Statutorily and Judicially Created Appellate Issues Preserved as a Matter of Law
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Statutorily Created Appellate Issues Preserved as a Matter of Law

1. Lack of jurisdiction of the trial court over the offense of which the defendant was convicted. N.C.G.S. § 15A-1446(d)(1).
   a. Cases In Which Appellant Was Successful on the Merits
         1. Facts: Defendant convicted of breaking and entering, larceny and possession of stolen goods. The felonious possession of stolen goods judgment was arrested and defendant was convicted of being a habitual felon. Defendant appealed
         2. Holding/Reasoning: Held that the larceny indictment was fatally defective because it failed to state that the church where the items were taken was a legal entity capable of owning property. The larceny conviction was vacated and the case was remanded for resentencing. In all other aspects, the judgment was affirmed.
         1. Facts: Defendant argued that the indictment charging him with robbery with a dangerous weapon was defective because the indictment: (1) did not state that the “implement” was dangerous; and (2) “keeping his hand in his coat” did not constitute a dangerous weapon.
         2. Holding/Reasoning: Although defendant failed to mention this error to the trial court, the failure of a criminal pleading to charge the essential elements of a crime preserves the error for appellate review. An indictment must allege every element of an offense in order to confer subject matter jurisdiction on the court. In this case, because the indictment stated that defendant kept his hand in his coat, suggesting that it was a dangerous weapon, the indictment failed to sufficiently list the elements of the crime. The court arrested judgment on the robbery with a dangerous weapon and remanded the case for judgment and resentencing on common law robbery.
         1. Facts: Defendant was convicted of two counts of first degree kidnapping. On appeal, defendant argued that the trial court lacked jurisdiction because the indictment failed to allege a necessary element—that the victims were seriously injured or not released in a safe place.
2. **Holding/Reasoning:** Held that allegations that defendant did something "for the purpose of doing other serious bodily harm" did not equate to the victims having been actually injured. Also concluded, however, that the indictments were valid for second degree kidnapping. The judgments for first degree kidnapping were vacated and the case was remanded for entry of judgment on verdict of second degree kidnapping and for resentencing.

   1. **Facts:** Defendant convicted of sexual battery on a charge of first degree rape. On appeal, defendant argued that because sexual battery is not a lesser included offense of first degree rape, the trial court did not have jurisdiction over him.
   2. **Holding/Reasoning:** State conceded that sexual battery was not a lesser included offense of first degree rape. Sexual battery required that the act be for the purpose of gratification, sexual arousal or abuse, while first degree rape did not. Because defendant was convicted of a crime that he was not formerly charged with, the conviction was a nullity. Furthermore, defendant did not invite error by failing to raise the issue at trial.

   1. **Facts:** Defendant convicted with possession and intent to sell and deliver Meth, felonious sale of Meth, and felonious delivery of the aforementioned controlled substance. Defendant argued that trial court lacked jurisdiction because the indictment did not allege a substance listed in Schedule I.
   2. **Holding/Reasoning:** Because the substance listed in defendant’s indictment did not appear in Schedule I, the indictment was fatally defective. Defendant’s convictions were vacated.

   1. **Facts:** Defendant convicted of felonious child abuse. Defendant argued that trial court erred in sentencing her for felonious child abuse inflicting serious bodily injury, a Class C felony, where the jury was only instructed on felonious child abuse inflicting serious physical injury, a Class E felony.
   2. **Holding/Reasoning:** Held that a remand for re-sentencing on felony child abuse inflicting serious physical injury was improper because the indictment failed to allege an essential element required for proof of that crime-that
injury be inflicted by a parent. However, the indictment and jury verdict did support conviction for misdemeanor assault. The judgment was vacated and the case was remanded for resentencing on misdemeanor assault.


1. **Facts**: Defendant was convicted of possession of Meth. Defendant argued that his indictment was defective because it failed to allege a substance listed in Schedule I of N.C.G.S. § 90-89.

2. **Holding/Reasoning**: Held that the substance does not appear in Schedule I. Thus, the indictment failed, and defendant’s conviction of felonious possession of MDA was vacated.


1. **Facts**: Defendant was convicted for various crimes, including larceny. He argued that the trial court erred in allowing the State to amend a fatally defective indictment.

2. **Holding/Reasoning**: Held that larceny indictment was fatally defective and that the trial court erred in allowing an amendment of the indictment. The indictment was fatally defective because it failed to list the entity that owned the property that defendant stole. Under NC statute, the indictment could not be amended where the amendment would substantially alter the charge. The court reversed the defendant’s conviction for larceny.


1. **Facts**: Defendant was arrested and indicted on five counts of felonious possession of stolen property and felonious larceny based on his alleged involvement in the theft of four-wheelers. On appeal, defendant argued that indictments were fatally defective.

2. **Holding/Reasoning**: Agreed with defendant. Held that an indictment was handed down for each of the four-wheelers stolen. Because the retailer was not a person, the indictment had to allege that the victim was a legal entity capable of owning property. No such allegation was made. As a result, the indictments were flawed and the judgments were vacated.


1. **Facts**: Grand jury indicted defendant for marijuana possession and marijuana possession with intent to sell. Convicted of possession of 42 grams of marijuana, and acquitted him of possession with intent to sell.

2. **Holding/Reasoning**: The indictment did not specify the weight of the marijuana that defendant had. Determined that the indictment was fatally flawed, as it did not specify
all of the essential elements of the charged crime because it left out the weight. The parties could not waive that requirement at trial and the harmless error analysis could not be used. Since indictment was fatally flawed, trial court did not have jurisdiction. The conviction for possession of 42 grams of marijuana was vacated and case remanded.


1. **Facts:** Defendant convicted of several sexual offenses and appealed. Defendant argued that the trial court erred by: (1) permitting evidence of his false answers regarding prior drug use, (2) denying his motion to dismiss, (3) accepting guilty verdicts where verdict sheets presented crimes for which he had not been indicted, and (4) finding that he abused a position of trust or confidence and sentencing him in the aggravated range of punishment for his convictions of sexual activity with a person in his custody.

2. **Holding/Reasoning:** First, while the admission of the drug evidence was error, this error did not entitle defendant to a new trial. Second, there was sufficient evidence of the crimes charged to warrant denial of a dismissal motion. Third, the State agreed that one of the convictions should be arrested. Finally, it was error to use an element of an offense for which one was convicted to prove any sentencing factor in aggravation. Two judgments were improperly increased upon the finding of the aggravating factor of abusing a position of trust. The judgment of conviction for a sexual offense by a person in a parental role was arrested. The matter was remanded for resentencing in two of the three judgments.


1. **Facts:** Defendant and another person assaulted the victim and stole his car. Defendant argued that the charge of assault with a deadly weapon failed to name the weapon.

2. **Holding/Reasoning:** Held that the charge needed to specifically name the weapon. The reference to a bottle in another count was insufficient since each count of an indictment must be complete in itself. However, the count at issue did properly allege one of the lesser included offenses. The indictment sufficiently charged misdemeanor operation to elude arrest. Two of the judgments were arrested and the case was remanded for entry of judgment on assault inflicting serious injury, for entry of judgment on misdemeanor operation of a motor vehicle to elude arrest, and for a new sentencing hearing.

1. **Facts**: Defendant convicted of felonious breaking and entering, felonious larceny, resisting arrest, assault upon an officer and habitual felon. Defendant appealed.

2. **Holding/Reasoning**: Held that where defendant was convicted of felonious breaking and entering it was not necessary that the indictment allege ownership of the building at issue. The indictment identified the building. It was not necessary that the indictment set forth the ownership of the property that defendant intended to steal. As to the larceny charge, the indictment was insufficient. The indictment lacked any indication of the legal ownership status of the victim, such as identifying the victim as a natural person or a corporation. It was fatally defective. The judgment on the charge of felonious larceny was vacated.


1. **Facts**: Defendant was indicted for first degree kidnapping and assault. At the end of the trial, defendant was acquitted of the assault charge but convicted of felonious restraint, which had been submitted to the jury as a lesser-included offense under the kidnapping indictment. The kidnapping indictment had not charged that defendant transported the victim by motor vehicle.

2. **Holding/Reasoning**: Held that defendant's failure to object to the submission of the felonious restraint charge did not preclude the appeal because a challenge to the indictment could be made for the first time on appeal. Nor was there a formal waiver of the right to an indictment. The lesser charge of felonious restraint had an essential element—proof that the victim was transported in a motor vehicle—which was not alleged in the bill of indictment charging the greater offense of kidnapping. Thus, the kidnapping indictment did not support the charge of felonious restraint.

b. Cases in Which Appellant Was Unsuccessful on the Merits


a. Cases in Which Appellant Was Successful on the Merits

   1. Facts: Defendant was arrested and indicted on two counts of robbery with a dangerous weapon. He was later convicted. On appeal, Defendant challenged the indictment, alleging that the indictment was insufficient as it failed to allege some essential elements of the charged crime.
   2. Holding: Held that the defendant’s opportunity for appellate review was preserved as a matter of law despite the fact that the defendant was challenging the sufficiency of the criminal charge for the first time on appeal. The trial court did not have subject matter jurisdiction to convict the defendant of robbery with a dangerous weapon. The court arrested judgment on the conviction for robbery with a dangerous weapon and remanded for entry of judgment and resentencing on common law robbery.

   1. Facts: The defendant was convicted of attempted first degree murder and possession of a firearm by felon while being a habitual felon. He appealed the conviction.
   2. Holding: An indictment is insufficient if it fails to allege the essential elements of the crime charged. Such an error may be reviewed on appeal despite the fact that no challenge was raised at trial.

   1. Facts: The defendant was convicted of felonious breaking and entering, felonious larceny, and other crimes. He failed to challenge the indictment at trial and raised the issue on appeal.
   2. Holding: A defendant may challenge an indictment on appeal, on the grounds that the indictment is insufficient to support the offense of which the defendant was convicted, even if the defendant did not raise a challenge to the indictment at trial.

   1. Facts: The defendant was convicted of robbery with a dangerous weapon, second degree kidnapping, and first degree kidnapping. He received prison sentences and appealed. The defendant’s sentence was enhanced by 60
months for possession of a firearm during the offense for which he was convicted, based on the “firearm enhancement” section of N.C.G.S. § 15A-1340.16A. Defendant did not raise an objection at trial, and the Court of Appeals reviewed the case based on plain error.

2. **Holding:** The court held that the indictment was fatally defective because it failed to allege facts that would sufficiently support the firearm enhancements.

   1. **Facts:** See previous.
   2. **Holding:** See previous.

   1. **Facts:** The defendant was charged and convicted of first-degree kidnapping. On appeal he alleged that the indictment was insufficient to support his conviction for first-degree kidnapping because it failed to allege some essential elements of first-degree kidnapping. The court allowed the defendant to bring this issue for the first time on appeal despite the fact that the defendant had not raised any objections at trial.
   2. **Holding:** Held that because some essential elements were missing in the indictment to support a conviction for first-degree kidnapping, the conviction should be vacated. The issue was remanded to the lower court for sentencing for second-degree kidnapping.

   1. **Facts:** Defendant convicted of felony murder based on the underlying felonies of breaking and entering, kidnapping and armed robbery. On appeal, defendant argued that denial of the motion for change of venue was error.
   2. **Holding/Reasoning:** Held that the denial of the motion for a change of venue was prejudicial error and granted defendant a new trial. When examining whether the indictment was sufficient to charge the defendant with first-degree kidnapping, the court noted that N.C.G.S § 15A-1146(d)(4) allows a party to assert error regarding a defective indictment without preserving the issue at trial.

   1. **Facts:** The defendant was arrested, tried, and convicted of possession of illegal gambling device. The warrant failed to allege an essential element of the offense. The warrant did not charge that the defendant operated the gambling devices or that he kept such devices in his own or the possession of other persons for the purpose of being operated
2. **Holding:** Held that the failure to allege an essential element of the crime charged was a fatal defect in the warrant. As such, the court did not have jurisdiction, and the judgment entered against the defendant at trial was arrested.

b. Cases in Which Appellant Was Unsuccessful on the Merits

3. Subsequent admission of evidence involving a specified line of questioning when there has been an improperly overruled objection to the admission of evidence involving that line of questioning. N.C.G.S. 15A-1446(d)(10).
   a. Cases in Which Appellant Was Successful on the Merits
      i. No Direct Citations
   b. Cases in Which Appellant Was Unsuccessful on the Merits

4. Questions propounded to a witness by the court or a juror. N.C.G.S. § 15A-1446(d)(11). See Also *State v. Bryant*, 189 N.C. 112, 126 S.E.2d 107 (1925) (Defendant awarded a new trial based upon the trial court’s comment in the presence of the jury that defendant had “the weakest voice or the shortest memory of any man he had ever seen.” The Court held that these comments reflected an opinion of the trial court regarding the defendant’s credibility in violation of the controlling statute which prohibited the expression of such opinions by the trial judge).
   a. Cases in Which Appellant Was Successful on the Merits
         1. **Facts:** The defendant was tried and convicted of felonious larceny, safecracking, felonious breaking and entering. During the trial, the judge made a statement to the jury, “Ladies and gentlemen if these witnesses are not telling the truth, then the court, I THINK IT IS OBVIOUS WHAT THE FACTS ARE. NOW, I HAVE MADE YOUR SPEECH AGAIN FOR YOU.” (Emphasis added). The defendant did not object at trial, but he did raise the issue for the first time on appeal.
         2. **Holding:** Held that the defendant was allowed to raise the issue for the first time on appeal even though he didn’t make an objection at trial. The judge’s remark constituted an opinion in violation of the statute. Thus, the judge’s comments were prejudicial and affected the defendant’s right to a fair trial. Defendant granted a new trial.
   1. **Facts**: The defendant was convicted of rape and common law robbery. During the trial, the judge asked the victim a question that inadvertently tied the defendant to the rape even though evidence had not yet firmly established that the defendant was the one who raped her.
   2. **Holding**: The court held that the defendant was entitled to raise the issue for the first time on appeal despite not having objected at trial. The court pointed out that the trial judge is expected to guide the trial and the jury, but not in a prejudicial way. The court felt that the judge’s statements and questions, even though he tried to retract them, were prejudicial against the defendant. The court ordered a new trial for the defendant.

   1. **Facts**: The defendants were convicted of robbery while armed with a firearm. At trial, the judge made a statement asserting that he felt the defendant’s statements were voluntary. This statement was made in the presence of the jury, but the judge later attempted to correct the statement and remove its prejudicial effect.
   2. **Holding**: The defendants were allowed to raise the issue on appeal despite the fact that they did not object at trial because an improper expression of opinion by a judge goes against the statute. The court determined that the judge’s comments were impermissible and were prejudicial. The court ordered a new trial for the defendants.

   1. **Facts**: The defendant was convicted of unlawful possession and transportation of non-tax paid liquor. He appealed and assigned as error the trial judge’s interrogation of alibi witnesses because it was done in a manner calculated to impeach the witnesses and depreciate their testimony.
   2. **Holding**: The court held that the defendant was allowed to raise the issue on appeal for the first time despite not making an objection at trial. The court determined that the trial judge’s questions were prejudicial and ordered a new trial for the defendant.

b. **Cases in Which Appellant Was Unsuccessful on the Merits**
5. Rulings and orders of the court, not directed to the admissibility of evidence during trial, when there has been no opportunity to make an objection or motion. N.C.G.S. § 15A-1446(d)(12).
   a. Cases in Which Appellant Was Successful on the Merits
      i. No Direct Citations
   b. Cases in Which Appellant Was Unsuccessful on the Merits

6. The court has expressed to the jury an opinion as to whether a fact is fully or sufficiently proved. N.C.G.S. § 15A-1446(d)(14).
   a. Cases where the court held that the defendant’s right to appeal was preserved despite the fact that he did not raise an objection as trial. However, the court found that the lower court did NOT express an opinion as to whether a fact was fully or sufficiently proved or that the statements were harmless error.

7. The defendant was not present at any proceeding at which his presence was required. N.C.G.S. § 15A-1446(d)(15).
   a. Cases in Which Appellant was Successful on the Merits
         1. Facts: Defendant convicted of first degree rape and first degree murder. On appeal, he argued that the trial court erred when, after jury selection, the trial judge told the court reporter he would admonish the jury in the jury room, which he did.
         2. Holding/Reasoning: Held that by admonishing the jury in the jury room, the trial judge committed reversible error by communicating with the jurors outside of open court and in the absence of defendant, counsel or a court reporter. Conviction reversed and new trial ordered.
      b. Cases in Which Appellant was Unsuccessful on the Merits

   a. Cases in Which Appellant Was Successful on the Merits
         1. Facts: Defendant found guilty of malicious conduct by a prisoner and habitual misdemeanor assault. He was also
convicted of having obtained the status of being a habitual felon.

2. **Holding/Reasoning:** Held that stipulating to habitual felon status, without the proper inquiry needed for a guilty plea, did not satisfy the requirements for pleading guilty. Lack of objection at sentencing on habitual felon status was not needed to preserve for appeal.

b. **Cases in Which Appellant Was Unsuccessful on the Merits**

9. The form of the verdict was erroneous. N.C.G.S. § 15A-1446(d)(17).
   a. **Cases in Which Appellant Was Successful on the Merits**
         1. **Facts:** Defendant convicted of one count of possession with intent to sale and/or distribute cocaine and one court of selling cocaine. On appeal, defendant argued that the trial court accepted unconstitutional true special verdicts that did not support the judgment.
         2. **Holding/Reasoning:** Held that true special verdicts were erroneously submitted, returned and accepted. True special verdicts are unconstitutional in criminal cases because such verdicts do not allow the jury to fulfill its role of finding the defendant guilty or not guilty. In this case, the jury did not fulfill its constitutional responsibility to make an actual finding of defendant's guilt. The verdict form only required the jury to make factual findings on the essential elements of the charged crimes and nothing more. Thus, defendant's Sixth Amendment right to a jury trial was violated because the jury did not make an actual finding of defendant's guilt.

      1. **Facts:** Defendant found guilty on several trafficking in heroin charges. He challenged his two convictions for conspiracy and possession, sale and delivery of heroin. Defendant argued that his conviction for possession was invalid because of the use of the disjunctive “or” in the verdict form. This rendered the verdict ambiguous and deprived him of the right of a unanimous verdict.
      2. **Holding/Reasoning:** Held that use of the disjunctive created an ambiguous verdict which failed to support the judgment.

b. **Cases in Which Appellant Was Unsuccessful on the Merits**

10. The sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed or is otherwise invalid as a matter of law. N.C.G.S. § 15A-1446(d)(18)
a. Cases in Which Appellant was Successful on the Merits
      1. Defendant argued that trial court erred in concluding that Ohio R.C. § 2901.23 ("Intentional shooting, cutting, or stabbing) was substantially similar to N.C.G.S. § 14-32 (Felonious assault with deadly weapon with intent to kill of inflicting serious injury) and therefore assigning four prior record level points to defendant and sentencing him as such. The Court of Appeals agreed. Defendant was not required to raise the issue at sentencing, because the determination of an offender’s prior record level is a conclusion of law subject to de novo appeal on review.

        1. Defendant argued that it was plain error to order her to pay restitution as the State failed to present evidence that supported the amount she was ordered to pay. She did not need to object to the imposition of restitution to preserve the issue for review under N.C. Gen. § 15A-1446(d)(18) (2009). The only evidence to support house arrest fees was the State's unsworn statement. There was no documentation concerning the amount of a victim's hospital bills. The imposition of restitution was vacated and remanded for a rehearing.

        1. There was no evidence as to the appropriate amount of restitution. The restitution portion of the judgment was vacated and remanded for new determination. Issue preserved under this section.

        1. Prosecutor’s unsworn statement was not sufficient evidence to determine appropriate amount of restitution. The restitution portion of the judgment was vacated and remanded for a new determination. Issue preserved under this section.

        1. The State's failure to present evidence to support the restitution worksheet required remand on that issue. The issue was preserved pursuant to this section.

        1. The Court of Appeals erred in vacating the portion of the judgment ordering defendant to pay restitution. While the mere presentation of a worksheet was not sufficient to support the award of restitution, any error in the determination of restitution was not prejudicial to defendant because defendant would pay the lesser of the actual amount owed or the amount ordered. Court also
ruled that 15A-1446(d)(18) does not conflict with any specific provision of the NC Appellate Rules and operates as a “rule of law” under Rule 10(a)(1), which permits review of the restitution issue.

1. Facts: Defendant argued that the trial court erred in calculating his prior record level.
2. Holding/Reasoning: Issue preserved under this section. Defendant’s prior record level calculation was only supported by an in-court statement and a prior record level worksheet. The State’s argument that the information presented was sufficient under the “any other method found by the court to be reliable,” clause of N.C.G.S. 15A-1340.014(f) was contrary to prior decisions of the Court. The State failed to meet its burden of proving the convictions listed on the worksheet. Defendant entitled to a new sentencing hearing.

1. Facts: Defendant pled guilty and also received a restitution order. Defendant argued that that the restitution order was not supported by competent evidence.
2. Holding/Reasoning: Issue preserved under this provision. Court noted that the unsworn statement of the prosecutor is insufficient to support the amount of an order for restitution. Here, defendant did not stipulate to the restitution amount by pleading guilty to the underlying crime, nor was any other evidence presented. Order vacated and remanded.

1. Although defendant did not object to his sentencing at trial, the court reviewed it pursuant to N.C. Gen. Stat. § 15A-1446(d)(18) (2009). The court concluded that it was a violation of defendant’s right against double jeopardy for the trial court to sentence him for both robbery and possession of stolen property when the property was the proceeds of the robbery, as it subjected him to multiple punishments for the same crime.

1. Facts: Respondent argued that the trial court erred by imposing a condition of probation that required him to admit guilt for the underlying offense, after he had testified at trial and denied guilt, in violation of 5th Amendment
2. Holding/Reasoning: Court concluded that the issue raised the question of whether his sentence was illegally imposed or otherwise invalid as a matter of law. Court ultimately determined that the trial court erred by specifically
conditioning respondent’s probation on his express admission of the underlying offense.

    1. Facts: Defendant argued that the trial court recommended an amount of restitution that was not supported by the evidence.
    2. Holding/Reasoning: Issue deemed preserved under the statute. There was no evidence in the record to support the prosecutor’s amount for genetic testing. This portion of the judgment was vacated.

    1. Facts: Defendant argued that the trial court assessed three additional points in determining his prior record level.
    2. Holding/Reasoning: Issue preserved under this provision. Since defendant was sentenced based on an erroneous prior record level, the Court remanded for sentencing.

    1. Facts: Defendant argued that the amount of restitution was not supported by competent evidence.
    2. Holding/Reasoning: Issue deemed preserved under this provision. The Court held that the defendant’s silence to the trial court’s determination of the amount did not constitute stipulation to the amount. No evidence was presented at trial or during sentencing to support the amount of restitution on the restitution worksheet, and therefore the order was vacated and remanded.

    1. The court held that the restitution order was improper because the only information regarding the amount of restitution owed to the victim's father was provided by the prosecutor and such information did not constitute evidence. Even though defendant did not specifically object, the issue regarding restitution was deemed preserved for appellate review under N.C. Gen. Stat. § 15A-1446(d)(18).

b. Cases in Which Appellate was Unsuccessful on the Merits
11. A significant change in law, either substantive or procedural, applies to the proceedings leading to the defendant’s conviction or sentence, and retroactive application of the changed legal standard is required. N.C.G.S. § 15A-1446(d)(19)

a. Cases in Which Appellant Was Successful on the Merits
      1. Facts: Defendant argued on appeal that the trial court erred by ruling that he had “forfeited” his right to representation by counsel, on the grounds that there was evidence that Defendant was not competent to represent himself.
      2. Holding/Reasoning: The US Supreme Court’s decision in Indiana v. Edwards applied to this case because it was on direct review. Therefore, 15A-1446(d)(19) permitted review of the defendant’s issues. The Court ultimately determined that the record did not support the trial court’s decision that the defendant waived his right to counsel. The record also raised questions about defendant’s competence under Indiana v. Edwards. Reversed and remanded.

    1. Facts: The trial court denied the defendant’s motion to suppress the evidence obtained from the warrantless search of the defendant’s car because it found that the search was made incident to a lawful arrest.
    2. Holding/Reasoning: The US Supreme Court’s decision in Arizona v. Gant applied retroactively to this because it was on direct review. Therefore, 15A-1446(d)(19) permitted review of the defendant’s motion to suppress. The Court ultimately determined that it could not distinguish the facts of this case from those of Gant. The Court denied the State’s request to remand the case back to the trial court for a suppression hearing. The record clearly showed here that the stop was unconstitutional, and remand to the trial court was not necessary. The trial court’s order denying the motion to suppress was reversed.

b. Cases in Which Appellant Was Unsuccessful on the Merits
   i. No Direct Citations

c. Note
   i. There are several cases in which this issue has been addressed under N.C.G.S. § 15A-1414(b)(17) when dealing with a motion for appropriate relief.

Judicially Created Appellate Issues Preserved as a Matter of Law
1. Where the error violates defendant’s right to trial by jury of twelve, defendant’s failure to object is not fatal to his right to raise question on appeal.  State v. Ashe, 314 N.C. 28, 331 S.E.2d 652 (1985).

   b. Cases in Which Appellant Was Successful on the Merits

         1. Facts: Defendant was convicted of armed robbery and conspiracy to commit armed robbery. Defendant appealed, arguing that his right to trial by jury of 12 was violated.
         2. Holding/Reasoning: Held that trial court erred when it gave 11 jurors one set of instructions and 1 juror another set of instructions. This error was not a structural error mandating reversal and therefore the Court used the harmless error test to determine if the error warranted a new trial. After applying the harmless error test, the court determined that trial court committed reversible error and defendant was granted a new trial.

           1. Facts: Defendant convicted of second degree kidnapping, breaking and entering and larceny. Defendant also attained status of violent habitual felon and sentenced to life in prison. Defendant appealed, arguing that the trial court erred in issuing a disjunctive jury instruction on the kidnapping charge.
           2. Holding/Reasoning: Held that where a trial court instructs the jury disjunctively as to various alternative acts, there must be evidence to support all of the alternative acts that will satisfy the element. Thus, defendant was awarded a new trial.

            1. Facts: Defendant was convicted of first degree statutory rape of a female under the age of 13. On appeal, he argued that there was nothing to distinguish the ten indictments that went to the jury, which violated his right to a unanimous verdict.
            2. Holding/Reasoning: Held that the instructions allowed the jury to find the defendant guilty without unanimously agreeing he committed a particular crime, violating his right to a unanimous verdict under the NC Constitution. Defendant granted a new trial.

          1. Facts: Defendant convicted of first degree murder and was sentenced to death. He appealed, arguing that his right to trial by 12 jurors was violated.
          2. Holding/Reasoning: Held that the post-verdict removal of Juror Eleven for juror misconduct committed during the guilt-innocence phase deliberations violated the
defendant’s rights. Under the NC Constitution, defendant had a right to be tried and sentenced by a jury composed of 12 jurors. Case remanded for new trial.

   1. Facts: Defendant convicted of first degree murder. On appeal, he argued that he was entitled to a new sentencing hearing because an alternate juror was put on the jury during sentencing.
   2. Holding/Reasoning: Held that defendant was entitled to a new sentencing hearing because the court could not say whether the alternate juror fully participated in reaching the verdict.

   1. Facts: Defendant was convicted of conspiracy to damage real and personal property and other similar offenses and appealed. The Court of Appeals affirmed and Defendant petitioned the Supreme Court for Writ of Certiorari which was granted.
   2. Holding/Reasoning: The Supreme Court reversed the Court of Appeals, holding that a new trial was required because an alternate juror was mistakenly allowed in the jury room for several minutes at the beginning of deliberations, violating the NC constitutional requirement of jury of 12.

   1. Facts: Defendant was convicted of sexual assault. At trial, defendant pled not guilty. One of the 12 jurors fell ill and defendant waived a trial by 12 jurors. On appeal, defendant did not raise the conviction by 11 jurors as an assignment of error.
   2. Holding/Reasoning: Held that a conviction by 11 jurors is not allowed. The verdict was a nullity despite the defendant’s failure to assign his conviction by 11 jurors as error. Ordered a new trial.

c. Cases in Which Appellant Was Unsuccessful on the Merits

2. When a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court’s action is preserved, notwithstanding defendant’s failure to object at trial. State v. Ashe, 314 N.C. 28, 331 S.E.2d 652 (1985).
   a. Cases in Which Appellant Was Successful on the Merits
i.  **State v. Davis**, 364 N.C. 297, 698 S.E.2d 65 (2010)
   1.  **Facts:** Defendant argued that N.C.G.S. § 20-141.4(b) did not authorize the trial court to impose punishment for felony death by vehicle and felony serious injury because the second-degree murder and ADWISI judgments provided greater punishment for the same conduct.
   2.  **Holding/Reasoning:** Citing the language from *Ashe*, the Court concluded that the issue was preserved. The Court ultimately held that defendant’s interpretation comports with the plain language of the statute.
   3.  **Statute at Issue:** N.C.G.S. § 20-141.4(b)

   1.  **Facts:** Defendant convicted of first degree sexual offense and first degree rape. Defendant argued that trial court erred in failing to respond to the jury’s request to review evidence under N.C.G.S § 1233(a).
   2.  **Holding/Reasoning:** Held that because the trial court failed to exercise its discretion under N.C.G.S. § 15-1233(a) to allow the jury to review the transcript, the case must be reversed and remanded for a new trial. The defendant was prejudiced because the requested evidence involved material evidence, rather than evidence that was not determinative of guilt or innocence.
   3.  **Statute at Issue:** N.C.G.S. § 15A-1233(a).

   1.  **Facts:** Defendant convicted of robbery with a dangerous weapon. On appeal, defendant argued that the trial court erred in failing to rule on defendant’s motion to dismiss at the close of the State’s evidence. Defendant argued that he was prejudiced by this failure because there was no substantial evidence identifying the defendant as the perpetrator of the offense.
   2.  **Holding/Reasoning:** Held that the trial court erred in failing to rule on defendant’s motion to dismiss at the close of the State’s evidence, in violation of N.C.G.S. § 15A-1227(c). Court agreed with defendant and held that because the State failed to meet its burden at trial, the defendant’s conviction was reversed and the charges were dismissed.
   3.  **Statute at Issue:** N.C.G.S. § 15A-1227(c).

   1.  **Facts:** Defendant was charged and convicted with communicating threats after his wife told the police that he had repeatedly threatened to punch her. Defendant appealed.
2. **Holding/Reasoning:** Held that the trial court erred by extending defendant’s probation period to 24 months without making the required specific findings of fact under N.C.G.S. § 15A-1343.2(d). Because the trial court violated this statutory mandate, the case was remanded for resentencing.

3. **Statute at Issue:** N.C.G.S. § 15A-1343.2(d).
   1. **Facts:** Defendant was convicted of first degree murder and sentenced to death.
   2. **Holding/Reasoning:** Held the right to a jury poll in a capital case is not dependent on a motion of a party under N.C.G.S. § 15A-2000(b). It is statutorily mandated. Thus, defendant was not sentenced in accordance with the requirements of the statute because the trial court failed to poll the jury individually. The case was remanded for resentencing.
   3. **Statute at Issue:** N.C.G.S. § 15A-2000(b).
   1. **Facts:** Defendant convicted of first degree sexual offense. On appeal, the defendant argued that the trial court erred by failing to exercise its discretion when it denied a jury request to hear additional evidence.
   2. **Holding/Reasoning:** Held that defendant was entitled to a new trial based upon the trial court’s failure to exercise discretion, since he established that, had the error not occurred, there was a reasonable possibility that a different outcome would have been reached at trial.
   3. **Statute at Issue:** N.C.G.S. § 15A-1233(a).
   1. **Facts:** Defendant convicted of second degree rape, second degree kidnapping and second degree sexual offense.
   2. **Holding/Reasoning:** Reversed and remanded for a new trial. The court held that trial court committed reversible error in discussing a question from the jury with the foreman only to the exclusion of the rest of the jury, violating N.C.G.S. § 15A-1233.
   3. **Statute at Issue:** N.C.G.S. § 15A-1233.
   1. **Facts:** Defendants robbed a jewelry store and shot the owner in the head. Both were appointed counsel. Several days later, the owner died and both defendants were additionally charged with first degree murder. At the trial, neither defendant was appointed additional counsel.
   2. **Holding/Reasoning:** Held that N.C.G.S. § 7A-450(b1) is mandatory and directed at the trial court. It states that an
indigent defendant facing a possible death penalty may not be tried unless an assistant counsel has been appointed in a timely manner. Because the trial court did not appoint additional assistant counsel in a timely manner, the trial court committed reversible error. The case was reversed and remanded for a new trial.

3. **Statute at Issue:** N.C.G.S. § 7A-450(b1).

   1. **Facts:** Defendant convicted of breaking and entering. On appeal, he argued that the trial court erred in denying his motion to dismiss.
   2. **Holding/Reasoning:** Held that trial court erred by denying the jury’s request to rehear testimony. The trial court denied the request because he felt that he could not grant it. Because the trial court failed to exercise its discretion under N.C.G.S. § 15A-1233(a), the case was reversed and remanded for a new trial.
   3. **Statute at Issue:** N.C.G.S. § 15A-1233(a).

   1. **Facts:** Defendant convicted of first degree murder. On appeal, he argued that the trial court erred under N.C.G.S. 15A-1233(a) which requires the trial court to summon all jurors into the courtroom before hearing and addressing a jury request. In this case, the jury foreman asked to review the transcript and the trial court responded only to the foreman that the transcript did not exist yet.
   2. **Holding/Reasoning:** Held that the trial court erred in responding to the foreman’s question without bringing all the jurors back to hear the answer. The statute requires the trial court to do this. Because the trial court committed reversible error, the defendant was granted a new trial.
   3. **Statute at Issue:** N.C.G.S. § 15A-1233(a).

b. Cases in Which Appellant Was Unsuccessful on the Merits
      1. Where defendant fails to object to lack of notice of alleged probation violation and participates in revocation hearing, defendant waives right to assert ground for appeal based on failure to receive notice.
   2. **Statute at Issue:** N.C.G.S. § 14A-1345(e)

ii. **State v. Starr,** 703 S.E.2d 876 (N.C. Ct. App. 2011)
    1. Where a defendant’s lawyer consents to a trial court’s communication with the jury in a manner other than bringing the jury back into the courtroom, the defendant
waives his right to assert a ground for appeal based on failure to bring the jury back into the courtroom.

2. **Statute at Issue:** N.C.G.S. § 15A-1233(a)


      1. **Facts:** Defendant convicted of first degree murder and assault on a law enforcement officer with a deadly weapon. On appeal, defendant argued that the trial court erred when it responded to a juror request to review certain testimony by sending a message to the jury through the bailiff rather than by addressing the jury in open court.

      2. **Holding/Reasoning:** Affirmed the conviction, holding that while the trial court did err under N.C.G.S. § 15A-1233(a), the harmless error test applies when there is only a statutory and not a constitutional violation. Under the test, the state must show that the error was harmless beyond a reasonable doubt. Here, the state showed that violation of the statute was not a constitutional violation. Thus, the conviction was affirmed.

   3. **Statute at Issue:** N.C.G.S. § 15A-1233(a).


      1. **Statute at Issue:** N.C.G.S. § 15A-1233(a)


      1. **Statute at Issue:** N.C.G.S. § 15A-1214(f).


      1. **Statute at Issue:** N.C.G.S. § 15A-1222.


      1. **Statute at Issue:** N.C.G.S. § 15A-1235.


      1. **Statute at Issue:** N.C.G.S. § 15A-1233(a).


      1. **Statute at Issue:** N.C.G.S § 15A-1214(c).


      1. **Statute at Issue:** N.C.G.S. § 15A-1222; 15A-1223

3. Where the particular evidence sought to be offered is specifically rendered incompetent by statute, it is the duty of the Trial Court to exclude it *sua sponte.* Its failure to do so may, on appeal, be held reversible error notwithstanding defendant’s failure to object at trial. **State v. McCall,** 289 N.C. 570, 223 S.E.2d 334 (1976).

   a. **Cases in Which Appellant Was Successful on the Merits**


         1. **Facts:** See previous.
         2. **Holding/Reasoning:** See previous


         1. **Facts:** See previous.
         2. **Holding/Reasoning:** See previous

1. **Facts:** Defendant convicted of criminal offense. On appeal, defendant argued that the trial committed prejudicial error by failing to intervene with the district attorney made improper statements regarding the fact that the defendant’s wife did not testify on his behalf.

2. **Holding/Reasoning:** Held that the trial court committed reversible error. When the objection was made regarding the district attorney’s comments during closing arguments, the trial court merely sustained the objection without giving a curative instruction to the jury. This was error and it was not harmless. Thus, the defendant was granted a new trial.


   1. **Facts:** Defendants were convicted of rape and the death penalty was imposed on them. On appeal, both argued that the death penalty should not be imposed because of a then recent US Supreme Court decision and Thompson argued that he should get a new trial because the State violated N.C.G.S. § 8-57 in commenting on his wife’s failure to testify for him.

   2. **Holding/Reasoning:** As to defendant McEachern, the death sentenced was vacated and a life sentence imposed. As to defendant Thompson, the court held that the State violated the statute regarding spousal immunity and that this error prejudiced the defendant. The court reversed the conviction and remanded the case for a new trial.


   1. **Facts:** Defendant convicted of first degree murder. On appeal, he argued that the trial court erred in allowing the State to reference spousal immunity in violation of N.C.G.S § 8-57.

   2. **Holding/Reasoning:** Held that while there was sufficient evidence against the defendant to take the charge to the jury, the State’s reference to the utilization of spousal immunity, for the purpose of preventing the wife from testifying, was prejudicial. Vacated and remanded for a new trial.

b. **Cases in Which Appellant Was Unsuccessful on the Merits**


4. **Statement of a material fact not in evidence will constitute reversible error whether or not it is called to the court’s attention.** **State v. Hall**, 59 N.C. App. 567, 297 S.E.2d 614 (1982).

   a. **Cases in Which Appellant Was Successful on the Merits**

1. **Facts:** Defendant convicted of assault with a deadly weapon inflicting serious injury. On appeal, defendant argued that the trial court committed prejudicial error in instructing the jury that the defendant, in effect, was charged with first degree murder.

2. **Holding/Reasoning:** Held that the trial court committed prejudicial error in stating that the defendant was essentially charged with attempted murder because the two crimes were not the same. The court held that “intent to kill” and “attempted murder” did not mean the same thing. Furthermore, the court held that a statement of a material fact not in evidence will constitute reversible error whether or not it is called to the court’s attention. Defendant awarded a new trial.

   1. **Facts:** Defendant convicted of first degree murder. On appeal, defendant argued several assignments of error, including that the trial court erred in instructing the jury.
   2. **Holding/Reasoning:** Held that the trial court erred in instructing the jury, which assumed that defendant had a gun in his hand upon entering the victim’s hotel room. The instructions were misleading because there were no facts in evidence to support them. Therefore, the verdict was set aside and case remanded for a new trial.

   1. **Facts:** Defendant convicted of second degree murder and his motion for judgment of nonsuit was denied. On appeal, the defendant argued that the State made improper arguments at trial that were not supported by the evidence.
   2. **Holding/Reasoning:** Held that the State’s comments about defendant’s testimony was erroneous because the testimony elicited by the State was not offered by the defendant or based on any of the evidence in the trial. New trial.

   1. **Facts:** Defendant convicted of first degree murder. On appeal, the record showed that the trial judge instructed the jury regarding evidence that was not in the record.
   2. **Holding/Reasoning:** Held that the record failed to disclose any evidence in support of the charge. Therefore, the instructions to the jury were erroneous and highly prejudicial to the defendant. Thus, defendant granted a new trial.

b. **Cases in Which Appellant Was Not Successful on the Merits**

5. When, however, the error complained of is so prejudicial that even upon timely objection no purported curative instruction could possibly remove the prejudicial effect, counsel’s failure to make a timely objection will not waive defendant’s right to object. State v. Dockery, 238 N.C. 222, 77 S.E.2d 664 (1953).

a. Cases in Which Appellant Was Successful on the Merits
      1. Facts: Defendant convicted of first degree murder. Defendant’s motion to declare a mistrial for prejudice to defendant by prosecutor’s argument was denied. On appeal, defendant argued that the prosecutor erred in making his closing argument that if the jury convicted him, he would get an automatic appeal.
      2. Holding/Reasoning: Ordered a new trial and holding that prosecutor’s argument was clearly intended to overcome the jury’s natural reluctance to render a verdict of first degree murder by diluting their responsibility for its consequences. Furthermore, the instruction by the trial court to disregard the statement was inadequate to correct the transgression. The case was remanded for a new trial.

b. Cases in Which Appellant Was Unsuccessful on the Merits
   i. No Direct Citations

6. A motion in arrest of judgment predicated upon some fatal error or defect appearing on the face of the record proper may be made at any time in any court having jurisdiction of that matter. This is true even though the motion is made for the first time on appeal from a judgment of superior court. State v. Sellers, 273 N.C. 641, 161 S.E.2d 15 (1968)

a. Cases in Which Appellant Was Successful on the Merits

b. Cases in Which Appellant Was Unsuccessful on the Merits