PRESENTATION ON “WHEN TO INTERVENE”

STATEMENTS OF FACTS

In this hypothetical case, the defendant Clyde Barrow is charged with possession with intent to sell or deliver methamphetamine, maintaining a dwelling for the purpose of selling controlled substances and being an habitual felon. The defendant has entered pleas of not guilty.

The State’s evidence in this case tends to show that a search warrant was issued for the search of a house located at 100 Bundy Drive in Brentwood, North Carolina. Detective Steve McGarrett executed the search warrant on March 3, 2022. After entering the house, detective McGarrett searched the premises. During the search, detective McGarrett discovered approximately 6 grams of a white granular substance in a bedroom. The white substance, according to the detective, was in a large plastic bag that contained 2 separate smaller clear plastic bags. There was also a set of digital scales seized that was located on a dresser in the same bedroom. The detective indicated that there were both men’s and women’s clothing in the bedroom where the white substance was located. There were also photographs of the defendant and utilities and cable television bills addressed to the defendant that bore an address of 100 Bundy Drive found in the same bedroom.

The defendant’s attorney, in her opening statement, informed the jury that the evidence would show that three people, the defendant, his girlfriend Bonnie Parker and Kato Kaelin, lived in the house located at 100 Bundy Drive. The defendant’s attorney further indicated that the defendant would offer evidence that proved that the white substance found in the house was possessed by Kato Kaelin and not the defendant.

CAST OF CHARACTERS

ADA ZEALOUS	JASON DISBROW
ATTORNEY PLEAD’EM OUT	TONIA CUTCHIN
DEFENDANT CLYDE BARROW	WILL LONG
TRIAL JUDGE	BILL STETZER
APPELLATE COURT	BOB ERVIN
DETECTIVE MCGARRETT	VINCE ROZIER
BONNIE PARKER	JESSICA LOCKLEAR

HYPOTHETICAL NUMBER ONE: JURY SELECTION PROCEDURES

COURT: What case does the State desire to call for trial?

ADA ZEALOUS: The State calls the case of State of North Carolina v. Clyde Barrow.

COURT: Are the parties ready to proceed?

ADA ZEALOUS: ADA Zealous for the State. The State is prepared to proceed.

PLEAD'EM OUT: Your, honor, I'm Penelope Plead'Em Out for the defendant. We are ready to go…

COURT: Before we start jury selection, I want to make a couple of things crystal clear. First, I am going to ask the jurors some basic questions. These questions will elicit information about their employment, their spouse's employment, where they live and their experience with the court system. Don't ask them any more questions about the matters that I inquire about. Do you understand that?

ZEALOUS: Yes, sir.

PLEAD'EM OUT: You betcha.

COURT: The second thing is we are short of both jurors and time. The jury pool is smaller than usual and we have to finish this trial by tomorrow afternoon. I've got to make sure that I get to the Pattern Jury Instruction meeting on Friday so that I can keep Judge Gottlieb from messing up the patterns again. So, when the State finishes with a group of jurors, even if they aren't a full group of 12, we're going to pass them to the defense while the Sheriff goes out to Wal-Mart to find some volunteers to fill out the jury pool. Any objections to this expedited approach.

ZEALOUS: No, sir.

PLEAD'EM OUT: Is it my understanding there's a possibility that, if we run out of jurors, then they would be passed to me with what we've got even if there are less than a full group of 12 jurors.

COURT: You betcha. There's that possibility.

COURT OF APPEALS: As an editorial comment, in our hypothetical trial that very event occurred without objection. On appeal, the defendant challenged the Court's imposition of limitations on the questioning of jurors and the practice of passing less than 12 jurors to the defense.

In State v. Lawrence, 352 N. C. 1, 530 S. E. 2d 807 (2000), the trial court conducted voir dire and later had the state pass 10 jurors to the defense. The defendant did not object to the incomplete panel. The Supreme Court held that "when a trial court acts contrary to a statutory mandate, the defendant's right to appeal is preserved despite the defendant's failure to object during the trial." The Court's expedited approach here violated the provisions of N. C. Gen. Stat. 15A-1214(d) which provides that "(w)hen the prosecutor is satisfied with the 12 in the box, they must then be tendered to the defendant." N. C. Gen. Stat. 15A-1214(f) provides that "(u)pon the calling of replacement jurors, the prosecutor must examine the replacement jurors and indicate satisfaction with a completed panel of 12 jurors before the replacement jurors are tendered to the defendant." In Lawrence, the Supreme Court concluded that the defendant was not prejudiced by the expedited procedure.

N. C. Gen. Stat. 15A-1214(c) provides that the prosecutor and the defense counsel, or the defendant if not represented by counsel, may personally question prospective jurors individually concerning their fitness and competency to serve as jurors in the case to determine whether there is a basis for a challenge for cause or whether to exercise a peremptory challenge." The statute further provides that "the prosecution or defense is not foreclosed from asking a question merely because the court has previously asked the same or similar question." Id. In State v. Jones, 336 N. C. 490, 497, 445 S. E. 2d 23 (1994), the defendant challenged the trial court's action in foreclosing inquiry when the court had previously asked the juror a particular question and the Supreme Court held that "(w)hen a trial court acts contrary to a statutory mandate the right to appeal the court's action is preserved, notwithstanding the failure of the appealing party to object." In Jones, the Supreme Court concluded that the trial court's limitation on voir dire was harmless error.

HYPOTHETICAL NUMBER TWO: EVIDENCE OF CONTROLLED SUBSTANCES

ZEALOUS: Detective McGarrett, did you seize anything from the house located at 100 Bundy Drive?

DETECTIVE: Yes, I did.

ZEALOUS: (Approaching the witness) I am now showing you State's Exhibit Number Four, do you recognize it?

DETECTIVE: This is the white substance that I found in the bedroom at 100 Bundy Drive.

ZEALOUS: What is inside the large plastic bag?

DETECTIVE: Methamphetamine.

PLEAD'EM OUT: (Playing with her cell phone acting like she's texting)

ZEALOUS: Detective, I'm showing you State's Exhibit Number Five. Do you recognize it?

DETECTIVE: Yes I do. It is a lab report from the State Bureau of Investigation Crime Lab that analyzes the material in State's Exhibit Number Four.

ZEALOUS: What did the SBI lab conclude?

DETECTIVE: The SBI lab determined that the white substance was methamphetamine and that it weighed 5.69 grams.

ZEALOUS: The State moves to admit State's Exhibits Four and Five.

COURT: What says the defense?

PLEAD'EM OUT: No problem, judge.

COURT: Let State's Exhibits Four and Five be admitted into evidence.

COURT OF APPEALS: In State v. Brunson, 204 N. C. App. 357, 693 S. E. 2d 390 (2010), the State's evidence to establish that a particular substance was hydrocodone consisted of the testimony of a witness who had compared the pills in question to a database of pharmaceutical preparations and identified the pills as hydrocodone based on their markings, color and shape. The Court of Appeals held that the admission of that evidence constituted plain error. As the Court of Appeals observed in Brunson, the plain error rule is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where error is

grave error which amounts to a denial of a fundamental right of the accused or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can fairly be said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty." In Brunson, the visual identification approach was deemed to be unreliable and to be tantamount to baseless speculation.

In State v. Blackwell, 207 N. C. App. 255, 699 S. E. 2d 474 (2010), the admission of SBI lab reports identifying certain substances as cocaine on the erroneous determination that the State had complied with the notice provisions of N. C. Gen. Stat. 90-95(g) constituted plain error. The Court of Appeals concluded that in the absence of the inadmissible evidence there would have been no evidence that the substance at issue was in fact cocaine.

HYPOTHETICAL NUMBER THREE: MOTION TO DISMISS

COURT: Will there be any more evidence for the State?

ZEALOUS: The State rests, your Honor.

COURT: Anything for the defense?

PLEAD'EM OUT: (Pretends to text something on a cell phone).

COURT: Any evidence for the defense?

PLEAD'EM OUT: I'd like to make a motion at this time.

COURT: I'll put a ruling in the record to that later. Do you have any witnesses?

PLEAD'EM OUT: Yes, your Honor.

COURT: All right, you may proceed.

COURT OF APPEALS: The Court in this instance failed to put a ruling on the record. The defendant offered evidence and failed to renew the motion at the close of all the evidence.

North Carolina appellate courts have reviewed a number of situations in which the defendant failed to make or renew a motion to dismiss. Rule 2 of the Appellate Rules of Procedure provides

that to prevent manifest injustice to a party, or to expedite a decision in the public interest, either court of the appellate division may, except as otherwise expressly provided in these rules, suspend or vary the requirements or provisions of the Rules of Appellate Procedure. In State v. Batchelor, 190 N. C. App. 369, 660 S. E. 2d 158 (2008), the Court of Appeals opined that "if we do not review the issue of the sufficiency of the evidence in the present case, defendant would remain imprisoned for a crime that the State did not prove beyond a reasonable doubt. Such a result would be manifestly unjust and we are therefore compelled to invoke Rule 2 under these exceptional circumstances."

In our mock case here, it is questionable whether there is sufficient evidence to support a conviction for maintaining a dwelling for the purpose of selling a controlled substance. In State v. Rogers, 371 N.C. 397, 817 S. E. 2d 150 (2018), the Supreme Court discussed the element of this offense that the premises was used for keeping or selling a controlled substance. Merely possessing or transporting drugs inside a car-because, for instance, they are in an occupant's pocket, or they are being taken from one place to another – is not enough to justify a conviction under the keeping element of N.C. Gen. Stat. 90-108(a)(7). "Rather, courts must determine whether the defendant was using a car for the keeping of drugs, which, again, means the storing of drugs – and courts must focus their inquiry on the use, not the contents, of the vehicle." 371 N.C. at 405. "The linchpin of the inquiry into whether a defendant was using a vehicle, building, or other place for the keeping of drugs is whether the defendant was using that vehicle, building or other place for the storage of drugs." 371 N.C. at 406. The critical question is whether a defendant's car is used to store drugs, not how long the defendant's car had been used to store drugs for. Id. Merely having drugs in a car (or other place) is not enough to justify a conviction under N.C. Gen. Stat. 90-108(a)(7). The evidence and all reasonable inferences drawn from the evidence must indicate, based on the totality of the circumstances, that the drugs are also being stored there. 371 N.C. at 406 In this instance, Rule 2 potentially could be invoked to vacate a conviction for that offense.

HYPOTHETICAL NUMBER FOUR: TRIAL COURT'S EXPRESSION OF OPINION

PLEAD'EM OUT: The defense calls Bonnie Parker.

COURT: Come around and be sworn. (Swear witness).

PLEAD'EM OUT: What is your name?

WITNESS: Bonnie Parker.

PLEAD'EM OUT: Do you know Clyde Barrow?

WITNESS: Yes sir.

PLEAD'EM OUT: How do you know him?

WITNESS: He's my boyfriend. We've been seeing each other for five blissful years.

PLEAD'EM OUT: Where did you live on March 3, 2022?

WITNESS: At 100 Bundy Drive with Clyde.

PLEAD'EM OUT: Do you know Kato Kaelin?

WITNESS: Yes, sir.

PLEAD'EM OUT: How do you know him?

WITNESS: He stayed at 100 Bundy Drive for about two months prior to the search.

ZEALOUS: Objection, Your Honor. Where Kato Kaelin stayed or didn't stay has nothing to do with these charges.

COURT: Sustained. Ms. Plead'em Out, move on to something else.

PLEAD'EM OUT: Are you aware though of Kato Kaelin staying…

COURT: Move on to another area. Kaelin has no involvement with these charges.

COURT OF APPEALS: This hypothetical is based on State v. Springs, 200 N. C. App. 288, 683 S. E. 2d 432 (2009). In Springs, the defendant argued on appeal that the Court's comments tended to discredit the defense's theory to the jury by demonstrating that the trial judge did not believe that alleged perpetrator was involved with or possessed the substances at issue in this case.

In State v. Springs, 200 N. C. App. 288, 683 S. E. 2d 432, the Court of Appeals noted that N. C. Gen. Stat. 15A-1222 provides

that a "judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury. This issue can be reviewed even though there was no objection because the trial court's action violated a statutory mandate. State v. Duke, 360 N. C. 110, 623 S. E. 2d 11 (2005). In Springs, the Court of Appeals observed that "a trial judge wields a strong influence over the trial jury. The trial judge occupies an exalted station. Jurors entertain great respect for his opinion and are easily influenced by any suggestion coming from him." In Springs, the Court of Appeals held that the trial court's statement rose to the level of an impermissible opinion that the alleged perpetrator was not involved with the possession of the drugs at issue. The trial court judge's comments suggested that the court had already assessed the credibility of the defendant's evidence and found it wanting.

HYPOTHETICAL NUMBER FIVE: IMPROPER JURY ARGUMENT

COURT: Is the State ready to make its final argument to the jury?

ZEALOUS: Ladies and Gentleman, in my first argument, I explained the State's evidence to you and showed you why you should return a verdict of guilty on both counts. Now you have heard the defendant's argument that the defendant should be found not guilty because Kato Kaelin possessed the methamphetamine.

Did the defendant ever have the guts to tell you that himself. What would be wrong when you're represented by a lawyer with calling up the detective or having his lawyer call him up and say "let me tell you some more, let me tell you the rest of this?" He didn't do that. He didn't call the DA's office. He didn't call any police officer. He didn't call the detective. He didn't do any of that.

(DURING THE ARGUMENT, DEFENDANT SHOULD PRETEND TO POKE OR PROD HIS ATTORNEY TO GET HER TO OBJECT. THE ATTORNEY SHOULD IGNORE THE DEFENDANT OR BRUSH HIM OFF.)

Ladies and gentlemen of the jury, ask yourselves now "Why on earth would I wait until now to try to tell that story if I had that kind of story? Why would I do that?"

Well, that's because of who he is. You got this quitter, this loser, this worthless piece of—who's mean…He's as mean as they come.

He's lower than the dirt on a snake's belly." Hiding behind his friend here. Find him guilty on both charges.

COURT OF APPEALS: The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene ex mero motu. State v. Jones, 355 N. C. 117, 558 S. E. 2d 97 (2002). A well reasoned, well-articulated closing argument can be a critical part of winning a case. Id. at 135. However, such argument, no matter how effective, must (1) be devoid of counsel's personal opinion; (2) avoid name-calling and/or references to matters beyond the record; (3) be premised on logical deductions, not appeals to passion or prejudice; and (4) be constructed from fair inferences drawn only from the evidence properly admitted at trial. Id. In Jones, the State made arguments that included name-calling similar to that used in this hypothetical and the Supreme Court awarded the defendant a new capital sentencing hearing.

In State v. Shores, 155 N. C. App. 342, 573 S. E. 2d 237 (2002), the State made jury arguments concerning the defendant's failure to apprise officers of his defense before trial similar to those in the hypothetical. The Court of Appeals observed that "a defendant's decision to remain silent following his arrest may not be used to infer his guilt, and any comment by the prosecutor on the defendant's exercise of his right to silence is unconstitutional." Id at 351. "A statement that may be interpreted as commenting on the defendant's decision to remain silent is improper if the jury would naturally and necessarily understand the statement to be a comment on the exercise of his right to silence." In Shores, the Court of Appeals ordered a new trial based on the prosecutor's violation of the defendant's constitutional rights.

HYPOTHETICAL NUMBER SIX: COURT'S CHARGE OMITTING AN ELEMENT

COURT Ladies and gentlemen of the jury, the defendant has been charged with maintaining a building which is used for the purpose of unlawfully selling controlled substances.

For you to find the defendant guilty of this offense, the State must prove two things beyond a reasonable doubt:

First, that the defendant maintained a building which was used for the purpose of unlawfully selling methamphetamine.

Methamphetamine is a controlled substance, the selling of which is unlawful.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant maintained a building which was used for the unlawful selling of controlled substances, then it would be your duty to return a verdict of guilty of this offense. If you do not so find, or have a reasonable doubt as to one or both of these things, you would not find the defendant guilty of this offense.

At the conclusion of the court's charge and in the absence of the jury, are there any objections, corrections or additions to the Court's charge, from the State?

ZEALOUS: No, your honor.

COURT: From the defense?

PLEAD'EM OUT: Can we be at ease now? I've got some cases in another courtroom that I need to go handle.

COURT OF APPEALS: In case you missed it, the instruction on maintaining a dwelling omitted the second element that requires that the defendant act intentionally.

In State v. Johnston, 173 N. C. App. 334, 618 S. E. 2d 807 (2005), the trial court judge omitted an element of the offense in his jury instructions and the defendant failed to object after the charge was given to the jury. In Johnston, the Court of Appeals noted that the defendant failed to preserve the issue for appellate review. In its opinion, the Court of Appeals cited the commentary of the drafting committee to Rule 2 of the Rules of Appellate Procedure which observes that Rule 2 "expresses an obvious residual power possessed by any authoritative rule-making body to suspend or vary operation of its published rules in specific cases where this is necessary to accomplish a fundamental purpose of the rules….it may be drawn upon by either appellate court where the justice of doing so or the injustice of doing so is made clear to the court." Id. at 339.

HYPOTHETICAL NUMBER SEVEN: JURY REQUEST FOR A TRANSCRIPT

COURT: Counsel, I've just received a note from the jury asking for a transcript of the detective's testimony. What is the State's position on that request?

ZEALOUS: The State will leave that matter to the Court.

COURT: What says the defense?

PLEAD'EM OUT: However you want to handle it is okay with us.

COURT: Bring the jury in, please. Ladies and Gentlemen of the jury, I have received your note requesting a transcript of the testimony of Detective McGarrett.

There is no transcript to bring back there. She might get one typed up in a month. You see what I mean; we don't have the fancy equipment that you might see on TV. I don't think it's out there, but if it was, I can assure you the State of North Carolina won't spend the money for it. I don't mind putting that in the record because higher judges agree with me on that. So, we don't have anything that can bring it back there to you. The Court doesn't have the ability to now present to you the transcription of what was said during the course of the trial.

What does counsel say about those additional comments to the jury?

PLEAD'EM OUT: Tell it like it is brother.

COURT OF APPEALS. In State v. Johnson, 164 N. C. App. 1, 595 S. E. 2d 176 (2004), the Court of Appeals was presented with a claim that the trial court's comments set out above were erroneous even though there was no objection made at the trial. N. C. Gen. Stat. 15A-1233(a) provides that "if the jury after retiring for deliberation requests a review of certain testimony or other evidence…the judge in his discretion after notice to the prosecutor and defendant may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence." In this instance, the trial court judge did not exercise his discretion. The State in Johnson argued that the defendant waived any alleged error by failing to object to the trial court's comments. When a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding the defendant's failure to object at trial. State v. Ashe, 314 N. C. 28, 39, 331 S. E. 2d 652 (1985).

HYPOTHETICAL NUMBER EIGHT: HABITUAL FELON PLEA

COURT: The jury having returned as its unanimous verdict that the defendant is guilty of possession with intent to sell and deliver methamphetamine and maintaining a dwelling for the purpose of selling methamphetamine, how does the defendant desire to proceed on the habitual felon status?

PLEAD'EM OUT: Your Honor, may I confer with Mr. Barrow briefly?

COURT: Yes, Madam.

(DEFENDANT AND PLEAD'EM OUT HUDDLE BRIEFLY WITH DEFENDANT SHAKING HIS HEAD AND LOOKING DISGUSTED)

PLEAD'EM OUT: The defendant will skip the jury trial and admit being an habitual felon.

COURT: Is that correct, Mr. Barrow? What do you have to say?

DEFENDANT: What I say doesn't matter in this courthouse. Given what's happened already and since I got appointed "Penitentiary Penny" here, I don't guess I have much choice or much of a chance anyway. I admit it.

COURT: Alright, I'll discharge the jury and then we can have a sentencing hearing.

PLEAD'EM OUT: We're ready to be heard on sentencing.

COURT OF APPEALS: In State v. Artis, 174 N. C. App. 668, 622 S. E. 2d 204 (2005), the defendant appealed the trial court's determination that he was eligible for sentencing as an habitual felon and contended that the trial court could not sentence him as an habitual felon without a jury's determination of his habitual felon status or his express waiver of a jury determination and admission of habitual felon status. In Artis, the defendant did not object to his sentencing as an habitual felon at trial. N. C. Gen. Stat. 15A-1446(d)(16) provides that error occurring in the entry of the plea may be subject to appellate review even though no objection, exception or motion has been made in the trial division.

In this instance, the inquiry (or lack of one) by the trial court failed to satisfy the requirements of N. C. Gen. Stat. 15A-1022(a). The trial court did not (1) determine that the defendant understood the

nature of the habitual felon charge; (2) inform the defendant of his right to deny habitual felon status; or (3) inform the defendant that his admission of attaining habitual felon status would waive his right to jury determination of that issue. In Artis, the habitual felon conviction was vacated.

HYPOTHETICAL NUMBER NINE: OUT OF STATE CONVICTION

COURT: The State may proceed with its presentation at the sentencing hearing.

ZEALOUS: I have a worksheet which I am handing to the Court, and the worksheet indicates that the defendant has prior convictions in Pennsylvania in 1989.The most serious conviction would be the two counts of armed robbery, Class D felony.
He also had an unauthorized use of a motor vehicle in '88 in Pennsylvania, and a domestic violence conviction in South Carolina in 2002.

The worksheet does not include the felonies that the State relied upon to establish his status as an habitual felon.

So, we would contend he has eight points, he's a prior record Level III for sentencing.

COURT: Does the defendant stipulate that he would have eight prior record level points, therefore, for sentencing purposes, he would be a record Level III?

PLEAD'EM OUT: Yes, sir.

COURT: Based on that stipulation, the Court will conclude that the defendant has eight prior record level points and he will be sentenced in Prior Record Level III? The Court will assign six points for the armed robbery conviction and one point for the two other convictions.

COURT OF APPEALS: In State v. Henderson, 201 N. C. App. 381, 689 S. E. 2d 462 (2009), the defendant appealed contending that the stipulation to the point total and prior record level "did not relieve the state of its burden of proving that the out-of-state offenses were substantially similar to any North Carolina crimes."

The Court of Appeals has determined that calculating an offender's prior record level, when an offender has out-of-state offenses, is a mixed question of fact and law, which requires comparison of the

relevant statutes describing the North Carolina crimes with those of the state where defendant was convicted. See State v. Hanton, 175 N.C. App. 250, 254-55, 623 S.E.2d 600, 604 (2006). The Court of Appeals has also explained that a defendant's stipulation to an out-of-state felony conviction is sufficient to support treating the felony conviction as a Class I felony, but the stipulation alone is not sufficient to support a higher classification for sentencing purposes. See State v. Bohler, 198 N.C. App. 631, 681 S.E.2d 801, 806 (2009).

While the trial court may not accept a stipulation to the effect that a particular out-of-state conviction is substantially similar to a particular North Carolina felony or misdemeanor, it may accept a stipulation that the defendant in question has been convicted of a particular out-of-state offense and that this offense is either a felony or a misdemeanor under the law of that jurisdiction.

Although the defendant could and did stipulate to the existence of his out-of-state convictions, and he could stipulate that they were felonies or misdemeanors, he *could not* stipulate to a question of law, i.e., whether "the State prove[d] by the preponderance of the evidence that an offense classified as either a misdemeanor or a felony in the other jurisdiction is substantially similar to an offense in North Carolina . . . ." N.C. Gen. Stat. § 15A-1340.14(e); *Bohler* 198 N. C. App. 631, 681 S.E.2d at 804

N. C. Gen. Stat. 15A-1446(d)(18) permits a defendant to appeal when the sentence imposed was unauthorized at the time imposed, exceeded the maximum allowed by law or is otherwise invalid as a matter of law. In this instance the defendant was allowed to appeal from the trial court's calculation of the defendant's prior record level even though the defendant did not object at the sentencing hearing and even though the defendant stipulated to the calculation.

It is not necessary that an objection be lodged at the sentencing hearing in order for a claim that the record evidence does not support the trial court's determination of a defendant's prior record level to be preserved for appellate review. State v. Bohler, 198 N. C. App. 631, 681 S. E. 2d 801.

HYPOTHETICAL NUMBER TEN: RESTITUTION ISSUE

ZEALOUS: Your Honor, there is one more thing we need to address.

COURT: What is that, Mr. Zealous?

ZEALOUS: You may recall that the search warrant was obtained using the assistance of a confidential and reliable informant who purchased methamphetamine at the defendant's residence on three prior occasions. The drug task force officers paid this informant for his or her services and there is also the buy money for the three purchases from the defendant's residence prior to the search. The State is seeking restitution of $ 400 for the informant's services and $ 200 for the buy money. I have a worksheet to hand up for that.

COURT: Does the defendant want to be heard?

PLEAD'EM OUT: Judge, he's going to be in so long that it won't matter.

COURT: The Court will grant the restitution request and tax it as a civil judgment.

COURT OF APPEALS: In State v. Wilson, 158 N. C. App. 235, 580 S. E. 2d 386 (2003), the Court of Appeals permitted a defendant to assert a claim that the trial court judge erred in assessing restitution when there was no objection to an order awarding restitution. In Wilson, the trial court awarded restitution for pain and suffering in a robbery case and the Court of Appeals reviewed that award under Rule 2 of the North Carolina Rules of Appellate Procedure since the appeal was deemed to raise "important questions concerning the trial court's authority to order restitution in a criminal case."

In State v. Shelton, 167 N. C. App. 225, 605 S. E. 2d 228 (2004), a trial court judge awarded restitution for genetic DNA testing in a sex offense case. The trial court judge assessed those costs as restitution. The defendant did not object. The Court of Appeals noted that although the defendant did not specifically object to the trial court's entry of an award of restitution, the issue was deemed preserved by N. C. Gen. Stat. 15A-1446(d)(18). That statute allows the Court of Appeals to review a sentence imposed that was unauthorized at the time imposed or otherwise invalid as a matter of law even though there was no objection, exception or motion made in the trial division. Since the award of restitution was only supported by an unsworn statement of the prosecutor, the evidence was insufficient to support the portion of the judgment that awarded restitution.