Criminal Procedure

Indictment Issues

State v. Jones, __ N.C. App. __, __ S.E.2d __ (Nov. 20, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0yODItMS5wZGY=). (1) No fatal variance occurred in an identity theft case. The defendant argued that there was a fatal variance between the indictment, which alleged that he possessed credit card numbers belonging to four natural persons and the evidence, which showed that three of the credit cards were actually business credit cards issued in the names of the natural persons. The court explained: "[N]o fatal variance exists when the indictment names an owner of the stolen property and the evidence discloses that that person, though not the owner, was in lawful possession of the property at the time." Here the victims were the only authorized users of the credit cards and no evidence suggested they were not in lawful possession of them. (2) The trial court did not err by dismissing an obtaining property by false pretenses indictment for failing to specify with particularity the property obtained. The indictment alleged that the defendant obtained "services" from two businesses but did not describe the services or specify their monetary value. (3) In a trafficking in stolen identities case, the court held, over a dissent, that the indictment was defective because it did not allege the recipient of the identifying information or that the recipient's name was unknown.

State v. Sergakis, __ N.C. App. __, __ S.E.2d __ (Nov. 20, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0zMzYtMS5wZGY=). The trial court committed plain error by instructing the jury that it could find the defendant guilty of conspiracy if the defendant conspired to commit felony breaking and entering or felony larceny where the indictment alleged only a conspiracy to commit felony breaking or entering.

Jury Instructions

State v. Hope, __ N.C. App. __, __ S.E.2d __ (Nov. 20, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi02NTktMS5wZGY=). (1) In an assault with a deadly weapon with intent to kill inflicting serious injury case where the weapon was not a deadly weapon per se, the trial court did not err by declining to give self-defense instruction N.C.P.I.—Crim. 308.40 and did not commit plain error by declining to give self-defense instruction N.C.P.I.—Crim. 308.45 over the defendant's objection. The court clarified that when a defendant is charged with assault with a deadly weapon and the weapon is a deadly weapon per se, the trial judge should instruct that the assault would be excused as being in self-defense only if the circumstances would create in the mind of a person of ordinary firmness a reasonable belief that such action was necessary to protect himself or herself from death or great bodily harm. If, however, the weapon is not a deadly weapon per se, the trial judge should further instruct the jury that if they find that the defendant assaulted the victim but do not find that the defendant used a deadly weapon, that assault would be excused as being in self-defense if the circumstances would create in the mind of a person of ordinary firmness a reasonable belief that such action was necessary to protect himself or herself from bodily injury or offensive physical contact. (2) In an assault with a deadly weapon inflicting serious injury case, the defendant is not

entitled to a simple assault instruction where the deadly weapon element is left to the jury but there is uncontroverted evidence of serious injury.

Sex Offenders

State v. Martin, __ N.C. App. __, __ S.E.2d __ (Nov. 20, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi01NTMtMS5wZGY=). The court affirmed the trial court's order requiring the defendant to enroll in SBM over the defendant's assertion that SBM enrollment violated his Fourth Amendment rights.

Evidence

Rule 403

State v. Jones, __ N.C. App. __, __ S.E.2d __ (Nov. 20, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0yODItMS5wZGY=). In an identity theft case where the defendant was alleged to have used credit card numbers belonging to several victims, the trial court did not abuse its discretion under Rule 403 by admitting evidence that the defendant also was in possession of debit and EBT cards belonging other persons to show intent.

404(b) Evidence

State v. Barnett, __ N.C. App. __, __ S.E.2d __ (Nov. 20, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0zODEtMS5wZGY=). In a second-degree rape case, the trial court properly admitted 404(b) evidence of the defendant's prior sexual conduct with the victim to show common scheme. The conduct leading to the charges occurred in 1985 when the victim was sixteen years old. After ingesting alcohol and other substances, the victim awoke to find the defendant, her uncle, having sex with her. At trial the victim testified that in 1977, the defendant touched her breasts several times; in 1978, he touched her breasts, put her hand on his penis, and made her rub his penis up and down; and in 1980 he twice masturbated in front of her. The court found the prior acts sufficient similar to the rape at issue, noting that they show "a progression from inappropriate touching in 1977 to sexual intercourse in 1985." Also, the court noted, all of the incidents occurred where the defendant was living at the time. The incidents were not too remote. Although there was a five year gap between the last act and the rape, the defendant did not have access to the victim for three years. The court also found that the evidence was admissible under Rule 403.

Error Correction

State v. Barnett, __ N.C. App. __, __ S.E.2d __ (Nov. 20, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0zODEtMS5wZGY=). A clerical error occurred in a Fair Sentencing Act case when the trial court found an aggravating factor and went on to sentence the defendant above the presumptive range but failed to check the box on the judgment indicating that the aggravating factor existed. The court remanded for correction of the error.

Arrest, Search & Investigation

State v. Grice, __ N.C. App. __, __ S.E.2d __ (Nov. 20, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi01NzctMS5wZGY=). (1) In a drug case, a seizure of marijuana plants was not justified under the plain view doctrine. Officers went to the defendant's home on a tip that he was growing and selling marijuana and parked behind a white car in the driveway. One of the officers walked up the driveway and knocked on the door; the other stayed in the driveway. While one officer was knocking on the door, the other looked "around the residence . . . from [his] point of view." Looking over the hood of the white car, he saw four plastic buckets about fifteen yards away. Plants were growing in three of the buckets which he immediately identified as marijuana. He pointed out the plants to the other officer, who also believed they were marijuana. The officers then walked to the backyard where the plants were growing beside an outbuilding and seized them. The court rejected the State's argument that the officers properly seized the marijuana plants because they were seen in plain view during a valid knock and talk. (2) The trial court's finding that exigent circumstances justified seizure of the marijuana plants was not supported by record evidence. One of the officers testified that no one answered the officer's knock at the door and that nothing prevented the officers from securing the premises and obtaining a search warrant. No evidence to the contrary was presented.

Criminal Offenses

Sexual Assaults & Kidnapping

State v. Huss, __ N.C. App. __, __ S.E.2d __ (Nov. 20, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0yNTAtMS5wZGY=). (1) In a case involving charges of second-degree sexual offense and second-degree rape, the trial court erred by denying the defendant's motion to dismiss where there was no evidence that the victim was physically helpless. The State proceeded on a theory that the victim was physically helpless. The facts showed that the defendant, a martial arts instructor, bound the victim's hands behind her back and engaged in sexual activity with her. The statute defines the term physically helpless to mean a victim who either is unconscious or is physically unable to resist the sexual act. Here, the victim was not unconscious. Thus, the only issue was whether she was unable to resist the sexual act. The court began by rejecting the defendant's argument that this category applies only to victims who suffer from some permanent physical disability or condition, instead concluding that factors other than physical disability could render a victim unable to resist the sexual act. However, it found that no such evidence existed in this case. The State had argued that the fact that the defendant was a skilled fighter and outweighed the victim supported the conclusion that the victim was physically helpless. The court rejected this argument, concluding that the relevant analysis focuses on "attributes unique and personal of *the victim*." Similarly, the court rejected the State's argument that the fact that the defendant pinned the victim in a submissive hold and tied her hands behind her back supported the conviction. It noted, however, that the evidence would have been sufficient under a theory of force. (2) In a case in which the defendant was charged with kidnapping the victim for the purpose of facilitating second-degree rape,

the court reversed the kidnapping conviction on grounds that the State had proceeded under "an improper theory of second-degree rape," as described above. It concluded: "because the State proceeded under an improper theory of second-degree rape, we are unable to find that the State sufficiently proved the particular felonious intent alleged here."

Larceny

State v. Sergakis, __ N.C. App. __, __ S.E.2d __ (Nov. 20, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0zMzYtMS5wZGY=). In a felony larceny case, there was sufficient evidence that the goods were valued at more than $1,000 where the victim testified that $500 in cash and a laptop computer valued at least at $600 were taken.

Identity Theft & Frauds

State v. Jones, __ N.C. App. __, __ S.E.2d __ (Nov. 20, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0yODItMS5wZGY=). (1) In an identity theft case, the State presented sufficient evidence that the defendant used the victims' credit card numbers with the intent to fraudulently represent himself as the cardholders. The evidence showed that the defendant possessed the credit card information of several other people without authorization, was the owner of a vehicle which had received a paint job, new tires, and other products and services paid for through unauthorized charges to some of the cards, possessed a cell phone from a store where unauthorized charges were made to some of the credit cards, and had a utility account for which one of the credit cards was used to make a payment. The court held:

> [W]hen one presents a credit card or credit card number as payment, he is representing himself to be the cardholder or an authorized user thereof. Accordingly, where one is not the cardholder or an authorized user, this representation is fraudulent. No verbal statement of one's identity is required, nor can the mere stating of a name different from that of the cardholder negate the inference of misrepresentation.