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Criminal Case Update Paper

Cases covered include published criminal and related decisions from the North Carolina appellate courts and the Fourth Circuit Court of Appeals decided between January 16, 2024, and August 23, 2024. State cases were summarized by Alex Phipps, Fourth Circuit cases were summarized by Phil Dixon, and U.S. Supreme Court cases were summarized by Jeff Welty and Phil Dixon. To view all of the case summaries, go the Criminal Case Compendium. To obtain summaries automatically by email, sign up for the Criminal Law Listserv. Summaries are also posted on the North Carolina Criminal Law Blog.

Warrantless Stops and Seizures

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, the 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 the defendant after seeing defendant's truck cross the centerline of the road at least three times. When the deputy approached the defendant's window, he smelled marijuana and saw marijuana residue on the passenger side floorboard. When asked about the marijuana, the 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. The defendant was subsequently indicted for possession of a stolen firearm, possession of a firearm by a felon, and carrying a concealed firearm. He 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 the defendant pleaded guilty to the charges, reserving his right to appeal the denial.

The Court of Appeals first noted the 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 the 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 the defendant's appeal, noting again that the 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 the motion to suppress.

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

State v. George, COA22-958, ___ N.C. App. ___; 898 S.E.2d 801 (March 5, 2024). In this Sampson County case, defendant appealed his convictions for trafficking heroin by possession and by transport, possession with intent to sell or deliver heroin and cocaine, and resisting a public officer, arguing (1) insufficient findings of fact, and (2) error in denying his motion to suppress the results of a traffic stop. The Court of Appeals found no error.

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

narcotics. The defendant filed a pre-trial motion to suppress the results of the search, but the trial court denied the motion after a suppression hearing.

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

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

Evidence of contraband found during search was admissible under inevitable discovery doctrine, but plain feel did not support seizure or search of pill bottle

State v. Jackson, COA23-727, ___ N.C. App. ___; 899 S.E.2d 582 (March 19, 2024). In this Avery County case, the defendant appealed his conviction for possession of methamphetamine, arguing error in denying his motion to suppress the results from a search. The Court of Appeals disagreed, finding no error.

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

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

the officer at the suppression hearing supported the assumption that he would have arrested the defendant for driving with a revoked license if he had not found the contraband. This triggered the "inevitable discovery doctrine" and justified admission of the contraband evidence despite the lack of probable cause for the search. *Id*. at 10.

Judge Stading concurred in the result only.

Phil Dixon blogged about this case, here.

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, COA23-474, ___ N.C. App. ___ (Aug. 6, 2024). In this Chatham County case, the 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 the defendant's probation, and remanded to the trial court for reconsideration.

In July of 2021, the 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 the defendant move an orange pill bottle from the center console to under his seat. The defendant then exited the vehicle, and the officer questioned him about the pill bottle. The 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, the defendant was on probation during the encounter. The trial court revoked this probation after the defendant's guilty plea, even though his 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 the 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 the defendant offered after questioning.

The court then considered the revocation of the 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.

Searches

Divided court holds short-term location data shared by Google in response to geofencing warrant did not amount to a search

U.S. v. Chatrie, 107 F.4th 319 (July 9, 2024). A bank was robbed in the Eastern District of Virginia, and police were unable to determine a suspect. Security cameras in the bank showed that the robber possessed a cell phone, and the detective applied for a geofencing warrant to obtain information from Google for a 150-meter area around the bank for the thirty-minute periods of time immediately before and after the robbery. The information obtained as a result ultimately led police to the defendant and he was indicted in federal court for various offenses relating to the armed robbery. He moved to suppress, arguing that the geofencing warrant violated his Fourth Amendment rights. The district court denied the motion. It declined to squarely resolve the Fourth Amendment question, instead finding that the officer was allowed to rely on the geofencing warrant under the good-faith exception. The defendant pled guilty and appealed.

On appeal, the Fourth Circuit undertook a detailed analysis of geofencing warrants. Cell phones operating with Google software at the time of the search warrant in the case had a setting for "Location Services." This is a setting users can choose to activate, whereby Google tracks the movement of the phone. By default, Location Services are turned off. There are user benefits to the service, such as tracking the phone if it is lost, and personalized recommendations based on location. The service also generates advertisement revenue for Google. Users must perform several steps to activate the service, including enabling location sharing, opting in to Location History on a Google account, enabling Location Reporting, and signing into a Google account. Google provides explanatory text about the nature of the location service before a user can activate it. Once the service has been activated, users still maintain some control of the location data. They may edit or delete all or parts of past data collected, and they may pause the service at any time. When activated, the location of the phone is always monitored by Google via GPS tracking, regardless of whether the phone is in use. Android phones have an additional option to enable "Google Location Accuracy," which uses additional data inputs like cell towers and wireless network contacts to further refine the location data. This data is stored by Google for study and use in other applications. Starting in 2016, law enforcement began sending geofencing warrants to Google, whereby Location History data for all users within a set geographic area (the "geofence") over a particular timeframe would be disclosed. Geofence warrants only operate to obtain data from users who have Location History enabled; when the service is not enabled, the location data of the user is not collected by Google. The numbers of these kinds of law enforcement requests grew 1500% from 2017-2018, and another 500% in the following year. Since the time of the search warrant in the defendant's case, Google has amended its policies on geofencing warrants, which the court did not consider.

Google has developed an internal procedure for handling these warrants. First, the warrant must request anonymized data showing the phones within the geofence at the relevant time. Second, law enforcement reviews that data and may request additional information about any of the users identified at step one. Here, unlike in the first step, Google can provide additional information about a given user, including their location both inside and outside the geofence area and over a longer period of time. Google typically will only provide this more detailed information about user locations for a shorter list of users than the greater pool of users identified at step one. Last, Google can provide information that identifies a user by account information, but only once law enforcement has again narrowed the pool of users from the list provided at step two.

A divided panel of the Fourth Circuit affirmed the denial of the motion to suppress, but on different grounds than the district court. Under the third-party doctrine, information voluntarily shared with others is unprotected by the Fourth Amendment, because a person lacks a reasonable expectation of privacy in such information. *U.S. v. Miller*, 425 U.S. 435, 443 (1976). While that rule has sometimes been in tension with evolving technology, it remains good law. In *Leaders of a Beautiful Struggle v. Baltimore Police Department*, 2 F.4th 330 (4th Cir. 2021) (en banc), the court explored the contours of the tension between privacy rights and information voluntarily exposed to others, interpreting the evolution of precedent to draw a line between "short-term public tracking of public movements—akin to what law enforcement could do prior to the digital age—and prolonged tracking that can reveal intimate details through habits and patterns." *Chatrie* Slip op. at 17 (cleaned up). Although *Beautiful Struggle* did not discuss the third-party doctrine, the sweeping and constant aerial surveillance at issue there intruded upon reasonable expectations of privacy because of the breadth of the otherwise-public information gathered. According to the majority, geofencing warrants like the one here—where only two hours of data from a set time and location were gathered—were different. The information sought and obtained by law enforcement in the current case was much more limited in scope, more akin to traditional public surveillance, and revealed much less private information about the defendant. The defendant also consented to share this information with Google, with Google making it clear to users what data is being collected, how it is being collected, and what options users have to edit, delete, or limit it. This case was distinguishable from *U.S. v. Carpenter*, 585 U.S. 296 (2018), where the cell site location data was shared with the communications company involuntarily by the very nature of the device. Also unlike the cell phone in *Carpenter*, Location History is not an indispensable feature of modern life. Most users of Google phones—about two thirds—choose not to activate Location History. In the words of the court:

> The third-party doctrine therefore squarely governs this case. The government obtained only two hours' worth of Chatrie's location information, which could not reveal the privacies of his life. And Chatrie opted into Location History . . . This means that he knowingly and voluntarily chose to allow Google to collect and store his location information. In doing so, he too the risk, in revealing his affairs to Google, that the information would be conveyed by Google to the Government. *Chatrie* Slip op. at 22.

Because the defendant had no reasonable expectation of privacy in this information, no search was conducted within the meaning of the Fourth Amendment when the government obtained it, and the motion to suppress was properly denied.

Responding to the dissent, the court stressed that *Carpenter* did not overturn the third-party doctrine, and that the majority was simply applying established Fourth Amendment principles. Both the electronic tracking device line of cases and the third-party doctrine line of cases from the U.S. Supreme Court remain important considerations when deciding cases involving searches of digital data. While the information obtained here could certainly reveal some private information about the defendant (and others), this "brief glimpse" into the defendant's life was closely circumscribed to a narrow time frame and did not allow law enforcement to determine his longer-term movements and associations. The court criticized the dissent's suggested multi-factor balancing test approach to resolving the question of whether the defendant had a reasonable expectation of privacy. In the words of the majority:

> Instead of faithfully apply[ing] established principles to the case before us, the dissent would have us depart from binding case law and apply a novel, unwieldy multifactor balancing test to reach the dissent's preferred policy outcome. We decline the invitation.

> Our Fourth Amendment doctrine compels a clear result here. If one thinks that this result is undesirable on policy grounds, those concerns should be taken to Congress. *Id*. at 35.

In a nearly 70-page dissent, Judge Wynn disagreed. He would have ruled that the geofencing information here was a search within the meaning of the Fourth Amendment and faulted the majority opinion for permitting geofencing information to be disclosed without a warrant.

Search warrants for Facebook accounts were supported by probable cause and were not overbroad; even if the lack of temporal limitation on account information for one of the warrants violated the Fourth Amendment, officers were entitled to rely on the warrant under the good faith exception

U.S. v. Zelaya-Veliz, 94 F.4th 321 (Feb. 16, 2024). In this multi-defendant case from the Eastern District of Virginia, the defendants were charged with sex trafficking of a minor child and related offenses. The men were associated with MS-13, an international criminal gang. After around six weeks, the 13-year-old girl escaped and met with local law enforcement. She identified and was able to help locate another minor being trafficked by the men. Eventually, the matter was turned over to the FBI. Relying on information from local law enforcement's investigation, the lead agent discovered that the suspects were likely communicating via Facebook to accomplish the trafficking and prostitution of the minors. Agents ultimately obtained four search warrants for Facebook accounts associated with the suspects, each building on the information obtained from the previous warrant.

The first warrant sought information associated with four accounts connected to one of the suspects and a fifth account of another man, none of whom were parties to this case. The warrants sought all information related to the accounts for the entire time the accounts had been in existence, including all direct messages. While the warrants permitted the government to search all of the information provided by Facebook, they limited the seizures of information to evidence of the four specific potential crimes (all of which related to sex trafficking of a minor). The affidavits in support of these warrants explained the information learned during the course of the investigation, including that both men had communicated with minors on Facebook about prostitution and that one of the men had sexual contact with one of the minors. It also stated that MS-13 members were known to communicate via Facebook and that its members often utilized sex trafficking as a means of generating money.

The second Facebook warrant requested similar information on eight different accounts, five of which belonged to one defendant and three other accounts by other co-conspirators. The one defendant was identified by a minor victim as a person who facilitated her trafficking and prostitution. A credit card in the defendant's name was connected to the cell phone possessed by the child when she was found by law enforcement as well. Like the first warrant, the seizures of information authorized by the warrant were limited to evidence of four specific sex trafficking related crimes but were not limited by any specific time frame.

The third warrant requested an account belonging to a different defendant, multiple accounts of other, unindicted people, and five accounts belonging to three minor victims. Unlike the first two warrants, this warrant only requested information within a ten-month period prior to and over the period when the minors were trafficked. This warrant also sought broader categories of information associated with the accounts, including IP address and location data. Again, the warrant only authorized seizure of information showing involvement of the suspects in four specific sex trafficking offenses.

The last warrant requested account info on 22 Facebook accounts, some of which were associated with other defendants. It too limited seizure of the information produced in response to the warrant to evidence of sex trafficking offenses. It recounted information obtained from earlier warrants showing that these defendants discussed coordinating prostitution of minors, transporting minors for commercial sex, obtaining explicit photos of minors, and admissions to sex trafficking of minors.

Five of the six defendants challenged the denial of their motions to suppress the information obtained from Facebook on appeal, arguing the warrants were overbroad and not based on probable cause. The Fourth Circuit unanimously affirmed.

As to the first warrant, the defendants lacked standing to challenge it. Because this warrant only targeted information from other co-conspirators who were not involved in the current matter, the court declined to consider any challenge to it. (One of the men targeted in this warrant pleaded guilty to sex trafficking conspiracy prior to the trial of the defendants.) Regarding the second, third, and fourth warrants, each was aimed towards obtaining the account information of at least one of the named defendants in the case and the defendants could challenge those. The court noted that most courts that have considered the question have agreed social media users have a reasonable expectation of privacy in private messages sent through a social media application. The Fourth Circuit agreed that such private messages sent through a third-party provider remain constitutionally protected and that the government must typically obtain a search warrant before accessing them. "It cannot be the rule that the government can access someone's personal conversations and communications without meeting the warrant requirements or one of the Supreme Court's delineated exceptions to it. The judiciary would not allow such a trespass upon privacy at its core." *Zelaya-Veilz* Slip op. at 21.

Turning to the merits of the challenges, the court first determined that the warrants were all amply supported by probable cause. The second warrant was supported by information that the target defendant had trafficked the minor recovered by police, that he had multiple accounts in fake names, that his credit card was connected to a phone in possession of a minor victim when police found her, and that his known affiliates were using Facebook to accomplish trafficking and other forms of child abuse. This information, coupled with information about how MS-13 operates and typically uses Facebook based on the agent's training and experience, established probable cause. The third warrant was supported by identification of the target defendant by one of the minor victims and information from the first warrant showing that the target communicated over Facebook to facilitate crimes by gang members. Likewise, the affidavit in support of the fourth warrant demonstrated that account activities of each target defendant showed the targets either coordinating prostitution of minors, discussing the trafficking of a minor, admitting to sexual abuse of a minor, or making sexual advances towards minors. This information was corroborated by the minor victim and easily established probable cause. In the words of the court:

> The warrant affidavits in this case are well-sourced. They incorporated information from a reliable witness, the experience of an agent well-versed in the workings of MS-13, and—with each successive warrant—an increasingly incriminating chain of messages that tethered successive Facebook accounts to a larger conspiracy. *Id*. at 26.

The defendants also argued that the warrants were overbroad, in that the second and third warrants sought account information without any time limitation. They also argued that the warrants scooped up too many categories of account information. The court rejected these arguments as well. While the warrants required Facebook to disclose all the requested information connected to the accounts, the

warrants limited the seizure of that information to evidence of the crimes of investigation only. According to the court:

> We have previously found that a warrant's particularity is bolstered where, as here, the scope of the seizure it authorized was limited to evidence of enumerated offenses. The warrants in this case thus appropriately confined the officers' discretion, by restricting them from rummaging through the appellants' social media data in search of unrelated criminal activities. *Id*. at 28.

The timeframe limits on the third and fourth warrants that included a period beyond the time during which the minor victims were trafficked also did not render the warrants overbroad. Law enforcement had information that the defendants were engaged in a far-reaching sex trafficking conspiracy involving multiple victims and that the perpetrators used Facebook to communicate about the crimes before and after their commission. "The extensive nature of the conspiracy being investigated in this case meant that less temporal specificity was required here than in other contexts where evidence can be more readily confined to a particular time period." *Id*. at 32 (cleaned up).

The court agreed with the defendants that the lack of any timeframe limitation in the second warrant was problematic and potentially unreasonable under the Fourth Amendment. "… [A] time-based limitation is both practical and protective of privacy interest in the context of social media warrants." *Id*. at 34 (cleaned up). However, the second warrant was not so obviously illegal that a reasonable officer would have recognized it as such, and the good faith exception acted to save the warrant here. The court cautioned that social media warrants without any temporal limitation could be subject to an overbreadth challenge. In its words: "… [F]uture warrants enhance their claims to particularity by requesting data only from the period of time during which the defendant was suspected of taking part in the criminal conspiracy." *Id*. at 35. In a footnote, the court also noted that its opinion did not address the contours of the plain view exception in the context of social media warrants.

Other challenges were similarly rejected, and the judgment of the district court was unanimously affirmed.

Jeff Welty and Phil Dixon jointly blogged about the case, here.

Suppression Motions

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

State v. Jonas, 386 N.C. 137 (May 23, 2024). In this Cabarrus County case, the Supreme Court upheld the Court of Appeals decision that the defendant was not required to give notice of his intent to appeal the denial of his motion to suppress prior to entering an open guilty plea.

The defendant was charged with possession of a controlled substance and filed a motion to suppress, arguing the officer who stopped and searched him lacked reasonable suspicion. The trial court denied the motion, and the defendant subsequently pleaded guilty. Notably, the defendant confirmed to the trial court that he was not pleading guilty as part of a plea arrangement. After sentencing, defense

counsel gave notice of appeal on the record. The Court of Appeals panel unanimously held that the defendant was not required to give notice of intent to appeal prior to entering his plea.

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

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

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. ___; 144 S.Ct. 1785 (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.

Phil Dixon blogged about the decision, here.

Pleadings

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

State v. Singleton, 386 N.C. 183 (May 23, 2024). In this Wake County case, the Supreme Court reversed the Court of Appeals decision vacating the defendant's conviction for second-degree rape due to a fatal defect in the indictment. The Court held that a defect in an indictment does not deprive the courts of jurisdiction unless the indictment wholly fails to allege a crime.

In November of 2017, the victim, a college student home for thanksgiving break, went out in downtown Raleigh with her friends and became intoxicated. At some point during the night, the victim blacked out, and woke up in the defendant's car with him on top of her. The defendant was subsequently convicted of second-degree forcible rape and first-degree kidnapping. On appeal, he argued for the first time that the trial court lacked jurisdiction over the second-degree forcible rape charge because the indictment

did not allege that he knew or should have known that the victim was physically helpless at the time of the act. The Court of Appeals agreed and vacated the rape conviction, holding that the indictment failed to allege an essential element of the crime.

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

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

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

Daniel Spiegel blogged about the case here, and Joe Hyde blogged about it here.

Indictment contained essential elements of G.S. 14-120 and was facially valid

State v. Simpson, COA23-618, ___ N.C. App. ___ (Aug. 20, 2024). In this New Hanover County case, the defendant appealed her convictions for felony forgery of endorsement and felony uttering a forged endorsement, arguing error in denying her motion to dismiss the uttering a forged instrument charge due to a flawed indictment, among other arguments. The Court of Appeals found no error but remanded to correct the judgment's clerical error of a guilty verdict as opposed to a guilty plea.

On February 7, 2019, the 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 the defendant was at home with her husband. The following day, the victim noted two checks were missing, and reported this to the 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.

The Court explained that the 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 the 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.

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

State v. Stewart, 386 N.C. 237 (May 23, 2024). In this Mecklenburg County case, the Supreme Court reversed the unpublished Court of Appeals opinion vacating the defendant's conviction for sexual battery. The Court applied the holding in *State v. Singleton* when determining that the failure of the indictment to allege defendant used force during the sexual battery did not make the indictment invalid.

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

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

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

Pretrial Release

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. ___; 902 S.E.2d 341 (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 the defendant after the district court imposed a $250 secured bond when he 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, the 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. The defendant was found guilty on all charges and given a

150-day suspended sentence. The defendant then gave notice of appeal, at which point the district court modified the defendant's pretrial release to require a $250 secured bond. This led to the defendant being taken into custody for a few hours while his family posted the bond. In October 2022, the 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 the 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 the 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 the 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 the 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 the 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 the defendant's motion to dismiss.

Right to Counsel

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

State v. Melton, COA23-411, ___ N.C. App. ___; 901 S.E.2d 853 (May 21, 2024). In this Forsyth County case, the defendant appealed his convictions for possession of methamphetamine and habitual felon status, arguing structural error in denying his court-appointed counsel's motion to withdraw. The Court of Appeals majority found no error.

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

trial court repronounced the motion to withdraw. The defendant was subsequently convicted and filed notice of appeal.

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

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

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

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

Phil Dixon blogged about structural errors, here.

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

State v. Smith, COA23-575, ___ N.C. App. ___; 898 S.E.2d 909 (March 5, 2024). In this Stanly County case, the defendant appealed the trial court's ruling that he forfeited his right to counsel. The Court of Appeals found no error.

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

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

Plea Bargains

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); *temp. stay allowed*, ___ N.C. ___; 901 S.E.2d 774 (June 26, 2024). In this Cumberland County case, both the State and the 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 the defendant did not show detrimental reliance on the agreement prior to the State's withdrawal, remanding for further proceedings.

In March of 2016, the defendant was charged with child abuse and first-degree murder in connection with the death of her daughter. The 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 the defendant submit to a polygraph and not to move for bond reduction or seek a probable cause hearing during its investigation, which the defendant did. She 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 the 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 the defendant rejected. The defendant filed a motion to enforce the prior plea agreement, which the trial court denied in November 2018. The 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 the 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 the 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.

Right to Jury Trial

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); *temp. stay allowed*, ___ N.C. ___; 901 S.E.2d 814 (June 28, 2024). In this Alamance County case, the 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 the convictions and remanding for a new trial.

In November of 2017, the defendant was involved in a dispute after a near-collision with another driver. After exchanging words, the defendant and his passenger pulled out guns, and eventually shots were fired at the other vehicle. The 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. The defendant was subsequently convicted.

Taking up the 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 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.

Shea Denning wrote about the earlier *Chambers* decision, here.

Character Evidence

Reference to past behavior predicting future behavior in closing argument violated Rule 404(b)

State v. Anderson, COA23-821, ___ N.C. App. ___ (Aug. 6, 2024). In this Cleveland County case, the defendant appealed his convictions for statutory sexual offense with a child and indecent liberties with a child, arguing error in in part that the trial court erred by failing to intervene *ex mero motu* during the prosecutor's closing argument. The Court of Appeals found no prejudicial error.

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.

The court observed that the that the prosecutor's statement here 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 the defendant did not rebut the presumption that the jury followed the trial court's instructions.

Joe Hyde blogged about the decision, here.

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

State v. Aguilar, COA23-556, ___ N.C. App. ___; 898 S.E.2d 914 (March 5, 2024). In this Mecklenburg County case, the defendant appealed his convictions for sexual battery, assault on a female, and false imprisonment, arguing error in allowing the State's witness to vouch for the alleged victim's credibility. The Court of Appeals agreed, ordering a new trial.

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

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

Crimes

Child Abuse

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, the 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 arose from abuse inflicted on the five-year old son of the defendant's fiancée. After the boy got in a scuffle at his bus stop, the 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, the 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, the defendant moved to dismiss the charges for insufficient evidence, and the trial court denied the motion. The 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, the 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), the 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, the 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 the 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).

Firearms Offenses

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

State v. Radomski, COA23-340, ___ N.C. App. ___; 901 S.E.2d 908 (May 21, 2024). In this Orange County case, the defendant appealed his conviction for possession of a firearm on education property, arguing the application of G.S. 14-269.2 to his case was unconstitutional and that the trial court erred by denying his motion to dismiss for insufficient evidence. The Court of Appeals majority agreed on both grounds, reversing the trial court and vacating defendant's conviction.

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

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

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

path Defendant took, what signs he saw, or any other indication of personal knowledge that he was on educational property." *Id*. at 21.

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

Phil Dixon blogged about the case, here.

Failure to store firearm to protect a minor statute applies only when the firearm is loaded

State v. Cable, COA23-192, ___ N.C. App. ___; 903 S.E.2d 394 (June 18, 2024); *temp. stay allowed*, ___ N.C. ___; 902 S.E.2d 267 (July 8, 2024). In this McDowell County case, the 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, the defendant's son had a friend over to their house to spend the night. The 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, the 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, the 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 the 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 the 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 the 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 the defendant, the court presumed the conviction was based on the now-reversed misdemeanor, and vacated the conviction for involuntary manslaughter.

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. ___; 903 S.E.2d 225 (June 18, 2024); *temp. stay allowed*, ___ N.C. ___; 901 S.E.2d 811 (June 28, 2024). In this Rutherford County case, the 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 the defendant's girlfriend and her children resided to execute a search warrant against the 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 the defendant was a co-occupant of the bedroom and that he constructively possessed the firearm, as no evidence showed the defendant physically possessing the firearm.

Taking up the 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. The defendant's conviction was therefore vacated and the defendant's motion to dismiss for insufficient evidence should have been granted.

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. ___; 144 S.Ct. 1889 (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.

Jeff Welty blogged about this case, here.

Hit and Run

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

State v. Buck, COA23-606, ___ N.C. App. ___; 901 S.E.2d 669 (May 7, 2024). In this New Hanover County case, the defendant appealed his convictions for assault with a deadly weapon with the intent to kill inflicting serious injury (AWDWIKISI), felony hit-and-run with serious injury, and robbery with a dangerous weapon, making several arguments centered around the definition of "crash" under G.S. 20-166, the mutually exclusive nature of the AWDWIKISI and hit-and-run charges, and a clerical error in the judgment. The Court of Appeals found no merit with the defendant's arguments regarding his convictions but did find that the trial court made a clerical error in the hit-and-run judgment and remanded for correction of that error.

In January of 2021, the defendant met the victim to sell him marijuana; instead of paying the defendant for the marijuana, the victim grabbed the drugs and ran. The defendant hit the victim with his car, got out of the vehicle and went through the victim's pockets, then drove away without calling for assistance.

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

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

Homicide

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

State v. Jackson, COA23-636, ___ N.C. App. ___; 899 S.E.2d 399 (March 19, 2024). In this Guilford County case, the defendant appealed his convictions for first-degree murder based on felony murder, armed robbery, and possession of a stolen vehicle, arguing error in (1) denying his motion to dismiss the armed robbery charge and (2) not instructing the jury that self-defense could justify felony murder based on armed robbery. The Court of Appeals found no error.

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

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

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

Joe Hyde blogged about the case, here.

Impaired Driving

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

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

In March of 2021, an Asheville police officer observed the defendant roll through a stop sign. The officer pulled over the defendant, and observed the smell of alcohol, glassy eyes, and slurred speech. The office conducted field sobriety tests, determining that the defendant was likely intoxicated. After the

defendant was arrested and taken to the Buncombe County Jail, a certified chemical analyst conducted a 15-minute observation period of the defendant, followed by an Intoximeter breath analysis. After this first breath test, the analyst noted that the defendant had gum in his mouth and had him spit it out, then conducted a second breath test two minutes after the first. Both tests resulted in 0.11 BAC readings. Both parties offered expert testimony about the possible effects of the gum, but no studies were admitted using the type of Intoximeter in question, and no evidence established the type of gum that the defendant had in his mouth at the time of the test.

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

> In sum, we believe the intent of both the legislature and DHHS in the provisions pertinent here is clear: to ensure that the chemical analysis of a subject's breath is accurate in measuring BAC and not tainted by the presence of substances in the mouth during testing. And in our view, to adopt the State's position that the observation period requirement is not violated when a subject "chews" something during the period would lead to absurd results and have bizarre consequences because it would mean, for example, that a subject could engage in the following activities not listed in 10A NCAC 41B.0106(6) moments before the taking of breath samples: *chewing* gum—presumably including nicotine gum—or tobacco or food that is spit out before swallowing, *dipping* snuff, *sucking* on a medicated throat lozenge or a hard candy, *using* an inhaler, and *swallowing* a pill.*Id*. at 13.

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

Judge Arrowood concurred in the result only.

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

Shea Denning blogged about this case, here.

Kidnapping

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. ___; 903 S.E.2d 861 (July 2, 2024). In this Davie County case, the 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 the conviction.

In September of 2019, the defendant was assisting an acquaintance in the search for her mother's stolen car. The search resulted in the 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. The 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.

The 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 the 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.

Joe Hyde blogged about the case, here.

Misdemeanor Death by Motor Vehicle

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. ___; 903 S.E.2d 865 (July 2, 2024). In this Mecklenburg County case, the 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.

The 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 the defendant was going approximately 100 miles per hour when he struck the pedestrian. The 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 the 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. The 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 the defendant was speeding to support the death by motor vehicle charge. The burden then shifted to the 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.

The 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.

Sexual 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. ___; 903 S.E.2d 221 (June 4, 2024). In this Iredell County case, the 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, the defendant exchanged snapchat messages with a fourteen-year-old girl he had met when he was giving a roofing estimate to her parents. The 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. The defendant never met with the victim, but snapchat messages were later retrieved from her phone and used by officers in the investigation. The 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.

The Court of Appeals explained substantial evidence, both circumstantial and direct, supported denial of defendant's motion. Circumstantially, the defendant knew that the girl was taking dual-enrollment community college classes while still in high school. For direct evidence, the girl messaged the 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. The 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.

Stalking

Defendant's course of conduct and actions towards victim supported stalking conviction; no 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

State v. Plotz, COA 23-749, ___ N.C. App. ___ (Aug. 20, 2024). Over the course of 2020, the 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, the 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. The 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, the 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 the defendant, leading to his conviction.

On appeal, the 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 the 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.

The 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 the 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. The 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 the defendant "specifically and affirmatively consented to this construction of the charge." *Id*. at 23. The court also pointed out that the 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.

The defendant also argued ineffective assistance of counsel, pointing to the alleged errors discussed above. The court dispensed with this part of the 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. Finally, the court considered the defendant's argument that the evidence was insufficient to support a conviction, determining that evidence of the 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, the 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 the 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, the 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, the defendant asked the widow for her phone number, which she willingly gave to defendant. When the widow arrived home, she found that the defendant had called her multiple times and left seven voicemails. The repeated calls continued for at least six months, with the defendant making comments about dating the widow and having sex with her. The 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, the defendant admitted he had previously been convicted of misdemeanor stalking, one element of the offense of felony stalking.

The Court of Appeals dispensed with the 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 the defendant harassed the victim, and whether the 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 the 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 that the 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.

Defenses

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 the 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 the defendant was prejudiced by the error.

In April of 2021, the victim approached the defendant's front door, leading to a confrontation between the two over the defendant's complaints to their landlord about the victim. After the confrontation escalated, the defendant fired several shots at the victim, hitting her in the left side and causing injuries that left her disabled. At trial, the 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, the 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 the 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.

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

State v. Vaughn, COA23-337, ___ N.C. App. ___; 901 S.E.2d 260 (May 7, 2024); *temp. stay allowed*, ___ N.C. ___; 900 S.E.2d 329 (May 16, 2024). In this Lincoln County case, the defendant appealed his convictions for first-degree murder and possessing a weapon of mass death and destruction, arguing error in denying his requested jury instructions on stand-your-ground and defense of habitation for murder and justification for the possession of a weapon of mass death charge. The Court of Appeals found error in denying the stand-your-ground instruction, but no error in denying the other two. The court vacated the first-degree murder charge and remanded for a new trial and resentencing.

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

Considering the defendant's arguments, the Court of Appeals explained that the recent decision in *State v. McLymore*, 380 N.C. 185 (2022), altered the analysis of whether a defendant could claim stand-your-ground as a defense under G.S. 14-51.3. Previously, under *State v. Crump*, 259 N.C. App. 144 (2018), a defendant was disqualified from using force in self defense if they were committing a felony, and the State did not have to prove a connection between the felony and the use of force in self-defense. The Supreme Court held in *McLymore* that "the State must prove the existence of an immediate causal nexus between the defendant's disqualifying conduct and the confrontation during which the defendant used force." Slip op. at 9, quoting *McLymore* at 197-98.

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

> [T]here is a reasonable possibility that, had the trial court instructed the jury on the stand-your-ground provision and causal nexus requirement, the jury would have determined

> that Defendant's use of deadly force was justified because he reasonably believed that such force was necessary to prevent imminent death to himself and that there was no causal nexus between Defendant's felonious possession of a weapon of mass death and destruction and his use of force.

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

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

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

Closing Argument

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

State v. Grant, COA23-656, ___ N.C. App. ___; 900 S.E.2d 408 (April 16, 2024). In this Mecklenburg County case, the defendant appealed his conviction for assault on a female, arguing prejudicial error in overruling his objection to the State's comment during closing argument regarding his decision not to testify. The Court of Appeals found no prejudicial error.

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

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

Shea Denning blogged about the case here.

Mistrial

Trial court erred by allowing a potential juror to reference defendant's time in prison in front of other potential jurors; reversible error to deny motion for mistrial

State v. Bruer, COA23-604, ___ N.C. App. ___; 903 S.E.2d 387 (June 18, 2024). In this Stanly County case, the 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 the 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 the defendant worked, finding methamphetamine, cocaine, and firearms. Defendant was arrested along with several coworkers. When the 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 the 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, the defendant's ankles were shackled. Defense counsel did not object to the shackling but requested that the 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 the defendant's motion.

Moving to (2), the court explained that substantial evidence showing the defendant constructively possessed the firearm justified denial of defendant's motion to dismiss. Specifically, the 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 the 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.

Sentencing, Probation, and Parole

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, COA23-801, ___ N.C. App. ___ (Aug. 6, 2024). In this Craven County case, the 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.

The 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 the 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.

Sex Offender Registration and Monitoring

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, the defendant appealed after entering guilty pleas to four counts of second-degree exploitation of a minor. The 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.

The defendant entered his guilty pleas in May 2023. The trial court entered four judgments; in the first, the 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.

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, the 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 the defendant's claims were meritless or procedurally barred and dismissed for lack of appellate jurisdiction.

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

The core of the 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 the defendant's argument, noting the cases cited by the 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 the 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 the appeal.

The court also briefly considered the 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.

Appeals

Oral notice of appeal is sufficient if given at any point before the end of the session of criminal superior court; 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, COA23-1100, ___ N.C. App. ___ (Aug. 6, 2024). In this Rowan County case, the 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, the 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, the 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. The 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 the 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. Once the court has adjourned *sine die* for the session, the session is concluded, and oral notice of appeal will not be sufficient; only written notice of appeal will be proper at that point.

Moving to the jury instruction, the court noted the distinction between the two offenses was that the "physical injury" element is not present in the lesser offense. The court found the physical injury element was sufficiently satisfied by the evidence showing that the 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.

Habeas

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 the defendant's petition for writ of habeas corpus. The 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.

The defendant pleaded guilty to multiple counts of obtaining property by false pretenses in 2019 and was imprisoned when the COVID-19 pandemic began. The 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 the application under G.S. 17-4(2), finding that the defendant had a valid final judgment in a criminal case entered by a court with proper jurisdiction. The 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 the defendant's claim did not represent a violation of his rights. Although the 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 the 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 the defendant did not assert a jurisdictional defect, the 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 expressing 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.