

Criminal Case Update – Full Version for On-line Posting (October 2024)

Cases covered include *Smith v. Arizona* and *United States v. Rahimi* from the Supreme Court of the United States and published opinions from the North Carolina Appellate Courts from May 24 to September 17, 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

Bond Forfeiture

Failure to appear for hearing on motion to set aside bond forfeiture did not justify denial of motion when statutory reason was provided in the motion.

[State v. Maye](#), COA24-77, ___ N.C. App. ___ (Aug. 6, 2024). In this Lenoir County case, defendant’s bond surety appealed the trial court’s order denying its motion to set aside bond forfeiture. The Court of Appeals reversed the trial court’s order and remanded.

In January of 2023, defendant did not appear for court, leading to the bond forfeiture notice. The surety filed a motion to set aside the forfeiture, including copies of orders for defendant’s arrest. The school board objected and sent a notice of hearing with an erroneous hearing date of August 2, 2023, when the hearing was actually August 30, 2023. The school board argued that it subsequently sent a corrected notice. Regardless, on the hearing date the bond surety did not appear, and the trial court denied the motion.

Taking up the appeal, the Court of Appeals first established jurisdiction after the parties raised issues concerning service of the proposed record and the record's necessary materials. Having established jurisdiction, the court noted that "[w]hen the bondsman files a motion to set aside, the 'forfeiture *shall* be set aside for any' of the reasons enumerated in [G.S.] 15A-544.5(b)." Slip Op. at 7. Here, even though the bond surety did not appear at the hearing on the motion, the motion contained a valid statutory reason to set aside the forfeiture. The court noted that failure to appear did not grant the trial court "absolute discretion to deny the absent party's motion," and concluded that the trial court erred. *Id.* at 8.

Habeas Corpus

Court of Appeals improperly considered G.S. 17-33 when affirming the denial of defendant's application for writ of habeas corpus; public interest exception to mootness justified consideration of defendant's petition after his release.

[State v. Daw](#), 174PA21, ___ N.C. ___ (August 23, 2024). In this Wake County case, the Supreme Court modified and affirmed the Court of Appeals decision affirming the denial of defendant's petition for writ of habeas corpus. Defendant argued that he was unlawfully and illegally detained because the Department of Public Safety could not ensure he was not exposed to COVID-19. The Supreme Court affirmed the denial, but modified the Court of Appeals decision as it was error to consider portions of G.S. Chapter 17 beyond G.S. 17-4.

Defendant pleaded guilty to multiple counts of obtaining property by false pretenses in 2019, and was imprisoned when the COVID-19 pandemic began. Defendant applied for a writ of habeas corpus in Wake County Superior Court, arguing "the potential viral spread of COVID-19 within the correctional institution, combined with petitioner's medical history and condition, rendered his continued confinement cruel and/or unusual." Slip Op. at 2. The trial court denied defendant's application under G.S. 17-4(2), as defendant had a valid final judgment in a criminal case entered by a court with proper jurisdiction. Defendant then petitioned the Court of Appeals, who allowed his petition and issued a decision affirming the denial, but repudiating the trial court's basis for its decision. The Court of Appeals pointed to G.S. 17-33(2) as an exception to G.S. 17-4(2), although defendant's claim did not represent a violation of his rights. Although defendant's application was never granted, he was released in February 2021 under the Extended Limits of Confinement Program, prior to the issuance of the Court of Appeals decision. The Court of Appeals acknowledged defendant's issue was moot in its decision. The State petitioned the Supreme Court for discretionary review of this Court of Appeals decision, leading to the current case.

The Supreme Court first confirmed that mootness did not prevent its review of the Court of Appeals decision as the public interest exception applied. Then the Court offered an

overview of the history related to writs of habeas corpus and explained how the current provisions of G.S. Chapter 17 govern applications for the writ. For applications, G.S. 17-4 provides “a general rule and an exception; application of the writ is available to any person restrained of their liberty regardless of whether such restraint resulted from a criminal or civil matter, unless the restraint stems from those instances specified in section 17-4.” *Id.* at 10.

Relevant for the current case, “the writ of habeas corpus is expressly not available in this State to persons ‘detained by virtue of the final order, judgment or decree of a competent tribunal of civil or criminal jurisdiction.’” *Id.* at 12. Because defendant did not assert a jurisdictional defect, defendant’s application was properly denied by the trial court under G.S. 17-4(2), and the Court of Appeals’ reference to G.S. 17-33 was erroneous. The Court pointed out that G.S. 17-33 was “inapplicable in this matter” as that provision applies to those “in custody by virtue of civil process,” as opposed to defendant, who was imprisoned after a final judgment. *Id.* at 14. Additionally, the Court took pains to clarify that the two provisions could not conflict due to the operation of G.S. Chapter 17. *Id.* at 18.

Justice Earls dissented and provided a lengthy discussion disagreeing with the majority’s invocation of the public interest exception to mootness, and disagreement with the majority’s interpretation of the provisions in G.S. Chapter 17. *Id.* at 21.

Justice Riggs dissented and agreed with Justice Earls’ analysis of the mootness issue but wrote separately to emphasize her disagreement with the majority’s invocation of the public interest exception. *Id.* at 61.

Jurisdiction

Acquittal at district court deprived superior court of jurisdiction to try defendant; superior court did not adequately conduct colloquy to determine if defendant knowingly waived his right to jury trial.

[State v. Rager](#), COA23-848, ___ N.C. App. ___ (June 18, 2024). In this Haywood County case, defendant appealed his convictions for making harassing phone calls and being intoxicated and disruptive in public, arguing the superior court lacked jurisdiction to try him for the intoxicated in public charge, and that he did not knowingly waive his right to a jury trial. The Court of Appeals agreed, vacating defendant’s conviction for being intoxicated and disruptive in public and granting a new trial for the harassing phone calls charge.

Beginning in the late evening hours of April 9, 2022, and continuing to the early morning, defendant called the Waynesville Police Department over fifty times to inquire about the investigation into an assault where he was the victim. Dispatchers told defendant that the assigned detective was not on duty, but defendant kept calling, eventually speaking with the sergeant in charge at that hour. After that call, defendant walked up to the police

department parking lot and confronted the sergeant, exhibiting clear signs of being intoxicated. Defendant was subsequently arrested, and appeared pro se in district court on the charges. The district court found defendant guilty of making harassing phone calls and not guilty of being intoxicated and disruptive in public, and defendant appealed to superior court. Defendant again appeared pro se before the superior court and was tried in a bench trial, being found guilty of both charges.

Taking up defendant's first argument, the Court of Appeals explained that the State conceded the superior court lacked jurisdiction to try him on the intoxicated and disruptive in public charge because he was acquitted at district court. The court explained that there was significant confusion about the charges before the superior court, and "the superior court incorrectly explained to Defendant that he was facing a trial de novo for both charges." Slip Op. at 6. Because the superior court lacked jurisdiction, the court vacated the conviction for being intoxicated and disruptive in public.

Moving to the jury trial waiver issue, the court explained that under G.S. 15A-1201(d), the trial court must conduct a colloquy with a defendant before allowing waiver of a jury trial. Here, the court looked to applicable precedent for the substance of that colloquy, and determined there was "no record evidence that the superior court personally addressed Defendant or conducted any colloquy whatsoever to determine whether he fully understood and appreciated the consequences of his decision to waive his right to a jury trial." *Id.* at 15. Additionally, defendant was pro se and no evidence in the record showed he was aware of his right to request a jury trial. Having established the failure to comply with the applicable standard, the court also held that the error was prejudicial, as there was a reasonable possibility that at least one juror would have found defendant's conduct was not a violation. This led the court to grant a new trial on the harassing phone calls charge.

Indictment & Pleading Issues

Sheriff submitting false documentation to maintain law enforcement certification did not support obtaining property by false pretenses convictions; indictment for obstruction of justice was invalid because it did not allege the wrongful acts were done to subvert a potential investigation or legal proceeding.

[State v. Wilkins](#), COA 23-839, ___ N.C. App. ___ (Sept. 17, 2024). In this Wake County case, defendant appealed his convictions for six counts of obtaining property by false pretenses and six counts of felony obstruction of justice, arguing error in denying his motions to dismiss the charges. The Court of Appeals agreed, reversing the denial of the motion to dismiss the obtaining property by false pretenses charges, and vacating the convictions for obstruction of justice.

Defendant was elected Granville County Sheriff in 2010, and between the years of 2013 and 2019, defendant reported that he had completed voluntary in-service training and firearm qualification classes. However, a 2019 investigation determined that defendant's signatures on training class rosters were falsified. At trial, defendant admitted he did not complete the required trainings and submitted false records, testifying "he submitted the false records for 'a personal reason' and that he 'wanted to get credit for it.'" Slip Op. at 3.

The Court of Appeals first considered the obtaining property by false pretenses convictions, noting defendant's argument that he did not submit the false records in an attempt to obtain a thing of value from another, an essential element of the charge. Instead, defendant argued "that he did not obtain anything because of his misrepresentation but only maintained possession of a certification obtained prior." *Id.* at 5. The court considered whether renewal of his certification represented "obtaining property" for purposes of the applicable statute, concluding "that renewing a previously acquired law enforcement certification does not constitute obtaining property." *Id.* at 6. Because defendant did not attempt to obtain property, the trial court erred by denying his motion to dismiss, and the court reversed.

Moving to the obstruction of justice charges, the court explained that it did not reach the sufficiency of the evidence issue for these charges because the indictments were facially invalid. The court looked back to [State v. Coffey](#), 898 S.E.2d 359, 364, *disc. review denied* 901 S.E.2d 796 (2024), where the defendant in that case certified the current defendant's falsified attendance and firearms records. Considering the indictment, the court held that "[i]t does not allege that [defendant's] wrongful acts were done to subvert a potential investigation or legal proceeding . . . [t]he indictment therefore fails entirely to charge Defendant with a criminal offense." Slip Op. at 11. Because the indictment failed to charge defendant with a criminal offense, the trial court lacked jurisdiction, and the court vacated the convictions.

Defendant's waiver of indictment was valid despite proceeding *pro se*.

[State v. Pierce](#), COA23-348, ___ N.C. App. ___ (Sept. 3, 2024). In this Durham County case, defendant appealed after pleading guilty to crimes against nature and sexual battery, arguing his waiver of indictment was invalid because he was not represented by counsel at the time. The Court of Appeals disagreed, affirming the judgment against defendant.

Defendant was indicted for statutory rape, kidnapping, and related charges in February of 2017. From his first appearance to the trial, defendant was provided five court-appointed attorneys, either as representation or standby counsel after defendant decided to represent himself. At the time defendant signed a waiver of indictment, he was not represented by counsel but had standby counsel available; the standby counsel did not sign the waiver.

Defendant's argument relied on G.S. 15A-642, specifically the provisions in subsection (b) that prohibit waiver of indictment when "the defendant is not represented by counsel" and subsection (c) that reference signature by defendant and his attorney. The court reviewed the three cases cited by defendant to support his argument, holding "[defendant's] case is distinguishable because he had previously waived multiple appointed counsels and had elected to proceed *pro se*." Slip Op. at 6-7. Moving to the statute, the court first explained that defendant had used the appointed counsel system to delay his trial and had knowingly proceeded without counsel when waiving the indictment. The court also determined that any prejudicial error by the trial court was invited by defendant, explaining that defendant "created any purported error of proceeding unrepresented through his own demands when signing the Waiver of Indictment *after* he deliberately chose to proceed *pro se*." *Id.* at 10.

Indictment for obtaining property by false pretenses properly alleged element of intent; State's evidence provided sufficient circumstantial evidence of intent beyond nonfulfillment of contract.

[State v. Horton](#), COA 24-29, ___ N.C. App. ___ (July 2, 2024). In this Duplin County case, defendant appealed his conviction for obtaining property by false pretenses, arguing the indictment was insufficient and the trial court erred by denying his motion to dismiss for insufficient evidence. The Court of Appeals disagreed, finding no error.

In June of 2020, the victim paid defendant \$4,000 to complete construction work on the victim's home. Defendant failed to complete the work, providing excuses for the delay at first, then failing to answer the victim's phone calls. The Duplin County Sheriff's Office investigated the matter and told defendant to return the money; defendant agreed to return the money in September 2020, but never did so. Defendant was subsequently indicted for failing to work after being paid and obtaining property by false pretenses, and the jury found him guilty of both charges.

On appeal, defendant argued that the trial court lacked jurisdiction as the indictment was insufficient to charge him with obtaining property by false pretenses under G.S. 14-100 as it failed to allege the essential element of intent. The Court of Appeals noted the recent decisions [State v. Singleton](#) and [State v. Stewart](#) establishing the appropriate test for a constitutional or statutory defect, and turned to the language of G.S. 14-100 to determine if the indictment contained the essential elements of the offense. Relevant to this inquiry, the language of G.S. 14-100(b) dictates that "evidence of nonfulfillment of a contract, without more, cannot establish the essential element of intent." However, the court explained that this subsection did not "relate[] to what is required in an indictment" but instead "relates to the sufficiency of the State's evidence offered to prove intent at trial, not the facts to be asserted in the indictment." Slip Op. at 6-7. Combined with the fact that an indictment for obtaining property by false pretenses "need only allege the defendant acted with the intent to defraud," not allege all the evidence supporting that intent, the court concluded that the indictment here was sufficient. *Id.* at 7.

Moving to defendant's argument that the evidence was insufficient to prove intent, the court acknowledged G.S. 14-100(b)'s requirement that nonfulfillment of the contract was not sufficient. The court noted that circumstantial evidence, including Rule of Evidence 404(b) evidence of defendant's scheme, supported a finding of intent in the current case. The court looked to defendant's behavior after being paid, including the fact that he never ordered the materials from the local supply store, but used the store's delay as an excuse, and the testimony of another member of the community that he also paid defendant for work that was never done. This evidence led the court to hold that the State offered substantial evidence of defendant's intent.

Defendant's objection to being charged by citation was improperly filed with the superior court, instead of the district court.

[State v. Carpio](#), COA23-987, ___ N.C. App. ___ (June 18, 2024). In this Dare County case, defendant appealed her conviction for reckless driving, arguing the superior court lacked jurisdiction to enter judgment due to a fatally defective citation, and error in instructing the jury on reckless driving that created a fatal variance between the citation and the jury charge. The Court of Appeals held the superior court had jurisdiction and found no error.

In March of 2021, defendant was driving a van on a highway in Dare County, and she made several aggressive gestures and movements towards another vehicle. Eventually, after speeding along the highway for several miles, defendant pulled in front of the other vehicle and "intentionally brake-checked" the other driver, leading to a collision. Slip Op. at 3. Defendant was cited for reckless driving, and at district court defendant was found guilty. On appeal to the superior court, defendant moved to dismiss the charge, arguing the citation failed to include specific factual details. The superior court denied the motion, and during trial at superior court, body cam footage from the responding officer showed defendant admitted to intentionally brake-checking the other driver. During the charge conference, defendant objected, arguing the alleged conduct in the instruction was not present in the pleading. The superior court denied the motion and defendant was subsequently found guilty by the jury.

Taking up defendant's first argument that the citation lacked specific descriptions of the actions, the Court of Appeals explained that under G.S. 15A-922, a defendant charged by a citation may move to be charged with a new pleading. However, the appropriate venue for the motion is the district court division. Here, defendant failed to make a motion before the district court, and "[p]er North Carolina law . . . for a defendant to properly object to a trial by citation, [they] must make such objection before the court of original jurisdiction." *Id.* at 8. Because defendant made her motion before the superior court, she waived her right to appeal the issue.

Moving to defendant's argument regarding a fatal variance between the citation and the jury charge, the court first explained that defendant failed to preserve the argument and the standard of review was plain error. Here, defendant argued that the specific conduct of

slamming on her brakes was not mentioned in the citation. The court pointed out that the citation specifically incorporated the officer's crash report which contained details of the alleged conduct. Based on the reference to the crash report in the citation, and the evidence showing defendant admitted to intentionally brake-checking the other driver, the court found no plain error by the superior court.

Jury Misconduct & Improper Contact with Jurors

Dismissal of juror for taking home notes did not justify granting motion for mistrial.

[State v. Galbreath](#), COA 24-48, ___ N.C. App. ___ (Sept. 3, 2024). In this Wake County case, defendant appealed his convictions for statutory rape of a child, sex offense with a child, and indecent liberties with a child, arguing error in denying his motion for a mistrial after one juror was dismissed for taking home notes during the trial. The Court of Appeals found no error.

Defendant sexually abused his daughter from November of 2018 to August of 2019, when the daughter called police after defendant struck her. At trial, the daughter testified as to the repeated sexual abuse she experienced. During the State's case, a bailiff noticed that Juror 4 tore out pages of notes and took them with her when court recessed for the day. One of the DA's legal assistants also noticed Juror 4 discussing research she did, including possibly child or psychological development. The trial court questioned Juror 4, who denied having conversations about development but admitted to tearing out pages of notes; the trial court removed her and appointed an alternate juror in her place. Defense counsel moved for a mistrial, and the trial court examined each juror individually, inquiring about their contact with Juror 4. After the examination, the trial court concluded the other jurors could serve impartially and denied the motion for a mistrial.

Considering defendant's argument, the Court of Appeals noted that "[b]ecause the trial court is in the best position to examine the facts and circumstances, we give great weight to its determination of whether juror misconduct occurred and whether to declare a mistrial." Slip Op. at 6. Here, the other jurors did not overhear discussions about child development from Juror 4, and the testimony from the remaining jurors showed they could remain impartial. The court did not agree that defendant was prejudiced, and determined "the trial court properly discharged its duty to investigate possible juror misconduct." *Id.* at 10.

Jury Selection

Trial court erred by allowing a potential juror to reference defendant's time in prison in front of other potential jurors.

[State v. Bruer](#), COA23-604, ___ N.C. App. ___ (June 18, 2024). In this Stanly County case, defendant appealed his convictions for possession with intent to sell and deliver methamphetamine, possession of cocaine, and possession of a firearm by a felon, arguing error in (1) denying his motion for a mistrial, (2) denying his motion to dismiss the possession of a firearm by a felon charge, and (3) failing to comply with the statutory requirements regarding shackling during the trial. The Court of Appeals agreed with defendant regarding (1) and granted a new trial.

In April of 2018, law enforcement officers executed a search warrant at the auto repair shop where defendant worked, finding methamphetamine, cocaine, and firearms. Defendant was arrested along with several coworkers. When defendant came for trial in August of 2022, the State asked prospective jurors if they knew anyone involved in the trial. One juror, a prison guard, responded that he knew defendant from his time in prison. Defendant moved for a mistrial, arguing the jury pool had been tainted by hearing this statement. The trial court denied the motion. During the trial, defendant's ankles were shackled. Defense counsel did not object to the shackling, but requested that defendant be seated at the witness stand before the jury was brought into the room so they would not see him walk awkwardly due to the shackles.

Taking up (1), the Court of Appeals noted the State conceded the trial court erred in denying the motion for a mistrial. The court explained that the prejudicial effect of having an employee of the justice system make a statement regarding defendant's former imprisonment justified a mistrial under *State v. Mobley*, 86 N.C. App. 528 (1987), and *State v. Howard*, 133 N.C. App. 614 (1999). Here, it was clearly error that the trial court failed to inquire whether the other prospective jurors heard the prison guard's statement, and an abuse of discretion to deny defendant's motion.

Moving to (2), the court explained that substantial evidence showing defendant constructively possessed the firearm justified denial of defendant's motion to dismiss. Specifically, defendant was in front of the office where three firearms were found, and one of the firearms was found in a cabinet next to a bill of sale for a truck defendant purchased.

Finally, in (3) the court found that defendant invited error and did not preserve his challenge to the shackling issue. Defense counsel failed to object and even requested accommodations for the shackling so that the jury would not see defendant walking awkwardly.

Motions

District court retained jurisdiction to alter pretrial release bond after defendant announced his intention to appeal to superior court; district court erred by not making written findings when imposing secured bond but this error did not justify dismissal of charges.

[State v. Robinson](#), COA23-564, ___ N.C. App. ___ (June 4, 2024). In this Guilford County case, the State appealed an order granting dismissal of the assault, interfering with emergency communications, and communicating threats charges against defendant after the district court imposed a \$250 secured bond when defendant announced his intention to appeal to superior court. The Court of Appeals reversed the superior court order dismissing the charges, remanding for further findings to support the imposition of a secured cash bond.

In June of 2019, defendant was charged with felony assault by strangulation, interfering with emergency communications, and communicating threats, and received a \$2,500 unsecured bond for pretrial release. The State reduced the assault by strangulation charge to simple assault, and a district court bench trial was held in August 2022. Defendant was found guilty on all charges, and given a 150-day suspended sentence. Defendant then gave notice of appeal, at which point the district court modified defendant’s pretrial release to require a \$250 secured bond, leading to defendant being taken into custody for a few hours while his family posted the bond. In October 2022, defendant moved at the superior court to dismiss the charges, and the superior court granted the motion, finding the district court did not properly modify defendant’s bond pursuant to statute and the denial of his right to a reasonable bond impermissibly infringed on his Fourth Amendment and Sixth Amendment rights.

Taking up the State’s appeal, the Court of Appeals first looked at the district court’s jurisdiction to modify the pretrial release bond, as defendant argued that the district court was immediately divested of jurisdiction when he announced his appeal. Looking to the language of G.S. 15A-1431, the court concluded “[g]iven that the plain language contained in Section 1431 mandates action from a magistrate or district court following a defendant giving notice of appeal, we conclude that the district court is not immediately divested of jurisdiction following ‘the noting of an appeal.’” Slip Op. at 11. This meant that the district court retained jurisdiction to modify defendant’s pretrial release. The court then looked to G.S. 15A-534 for the requirements to impose a secured cash bond, finding that the district court did not properly record its reasons in writing, meaning the superior court’s order was correct in finding the district court erred.

Having established that the district court erred by imposing a secured bond without written findings, the court moved to the question of whether defendant’s rights were flagrantly violated and whether his case suffered irreparable prejudice to support dismissal of the charges against him under G.S. 15A-954. The court concluded that defendant had not been

irreparably prejudiced, looking to the superior court’s own findings, pointing to Finding No. 12 that “the court does not find, that the \$250 cash bond and subsequent time in custody affected defendant’s ability to prepare his case in superior court, or otherwise to consult with counsel to be ready for trial.” *Id.* at 14 (cleaned up). Because the superior court’s own findings showed no prejudice and the findings were not challenged on appeal, the court determined it was error to grant defendant’s motion to dismiss.

Pleas

Defendant’s plea agreement covering multiple charges in two counties did not prevent trial court finding him as a recidivist because charges were not joined for trial.

[State v. Walston](#), COA24-58, ___ N.C. App. ___ (July 2, 2024). In this Wayne County case, defendant appealed his convictions for two counts of indecent liberties with a child, arguing error in finding that he was a recidivist. The Court of Appeals determined that defendant’s claims were meritless or procedurally barred and dismissed for lack of appellate jurisdiction.

Defendant entered into a plea agreement where he agreed to plead guilty based on allegations made against him in Duplin and Wayne Counties. In Duplin County, defendant pleaded guilty to two counts of first-degree statutory sexual offense in April 2020. In Wayne County, defendant pleaded guilty to the two indecent liberties charges giving rise to the current case in July 2023. When sentencing defendant in Wayne County, the trial court found that defendant qualified as a recidivist based on his prior Duplin County convictions and ordered him to register as a sex offender for life. Defendant filed a notice of appeal for the “Judicial Findings and Order for Sex Offenders” but did not appeal the underlying judgment. Subsequently, defendant filed a petition for writ of certiorari with the Court of Appeals.

The core of defendant’s argument was that the Duplin County charges for sexual offense were “joined in the same plea agreement” with the Wayne County charges for indecent liberties, and thus “should be treated in the same way as charges that are joined for trial.” Slip Op. at 3. Looking through applicable precedent, the court quickly dispensed with defendant’s argument, noting the cases cited by defendant were “readily distinguishable from the present case because the Duplin County charges and Wayne County charges were not joined for trial.” *Id.* at 5. The court explained that it was irrelevant that defendant entered a plea agreement for all the charges at the same time because defendant “was convicted and sentenced at different times for two separate sets of qualifying offenses.” *Id.* at 5-6. The court thus declined to grant the petition for lack of merit and dismissed defendant’s appeal.

The court also briefly considered defendant’s argument that his due process rights were infringed by the recidivist determination, explaining that defendant did not raise this

argument in front of the trial court and that the court declined to invoke Rule of Appellate Procedure 2 to consider it.

Trial court did not err in denying defendant's request to withdraw his plea as defendant did not provide just and fair reason for withdrawing the plea.

[State v. Scott](#), COA23-936, ___ N.C. App. ___ (June 4, 2024). In this New Hanover County case, defendant appealed after a guilty plea to four counts of selling crack cocaine, arguing error in denying his motion to withdraw his guilty plea and failing to advise him of the consequences of pleading guilty. The Court of Appeals denied defendant's petition for review of the trial court's advice regarding his guilty plea, and found no error.

Between September 2017 and May 2018, defendant sold crack cocaine to confidential informants working for the Wilmington Police Department while being recorded on video. Defendant reached a plea agreement where he would plead guilty to four counts of selling crack cocaine and other charges would be dismissed, and the State prayed for judgment to be continued with defendant on pretrial release with the presumption that defendant would testify in an unrelated matter. While on pretrial release, defendant was arrested for possession of a firearm by a felon and other charges, and his pretrial release was revoked. Defendant subsequently decided not to testify for the State in the unrelated matter, and the State prayed for judgment on defendant's plea, leading to his sentencing in January 2023. At the sentencing defendant moved to withdraw his plea, but the trial court denied his motion after reviewing the plea colloquy.

Considering defendant's first issue, the Court of Appeals explained that defendant's side agreement to testify for the State was not put before the trial court, and thus his argument that the trial court did not advise him of the possible consequences was not appealable. This led defendant to file a petition for writ of certiorari. Looking to the record, the court noted that it was defendant's choice not to put the agreement for his testimony on the plea transcript, as he did not want to be seen cooperating with the State. The court noted that the trial court still attempted to advise defendant of possible consequences, and found no merit in his petition.

Moving to defendant's motion to withdraw his plea, the court explored defendant's argument about an "order for his arrest" that the State delayed serving on defendant before his plea, finding no clear evidence of this issue. Slip Op. at 8-9. The court did find clear evidence that defendant did not provide a just and fair reason for withdrawing his plea, as the State's evidence against defendant was strong, defendant had ample time to review and prepare prior to entering his plea, and the trial court explained the possible outcomes from his plea prior to entering it. Instead, the record showed defendant "was dissatisfied with the outcome of his plea despite being made fully aware of said outcome prior to entering the plea." *Id.* at 9.

Order of specific performance for plea agreement was error where defendant did not show detrimental reliance on the agreement.

[State v. Ditty](#), COA23-141, ___ N.C. App. ___ (June 4, 2024), *temporary stay allowed*, ___ N.C. ___, 901 S.E.2d 774 (June 26, 2024). In this Cumberland County case, both the State and defendant filed petitions for writ of certiorari after the trial court issued an order to enforce a plea agreement between the parties. The Court of Appeals held that the trial court had jurisdiction to enter the order, but reversed the order's requirement for specific performance because defendant did not show detrimental reliance on the agreement prior to the State's withdrawal, remanding for further proceedings.

In March of 2016, defendant was charged with child abuse and first-degree murder in connection with the death of her daughter. Defendant negotiated a plea agreement based upon the argument that her romantic partner caused the injuries to the child, ultimately reaching an agreement to plead guilty to accessory after the fact to first-degree murder. The State requested defendant submit to a polygraph and not to move for bond reduction or seek a probable cause hearing during its investigation, which defendant did. Defendant also submitted to a second interview with investigators. After all this, the State provided a plea agreement for accessory after the fact to first-degree murder, which defendant signed in January 2018, with a plea hearing set for March 2018. However, before the plea hearing, the district attorney's office cancelled the hearing, and then withdrew as counsel for the State due to a conflict. The newly appointed special prosecutor then cancelled the plea agreement in April 2018 and made a new offer which defendant rejected. Defendant filed a motion to enforce the prior plea agreement, which the trial court denied in November 2018. Defendant proceeded to trial on the charges, and filed a second motion seeking specific performance of the plea agreement. In November 2021, a second judge acting as the trial court granted this second motion to enforce the agreement, leading to the present appeal prior to any judgment in defendant's case.

The Court of Appeals first took pains to explain the complicated procedural history of the case, noting it arose from an interlocutory order reviewed under N.C. Rule of Appellate Procedure 21(a)(1). The court then moved to the issue of the trial court's jurisdiction, explaining that the initial ruling of November 2018 was not properly entered in the record. The court turned to *State v. Oates*, 366 N.C. 264 (2012), for the proposition that in criminal cases a judgment is entered "when the clerk of court records or files the judge's decision." Slip Op. at 12. Although the trial court announced a November 2018 ruling in open court, the record did not show any file stamp or entry by the clerk recording the order, leading the court to conclude it was never entered. This meant that the second judge acting as trial court had jurisdiction to enter an order in November 2021.

Having established jurisdiction, the court moved to the enforceability of the plea, concluding that the trial court mistakenly determined defendant's due process rights were violated. The court reviewed Supreme Court precedent on the issue including *State v. Collins*, 300 N.C. 142 (1980), and articulated the applicable rule:

The State may be bound to an offer which has not resulted in the actual entry and acceptance of the defendant's guilty plea only when the defendant is necessarily prejudiced by changing her position in detrimental reliance upon that agreement prior to judicial sanction or the State's withdrawal.

Slip Op. at 20. Here, the court did not find the necessary detrimental reliance, explaining the terms of the plea agreement did not require defendant to submit to the interview or forego the bond reduction or probable cause hearings, and those events took place prior to the plea agreement offer. The trial court's findings did not show detrimental reliance by defendant after the presentation of the plea agreement in January 2018, leading the court to conclude it was error to order specific performance of the agreement.

Sentencing

Defendant could be convicted of multiple counts of human trafficking under G.S. 14-43.11; error in calculating prior record level was not prejudicial.

[State v. Applewhite](#), 39A22, ___ N.C. ___ (August 23, 2024). In this Cumberland County case, the Supreme Court affirmed the Court of Appeals decision finding no error in defendant's convictions for human trafficking and promoting prostitution. The Court held that (1) defendant could be convicted of multiple counts of human trafficking for each victim under G.S. 14-43.11, and (2) the trial court erred in calculating defendant's prior record level, but this error was not prejudicial.

Between 2012 and 2015, defendant supplied heroin to several women, and used their addiction to manipulate them into prostitution. Defendant used online solicitations to set up customers, and he transported the women to various locations to engage in prostitution. Defendant was ultimately indicted and convicted of multiple charges for each victim, and he appealed. At the Court of Appeals, the majority found no error, but the dissenting judge "argued that human trafficking is a continuing offense because the statute criminalizing human trafficking does not define the unit of prosecution." Slip Op. at 4.

Taking up (1), the Supreme Court first examined the structure of G.S. 14-43.11, noting that subsection (a) provides the conduct representing an offense, and subsection (c) "clarifies that human trafficking is not a continuing offense . . . demonstrat[ing] that each distinct act of recruiting, enticing, harboring, transporting, providing or obtaining a victim can be separately prosecuted." *Id.* at 7. The Court also noted the anti-merger provision in subsection (c). Having established that each act was a separate offense under the statute, the Court moved to a double jeopardy analysis, determining that defendant did not suffer "multiple punishments for the same conduct." *Id.* at 12. The Court also considered the sufficiency of the indictments, as each "tracked the language of the statute but included variations for the names of the victims and the date ranges of the alleged violations." *Id.* at 14. These were sufficient as "none of the indictments rendered the charged offenses

uncertain” and the statute did not provide for alternative offenses, meaning defendant was given sufficient notice of the charges against him. *Id.* at 16.

The Court also considered (2), the calculation of defendant’s prior record level. Defendant did not stipulate to his prior convictions, and the State did not offer any evidence that defendant’s prior federal firearm conviction was similar to a North Carolina offense. However, the Court explained it was not prejudicial, as “[defendant’s] federal firearms conviction is substantially similar to a Class G felony in North Carolina . . . [and if] remanded for resentencing, defendant’s sentence would not change.” *Id.* at 19.

Justice Riggs, joined by Justice Earls, concurred in (2), but dissented from (1), and would have held “that the indictments are only sufficient to support one count of human trafficking per victim within the dates provided in the indictment.” *Id.* at 23.

Trial court properly assessed credibility of witnesses in 1999 trial and weighed mitigating factors when conducting life without parole resentencing hearing.

[State v. McCord](#), COA23-915, ___ N.C. App. ___ (Sept. 17, 2024). In this Cleveland County case, defendant appealed the result of his resentencing hearing for life without parole and the denial of his constitutional challenges to his sentence. The Court of Appeals affirmed the trial court’s orders.

In 1999, defendant received a sentence of life without parole for a murder committed when he was 16 years old. Subsequently, the U.S. Supreme Court decided *Miller v. Alabama*, 567 U.S. 460 (2012), holding that mandatory life without parole sentences for defendants under age 18 were unconstitutional, and *Montgomery v. Louisiana*, 577 U.S. 190 (2016), holding that *Miller v. Alabama* was retroactive. The General Assembly adopted G.S. 15A-1340.19A, referred to by the court as “the *Miller* statute,” to require a resentencing hearing for every defendant convicted of first-degree murder committed while under 18 and with a sentence of life without parole. Slip Op. at 2. Defendant’s *Miller* resentencing hearing in 2020 gave rise to the current case.

The Court of Appeals considered three arguments from defendant. First, defendant argued that the resentencing judge erred when he “impermissibly assessed the credibility of witnesses who testified during the 1999 trial, where he was not the presiding judge at that trial.” *Id.* at 3. The court disagreed, pointing to the language of the *Miller* statute as well as general practice allowing substitution of new judges during criminal trials. The court concluded “the judge thoroughly reviewed the record and could appropriately assess the credibility of the two co-defendants who testified against Defendant at the 1999 trial.” *Id.* at 6.

Defendant next argued that the trial court improperly weighed several mitigating factors: “(1) age, (2) immaturity, (3) reduced ability to appreciate risks and consequences, (4)

family and peer pressure exerted upon the defendant, and (5) the defendant’s likelihood to benefit from rehabilitation.” *Id.* at 7. The court walked through the analysis for each factor, concluding the trial court did not abuse its discretion when considering the mitigating factors.

Finally, the court reached defendant’s constitutional arguments that (1) the Miller statute was unconstitutional as it contained a presumption in favor of life without parole and lacks guidance for resentencing, and (2) that life without parole sentences for juvenile offenders is unconstitutional under the Eighth Amendment and North Carolina constitution. The court rejected both arguments, noting for (1) that *State v. James*, 371 N.C. 77 (2018), upheld the constitutionality of the Miller statute, and for (2) that *State v. Conner*, 381 N.C. 643 (2022), and *State v. Kelliher*, 381 N.C. 558 (2022), upheld the constitutionality of life without parole sentences. Slip Op. at 10.

Evidence supported defendant’s intent to permanently deprive even though she reimbursed her employer for missing funds after being arrested; defendant’s record level was properly calculated because General Assembly reclassified offense as felony in the same year as the plea.

[State v. Evans](#), COA23-1160, ___ N.C. App. ___ (Sept. 17, 2024). In this Johnston County case, defendant appealed her convictions for three counts of larceny by an employee, arguing error in denying her motion to dismiss for insufficient evidence and calculating her prior record level. The Court of Appeals found no error.

From May 13 -15, 2021, defendant was responsible for making cash deposits from her Dollar General store to the bank. In the store’s deposit log, defendant recorded that deposits were made on each day; she quit her job at the store on May 17. An audit later determined that defendant never made the deposits and stole over \$11,000 from the store. A loss prevention officer tried to contact defendant, but could not reach her, and the matter was reported to the local sheriff’s office. Defendant was finally located and served with arrest warrants in September of 2021. After being served with arrest warrants, defendant made deposits into the Dollar General bank account in March and April of 2022, totaling the missing amount. When the matter came for trial, defendant testified that she left the deposit bags containing the missing amount in her car, and assumed her daughter had made the necessary deposits. When asked where she obtained the money to make the deposits in 2022, defendant said that she scraped together the money from working jobs and borrowing from family members, admitting that it was not the same money that had been taken from the store.

The Court of Appeals explained the evidence supported a conclusion that defendant intended to take and deprive Dollar General of the money because defendant “quit her job the day after she falsely indicated that she had deposited Dollar General’s money into its bank account and left town.” Slip Op. at 7. The court rejected defendant’s argument that

she did not have an intent to permanently deprive Dollar General of the funds, noting that defendant reimbursed the missing funds only after being arrested for larceny.

Moving to the record level calculation, the court noted that defendant pleaded guilty to misdemeanor possession of methamphetamine in 1999, but the same year the General Assembly reclassified the possession of any amount of methamphetamine as a felony. As a result, defendant's plea agreement to the apparent misdemeanor was properly classified as a felony under G.S. 15A-1340.14(c), adding two points to her prior record level. The court explained that this did not breach defendant's plea agreement, as "[s]he 'bargained' for a conviction to a lesser degree of possession of methamphetamine, dismissal of the possession of drug paraphernalia charge, and a sentence in accordance with that agreement." *Id.* at 10.

Search of defendant's vehicle was supported by probable cause based on officer's observation from outside vehicle; trial court improperly revoked defendant's probation without finding of good cause.

[State v. Siler](#), COA 23-474, ___ N.C. App. ___ (Aug. 6, 2024). In this Chatham County case, defendant appealed after pleading guilty to trafficking in opium or heroin by possession with a plea agreement to preserve his right to appeal the denial of his motion to suppress. The Court of Appeals affirmed the judgment on the guilty plea, but vacated the judgment that revoked defendant's probation, and remanded to the trial court for reconsideration.

In July of 2021, defendant was sitting in the passenger seat of a car parked at a gas station when a law enforcement officer pulled up next to him. The officer was in uniform and in a marked car; while the officer pumped gas into his vehicle, he observed defendant move an orange pill bottle from the center console to under his seat. Defendant then exited the vehicle, and the officer questioned him about the pill bottle. Defendant denied having any pills, but after further questioning, produced a different pill bottle, and told the officer the pills were Vicodin he received from a friend. The officer then searched the vehicle, finding the orange pill bottle, and lab testing later confirmed the pills were opioids. Unbeknownst to the officer, defendant was on probation during the encounter. The trial court revoked this probation after defendant's guilty plea, even though defendant's probationary period had expired, but the trial court did not make any findings of good cause.

Taking up the motion to suppress, the Court of Appeals first noted that the case presented an issue of first impression: "Is a search based on a standard less than probable cause (as authorized by the terms and conditions of probation) valid, where the officer performing the search is not aware that the target of his search is on probation?" Slip Op. at 3. However, the court declined to answer this question. Instead, the court concluded that "the evidence of the encounter up to just prior to the search of the vehicle was sufficient to give the officer probable cause to search the vehicle." *Id.* at 8. Because defendant only pleaded guilty to the charge related to the orange pill bottle in the vehicle, the court

avoided exploring the issues related to the Vicodin inside the *other* pill bottle that defendant offered after questioning.

The court then considered the revocation of defendant's probation, noting that the State conceded the trial court's error in not making a "good cause" finding. The court noted that "there was sufficient evidence before the trial court from which that court *could* make the required finding" and remanded for reconsideration. *Id.* at 10.

Trial court made insufficient findings to support recommendation to parole commission that defendant should not be granted parole under G.S. 15A-1380.5.

[State v. Dawson](#), COA 23-801, ___ N.C. App. ___ (Aug. 6, 2024), *temporary stay allowed*, ___ N.C. ___, 904 S.E.2d 809 (Aug. 27, 2024). In this Craven County case, defendant appealed the trial court's recommendation to the parole commission that he should not be granted parole and his judgment should not be altered or commuted. The Court of Appeals vacated the trial court's recommendation and remanded for further proceedings.

Defendant's appeal arose from the former G.S. 15A-1380.5, which was repealed in 1998. That section permitted a defendant sentenced to life without parole to petition for review of their sentence after 25 years served. The Court of Appeals first established that defendant had a right to appeal the trial court's recommendation to the parole commission under the language of the former statute, concluding it was a "final judgment" and defendant had a right to review for "abuse of discretion." Slip Op. at 6. The court then moved to the findings, and lack thereof, in the trial court's order, holding "the findings in the Order are insufficient for us to conduct a meaningful review of the trial court's reasoning." *Id.* at 8. The court vacated the order, remanding so the trial court could either make additional findings or reconsider its recommendation.

Trial court improperly required SBM for low risk range; probation and post-release supervision must run concurrently.

[State v. Barton](#), COA23-1148, ___ N.C. App. ___ (Aug. 6, 2024). In this Brunswick County case, defendant appealed after entering guilty pleas to four counts of second-degree exploitation of a minor. Defendant argued error in (1) requiring him to register for satellite-based monitoring (SBM) when he was in the low-risk range, and (2) sentencing him to probation after his post-release supervision was completed. The Court of Appeals agreed, vacating the SBM order without remand, and vacating the probation judgment and remanding to the trial court for further proceedings.

Defendant entered his guilty pleas in May 2023. The trial court entered four judgments; in the first, defendant was sentenced to 25 to 90 months of imprisonment, followed by the mandatory five years of post-release supervision for a reportable conviction under G.S. 14-

208.6. The trial court suspended the active sentences of the other three judgments and imposed 60 months of probation to run consecutively with the first judgment. The trial court specified that “probation is not going to begin to run until the conclusion of his post-release supervision.” Slip Op. at 2. The trial court then conducted an SBM hearing where evidence of defendant’s STATIC-99R score of “1” was admitted, classifying him as “low risk range” for recidivism. *Id.* at 3. Despite the low risk score and the lack of additional evidence from the State, the trial court ordered five years of SBM, with no additional findings justifying the order. The Court of Appeals granted defendant’s petitions for writ of certiorari to consider both issues.

Considering (1), the court explained it was error under *State v. Jones*, 234 N.C. App. 239 (2014), to impose SBM on a low risk defendant without additional findings. Here the State admitted no evidence and the trial court made no findings justifying the imposition of SBM. The court held this was error, and following the *Jones* precedent, reversed the imposition of SBM without remand.

Moving to (2), the court noted that the structure of G.S. 15A-1346 could permit two different interpretations, as this section does not specifically address whether probation should run concurrently with post-release supervision. The section provides that probation must run concurrently with “probation, parole, or imprisonment,” but does not reference post-release supervision, and no previous case had determined “imprisonment” included post-release supervision. *Id.* at 10. This led the court to conclude that “the General Assembly has not clearly stated whether probation can run consecutively with post-release supervision.” *Id.* at 12. The court applied the rule of lenity and determined that defendant’s “probation must run concurrently with his post-release supervision.” *Id.* This necessitated vacating and remanding to the trial court for a new plea agreement or a trial on the matter.

Sex Offenders

Petitioner properly filed to terminate sex offender registration in North Carolina county where he resided before moving to Florida.

[*In re Goldberg*](#), COA 23-1015, ___ N.C. App. ___ (Sept. 17, 2024). In this Mecklenburg County case, petitioner appealed the dismissal of his petition to terminate his sex offender registration for improper venue. The Court of Appeals agreed, reversing and remanding to the trial court for consideration of the petition.

In 2003, petitioner was convicted of possession of child pornography in South Carolina, where he initially registered as a sex offender. In 2005, he moved to Mecklenburg County and registered as a sex offender in North Carolina. He subsequently moved to Florida, but in November of 2022, he successfully petitioned for removal from the South Carolina sex offender registry. In June of 2022, he filed his petition in Mecklenburg County, as this was

the place he last resided in North Carolina. At the hearing, the State argued the trial court did not have jurisdiction under G.S. 14-208.12A as the statute requires a petitioner to file “in the district where the person resides” and petitioner resided in Florida. Slip Op. at 2. The trial court concluded that the venue was improper and dismissed the petition.

The Court of Appeals first turned to the text of the statute, noting that G.S. 14-208.12A “expressly assigns the proper district for filing a petition for (1) those with in-state convictions (the district of conviction) and (2) those with out-of-state convictions who reside in North Carolina (their district of residence).” *Id.* at 4. The court disagreed with the State’s contention that “filing the Petition in Mecklenburg was improper because there is no district in which it can be properly filed.” *Id.* at 6. Because the statute does not provide an alternative procedure for registered offenders who move out of state, “for purposes of the North Carolina Sex Offender Registry, Petitioner’s residency in North Carolina remains in Mecklenburg County.” *Id.* at 8. This led the court to conclude venue in Mecklenburg County was proper and the trial court erred by dismissing the petition.

Verdict

Substitution of juror after deliberations began as provided in G.S. 15A-1215(a) was a violation of defendant’s constitutional rights under *State v. Chambers*, justifying new trial.

[State v. Watlington](#), COA22-972, ___ N.C. App. ___ (June 18, 2024) *temporary stay allowed*, ___ N.C. ___, 901 S.E.2d 814 (June 28, 2024). In this Alamance County case, defendant appealed his convictions for assault by pointing a gun and discharging a weapon into an occupied vehicle, challenging the juror substitution provision G.S. 15A-1215(a) as unconstitutional. The Court of Appeals agreed, vacating defendant’s convictions and remanding for a new trial.

In November of 2017, defendant was involved in a dispute after a near-collision with another driver. After exchanging words, defendant and his passenger pulled out guns, and eventually shots were fired at the other vehicle. Defendant came to trial in April of 2022. After the presentation of all evidence and when the jury had begun deliberations, one of the jurors went missing due to a foot injury. After learning the juror suffered an injury that required a trip to the emergency room, the trial court spoke to defense counsel and the prosecutor, and then appointed an alternate juror. The trial court followed the procedures required by G.S. 15A-1215(a), including an instruction to begin deliberations anew. Defendant was subsequently convicted.

Taking up defendant’s argument, the Court of Appeals explained that precedent from [State v. Chambers](#), COA22-1063, ___ N.C. App. ___ (Feb. 20, 2024), controlled, and justified finding the substitution of a juror in this case as unconstitutional. The opinion of the court spent substantial time exploring the relevant caselaw, and pointing out the issues created

by the *Chambers* holding, noting that “[t]he *Chambers* Court did not explain how or why a verdict delivered in open court by a properly constituted and instructed jury of twelve in compliance with [G.S.] 15A-1215(a) violates article I, Section 24 of the North Carolina Constitution.” Slip Op. at 10. After acknowledging that the *Chambers* case was subject to a stay and may be taken up by the North Carolina Supreme Court, the court concluded it was bound by the *Chambers* precedent to grant defendant a new trial.

Judge Arrowwood concurred only in the result by separate opinion, and wrote to express concern with the *Chambers* case itself and the possible violations of precedent in that case.

Judge Griffin concurred but wrote separately to disagree with the lead opinion’s tone and interpretation of the *Chambers* opinion.

Evidence

Crawford Issues & Confrontation Clause

When an expert witness conveys a non-testifying analyst’s statements in support of the expert’s opinion, and the statements provide that support only if true, the statements are offered for the truth of the matter asserted and thus are hearsay implicating the Confrontation Clause.

[Smith v. Arizona](#), 602 U.S. ___ (2024). Mr. Smith was charged and tried for various drug offenses in Arizona state court. Suspected drugs seized from Smith’s property were sent to a state-run crime lab for testing. Analyst Rast performed the testing, producing notes and a final report on the identity of the substances. She concluded that the items tested were illegal controlled substances. For reasons not apparent from the record, Rast was not available to testify at trial, and state prosecutors called a substitute analyst, Longoni, to provide his independent expert opinion about the drugs. Longoni was not involved in the testing procedures performed by Rast, but he used Rast’s report and notes as the basis of his opinion at Smith’s trial. On appeal, the defendant argued that the use of a substitute analyst to present the conclusions of another, non-testifying analyst violated his rights under the Confrontation Clause of the Sixth Amendment to the U.S. Constitution. The Arizona Court of Appeals affirmed the convictions, relying on state precedent permitting a substitute analyst to testify to an independent opinion by using the report of a non-testifying witness as the basis of opinion. Smith then sought review at the U.S. Supreme Court. The Court unanimously vacated the lower court’s decision, with five justices joining the Court’s opinion in full.

The Confrontation Clause bars the admission of testimonial hearsay statements unless the witness is unavailable, and the defendant previously had a motive and opportunity to

cross-examine the witness (subject to certain narrow exceptions not relevant here). *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). Testimonial forensic reports are subject to this general rule. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 307 (2009). Arizona (like North Carolina) has permitted substitute analyst testimony under the theory that the use of a non-testifying expert's report is not hearsay (and therefore not subject to the Confrontation Clause) when the report is used as the basis for the testifying expert's opinion. According to the Court's opinion: "Today, we reject that view. When an expert conveys an absent analyst's statements in support of his opinion, and the statements provide that support only if true, then the statements come into evidence for their truth." *Smith* Slip op. at 1-2.

This question was argued but left open by a fractured plurality decision in *Williams v. Illinois*, 567 U.S. 50 (2012). There, five Justices rejected the "basis of opinion" logic, but there was no majority decision. The *Williams* opinion caused widespread confusion in lower courts about substitute analyst testimony and created a split of authority among jurisdictions. The *Smith* decision clarifies that the use of a non-testifying analyst's testimonial report is offered for the truth of the matter asserted when used by a substitute analyst as the basis of their opinion. Because such use of the testimonial forensic report of another is offered for its truth, it is hearsay and implicates the Confrontation Clause. In the words of the Court:

. . . [T]ruth is everything when it comes to the kind of basis testimony presented here. If an expert for the prosecution conveys an out-of-court statement in support of his opinion, and the statement supports that opinion only if true, then the statement has been offered for the truth of what it asserts. How could it be otherwise? The whole point of the prosecutor's eliciting such a statement is 'to establish—*because of the statement's truth*—a basis for the jury to credit the testifying expert's opinion. *Id.* at 14 (cleaned up) (emphasis in original).

Some courts have relied on Federal Rule of Evidence 703 or a comparable state evidentiary rule in support of the practice of substitute analyst testimony. Rule 703 permits an expert to offer an opinion based on facts and data that would not otherwise be admissible when the inadmissible information is used to form the basis of an opinion. According to the Court, Rule 703 did not control here. "[F]ederal constitutional rights are not typically defined—expanded or contracted—by reference to non-constitutional bodies of law like evidence rules." *Smith* Slip op. at 12. The prosecution cannot circumvent confrontation rights by labeling the out of court statement (here, the forensic report) as the basis of the testifying expert's opinion. The defendant must normally be afforded an opportunity to challenge the expert who performed the testing through cross-examination.

A substitute analyst may nonetheless be able to provide helpful testimony for the prosecution without violating the Confrontation Clause by offering evidence about typical

lab practices and procedures, chains of custody, lab accreditation, standards, or by answering hypothetical questions. This kind of testimony “allow[s] forensic expertise to inform a criminal case without violating the defendant’s right of confrontation.” *Id.* at 18. The substitute analyst’s testimony in *Smith* went far beyond those kinds of permissible uses. According to the Court:

Here, the State used Longoni to relay what Rast wrote down about how she identified the seized substances. Longoni thus effectively became Rast’s mouthpiece. He testified to the precautions (she said) she took, the standards (she said) she followed, the tests (she said) she performed, and the results (she said) she obtained. The State offered up that evidence so the jury would believe it—in other words, for its truth. *Id.* at 18-19.

To the extent these statements were testimonial, their admission violated the Confrontation Clause and constituted error. Whether the statements from the forensic report are testimonial, however, is a separate question from whether they were offered for their truth. Generally, statements are testimonial when they are primarily made in anticipation of and for use in a criminal trial. *Davis v. Washington*, 547 U.S. 813, 822 (2006). Here, Arizona never raised the issue of whether the statements from the forensic report were testimonial, seemingly presuming that they were. The Court declined to decide the issue, instead remanding the case back to the state appellate division for that determination.

The Court nonetheless opined about ways the state appellate court might consider that issue. First, the state appellate court should determine what exact statements of Rast were used by Longoni at the trial. The parties disputed whether Longoni used only Rast’s notes, her report, or a mixture of the two. “Resolving that dispute might, or might then again not, affect the court’s ultimate disposition of Smith’s Confrontation Clause claim. We note only that before the court can decide the primary purpose of the out-of-court statements, it needs to determine exactly what those statements were.” *Smith* Slip op. at 20-21. Further, when determining the primary purpose of the statements, the Court reminded the lower state court that not all lab records will be testimonial. “. . .[L]ab records may come into being primarily to comply with laboratory accreditation requirements or to facilitate internal review and quality control. Or some analysts’ notes may be written simply as reminders to self. In those cases, the record would not count as testimonial.” *Id.* at 21.

The Court therefore vacated Smith’s conviction and remanded the case for additional proceedings.

Justice Thomas wrote separately to concur in part. He agreed that the non-testifying expert’s report was being offered for the truth of the matter asserted when used as the basis of a testifying expert’s opinion, but disagreed with the Court’s directive to consider

the primary purpose of the challenged statement on remand when determining whether the statements were testimonial. In Justice Thomas's view, the testimonial nature of a statement turns on whether it was made under sufficiently formal circumstances, and not whether its primary purpose was in anticipation of a criminal prosecution.

Justice Gorsuch also wrote separately to concur in part. He too agreed with the Court's holding rejecting the logic of the "basis of opinion" theory by which Arizona and other states have justified substitute analyst testimony. He believed that the issue of whether the forensic report and notes were testimonial was not properly before the Court and declined to join that part of the opinion. He also expressed concerns about the primary purpose test used to determine whether a statement is testimonial.

Justice Alito, joined by Chief Justice Roberts, wrote separately to concur in judgment only. According to these Justices, Longoni's testimony crossed the line between permissible basis of opinion testimony and inadmissible hearsay, thus raising a confrontation problem. They would have resolved the case on that narrow ground, without reaching the wider constitutional question of the use of substitute analysts generally.

Cross-Examination, Impeachment, Corroboration & Related Issues

Cross-examination of witness regarding defendant's plea to felony possession of firearm served to impeach witness's credibility; evidence supported constructive possession of methamphetamine.

[State v. Jones](#), COA23-1062, ___ N.C. App. ___ (Aug. 6, 2024). In this Cleveland County case, defendant appealed his conviction for possession of a firearm by a felon, possession of a weapon of mass destruction, and possession of methamphetamine, arguing error in (1) allowing cross-examination on his previously-conceded felony conviction and (2) denying defendant's motion to dismiss for insufficient evidence. The Court of Appeals found no error.

Defendant's girlfriend reported to law enforcement in January of 2022 that defendant had guns in his house. After obtaining a search warrant, law enforcement found guns and methamphetamine in defendant's bedroom. At trial, defendant objected to the cross-examination of one of his witnesses, his mother, about defendant's prior conviction for possession of a firearm by a felon. Defendant had previously conceded that he was a felon, hoping to avoid having the jury hear he had a previous conviction for possession of a firearm by a felon. The trial court allowed the cross-examination and the State questioned defendant's mother about his prior guilty plea to possession of a firearm by a felon, which she was in the courtroom to witness.

Taking up (1), the Court of Appeals explained that the evidence that defendant had previously pleaded guilty to possessing a firearm was relevant to impeach his mother's credibility, as she had testified that she had never known him to possess a gun. Even though the evidence may have had some prejudicial effect, the court could not find abuse of discretion by the trial court in admitting the evidence here.

Moving to (2), defendant's argued lack of evidence that he constructively possessed the meth found in his bedroom, as others visited the trailer where he lived. The court disagreed, noting that he owned the trailer, that scales and other paraphernalia were found with the meth, and that a jailhouse phone call referenced "that the officers probably 'found something on that mirror.'" Slip Op.at 7.

(1) Statement by child describing her sister's sexual abuse was admissible under Rule 803(4); (2) testimony "corroborating" a statement by a witness who did not testify was improper but defendant waived objection; (3) reference to past behavior predicting future behavior was improper for Rule 404(b) evidence.

[State v. Anderson](#), COA23-821, ___ N.C. App. ___ (Aug. 6, 2024). In this Cleveland County case, defendant appealed his convictions for statutory sexual offense with a child and indecent liberties with a child, arguing error in (1) admitting testimony containing hearsay from a pediatrician, (2) admitting testimony containing hearsay to "corroborate" a minor victim's account of abuse, and (3) failing to intervene *ex mero motu* during the prosecutor's closing argument. The Court of Appeals found no error in (1), and no prejudicial error in (2)-(3).

Defendant came to trial on the charges in January of 2023, after an investigation by the Cleveland County Department of Social Services into allegations that defendant sexually abused his two daughters. During the trial, defendant's two daughters both testified about defendant's actions. Additionally, a pediatrician who examined the two girls testified about statements they made during medical examinations. Defendant's half-brother also testified, and explained that his step-sister had told him about sexual contact between defendant and the half-brother's daughter. The daughter also testified about those events at trial, and a signed statement from defendant that was given in 2009 was admitted into evidence. During closing argument, the prosecutor attempted to describe "404(b) evidence" to the jury, and included the following statement: "The best predictor of future behavior is past behavior." Slip Op. at 6.

Taking up (1), the Court of Appeals first noted the basis of the objection, as the pediatrician testified that the patient, one of defendant's daughters, told her that defendant had touched her sister in a no-no spot. The prosecution responded to defendant's objection by arguing that the statement could be admitted under Rule of Evidence 803(4), as a statement offered for medical diagnosis or treatment. Even though the statement referenced the patient's sister, the court held that it was still offered for medical diagnosis

or treatment. Here the pediatrician was conducting an exam that included “a patient’s mental health,” and the patient’s statement “concerned an eyewitness account of her sister’s sexual abuse, which undoubtedly affected [the patient’s] mental health.” *Id.* at 12.

Moving to (2), the court agreed with defendant that the trial court erred by admitting the hearsay statements, but held that defendant waived his objection. The testimony was framed as “corroborating” a witness’s former statement, but this witness did not testify at trial. Despite the error, the court held that defendant waived his objection because he did not object to other evidence that supported the out of court statements. Because the other evidence was “of a similar character,” including the written statement given by defendant himself, the court held that defendant waived his objection. *Id.* at 16.

Finally, the court considered (3), noting that the prosecutor’s statement was “the exact propensity purpose prohibited by [Rule of Evidence] 404(b).” *Id.* at 19. Although this statement was improper, the court did not see prejudice to the defendant, as there was ample evidence of guilt, and defendant did not rebut the presumption that the jury followed the trial court’s instructions.

Exclusion of handwritten note from alleged victim justified granting new trial.

[State v. Lail](#), COA23-845, ___ N.C. App. ___ (June 4, 2024). In this Catawba County case, defendant appealed his convictions for statutory rape, indecent liberties with a child, and incest with a child, arguing error in excluding a handwritten note that defendant attempted to introduce to attack the alleged victim’s credibility. The Court of Appeals majority agreed with defendant, ordering a new trial.

In April of 2020, the alleged victim ran away from home, eventually telling police that she left because she was angry at defendant for cancelling a sleepover with her friends. She alleged several incidents of sexual abuse by defendant, and a forensic examination found evidence of past sexual trauma. At trial, defendant attempted to attack the victim’s credibility by introducing a handwritten note that she snuck out of her bedroom window one night to meet her boyfriend. Defendant argued the note showed (1) lack of credibility and (2) a possible perpetrator of the assaults, the boyfriend. After voir dire about the note and an extended discussion with the parties, the trial court held the note was inadmissible, noting it was more prejudicial than probative.

Taking up the defendant’s argument, the Court of Appeals majority first established that defendant adequately preserved the objection to the trial court’s ruling, despite a confusing exchange between defense counsel and the trial court regarding the objection. The court then explained the abuse of discretion, holding that “[t]he trial court applied the wrong legal standard because: (1) it failed to engage in the requisite [Rule] 403 balancing; and (2) it failed to find that the Note’s probative value was substantially outweighed by the possibility of unfair prejudice.” Slip Op. at 12 (cleaned up). Because the credibility of the alleged victim was the primary issue at trial, impeachment of her was central to

defendant's case, and "[t]he contradictions within the Note and created by the Note are highly probative of Complainant's credibility." *Id.* at 13. As a result of the trial court's error, defendant was prejudiced and the court ordered a new trial.

Judge Tyson dissented, and would have applied the plain error standard to reviewing defendant's argument as it was not properly preserved; the judge also would have held that the Rule 403 conclusion excluding the note was not an abuse of discretion had it been preserved. The lengthy dissent also discusses Rule 412 and defendant's objections to certain expert testimony.

Hearsay

(1) Court of Appeals improperly reviewed evidence of robbery in isolation instead of as a whole when dismissing charge, (2) defendant could not show prejudice based on Rule 404(b) evidence of gang affiliation, (3) quick phone conversation represented excited utterance under Rule 803(2).

[State v. Davenport](#), 155PA22, ___ N.C. ___ (August 23, 2024). In this Martin County case, the Supreme Court reversed an unpublished Court of Appeals decision granting defendant a new trial for first-degree murder and finding that the robbery with a dangerous weapon charge should have been dismissed. The Court held that (1) the State admitted substantial evidence of every element of the robbery charge, (2) admitting Rule of Evidence 404(b) evidence related to defendant's gang affiliation and tattoos was not plain error, and (3) admitting a statement as an excited utterance under Rule of Evidence 803(2) was not error.

In 2015, defendant was released from prison and rekindled a relationship with the victim. Both men had a history of being in prison and had previously been in a relationship in the 1990s. In December of 2015, the two had an argument, which led to a physical altercation and threats of violence, including reference to defendant's gang affiliation. In January of 2016, the victim was found dead in his home from stab wounds, and the victim's cellphone and wallet with a large amount of cash were missing. Defendant was tried and convicted for robbery with a dangerous weapon and first-degree murder, but on appeal, the Court of Appeals issued a unanimous unpublished opinion holding the robbery conviction should be dismissed and granting a new trial for first-degree murder. The State appealed and the Supreme Court granted discretionary review.

Taking up (1), the Court explained that the Court of Appeals improperly "reviewed the evidence of robbery with a dangerous weapon 'in isolation,'" instead of reviewing the evidence as a whole. Slip Op. at 9. The Court then laid out the three elements of robbery with a dangerous weapon under G.S. 14-87(a), and looked to the record for support. Here, defendant had made an extrajudicial confession to a cellmate after his arrest, and the money and cellphone from the victim were never found, meaning the *corpus delicti* doctrine applied. The *corpus delicti* doctrine required the State to admit corroborating

evidence to support “the trustworthiness of the accused’s confession.” *Id.* at 12. The Court concluded that the confession, along with the independent testimony and evidence, represented substantial evidence that defendant committed the offense.

Moving to (2), the Court approached the issue of the Rule 404(b) evidence of defendant’s prior incarceration, gang affiliation, and tattoos by considering the second prong of the plain error standard, whether defendant could demonstrate prejudice by “showing that without the admission of the evidence in question, the jury probably would have reached a different result.” *Id.* at 19. The Court concluded defendant could not meet this standard, as additional evidence supported defendant as the perpetrator and connected him to the victim.

Finally in (3), the Court considered the admission of the victim’s statement “Dianne to the house” as an excited utterance under Rule 803(2). The victim made this statement on a quick phone call with his niece, and it was offered to prove defendant went to the victim’s house the night of the murder, with “Dianne” being a codeword for defendant. The Court outlined the applicable standard for an excited utterance, and determined that because “the statement [the victim] made followed a startling experience and was brief and quick, this statement qualifies as an excited utterance.” *Id.* at 21.

Letters from SunTrust Bank and Amazon given under penalty of perjury but not sworn before notary satisfied authentication requirement of Rule 803(6).

[State v. Hollis](#), COA 23-838, ___ N.C. App. ___ (Aug. 6, 2024). In this New Hanover case, defendant appealed her conviction for embezzlement of property received by virtue of office or employment, arguing error in admitting business records without an affidavit sworn before a notary public. The Court of Appeals disagreed, finding no error.

Defendant performed purchasing and billing for her employer and had access to the corporate credit card. Another employee discovered two first class tickets to the Bahamas reserved in defendant’s name and purchased with the company card. This led to the discovery of additional fraudulent purchases and expenses, totaling more than \$360,000. Defendant came to trial in October of 2022, where the State offered business records from SunTrust Bank and Amazon showing purchases by defendant. The records contained authentication certificates that indicated they were signed under penalty of perjury, but they were not notarized or otherwise confirmed by oath or affirmation. Defendant objected, but the trial court admitted the records.

Reviewing the appeal, the Court of Appeals noted that the version of Rule of Evidence 803(6) in place prior to March 1, 2024, allowed business records to be admitted with an affidavit, but neither document was sworn before a notary as traditionally expected of an affidavit. The court then parsed whether the certificates with the documents could qualify as an “affidavit” for purposes of the rule, explaining that “[t]he purpose of an oath before a notary is to impart to the affiant the importance of stating the truth, and explicit

acknowledgement of the penalty of perjury evinces a similar level of credibility.” Slip Op. at 12-13. Considering this, the court concluded that “[t]he letters from SunTrust and Amazon employees, made under penalty of perjury and communicating that the records were made in the course of a regularly conducted business activity . . . fulfill the purpose of authentication.” *Id.* at 15. The court found no reversible error in admitting the documents.

Limits on Relevancy

Rule 404(b) testimony about uncharged sexual assault offenses showed common plan or scheme and were not unduly prejudicial under Rule 403; possible variance in dates of offenses did not prejudice defendant.

[State v. Lopez](#), COA23-726, ___ N.C. App. ___ (Aug. 6, 2024). In this Rowan County case, defendant appealed his convictions for rape of a child and additional sexual offenses with two children, arguing error in (1) admitting evidence of prior sexual abuse that was not charged, and (2) denying his motion to dismiss because the State did not produce substantial evidence of the dates of his alleged offenses against one victim. The Court of Appeals found no error.

Defendant sporadically dated, and occasionally lived with, the mother of the two victims between 2007 and 2017. In September of 2019, one victim reported sexual abuse to her pediatrician. Subsequently, the other victim reported similar allegations of sexual abuse against defendant. During trial, the State elicited testimony from one victim about abuse that occurred in Cabarrus County in an earlier time period. The victim testified that she had blocked out the specific details of the individual acts, and they were not part of the charged offenses. The trial court found this evidence was admissible to show defendant’s plan, intent, or scheme and allowed the testimony before the jury.

Taking up (1), the Court of Appeals explained that defendant challenged the admission of the testimony as erroneous under Rule of Evidence 404(b) and highly prejudicial under Rule of Evidence 403. The court first concluded that “[b]ased on the similarity of the allegations and the temporal proximity” the testimony showed a common plan or scheme by defendant. Slip Op. at 10. Looking next to the Rule 403 analysis, the court did not see abuse of discretion, noting that the trial court weighed the evidence and limited the amount of testimony in front of the jury.

Reaching (2), the court explained that “[i]n cases involving sexual assaults of children, our Supreme Court has explicitly relaxed the temporal specificity requirements that the State must allege.” *Id.* at 13. Here, defendant did not prove prejudice by the possible variance in the dates, and beyond asserting “that his relationship with the girls’ mother was volatile and that he frequently left the home” defendant did not present an alibi that would have been affected by the dates. *Id.* at 14.

Prior Acts – 404(b) Evidence

Trial court properly admitted Rule 404(b) evidence related to past sexual abuse of another minor.

[State v. Nova](#), COA23-883, ___ N.C. App. ___ (Sept. 17, 2024). In this Gaston County case, defendant appealed his conviction for taking indecent liberties with a child, arguing error in admitting testimony under Rule of Evidence 404(b) that was dissimilar to the crime charged and unfairly prejudicial. The Court of Appeals found no error.

In 2014, defendant fondled a youth member of his church during a worship practice. The minor victim initially reported the abuse to a youth leader at the church, and then learned that defendant had abused another minor in the church. At that point, the victim reported defendant to law enforcement. Before trial, the State moved to introduce evidence of the other youth member abused by defendant under Rule 404(b). The trial court granted the motion, reasoning that the previous abuse was sufficiently similar to the current case and the temporal proximity was “not so remote that it would render the evidence inadmissible in the present case.” Slip Op. at 3.

Taking up defendant’s argument, the Court of Appeals first looked to *State v. Beckelheimer*, 366 N.C. 127 (2012), for the similarity and temporal requirements applicable to Rule 404(b) evidence. The court concluded that the evidence here met those standards, as the two victims were both young boys of similar in age at the time of the acts, and defendant met and formed his relationships with both through the church. When considering proximity, the court noted “[h]ere, the modus operandi of the crime being tried is not only strikingly similar to [the other victim’s] testimony, but also occurred only two years earlier.” Slip Op. at 11. Having determined the evidence was admissible under Rule 404(b), the court then moved to the Rule of Evidence 403 balancing test, determining that the trial court conducted a fair evaluation of the possible prejudice and provided a limiting instruction to “curtail[] the risk of unfair prejudice.” *Id.* at 13.

Relevancy – Rule 401

Defendant’s jailhouse phone calls, including his silence in response to accusations he was the perpetrator, were admissible and not prejudicial; failure to inform defendant that testifying officer was under investigation for embezzlement did not represent prejudicial prosecutorial misconduct.

[State v. Saddler](#), COA22-989, ___ N.C. App. ___ (June 18, 2024). In this Scotland County case, defendant appealed his conviction for second-degree murder, arguing error in admitting several jailhouse phone calls, and appealed the denial of his motion for appropriate relief (MAR) based on prosecutorial misconduct in withholding exculpatory

evidence. The Court of Appeals found no error with the conviction and denied defendant's MAR.

In October of 2017, a victim at a party in Laurinburg was shot from a car parked on the street. Eyewitness testimony put defendant in the car, and defendant was subsequently convicted of second-degree murder. After his conviction but prior to the current appeal, defendant filed an MAR arguing the prosecutor withheld evidence that a law enforcement officer who testified at defendant's trial was under investigation for embezzlement at the time of the trial. The Court of Appeals remanded the case to the trial court for a hearing on the MAR, and the trial court conducted a hearing and made findings on the MAR. Both matters form the basis of the current case.

Considering defendant's arguments regarding the jailhouse calls, the Court of Appeals explained that under Rule of Evidence 401, the calls were relevant because they showed defendant discussing the circumstances around the shooting and a possible motivation for defendant to kill the victim. The court also pointed out that "[defendant's] silence when told by the female caller that others in the neighborhood were saying that he fired the fatal shot is some evidence of guilt." Slip Op. at 4-5. Applying Rule of Evidence 403, the court did not see the calls as unfairly prejudicial, especially in light of the limiting instruction given by the trial court regarding hearsay statements in the calls. The court also dispensed with defendant's constitutional arguments as his "silence was not in response to questions by State actors" and the jury was free to make reasonable inferences from defendant's statements and silence. *Id.* at 7.

Moving to the MAR, the court explained that while a former district attorney in the office was aware of the investigation into the officer, those working on defendant's case were not aware until after the trial. Although the court acknowledged U.S. Supreme Court precedent that knowledge from the former district attorney was likely imputed to those working the case, the court did not find any prejudicial effect from the failure to disclose the investigation. To support this conclusion the court pointed out the abundance of evidence supporting defendant's guilt outside of the officer's testimony, such as the jailhouse calls and eyewitness testimony. This led the court to deny defendant's MAR.

Arrest, Search, and Investigation

Exigent Circumstances

Defendant’s admission of sexual contact with a minor was voluntarily given; seizure of cellphones was justified by consent search and exigent circumstances exceptions to warrant requirement.

[State v. Duran-Rivas](#), COA23-743, ___ N.C. App. ___ (July 2, 2024). In this New Hanover County case, defendant appealed his convictions for statutory rape of a child by an adult, statutory sexual offense with a child by an adult, taking an indecent liberty with a child, first-degree sexual exploitation of a minor, and third-degree sexual exploitation of a minor, arguing error in denying his motion to suppress statements and cellphone evidence obtained by sheriff’s deputies during an interview. The Court of Appeals found no error.

Defendant was pulled over in May of 2018 for speeding, and the officer recognized defendant’s vehicle from a BOLO issued regarding allegations of child sexual abuse. Defendant spoke primarily Spanish, and the officers used a translation app to assist communication. After the traffic stop, a detective from the sheriff’s office asked defendant to participate in a voluntary interview; defendant agreed and drove himself to the New Hanover County Sheriff’s Office. Defendant initially answered questions from detectives, one of whom spoke and understood Spanish. Defendant admitted he had touched the victim in a sexual manner. The detectives then informed defendant of his *Miranda* rights, providing a written copy in Spanish and obtaining a Spanish translator to inform him of his rights, and he chose to continue with the interview without an attorney, answering questions and eventually writing a letter apologizing to the victim. The cellphone in defendant’s possession was seized, along with another cellphone that defendant’s ex-wife had provided to the sheriff’s office, and after the detective obtained a search warrant for the phones he discovered videos showing an adult male sexually penetrating a female child. Prior to trial, defendant filed a motion to suppress the results of the interview and search of his phones, and the motion was denied. Subsequently the jury found defendant guilty of all charges.

Considering defendant’s arguments, the Court of Appeals first considered whether defendant’s statements were given voluntarily, noting that defendant was informed multiple times that the interview was voluntary, that he was free to leave, and that defendant was not kept in a locked room or handcuffed. The court held that “Defendant was not in custody when he first voluntarily admitted he had inappropriately touched the victim[, and his] subsequent oral and written statements providing further details regarding Defendant’s actions were made *after* the proper administration of *Miranda* warnings and without a request for counsel.” Slip Op. at 12.

The court then moved to the cellphone seizure, explaining that the “consent searches” exception applied to the phone defendant’s ex-wife gave to deputies, as she had common

control over the phone because defendant gave it to their son to use for watching videos. *Id.* at 13. The seizure of the phone in defendant’s possession was likewise justified by the “exigent circumstances” of preventing defendant from destroying evidence, as defendant had permitted a detective to look through his phone until he reached the deleted files section, when defendant tried to pull the phone away from the detective. *Id.* at 15. This suggested defendant was attempting to conceal and permanently delete relevant evidence, justifying the warrantless seizure of the second phone.

Identification of Defendant

Indictment contained essential elements of G.S. 14-120 and was facially valid; out-of-court photographic identification did not violate EIRA because it was not intended to identify defendant as the perpetrator.

[State v. Simpson](#), COA23-618, ___ N.C. App. ___ (Aug. 20, 2024). In this New Hanover County case, defendant appealed her convictions for felony forgery of endorsement and felony uttering a forged endorsement, arguing error in (1) denying her motion to dismiss the uttering a forged instrument charge due to a flawed indictment, and (2) admitting an out-of-court identification based on a photograph in violation of the Eyewitness Identification Reform Act (EIRA), or in the alternative, (3) ineffective assistance of counsel. The Court of Appeals found no error and no ineffective assistance of counsel, but remanded to correct the judgment’s clerical error of a guilty verdict as opposed to a guilty plea.

On February 7, 2019, defendant was assigned as a home care assistant for the victim’s husband, who had dementia. On that day, the victim went out to run errands while defendant was at home with her husband. The following day, the victim noted two checks were missing, and reported this to defendant’s employer, as well as to her bank. In August of 2019, the victim received a notice regarding one of the checks she had reported stolen; Wilmington police later determined the check was made out to one of defendant’s aliases.

Beginning with (1), the Court explained that defendant’s argument was “that the indictment fails to allege the facts and elements of the crime of felony uttering a forged endorsement with sufficient precision, leaving her without notice of the offense being charged and unable to prepare a defense.” Slip Op. at 6. This was a nonjurisdictional defect under recent North Carolina Supreme Court precedent, so defendant had to show a statutory or constitutional defect that prejudiced her defense to prevail. The court did not see any such statutory or constitutional issue after examining the elements of the offense and the indictment, concluding “Count III of the indictment is facially valid, having sufficiently alleged each essential element of [G.S.] 14-120.” *Id.* at 8.

Moving to (2), the court first explained that “the EIRA bans photographic show-ups; however, not all out-of-court identifications are show-ups as defined in and subject to the EIRA.” *Id.* at 9 (cleaned up). Here, the victim identified defendant in an out-of-court

photograph, but this identification was after the victim had already identified defendant as a possible perpetrator to the police. Since the identification was not intended to identify defendant as the perpetrator, “the EIRA [was] inapplicable here.” *Id.* at 13. The court also determined that the identification did not violate defendant’s due process rights, declining to invoke Rule of Appellate Procedure 2 to consider her argument.

Because the court did not establish any error in (2), the court likewise found no ineffective assistance of counsel for (3). Even though defense counsel failed to move to suppress the out-of-court identification on EIRA and due process grounds (although counsel did object to testimony on EIRA grounds), based on the analysis above, these arguments lacked merit.

(1) Defendant’s requested special instruction was not submitted in writing and was not proper application of the law; (2) allowing witness to testify to his pretrial identification of defendant at bond hearing was error, but not prejudicial error; (3) prosecutor’s statements during closing argument regarding photographs not in evidence was not grossly improper and did not justify trial court intervention.

[State v. Young](#), COA23-608, ___ N.C. App. ___ (June 18, 2024). In this Mecklenburg County case, defendant appealed his conviction for possession of a firearm by a felon, arguing error in (1) denying his request for a special instruction, (2) allowing a witness to testify regarding pretrial identification of defendant, and (3) failing to intervene *ex mero motu* during the prosecutor’s closing argument. The Court of Appeals found no prejudicial error.

In February of 2020, a man was sitting in his apartment when he heard a loud noise and saw an intruder with a shotgun standing in his doorway. The intruder asked for money and jewelry, and the man complied. At that point, a struggle ensued, and the man was shot in the stomach while escaping with the shotgun. After an investigation, police arrested defendant as the likely intruder. During defendant’s bond hearing, the man was present, and approached the prosecutor to say he recognized defendant based on his appearance. The man gave a statement to the prosecutor confirming defendant was the intruder at his home that night. Defendant eventually came for trial on charges of robbery, burglary, assault, and possession of a firearm by a felon. The jury convicted defendant of possession of a firearm by a felon but acquitted him of the other charges.

Taking up (1), the Court of Appeals explained that defendant’s requested instruction focused on the palm print from the shotgun. Defendant argued that the jury should be instructed that it could only consider “evidence about fingerprints” if the jury determined the fingerprints were found in the place the crime was committed and put there when the crime occurred. Slip Op. at 9. The court pointed out that defense counsel did not submit the requested instruction in writing as required by N.C. Rule of Civil Procedure 51(b). The court went on to conclude that even if the special instruction was properly submitted, it “was not a proper application of the law to the facts of this case,” as the instruction was not clearly targeted at the possession of a firearm charge and the nature of that offense did

not require the jury to find that defendant possessed the firearm at the time of the other alleged offenses related to the home invasion. *Id.* at 18.

Moving to (2), the court noted the substance of defendant's argument dealt with the witness's testimony that he identified defendant prior to the trial. Here, the court pointed out the required analysis under *State v. Harris*, 308 N.C. 159 (1983), regarding impermissibly suggestive pretrial identification procedures. The trial court identified several factors suggesting the information, specifically the name, provided by law enforcement to the witness set up a procedure improperly suggesting defendant was the perpetrator. Despite determining the pretrial identification procedure contained elements that were impermissibly suggestive, the trial court subsequently allowed the witness to testify. The court determined this was error, explaining that "the trial court's factual findings did not support its conclusion of law that [the witness's] testimony regarding pretrial identification was admissible." *Id.* at 33. Despite the trial court's attempts to separate the concept of an in-court identification from the pretrial identification, the court concluded "we are constrained to hold the trial court erred in prohibiting an in-court identification but thereafter allowing testimony about the pretrial identification." *Id.* at 34. However, the court determined that this error was harmless beyond a reasonable doubt due to the evidence in the record, such as the palm print on the shotgun and other supporting circumstantial evidence.

Finally, in (3) the court rejected defendant's argument that the trial court should have intervened in closing argument when the prosecutor mentioned photographs of defendant holding a firearm that the trial court had previously prevented the jury from viewing. The court noted that defense counsel did not object during the closing argument, and a detective had previously testified about the existence of the photographs, even though the trial court had ruled against admitting them due to their potential prejudicial effect. As a result, the court did not see grossly improper statements that would justify the trial court's *ex mero motu* intervention.

Arrest, Search, and Investigation

Plain Smell

Odor and appearance of marijuana provided probable cause to search defendant's vehicle despite the legalization of hemp.

[State v. Little](#), COA23-410, ___ N.C. App. ___ (Sept. 3, 2024). In this Hoke County case, defendant appealed the denial of his motion to suppress the evidence seized after a traffic stop, arguing the odor and appearance of marijuana did not support probable cause to search his vehicle. The Court of Appeals disagreed, affirming the denial.

In May of 2020, a Hoke County deputy sheriff stopped defendant after seeing defendant's truck cross the centerline of the road at least three times. When the deputy approached defendant's window, he smelled marijuana and saw marijuana residue on the passenger side floorboard. When asked about the marijuana, defendant said it was from his cousin, but did not claim that it was legal hemp. Officers from the sheriff's office searched the vehicle and found a firearm, bullets, sandwich bags, and \$10,000 in cash. Defendant was subsequently indicted for possession of a stolen firearm, possession of a firearm by a felon, and carrying a concealed firearm. Defendant filed a motion to suppress, arguing "the odor or appearance of marijuana, standing alone, after the legalization of hemp was insufficient to establish probable cause." Slip Op. at 3. The trial court denied the motion and defendant pleaded guilty to the charges, reserving his right to appeal the denial.

The Court of Appeals first noted defendant's argument leaned heavily on the State Bureau of Investigation (SBI) memo considering the Industrial Hemp Act and the "impossibility" of distinguishing legal hemp from illegal marijuana by sight or smell. *Id.* at 5. The court then gave a brief overview of the Industrial Hemp Act and the SBI memo. Defendant argued that the Court of Appeals considered the SBI memo in *State v. Parker*, 277 N.C. App. 531 (2021), and *State v. Teague*, 286 N.C. App. 160 (2022), but the court noted that "neither *Parker* nor *Teague* accorded the Memo the status of binding law." Slip Op. at 11.

To establish applicable probable cause requirements for a search of defendant's vehicle, the court looked to the Fourth Amendment and the plain view doctrine, noting the requirement that it be "immediately apparent" a substance was contraband to justify a search. *Id.* at 13. Applicable precedent provides that the plain view doctrine also includes the plain smell of marijuana, and the N.C. Supreme Court held (prior to the Industrial Hemp Act) that "the smell of marijuana gives officers the probable cause to search an automobile." *Id.* at 14. The court took pains to explain the requirement that contraband be "immediately apparent" under the plain view doctrine, looking to *Texas v. Brown*, 460 U.S. 730 (1983), for the concept that it was "no different than in other cases dealing with probable cause," despite the phrase's implication of a higher degree of certainty. Slip Op. at 15.

Having established the applicable law, the court moved to the facts of defendant's appeal, noting again that defendant did not claim the substance in his vehicle was legal hemp or that he was transporting or producing hemp. The court likened the situation to prescription medication, where "[i]t is legal for a person to possess certain controlled substances with a valid prescription . . . [but a] law enforcement officer may have probable cause to seize a bottle of pills in plain view if he reasonably believes the pills to be contraband or illegally possessed." *Id.* at 19. Emphasizing that the issue at hand was not proving beyond a reasonable doubt that the substance was illegal marijuana, the court focused instead on "whether the officer, based upon his training and experience, had reasonable basis to believe there was a 'practical, nontechnical' probability that incriminating evidence would be found in the vehicle." *Id.* at 21 (cleaned up). The court then summarized its reasoning:

Even if industrial hemp and marijuana look and smell the same, the change in the legal status of industrial hemp does not substantially change the law on the plain view or plain smell doctrine as to marijuana. The issue is not whether the substance was marijuana or even whether the officer had a high degree of certainty that it was marijuana, but “whether the discovery under the circumstances would warrant a man of reasonable caution in believing that an offense has been committed or is in the process of being committed, and that the object is incriminating to the accused.” In addition, even if the substance was hemp, the officer could still have probable cause based upon a reasonable belief that the hemp was illegally produced or possessed by Defendant without a license Either way, the odor and sight of what the officers reasonably believed to be marijuana gave them probable cause for the search. Probable cause did not require their belief that the substance was illegal marijuana be “correct or more likely true than false. A ‘practical, nontechnical’ probability that incriminating evidence is involved is all that is required.”

Id. at 21-22 (cleaned up). This conclusion led the court to affirm the denial of defendant’s motion to suppress.

Searches

Substitution of alternate juror during deliberations justified new trial; use of post-release supervision GPS ankle monitor data by police department was not illegal search.

[State v. Thomas](#), COA23-210, ___ N.C. App. ___ (Sept. 3, 2024), *temporary stay allowed*, ___ N.C. ___, 2024 WL 4261804 (Sept. 23, 2024).. In this Wake County case, defendant appealed his convictions for second-degree murder and assault with a deadly weapon, arguing (1) the substitution of an alternate juror after deliberation began justified granting him a new trial, and (2) error in denying his motion to suppress the results of GPS tracking from his ankle monitor. The Court of Appeals granted a new trial due to the substitution in (1) but affirmed the order denying the motion for (2).

In November of 2019, surveillance footage caught a red car at a convenience store where a shooting occurred. An informant linked defendant to being an occupant of the car, and police determined that defendant was under post-release supervision (PRS) and wearing a GPS ankle monitor. A Raleigh police officer accessed the location history of defendant’s monitor, and found results tying him to the scene of the shooting. Defendant was subsequently indicted for the shooting and came to trial in December of 2021. During jury selection, one of the jurors informed the court that he had a scheduled vacation but could serve if the trial concluded before that date. The juror was seated, but due to the trial schedule, the jury was still in deliberations when his scheduled vacation arrived. Neither

the State nor defendant objected when the trial court released the juror and replaced him with an alternate. The jury subsequently returned a verdict of guilty.

Taking up (1), the Court of Appeals pointed to [State v. Chambers](#), 898 S.E.2d 86 (N.C. App. 2024), as controlling precedent. Under *Chambers*, any substitution of a juror after deliberation violated defendant’s constitutional right to a unanimous verdict. The court noted “[a]lthough the Supreme Court of North Carolina has granted discretionary review of *Chambers*, this Court remains bound by *Chambers* and we are therefore required to grant Defendant’s request for a new trial based upon the juror substitution.” Slip Op. at 8.

Because the issue would arise again in the new trial, the court next considered (2). Defendant argued “the State exceeded the scope of the search allowed by [G.S.] 15A-1368.4 because the law enforcement officer who accessed the data from his ankle monitor was not his supervising officer under his PRS.” *Id.* at 9. The court first established defendant was subject to PRS and outlined the statutory basis under G.S. 15A-1368.4 for his ankle monitor. In particular, the court noted “subsection (e)(13) does not limit the access to electronic monitoring data to the supervisee’s post-release supervision officer or any particular law enforcement agency[. . .] a supervisee can be required to ‘remain in one or more specified places’ at specific times and to ‘wear a device that permits the defendant’s compliance with the condition to be monitored electronically[.]’” *Id.* at 18. The limitations for warrantless searches of a PRS supervisee’s person and vehicle are different than those imposed on electronic monitoring, and the court concluded that “under these circumstances, [the police officer’s] accessing the ankle monitor data was not a ‘search’ as defined by law.” *Id.* at 20-21. The court also clarified that “[a]s a supervisee under PRS under [G.S.] 15A-1368.4, Defendant had a lower expectation of privacy than the offenders subject to lifetime SBM under the [*State v. Grady*, 259 N.C. App. 664 (2018)] caselaw.” *Id.* at 23.

Record established probable cause for search warrant unconnected to officer’s possible illegal search of the curtilage.

[State v. Corrothers](#), COA23-865, ___ N.C. App. ___ (Aug. 6, 2024). In this Columbus County case, defendant appealed his convictions for first-degree murder and robbery with a dangerous weapon, arguing (1) plain error in admitting tainted evidence obtained after an improper search, (2) ineffective assistance of counsel when his attorney failed to file motions to suppress the tainted evidence, and (3) error in denying motions to dismiss and set aside the verdict. The Court of Appeals dismissed (1) as unpreserved and found no ineffective assistance of counsel or error in (2)-(3).

In January of 2020, the victim was reported missing after going to defendant’s home for an apparent drug deal. Law enforcement checked cellphone records and determined that defendant’s home was the last active location of the victim’s phone. A detective went to defendant’s residence, but no one answered his knock at the door. The detective walked

around the home, and in the rear of the house observed a hole in the ground. After obtaining several search warrants, the victim's body was found in the hole. When defendant came to trial, defendant did not object to the admission of evidence obtained from the search warrants.

Taking up (1), the Court of Appeals explained that under *State v. Miller*, 371 N.C. 266 (2018), defendant had waived his arguments against the evidence obtained after the detective walked around his home and observed the hole because he failed to file a motion to suppress. However, defendant also argued in (2) that his counsel's failure to file a motion to suppress represented ineffective assistance of counsel. Here, defendant argued the detective went beyond the normal area open to the public for a knock-and-talk when he walked onto the curtilage of the house and into the back yard. The court declined to consider whether this was an unlawful search, holding the record established that the observation of the hole/possible unlawful search was not the source of the information supporting the search warrant. The court explained "the cold record establishes that [the detective's] observation of the hole during his walk about the Property . . . did not prompt the warrant applications when viewed in light of the totality of the circumstances, which supported the trial court's determinations of probable cause." Slip Op. at 10. Because the search warrant applications were supported by evidence unconnected to the detective's visit, defendant could not demonstrate ineffective assistance of counsel.

Moving to (3), the court found ample evidence in the record to support defendant's guilt and the denial of defendant's motions, including a long text message exchange setting up a drug deal with the victim, and shell casings matching the projectiles removed from the victim's body.

Criminal Offenses

Abuse Offenses

Trial court properly denied request for lesser included offense of misdemeanor child abuse and instruction on parent's right to administer corporal punishment.

[State v. Freeman](#), COA24-120, ___ N.C. App. ___ (Aug. 6, 2024). In this Montgomery County case, defendant appealed her conviction for felony child abuse resulting in serious physical injury, arguing error in (1) failing to instruct on the lesser included offense of misdemeanor child abuse, (2) denying her motion to dismiss, and (3) failing to instruct on a parent's right to administer corporal punishment. The Court of Appeals found no error.

The charge against defendant arose from abuse inflicted on the five-year old son of defendant's fiancée. After the boy got in a scuffle at his bus stop, defendant made him run in place for at least 45 minutes. A social worker at the school observed bruises and swelling on his feet, and other bruises on his body. During an interview, defendant

admitted to making the boy run in place for at least 45 minutes “three to four times” during the previous week. Slip Op. at 5. At trial, defendant moved to dismiss the charges for insufficient evidence, and the trial court denied the motion. Defendant did not object to the jury instructions or request an instruction on the lesser included offense.

Beginning with (1), the Court of Appeals explained that because the evidence was clear as to each element of felony child abuse, defendant was not entitled to an instruction on the lesser included offense. The court focused on the “serious physical injury” standard to differentiate between the charges, and noted “[i]n totality, the evidence here demonstrated [the boy] experienced ‘great pain and suffering’ and that his injuries were such that a reasonable mind could not differ on the serious nature of [his] condition.” *Id.* at 14.

Moving to (2), defendant argued insufficient evidence of “serious physical injury” and “reckless disregard for human life.” *Id.* at 15. The court disagreed, pointing to the analysis in (1) above, and to the standard from *State v. Oakman*, 191 N.C. App. 796 (2008), that culpable or criminal negligence could constitute “reckless disregard for human life.” Here defendant’s actions represented sufficient evidence of both elements to justify denying the motion to dismiss.

Finally, in (3) the court acknowledged the general rule that a parent, including a person acting *in loco parentis*, is not criminally liable for corporal punishment, but the general rule does not apply when the parent acts with malice. First, the court concluded that defendant’s position as a fiancée of the biological mother did not represent her acting *in loco parentis*. The court then explained that even if defendant was acting *in loco parentis*, “a jury could reasonably infer that Defendant acted with malice; therefore, the absence of a jury instruction on corporal punishment did not prejudice Defendant.” *Id.* at 21.

Judge Murphy concurred in (2) and concurred in the result only for (1) and (3).

Assaults

Evidence that prisoner struck corrections officer in the face represented “physical injury” for assault inflicting physical injury on an employee of a state detention facility.

[State v. McLean](#), COA 23-1100, ___ N.C. App. ___ (Aug. 6, 2024). In this Rowan County case, defendant appealed his conviction for assault inflicting physical injury on an employee of a state detention facility, arguing the jury should have been instructed on the lesser included offense of assault on an officer or employee of the State. The Court of Appeals disagreed, finding no error.

In March of 2021, defendant was confined at Piedmont Correctional Center. He became agitated because he did not receive the personal hygiene items he needed and began discussing the matter with correctional officers. Eventually, a sergeant asked him to leave his cell and walk to a private area to discuss. During the walk, defendant turned around and struck the sergeant in the face with his fist, leading to a tussle before defendant was subdued. At trial, a video recording of the incident was played for the jury, and the sergeant testified that he was struck “multiple times in the face, around six to ten times.” Slip Op. at 3. During the charge conference, defense counsel requested the lesser included offense, but the trial court denied the request.

Before taking up the substance of defendant’s appeal, the Court of Appeals discussed the appellate jurisdiction for the case. Defendant gave notice of appeal in open court but gave this notice the day *after* the trial court sentenced him for the offense. The court considered what “at the time of trial” meant for purposes of the appeal. *Id.* at 5. After reviewing relevant precedent and appellate rules, the court concluded that defendant’s appeal was timely because he “provided notice of appeal in open court while the judgment was *in fieri* and the trial court possessed the authority to modify, amend, or set aside judgments entered during that session.” *Id.* at 8.

Moving to the jury instruction, the court noted the distinction between the two offenses was the “physical injury” element not present in the lesser offense. The court found the physical injury element was sufficiently satisfied by the evidence showing defendant struck the sergeant in the face. Because the State supplied sufficient evidence of each element of the offense, there was no error in omitting the instruction on the lesser included offense.

Drug Offenses

Defendant had constructive possession of FedEx package containing methamphetamine to support conviction.

[State v. McNeil](#), COA 23-977, ___ N.C. App. ___ (June 4, 2024). In this Randolph County case, defendant appealed his conviction for trafficking methamphetamine by possession, arguing error in denying his motion to dismiss and denying his request for a jury instruction on the lesser-included offense of attempted trafficking. The Court of Appeals found no error.

In October of 2019, a detective for the Asheboro Police Department learned that the Department of Homeland Security had intercepted a package testing positive for liquid methamphetamine. The detective and other officers set up a plan to execute a controlled delivery of the package, and when the package was delivered, a resident of the home called defendant to come and retrieve his package. When defendant arrived, he was arrested. Subsequently, two more packages arrived at the home containing marijuana, and

defendant pleaded guilty to charges related to those packages. The guilty plea transcript was admitted into evidence in the current case. After the close of State's evidence, defendant moved to dismiss the charges against him, and the trial court dismissed one charge of trafficking by transportation, but denied the motion for the trafficking by possession charge. Defendant was subsequently convicted, and appealed.

Beginning with defendant's motion to dismiss, the Court of Appeals first reviewed the precedent around constructive possession, as defendant argued he never possessed or controlled the package of methamphetamine as he was arrested before he could retrieve it from the home. The court found sufficient constructive possession, explaining "[d]efendant was within close juxtaposition to the seized package; had knowledge about the details of the delivery, including the carrier service and name on the package; arrived at the house as soon as he learned it had been delivered; and had subsequent packages containing contraband sent to the house." Slip Op. at 9.

The court then considered the jury instruction argument, noting that the plain error standard applied as defendant did not object to the instructions at trial. Here, the State presented sufficient evidence of all elements of the offense as noted in the constructive possession discussion, and "an attempt instruction was not required as the offense was complete when Defendant arrived at the house and walked through the door." *Id.* at 11.

Homicide

Jury's conviction of police officer for misdemeanor death by vehicle was not barred by G.S. 20-145 and not illogical under applicable standard.

[State v. Barker](#), COA23-1090, ___ N.C. App. ___ (July 2, 2024). In this Mecklenburg County case, defendant appealed his conviction for misdemeanor death by motor vehicle, arguing that as a police officer he was exempt from speeding under G.S. 20-145 and that the prosecutor made improper statements during closing argument. The Court of Appeals found no error.

Defendant, a Charlotte-Mecklenburg Police Department officer, was driving at high speed early in the morning of July 8, 2017, when he struck and killed a pedestrian. The posted speed limit in the area was 35 miles per hour, and defendant was going approximately 100 miles per hour when he struck the pedestrian. Defendant was charged with involuntary manslaughter, and after a trial, the jury convicted him of the lesser-included offense of misdemeanor death by motor vehicle.

Taking up defendant's argument regarding G.S. 20-145, the Court of Appeals explained that the statute exempted law enforcement officers from speed limitations when they were in the pursuit of a criminal suspect, unless the officer acts with reckless disregard for the safety of others. Defendant argued that it was "illogical for the jury to find that he was not

culpably negligent (in acquitting him for involuntary manslaughter) but to also find that he did break a law (speeding) which necessarily requir[ed] (based on G.S. 20-145) that the jury [] find he acted with culpable/gross negligence in his speeding.” Slip Op. at 3. The court disagreed on the logical possibility, explaining that while the burden was on the State to prove culpable negligence for the manslaughter charge, the State needed only to prove that defendant was speeding to support the death by motor vehicle charge. The burden then shifted to defendant to assert the affirmative defense “that he was not acting with gross negligence while he was speeding.” *Id.* at 7. Reviewing under the plain error standard the court found no error and no merit in various other arguments raised by defendant based on the same reasoning.

Defendant also argued that the prosecutor asked the jurors to place themselves in the victim’s shoes, which the court explained was improper under applicable Supreme Court precedent. However, here the court did not agree that the arguments were improper, and instead held that they were trying to illustrate the victim “was a typical citizen like the jurors.” *Id.* at 10.

State failed to enter proof of the value of victim’s car, invalidating underlying felony for first-degree murder conviction.

[State v. Montanino](#), COA23-409, ___ N.C. App. ___ (June 4, 2024), *temporary stay allowed*, ___ N.C. ___, 901 S.E.2d 633 (June 21, 2024). In this Durham County case, defendant appealed his conviction for first-degree murder based on the felony-murder rule, arguing insufficient evidence of the underlying felony because the State did not admit evidence establishing the value of the victim’s car. The Court of Appeals agreed, reversing defendant’s conviction and remanding for the trial court to enter judgment on the lesser-included offense of involuntary manslaughter.

In July of 2018, police found the victim dead in her apartment; the police noted the apartment looked as if there had been a party, as it was in disarray. Defendant was known to have spent time drinking with the victim, and his fingerprints were found on beer cans in the apartment. Later that day, police found defendant in Chapel Hill near defendant’s car, and defendant asked “is she dead?” when he was arrested. Police found the victim’s driver’s license and debit card in defendant’s wallet and determined defendant sold the victim’s smartphone in Burlington. Defendant was subsequently convicted based on the felony-murder rule as the determination was that the victim died while defendant was stealing her car.

The Court of Appeals first considered defendant’s argument that the jury instruction sheets were flawed as they did not have a selection for “not guilty.” The court noted defendant did not raise this objection during trial, and that the plain error standard applied. Because the jury selection sheet had a space for “no” for each charge, the court determined this did not represent plain error. The court noted this was not ideal, but when

combined with the jury instructions from the trial court, the issue did not rise to the level of plain error.

Moving to the felony murder argument, the court explained that “in order to prove *felony* larceny, the State had the burden of proving that the victim’s car was worth over \$1,000.00.” Slip Op. at 8. Here, “the State did not offer any opinion evidence regarding the vehicle’s value, evidence of what the victim paid for the vehicle, or any other evidence which included a dollar amount from which the jury could make a value determination.” *Id.* at 10. Although the State referenced various pieces of evidence in the record that could have supported the value was over \$1,000, the court noted this was insufficient. Under *State v. Holland*, 318 N.C. 602 (1986), providing information about the vehicle’s make and year, a picture of the vehicle, and evidence the vehicle was operational did not represent sufficient evidence for a jury to establish a monetary value, and the court noted that here, the State presented even less evidence than in *Holland*.

The court also provided an explanation of the basis for entering judgment or retrying defendant for lesser-included offenses, explaining “[a] retrial for second-degree murder and/or voluntary manslaughter is one of ‘continuing jeopardy,’ as the original indictment in this case embraced second-degree murder and involuntary manslaughter as lesser-included offenses of first-degree premeditated murder and also embraced misdemeanor manslaughter as a lesser-included offense of first-degree felony murder.” Slip Op. at 14.

Judge Stroud concurred as to the insufficiency of the evidence related to the car’s value, but dissented from the conclusions related to the jury selection sheet, and would have granted defendant a new trial.

Kidnapping & Related Offenses

Defendant’s actions during attempted carjacking did not represent separate restraint or confinement to support kidnapping conviction.

[State v. Andrews](#), COA23-675, ___ N.C. App. ___ (July 2, 2024). In this Davie County case, defendant appealed his first-degree kidnapping with a firearm conviction, arguing error in denying his motion to dismiss for insufficient evidence. The Court of Appeals agreed, reversing defendant’s conviction.

In September of 2019, defendant was assisting an acquaintance in the search for her mother’s stolen car. The search resulted in defendant aggressively driving a van in pursuit of the victim, who was driving a similar vehicle to the stolen car. After a high-speed pursuit and several shots fired in the direction of the victim’s vehicle, the victim escaped and called law enforcement. Defendant came to trial for three offenses related to the pursuit, attempted robbery with a firearm, attempted discharge of a firearm into an occupied

vehicle, and first-degree kidnapping with a firearm. The jury found him guilty of all three offenses.

Defendant argued in his motion to dismiss that the evidence was insufficient to support a finding of confinement or restraint to support the kidnapping charge. Agreeing with defendant, the Court of Appeals explained “because some degree of restraint or confinement is inherent in felonies such as robbery with a firearm, kidnapping charges can implicate double jeopardy concerns where the restraint is the basis for both the underlying felony and the kidnapping.” Slip Op. at 5. Here, “defendant’s pursuit of the victim’s vehicle was part of the ‘necessary restraint’ to accomplish defendant’s objective of taking the victim’s vehicle from the victim at gunpoint.” *Id.* at 8. As a result, the court could not find a “separate, complete restraint or confinement” in evidence to support the kidnapping conviction. *Id.* at 9.

Sexual Assaults & Related Offenses

Circumstantial and direct evidence supported conclusion that defendant knew child was under 16 years of age when he solicited her via Snapchat.

[State v. Primm](#), COA23-949, ___ N.C. App. ___ (June 4, 2024). In this Iredell County case, defendant appealed his conviction for solicitation of a child by an electronic device, arguing he did not know the victim was under sixteen years old. The Court of Appeals found no error.

In September of 2019, defendant exchanged snapchat messages with a fourteen-year-old girl he had met when he was giving a roofing estimate to her parents. Defendant’s messages to the girl became sexually explicit, and he set up a time to meet with her, driving to her home. At that point, the girl became scared and told her parents, who called police to report the situation. Defendant never met with the victim, but snapchat messages were later retrieved from her phone and used by officers in the investigation. Defendant moved to dismiss the charges, arguing insufficient evidence was admitted that he knew the victim’s age before traveling to meet her, but the trial court denied the motion.

Taking up defendant’s argument, the Court of Appeals explained substantial evidence, both circumstantial and direct, supported denial of defendant’s motion. Circumstantially, defendant knew that the girl was taking dual-enrollment community college classes while still in high school. For direct evidence, the girl messaged defendant that she was under fourteen after she went into her parents’ room to tell them of the situation, and in her message, she asked defendant if that was a problem. Defendant responded “naw,” which was ambiguous, but the court explained “in the light most favorable to the State, Defendant’s response indicated he did not care that [the victim] was fourteen and chose to proceed with the plan to meet with her to engage in sexual activity regardless of her age.” Slip op. at 10.

Threats & Related Offenses

Not invited error when defense counsel participated in crafting jury instruction but did not affirmatively consent to exclusion of contested provision; limiting instruction for Rule 404(b) evidence not required when no party requests it; defendant’s course of conduct and actions towards victim supported stalking conviction.

[State v. Plotz](#), COA 23-749, ___ N.C. App. ___ (Aug. 20, 2024), *temporary stay allowed*, ___ N.C. ___, 905 S.E.2d 55 (Sept. 9, 2024). In this Forsyth County case, defendant appealed his conviction for misdemeanor stalking, arguing a host of issues related to the charging document and jury instructions, as well as ineffective assistance of counsel. The Court of Appeals found no error.

Over the course of 2020, defendant engaged in a series of harassing and intimidating behaviors towards his duplex neighbor, who was a 65-year-old black man. After an argument about yard waste, defendant placed a letter in the victim’s mailbox referencing Section 74-19 of the Winston-Salem ordinances, which requires residents to keep the streets and sidewalks free of vegetation. Defendant began putting milk jugs filled with water in his driveway, with letters written on them that spelled out racial and homophobic slurs. Late at night, defendant would rev up his truck’s engine with the taillights aimed at the victim’s bedroom window, and bang on the wall of the duplex which served as the victim’s bedroom wall. The victim eventually filed charges against defendant, leading to his conviction.

On appeal, defendant first argued error in failing to instruct the jury to the specific course of conduct, which allowed the jury to convict him of stalking under a theory of conduct not alleged in the charging instrument. This led the court to consider whether it was invited error, as defense counsel participated in the discussion of the jury instructions based on the pattern instruction for stalking. After reviewing the relevant caselaw, the court could not establish invited error here. Defense counsel participated in discussion around the jury instructions, but “the specific issue of instructing the jury that its conviction could only be based on the course of conduct alleged in the charging instrument did not arise during the charge conference.” Slip Op. at 14. The court explained that “when a provision is excluded from the instruction and the appealing party did not affirmatively consent to its exclusion but only consented to the instructions as given[,]” the party’s actions do not rise to invited error. *Id.* at 16. The court then moved to plain error review, finding defendant could not show prejudice as the evidence supported conviction based on the course of conduct alleged in the charging document, and different instructions would not have produced a different result.

Defendant also argued that admitting evidence of conduct not described in the charging document represented the admission of evidence under Rule of Evidence 404(b), and he

argued this required a limiting instruction from the trial court. The court disagreed, explaining that defendant did not request a limiting instruction and “the trial court is not required to provide a limiting instruction when no party has requested one.” *Id.* at 21. Defendant then argued error in instructing the jury on theories of guilt under G.S. 14-277.3A that were not in the charging document, and here, in contrast to the issue above, the court found invited error because defendant “specifically and affirmatively consented to this construction of the charge.” *Id.* at 23. The court also pointed out that defendant could not demonstrate prejudice, as it was unlikely that the jury would find the defendant put the victim at fear of death or serious injury, but not of further harassment.

Defendant also argued ineffective assistance of counsel, pointing to the alleged errors discussed above. The court dispensed with this part of defendant’s argument by noting he could not establish the prejudice necessary to prevail on an ineffective assistance claim. Assuming counsel had objected to the various issues above, the court determined that the same guilty outcome was likely for defendant. Finally, the court considered defendant’s argument that the evidence was insufficient to support a conviction, determining that evidence of defendant’s “course of conduct . . . combined with evidence of his other actions towards [the victim]” supported the jury’s verdict.

Defendant’s repeated phone calls and in-person contact caused the victim substantial emotional distress and represented harassment to support felony stalking conviction.

[State v. Smith](#), COA23-997, ___ N.C. App. ___ (July 16, 2024). In this Pitt County case, defendant appealed his conviction for felony stalking, arguing error in denying his motion to dismiss for insufficient evidence of harassing the victim, or in the alternative insufficient evidence that defendant should have known a reasonable person would suffer substantial emotional distress after receiving his unsolicited phone calls. The Court of Appeals found no error.

In the summer of 2021, defendant met a 75-year-old widow at his church; they attended the same weekday services and participated in the church’s prayer line. After a weekday service, defendant asked the widow for her phone number, which she willingly gave to defendant. When the widow arrived home, she found that defendant had called her multiple times and left seven voicemails. The repeated calls continued for at least six months, with defendant making comments about dating the widow and having sex with her. Defendant also approached the widow at church services. Eventually the widow told the church’s pastor and local police, leading to the felony stalking charge. At trial, defendant admitted he had previously been convicted of misdemeanor stalking, one element of the offense of felony stalking.

The Court of Appeals dispensed with defendant’s arguments by determining the State presented substantial evidence of each element of felony stalking. The court first reviewed G.S. 14-277.3A for the elements of the stalking offense. Two elements of the offense were

in question for the current case, whether defendant harassed the victim, and whether defendant knew or should have known his conduct would create substantial emotional distress for a reasonable person. The court noted that testimony in the record was “substantial evidence that Defendant’s conduct constituted harassment that tormented and terrorized [the widow] and served no legitimate purpose.” Slip Op. at 8.

Having established that defendant’s conduct was harassment the court moved to substantial emotional distress. The statute in question specifically referenced suffering that may require “medical or other professional treatment or counseling.” *Id.* Applicable precedent also held that “evidence that the victim significantly altered their lifestyle in response to the harassing conduct” supported a finding of substantial emotional distress. *Id.* The court found both of those aspects here, explaining defendant’s conduct caused the widow to “feel terror, to suffer emotional torment that prompted her to seek out medical and psychiatric care, and to change her daily habits and routine due to her fear of continued harassment.” *Id.* at 9.

Weapons Offenses

Ban on gun possession under 18 U.S.C. § 922(g)(8) by a person subject to a qualifying domestic violence protective order is valid under the Second Amendment as the prohibition is sufficiently similar to historical analogues

United States v. Rahimi, 602 U.S. __ (2024). In 2020, a Texas restraining order was issued against Zackey Rahimi based on evidence that he assaulted his girlfriend and fired a gun in her general direction as she fled. Rahimi agreed to the entry of the order. Police suspected that Rahimi violated the protective order by attempting to contact his girlfriend; assaulted another woman with a gun; and participated in five other incidents in which he fired a handgun at or near other people. Based on their suspicions, officers obtained a search warrant for Rahimi’s house and found two firearms and ammunition.

Rahimi was charged with violating [18 U.S.C. § 922\(g\)\(8\)](#). That statute makes it a crime for a person to possess a gun if the person is subject to a qualifying domestic violence protective order. Specifically, the order must be “issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate”; it must “restrain[] such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or . . . plac[ing] an intimate partner in reasonable fear of bodily injury to the partner or child”; and it must either (1) “include[] a finding that such person represents a credible threat to the physical safety of such intimate partner or child” or (2) “by its terms explicitly prohibit[] the use, attempted use, or threatened use of [injurious] physical force against such intimate partner or child.” The protective order against Rahimi fell within the scope of the statute.

Rahimi moved to dismiss, arguing that Section 922(g)(8) was facially invalid under the Second Amendment. The motion was denied, and he pled guilty and appealed to the Fifth Circuit. A three-judge panel ruled against him. He petitioned for rehearing *en banc*, and while his petition was pending, the Supreme Court decided [*New York State Rifle & Pistol Association, Inc. v. Bruen*](#), 597 U.S. 1 (2022), which adopted a new approach to Second Amendment analysis. Rather than the “intermediate scrutiny” test that most lower courts had followed, the Supreme Court instructed that regulations burdening the Second Amendment’s right to bear arms were presumptively invalid and could be sustained only if historical analogues existed at or near the time of ratification, because that would show that the original public understanding of the Second Amendment, and the nation’s history and tradition of gun regulations, was consistent with the type of regulation at issue.

In light of *Bruen*, the Fifth Circuit withdrew its prior opinion and assigned the case to a new panel. The new panel ruled for Rahimi, finding that the various historical precedents identified by the government “falter[ed]” as appropriate precursors. The government petitioned for certiorari and the Supreme Court granted review.

Chief Justice Roberts wrote for the majority. He emphasized generally that a historical analogue need not be a “twin” of the challenged regulation and suggested that some lower courts had “misunderstood the methodology” used in *Bruen*. He explained that the requisite historical inquiry is “not meant to suggest a law trapped in amber” and that “the Second Amendment permits more than just those regulations identical to ones that could be found in 1791.”

Turning specifically to Section 922(g)(8), the Chief Justice found that section was sufficiently similar to two historical analogues. The first were so-called surety laws, which “authorized magistrates to require individuals suspected of future misbehavior to post a bond. If an individual failed to post a bond, he would be jailed. If the individual did post a bond and then broke the peace, the bond would be forfeit.” These surety laws “could be invoked to prevent all forms of violence, including spousal abuse.” The Chief Justice concluded that they therefore shared a common purpose with Section 922(g)(8).

The second set of analogues were what the Chief Justice described as “going armed” laws, like North Carolina’s law against going armed to the terror of the public. These laws prohibited people from arming themselves with dangerous weapons and going about in public while frightening others. According to Blackstone, the law punished these acts with “forfeiture of the arms . . . and imprisonment.” 4 Blackstone 149. For the Chief Justice, these laws shared a similar motivation with the statute under consideration – controlling the risk of violence – and did so through a similar means, namely, disarmament.

Considering these precedents plus “common sense,” the Chief Justice summarized that:

Section 922(g)(8) applies only once a court has found that the defendant “represents a credible threat to the physical safety” of another. That

matches the surety and going armed laws, which involved judicial determinations of whether a particular defendant likely would threaten or had threatened another with a weapon. Moreover, like surety bonds of limited duration, Section 922(g)(8)'s restriction was temporary as applied to Rahimi.

The Court therefore rejected Rahimi's facial challenge and affirmed his conviction. Several Justices wrote concurrences, and Justice Thomas, the author of *Bruen*, dissented.

State's evidence did not demonstrate constructive possession for purposes of possession of a firearm by a felon.

[State v. Norris](#), COA23-889, ___ N.C. App. ___ (June 18, 2024), *temporary stay allowed*, ___ N.C. ___, 901 S.E.2d 811 (June 28, 2024). In this Rutherford County case, defendant appealed his conviction for possession of a firearm by a felon, arguing error in denying his motion to dismiss for insufficient evidence. The Court of Appeals agreed, reversing the denial and remanding to the trial court for dismissal.

In July of 2020, law enforcement officers approached the house where defendant's girlfriend and her children resided to execute a search warrant against defendant for a different charge not relevant to the current case. During a search of the house, officers found a firearm in the bedroom, in a dresser drawer containing the girlfriend's personal items and feminine products. At trial, the State argued that defendant was a co-occupant of the bedroom and that he constructively possessed the firearm, as no evidence showed defendant physically possessing the firearm.

Taking up defendant's argument, the Court of Appeals explained the body of law around constructive possession where the defendant does not have exclusive control over the location. When a defendant does not have exclusive control, "the State is required to show other incriminating circumstances in order to establish constructive possession." Slip Op. at 6, quoting *State v. Taylor*, 203 N.C. App. 448, 459 (2020). Here, the court could not find sufficient incriminating circumstances in the State's evidence, concluding no evidence of "ownership, registration, fingerprints, DNA, nor any other evidence ties Defendant to the gun, which [his girlfriend] asserted belonged to her, was located inside a closed drawer, was found with her other property, and was found in a closed drawer in her bedroom located inside the home she rents." *Id.* at 10.

For purposes of G.S. 14-315.1, "in a condition that the firearm can be discharged" means when the firearm is loaded.

[State v. Cable](#), COA23-192, ___ N.C. App. ___ (June 18, 2024), *temporary stay allowed*, ___ N.C. ___, 902 S.E.2d 267 (July 8, 2024). In this McDowell County case, defendant appealed her convictions for involuntary manslaughter and two counts of failure to store a firearm to protect a minor, arguing error in denying her motion to dismiss for insufficient evidence.

The Court of Appeals agreed, reversing the two counts of failure to store a firearm to protect a minor and vacating the conviction for involuntary manslaughter based upon the underlying misdemeanor.

In July of 2018, defendant's son had a friend over to their house to spend the night. Defendant left an unloaded .44 magnum revolver and a box of ammunition on top of a gun safe in her bedroom. Early in the morning, defendant's son retrieved the revolver and ammunition and took it to his room, where he and his friend decided to play Russian roulette. The friend was killed when he pulled the trigger and a round was fired. At trial, defendant waived her right to a jury trial and was convicted after a bench trial.

The Court of Appeals first considered the failure to store the revolver to protect a minor conviction, explaining that defendant's argument was not based on the evidence admitted, but on statutory interpretation of G.S. 14-315.1, as "an unloaded gun with a double safety is not in a condition that it can be discharged." Slip Op. at 8. This required the court to conduct an analysis of the statute and what "discharge" means for purposes of G.S. 14-315.1. Here, the court concluded that "a firearm is 'in a condition that the firearm can be discharged' when it is loaded." *Id.* at 14. The court also noted that it did not reach additional ambiguities such as firearm safety mechanisms. Because the revolver in question was not loaded, there was insufficient evidence to support the first count against defendant. The court then explained that the State conceded its failure to show the minors gained access to any other firearms stored in the home, meaning there was insufficient evidence to support the second count against defendant.

Having reversed the two failure to store a firearm to protect a minor convictions, the court turned to the involuntary manslaughter conviction, explaining "there are two theories under which the State may prove involuntary manslaughter—an unlawful act or a culpably negligent act or omission." *Id.* at 17. Although this was a bench trial with no jury instruction, the record indicated the State and trial court presumed the conviction was based on the underlying misdemeanor of failure to store the revolver to protect a minor. Because the record did not show any discussion of the alternate theory of a culpably negligent act or omission by defendant, the court presumed the conviction was based on the now-reversed misdemeanor, and vacated the conviction for involuntary manslaughter.

Defenses

Self-Defense

Trial court erred by giving jury instruction that defendant did not have the right to use excessive force under the castle doctrine.

[State v. Phillips](#), 281A23, ___ N.C. ___ (August 23, 2024). In this Cumberland County case, the Supreme Court modified and affirmed the Court of Appeals decision vacating

defendant's conviction for assault with a deadly weapon with intent to kill inflicting serious injury due to an erroneous instruction on excessive force and the castle doctrine. The Court affirmed the Court of Appeals' finding of error but vacated the finding of prejudice and granting of a new trial, instead remanding to the Court of Appeals for a proper consideration of whether defendant was prejudiced by the error.

In April of 2021, the victim approached defendant's front door, leading to a confrontation between the two over defendant's complaints to their landlord about the victim. After the confrontation escalated, defendant fired several shots at the victim, hitting her in the left side and causing injuries that left her disabled. At trial, defendant asserted self-defense and defense of habitation under the castle doctrine. The trial court expressed concern over giving a castle doctrine instruction, and ultimately altered the instruction with the following: "However, the defendant does not have the right to use excessive force." Slip Op. at 5. Defense counsel objected that this limitation was from common law, not statutory law, but the trial court went forward with the altered instruction. When the matter reached the Court of Appeals, defendant argued that the trial court's instruction was error, and the panel's majority agreed. The dissenting judge did not see error in the instruction, and reasoned that the castle doctrine law aligned with common law defenses, leading to the State's appeal based on the dissent.

Taking up the State's appeal, the Supreme Court first gave an overview of the castle doctrine's evolution from a common law defense to the modern G.S. 14-51.2. The Court then spent a significant amount of the opinion exploring the text of G.S. 14-51.2 and the presumptions it contains, including the presumption that a lawful occupant who uses deadly force "is 'presumed to have held a reasonable fear of imminent death or serious bodily harm' and has no duty to retreat from the intruder." *Id.* at 15. The Court emphasized this presumption was rebuttable, but that "the castle doctrine's statutory presumption of reasonable fear may only be rebutted by the circumstances contained in section 14-51.2(c)." *Id.* at 16. This precluded any common law concept of excessive force as provided in the trial court's instruction. Having established the instruction was error, the Court then moved to whether defendant was prejudiced, determining that the Court of Appeals "failed to conduct an appropriate inquiry" into the prejudice determination. *Id.* at 21. As a result, the Court remanded to the Court of Appeals for a proper analysis.

Justice Earls, joined by Justice Riggs, concurred in the conclusion that the castle doctrine instruction was error, but dissented from the majority's decision to remand to the Court of Appeals, reasoning that the Court had the ability to decide whether defendant was prejudiced based on the briefing.

(1) State failed to admit sufficient evidence of premeditation and deliberation for first-degree murder conviction; (2) defendant was not entitled to stand-your-ground instruction because he was on neighbor’s property without explicit authorization to be there; (3) evidence of victim’s felony convictions were admissible for nonpropensity purposes.

[State v. Hague](#), COA 23-734, ___ N.C. App. ___ (Aug. 20, 2024), *writ of supersedeas allowed*, ___ N.C. ___, 2024 WL 4269881 (Sept. 23, 2024). In this Iredell County case, defendant appealed his conviction for first-degree murder, arguing error in (1) denying his motion to dismiss for insufficient evidence of premeditation and deliberation, (2) omitting stand-your-ground from the instruction on self-defense, and (3) excluding evidence of the victim’s previous felony convictions. The Court of Appeals majority found error in (1) and (3), vacating defendant’s conviction and remanding for a new trial.

In September of 2020, the victim and several other men were dove hunting in a field next to defendant’s land. The victim had permission from the landowner to hunt in the field, and had hunted here for several years, but as a convicted felon he could not legally possess a firearm. Defendant kept a horse rescue farm next to the field, and in 2017 a man hunting with the victim had shot one of defendant’s horses. After that incident, defendant asked the victim to be more cautious while hunting, and to avoid hunting near the fence line. On the morning of the incident, defendant heard shooting and went to confront the victim; defendant was carrying a pistol in his back pocket. After an argument, the victim shoved defendant to the ground. After that, testimony differed as to whether the victim charged defendant and defendant shot him in self-defense, or defendant shot the victim immediately. At trial, the State moved to exclude discussion of the victim’s prior felony convictions, and the trial court granted the motion. Defendant moved to dismiss, arguing lack of evidence showing premeditation or deliberation for the murder, but the motion was denied. Defendant also objected to the proposed jury instruction on self-defense, arguing it did not include an instruction on stand-your-ground law, but the trial court declined to change the instruction.

Taking up (1), the Court of Appeals first outlined the eight factors “which assist in the determination of whether premeditation and deliberation were present.” Slip Op. at 12. Here, defendant argued he “did not have a history of arguments, ill will, or serious animosity” towards the victim, and instead “was in fear for his life” as he thought the victim was reaching for a gun. *Id.* at 14. The court’s majority agreed with defendant that there was no evidence of arguments or ill will, and after reviewing the eight factors, concluded this case did not show premeditation and deliberation. The majority highlighted the age difference, as defendant was 72 years old and the victim was 46, and the conduct of defendant after the shooting, as he went home, unloaded his firearm, and called law enforcement to report the shooting.

Moving to (2), the court disagreed that a stand-your-ground instruction was justified, as defendant was not in a place where he had a lawful right to be, the field adjacent to his

property. Defendant argued that “absent evidence that he was a trespasser, he had a lawful right to be in the field and there is no reason to assume he was there unlawfully.” *Id.* at 21. However, the court looked to G.S. 14-51.3 and caselaw interpreting it, determining that since defendant was on privately owned property, and he did not admit evidence that he had permission to be there, he had not established a lawful right to be there for stand-your-ground purposes. The court also noted that, even assuming the instruction was error, defendant could not demonstrate prejudice as the self-defense instruction required the jury to consider the “the proportionality between the degree of force and the surrounding circumstances” before convicting him of first-degree murder. *Id.* at 23.

Reaching (3), the court noted that the trial court excluded evidence of the victim’s convictions under Rule of Evidence 404(b) because defendant did not know the nature of the victim’s prior convictions. The majority opinion explained this was error, as the evidence was not being admitted to show the victim’s propensity for violence, but instead to show defendant’s state of mind and fear of being harmed. Applying *State v. Jacobs*, 363 N.C. 815 (2010), the majority held that “the evidence presented serves a nonpropensity purpose and such evidence should generally be admissible.” *Id.* at 27. After establishing the evidence was admissible, the majority determined that the error was prejudicial, as “[t]he excluded evidence would most certainly have provided the jury with insight into Defendant’s state of mind, which [was] essential to his claim of self-defense, and whether Defendant’s fear and degree of force was reasonable.” *Id.* at 28. The exclusion also required redaction of the 911 call and removed the context from testimony about the victim hunting illegally, which would have been relevant to the jury’s deliberation.

Judge Stading concurred in (2), but dissented from the majority’s opinion in (1) and (3), and would have held that sufficient evidence supported premeditation and deliberation and that it was not error to exclude the victim’s felony status. *Id.* at 32.

Post-Conviction Proceedings

G.S. 15A-1335

Circumstantial evidence supported “lack of consent” for breaking and entering and larceny charges; G.S. 15A-1335 did not prevent imposing a more severe sentence when the prior record level increase was statutorily required.

[State v. Thomas](#), COA23-774, ___ N.C. App. ___ (Aug. 6, 2024). In this Guilford County case, defendant appealed his convictions for possession of a stolen motor vehicle and associated charges related to several vehicle break-ins, arguing error in (1) denying his motion to dismiss, (2) admitting lay opinion testimony, and (3) sentencing defendant to a more severe sentence than his prior vacated sentence in violation of G.S. 15A-1335. The Court of Appeals found no error.

The Court of Appeals previously considered defendant's case and granted him a new trial in [State v. Thomas](#), 281 N.C. App. 722 (2022) (unpublished). In 2019, the High Point Police Department investigated several vehicle break-ins and thefts, including the use of stolen credit cards from vehicles at retailers in the area. After spotting a stolen vehicle, officers pursued, but lost the vehicle and later found it abandoned. Inside were items related to several of the break-ins. The police were able to use surveillance footage and other evidence to tie the stolen vehicle and thefts to defendant.

In (1), defendant argued that the State failed to present evidence of "lack of consent" from the owner of one of the vehicles, a van, that he broke into, because the owner did not testify. The Court of Appeals disagreed, noting that while lack of consent is an essential element of breaking and entering and larceny, circumstantial evidence can support a finding of lack of consent. Here, defendant was caught on surveillance video walking around the van, then trying the door handles to determine if the door was unlocked. After finding the door unlocked, he quickly went through the van's contents while "rarely go[ing] more than a second without looking up at the storefront or around the parking lot." Slip Op. at 11. Defendant then kept his headlights off until he drove away from the parking area. This circumstantial evidence supported the inference that defendant did not have consent to enter the vehicle.

Moving to (2), defendant argued that testimony from one of the police officers identifying defendant as the person shown on surveillance video represented improper lay opinion testimony. The court noted that here the standard of review was plain error, as defendant did not object at trial, and defendant did not show that he was prejudiced by the possible error, as overwhelming evidence of his guilt was already in the record.

Reaching (3), the court explained that G.S. 15A-1335 prohibits a more severe sentence than the prior sentence, unless the increased sentence is statutorily required. Here, the trial court added a point to defendant's prior record level "which raised his prior record level from III to IV." *Id.* at 17. The court looked to the language of the companion statute G.S. 15A-1340.14, noting that subsection (b)(6) specifies how points are assigned and does not provide for a discretionary allocation by the trial court. The court disagreed with defendant's interpretations of applicable caselaw and the language of the relevant statutes, explaining that "[i]n the absence of any mitigating factors, the trial court was not statutorily authorized to impose any lesser sentence than the sentence entered." *Id.* at 18.

Judicial Administration

Contempt

Potential juror's refusal to wear mask in jury assembly room did not justify finding of direct criminal contempt.

[State v. Hahn](#), COA23-238, ___ N.C. App. ___ (Sept. 3, 2024). In this Harnett County case, defendant appealed the trial court order finding him in direct criminal contempt, arguing that his actions did not represent a contemptuous act. The Court of Appeals agreed, reversing the order.

In October of 2022, defendant was summoned for jury duty at the Harnett County Courthouse; during this time, a local emergency order allowed presiding judges to decide whether masks were required in their courtrooms. When defendant assembled with other jurors in the jury assembly room, a court employee told him to wear a mask. Defendant refused, and he was then removed from the jury assembly room and taken to a courtroom in front of the judge. Defendant again declined to wear a mask, even after the judge informed him it was a requirement and that if he refused he would be subject to contempt of court. The judge entered an order finding that defendant refused to wear a mask after being ordered to do so three times and imposed a 24-hour jail sentence.

The exclusive grounds for criminal contempt are outlined in G.S. 5A-11, and “direct” criminal contempt is defined in G.S. 5A-13(a). Here, the trial court’s order pointed to G.S. 5A-11(a)(1)-(2), finding that defendant’s actions interrupted the trial court’s proceedings and impaired the respect due its authority. The Court of Appeals disagreed, noting that defendant “was not a participant in ongoing proceedings in a courtroom,” and “the judge summoned Defendant from the jury assembly room to his courtroom.” Slip Op. at 9. The court saw no disruption in defendant’s actions, noting he responded to the judge’s inquiries and “was respectful to the trial court.” *Id.* This led the court to conclude defendant’s refusal “was not a contemptuous act.” *Id.*

The court then moved to the State’s arguments that G.S. 5A-11(a)(3) or (7) applied, considering whether defendant could be held in contempt “for willful disobedience of the trial court’s lawful process, order, directive, or instruction pursuant to a valid local emergency order.” *Id.* at 10. This required the court to consider the validity of the local emergency order, and the court concluded “[t]he authority underlying the local emergency order at issue was revoked” as the Chief Justice of the North Carolina Supreme Court revoked the emergency directive authorizing local officials to address face coverings in June of 2021. *Id.* at 12.

Finally, the court determined defendant’s actions were not willful, noting “a misapplication of the local emergency order served as the impetus of the conflict” as the local order made masks optional in meeting rooms, and defendant had not yet been called to the courtroom

to serve as a juror. *Id.* at 13. The court explained “[t]here are no findings, nor evidence in the record sufficient to support findings, that Defendant could have known his discussion with the courthouse employee in the jury assembly room might directly interrupt proceedings or interfere with the court’s order or business.” *Id.* at 14.

Judge Griffin concurred in the result by separate opinion, and would have held that defendant’s actions were not likely to interrupt or interfere with matters before the trial court.

Recusal

Trial court judge properly denied request for recusal under G.S. 15A-291.

[State v. Guzman](#), COA23-412, ___ N.C. App. ___ (June 4, 2024). In this Forsyth County case, defendant appealed the denial of his request for the trial court judge’s recusal due to the judge’s issuance of several tracking and cell site location orders. The Court of Appeals majority affirmed the denial of the request for recusal.

In 2019 and 2020, law enforcement obtained several orders to intercept cell phone calls and conversations between defendant and co-conspirators from a judicial review panel under G.S. 15A-291. After obtaining these orders, law enforcement sought three more orders allowing a GPS tracking device, a pen register and trap and trace device, and cell site location information and call detail records for two target phones relevant to defendant. These three orders were issued in December 2019 and January 2020 by the same judge who would later preside over the trial and form the basis of the request for recusal. After defendant was indicted for trafficking cocaine, he raised the issue of recusal with the trial court, pointing to G.S. 15-291(c). The trial court refused the request for recusal, as “the orders were authorized pursuant to sections 15A-262 and 15A-263 of Article 12, not pursuant to section 15A-291 of Article 16, and [the trial court judge] was not part of a judicial review panel as stated in the plain language of section 15A-291(c).” Slip Op. at 3. After defendant’s conviction, he appealed, arguing recusal was required.

The Court of Appeals first explained defendant’s arguments, noting the primary point that Article 16 of G.S. Chapter 15A, and G.S. 15-291 itself, both reference “electronic surveillance,” seemingly showing that the recusal requirement from the statute controls all requests for surveillance involving electronic means. The court rejected this conclusion, explaining “[t]he plain language of section 15A-291(c) only disqualifies judges who enter orders as part of a judicial review panel that authorize ‘any manner related to information gained pursuant to a lawful electronic surveillance order.’” *Id.* at 7. The court also noted that defendant failed to preserve a challenge to the validity of the orders, meaning its conclusion was solely on the recusal issue.

Judge Hampson concurred by separate opinion, expressing concern about the scope of the order issued by the judge permitting the collection of cell site location information under Article 12 of G.S. Chapter 15A.

Judge Arrowood dissented. He would have held that defendant adequately preserved the challenge to the validity of the orders issued by the judge and that G.S. 15A-291(c) was applicable to the orders and required the judge's recusal.