant was subsequently convicted.

The Court of Appeals first explained that "possession" for purposes of defendant's conviction could be actual or constructive; here defendant was not in actual possession, so the caselaw regarding constructive possession in a vehicle applied to defendant's appeal. To show constructive possession in this situation, the State is required to show "other incriminating circumstances" to allow a finding of constructive possession. Slip Op. at 7. The court noted that two common factors used to satisfy the "incriminating circumstances" inquiry were (1) proximity, and (2) indicia of control. *Id.* Here, (1) the bag containing the gun was located behind the passenger seat where defendant was sitting, and (2) the gun was touching a crown royal bag containing a wallet with defendant's identification cards in it. The combination of these two factors supported the finding that defendant constructively possessed the gun.

Defenses

Necessity

Defendant did not show reasonableness or lack of acceptable choices to justify defense of necessity.

[State v. Templeton](#), COA23-443, ___ N.C. App. ___ (March 19, 2024). In this Onslow County case, defendant appealed his convictions for felony fleeing to elude arrest and speeding in

excess of 80 mph, arguing error in denying his request for an instruction on necessity as a defense. The Court of Appeals found no error.

In September of 2021, defendant led officers of the Onslow County Sheriff's Office on a high speed chase on his motorcycle. When defendant came for trial, he testified that he had been threatened earlier in the day by members of a motorcycle gang, justifying his actions. During the charge conference, defense counsel requested an instruction on the defense of necessity, but the trial court denied this request, explaining that defendant failed to demonstrate that he had no other acceptable choices.

Taking up defendant's appeal, the Court of Appeals explained that the defense of necessity required defendant to establish (1) his action was reasonable, (2) it was taken to protect life, limb, or health of a person, and (3) no other acceptable choices were available. The court found that defendant did not demonstrate reasonableness as defendant's long flight from law enforcement provided "ample time and opportunity to realize the vehicles pursuing him were law enforcement." Slip Op. at 5. Likewise, the court faulted defendant for not noticing the vehicles chasing him were law enforcement vehicles, not motorcycles. The court found defendant presented no evidence on "the lack of acceptable alternatives or the reasonableness of his actions." *Id.* at 7. As a result, the defense of necessity was not applicable.

Post-Conviction Proceedings

Motions for Appropriate Relief

Supreme Court reversed holding in *State v. Allen* that review of MAR must be in the light most favorable to defendant; defendant could not demonstrate ineffective assistance of trial or appellate counsel.

[State v. Walker](#), 202PA22, ___ N.C. ___ (March 22, 2024). In this Wake County case, the Supreme Court affirmed an unpublished Court of Appeals opinion denying defendant's motion for appropriate relief (MAR) based upon ineffective assistance of his trial and appellate counsel. The Court's opinion reversed the holding in *State v. Allen*, 378 N.C. 286 (2021), that the factual allegations in a MAR must be reviewed in the light most favorable to the defendant.

Defendant was convicted of first-degree murder in 1999 and sentenced to life without parole. Defendant appealed his conviction, but the Court of Appeals found no error. In April of 2020, defendant filed the MAR giving rise to the current case, arguing ineffective assistance of counsel from both trial counsel and appellate counsel. The Court of Appeals affirmed the trial court's denial of the MAR but did not state that the standard of review was in the light most favorable to defendant as called for by *Allen*.

After noting that *Allen* had created confusion for the Court of Appeals, the Supreme Court first clarified that the *Allen* standard would no longer apply:

Reviewing a defendant's asserted grounds for relief in the light most favorable to defendant is a departure from this Court's longstanding standard of review. The mere fact that some ground for relief is asserted does not entitle defendant to a hearing or to present evidence. An MAR court need not conduct an evidentiary hearing if a defendant's MAR offers insufficient evidence to support his claim or only asserts general allegations and speculation.

Slip Op. at 3 (cleaned up). The Court then turned to the applicable review in the current case, explaining that under *Strickland v. Washington*, 466 U.S. 668 (1984), defendant must show (1) deficient performance by his counsel and (2) prejudice from counsel's errors.

Defendant argued that his trial counsel refused to allow him to testify, despite his desire to do so. The Court noted that the record did not support defendant's argument, and "[a]t no point during trial did defendant indicate he wished to testify." Slip Op. at 6. Moving to the appellate counsel issue, the Court explained that the trial court limited the testimony of defendant's psychologist, prohibiting her from using legal terminology. The Court pointed out that the expert was permitted to testify about defendant's mental health issues, and the limitations on her testimony were permissible. Because defendant could not demonstrate ineffective assistance of counsel in either circumstance, the Court affirmed the denial of defendant's MAR.

Justice Berger concurred by separate opinion and discussed the reversal of *Allen. Id.* at 9.

Justice Earls, joined by Justice Riggs, concurred in part and dissented in part and would have found that defendant's MAR lacked factual support for an evidentiary hearing, but would not have reversed *Allen. Id.* at 12.

Defendant's lack of understanding related to collateral consequences from federal immigration law did not justify withdrawal of his guilty plea.

[State v. Saldana](#), COA23-51, ___ N.C. App. ___ (Dec. 19, 2023). In this Wayne County case, defendant appealed the order denying his motion to withdraw his guilty plea to felony possession of cocaine. The Court of Appeals affirmed the trial court's order.

In January of 2005, defendant was indicted for felony possession of cocaine; subsequently defendant "entered a plea of guilty to felony possession of cocaine in order to receive a conditional discharge pursuant to [G.S.] 90-96." Slip Op. at 2. In February of 2006, the trial court determined defendant had satisfied the conditions imposed for a conditional discharge and dismissed the charges under G.S. 90-96. During these events, defendant was an undocumented immigrant married to an American citizen and father to one child

through the marriage. In 2021, defendant was detained by immigration officials and sent to a detention center in Georgia, where he was held without bond as a result of his guilty plea to a felony in 2005. In January of 2022 defendant filed a motion to withdraw his guilty plea to the possession charge, arguing he was “confused” and did not know the guilty plea would continue to constitute a conviction for federal immigration purposes. *Id.* at 3. After holding a hearing, the trial court denied defendant’s motion, treating it as a motion for appropriate relief (MAR).

The Court of Appeals first established that the trial court was correct in interpreting the motion as a MAR, explaining the dismissal of charges in 2006 was “final judgment” in the matter, and defendant’s subsequent motion was “a post-sentence MAR requiring Defendant to show manifest injustice in order to withdraw his guilty plea.” *Id.* at 9. The court then noted the six factors recognized in North Carolina case law justifying withdrawal of a plea, and that defendant argued “misunderstanding the consequences of the guilty plea, hasty entry, confusion, and coercion.” *Id.* at 10. Here, while the court expressed sympathy to defendant’s situation, it explained that he had not shown manifest injustice, as the federal immigration consequences were collateral, not direct consequences of entering his plea that he failed to understand. Summarizing the situation, the court stated “[w]hile Defendant may now regret the consequences of his guilty plea in light of its implications under federal law, his remorse does not reflect a misunderstanding of the guilty plea at the time he entered into it.” *Id.* at 15.

Judicial Administration

Removal of District Attorney

Superior court order disqualifying DA’s office did not identify actual conflict of interest to support disqualification.

[State v. Giese](#), 309PA22, ___ N.C. ___ (May 23, 2024). In this Onslow County case, the Supreme Court vacated a superior court order disqualifying the prosecutors from the Fifth Prosecutorial District and remanded for further proceedings. The Court determined that the district and superior court orders disqualifying the district attorney and his staff did not identify an actual conflict of interest or legitimate due process concerns.

In 2022, defendant was charged with cyberstalking and making harassing phone calls to the county manager of Onslow County. When the matter came to district court for trial, defendant moved to disqualify the district attorney and his staff, arguing they had a conflict of interest because the county manager had financial and functional links with the district attorney and his staff. The district court granted the motion, and the State appealed to superior court. The superior court left the order intact, leading the State to petition the Court of Appeals, where writ was denied, and ultimately to petition the Supreme Court, leading to the current opinion.

Allowing the State's petition for writ of certiorari, the Supreme Court first explored the basis for disqualification, looking to *State v. Camacho*, 329 N.C. 589 (1991), for the appropriate balancing test. The Court noted that *Camacho* first required the finding of an "actual conflict of interest," which only exists "when a member of a DA's office once represented a defendant and obtained confidential information that "may be used to the defendant's detriment at trial.'" Slip Op. at 11, quoting *Camacho* at 601. If a court finds an actual conflict, then *Camacho* calls for a balancing test of the competing interests of the prosecutor and defendant. However, here the Court could not find evidence of a conflict here, concluding "a county manager's 'inherent authority' does not bar a DA from prosecuting a case in which that county manager is the alleged victim." *Id.* at 15. As a result, the Court remanded to the superior court for further proceedings in keeping with the opinion.