

Criminal Procedure

Bond Forfeiture

[State v. Cortez](#), __ N.C. App. __, __ S.E.2d __ (Aug. 20, 2013). (1) Even though the surety's name was not listed on the first page of form AOC-CR-201 (Appearance Bond for Pretrial Release) the surety was in fact the surety on a \$570,000.00 bond, where among other things, the attached power of attorney named the surety and the surety collected the premium on the bond and did not seek to return it until 3 years later when the trial court ordered a forfeiture. (2) The trial court did not err by concluding that the surety's exclusive remedy for relief from a final judgment of forfeiture is an appeal pursuant to G.S. 15A-544.8. (3) The trial court did not err in granting the Board monetary sanctions against the surety and the bondsmen pursuant to G.S. 15A-544.5(d)(8). The court rejected the surety's argument that the Board's sanctions motion was untimely. (4) The trial court properly considered the relevant statutory factors before imposing monetary sanctions against the surety under G.S. 15A-544.5(d)(8) where there was no evidence that the surety's failure to attach the required documentation was unintentional. (5) The trial court did not abuse its discretion by imposing a monetary sanction of \$285,000 on the surety.

Discovery

[State v. Marino](#), __ N.C. App. __, __ S.E.2d __ (Aug. 20, 2013). (1) In this misdemeanor DWI case the trial court did not err by denying the defendant's motions to examine the Intoximeter source code. The court rejected the defendant's argument that the source code was *Brady* evidence, reasoning that he failed to show that it was favorable and material. The court noted that the jury found the defendant guilty under both prongs of the DWI statute. The court also rejected the defendant's argument that under *Crawford* and the confrontation clause he was entitled to the source code. (2) The court held that the defendant had no statutory right to pretrial discovery and rejected the defendant's argument that G.S. 15A-901 violated due process. The court noted, however, that the defendant did have discovery rights under *Brady*.

Jury Argument

[State v. Marino](#), __ N.C. App. __, __ S.E.2d __ (Aug. 20, 2013). In this DWI case, the trial court did not err by failing to intervene ex mero motu to the State's closing arguments. The defendant argued that certain remarks were improper because they speculated that he had driven impaired on other occasions; were sarcastic and provoked a sense of class envy; tended to shift the burden of proof to the defendant; and indicated that the defendant's witnesses were hypocrites and liars. Without discussing the specific remarks, the court held that "although the State pushed the bounds of impropriety" the remarks were not so grossly improper as to require intervention ex mero motu.

Jury Instructions

[*State v. Agustin*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 20, 2013). In a rape of a child by an adult case, the trial court did not commit plain error by failing to instruct the jury on the lesser offense of first-degree rape where there was no dispute that the defendant was at least 18 years of age.

[*State v. Walston*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 20, 2013). In this child sex case, the trial court committed prejudicial error by identifying the prosecuting witnesses as "victims" rather than "alleged victims" in its jury instructions. The court noted that in this case an issue before the jury was whether any sexual assault occurred two decades earlier as alleged in the indictment and the defense objected to the relevant language at trial.

Sentencing

[*State v. Bowden*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 20, 2013). (1) In a case involving a life-sentenced inmate from the 1970s, the trial court did not err by finding that the defendant had a liberty interest in having appropriate sentence reduction credits applied to his 80-year life-sentence for all purposes, including calculation of his unconditional release date. The inmate committed his crimes at a time when G.S. 14-2 defined a life sentence as a term of 80 years. Based on good time, gain time, and merit time credit accumulated between 1975 and 2009, the inmate completed his 80-year life sentences in 2009. (2) The trial court did not err by distinguishing the defendant's case from *Jones v. Keller*, 364 N.C. 249 (2010), in which the Supreme Court held that life sentenced inmates convicted of first-degree murder were not entitled to have sentence reduction credits applied to their unconditional release date. Unlike *Jones*, competent record evidence in Bowden's case showed that corrections officials actually applied sentence reduction credits toward the defendant's unconditional release date, informed him that his sentence had expired, and prepared him for release. By reference to a series of emails between corrections officials, the court rejected the State's argument that the Department of Correction (DOC) never actually applied sentence reduction credits to the defendant's unconditional release date. (3) Having found that DOC actually awarded the sentence reduction credits to Bowden, the trial court did not err by finding that DOC's revocation of the credits violated the Ex Post Facto Clause and due process. Judge McCollough filed a concurring opinion reaching the same result through application of the law of the case doctrine, based on the timing and sequence of prior appellate orders related to Mr. Bowden. [Author's note: Thanks to my colleague Jamie Markham for providing this summary.]

[*State v. Perry*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 20, 2013). The court rejected the defendant's argument that a sentence of life in prison without the possibility of parole for first-degree felony-murder (child abuse as the underlying felony) violated the 8th Amendment.

Sex Offenders

[*State v. Green*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 20, 2013). The trial court erred by ordering lifetime sex offender registration and lifetime SBM because first-degree sexual offense is not an "aggravated offense" within the meaning of the sex offender statutes.

Evidence

404(b) Evidence

[*State v. Green*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 20, 2013). In a residential robbery case, the trial court did not err by admitting 404(b) evidence of the defendant's robbery at a Holiday Inn two days after the incident in question. As to similarity, the court noted that both incidents were armed robberies. Also, the perpetrators in both wore black hoodies and dark fabric covering part of their faces, immediately demanded money upon entering the buildings, used a black semi-automatic handgun by "pushing" it to the heads of the victims, restrained the victims in a similar manner, and moved the victims from place to place, searching for money.

[*State v. Walston*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 20, 2013). In a child sex case, the trial court did not err by admitting 404(b) evidence. The court found the prior acts sufficiently similar and that the requirement of temporal proximity was met.

Character Evidence

[*State v. Tatum-Wade*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 20, 2013). In this tax evasion case, the trial court erred by excluding the defendant's character evidence. The facts indicated that the defendant believed advice from others that by completing certain Sovereign Citizen papers, she would be exempt from having to pay taxes. The defendant's witness was permitted to testify to the opinion that the defendant was a truthful, honest, and law-abiding citizen. However, the trial court excluded the witness's testimony regarding the defendant's trusting nature. The court agreed with the defendant that her character trait of being trusting of others was pertinent to whether she willfully attempted to evade paying taxes. The court found the error harmless.

[*State v. Walston*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 20, 2013). In a child sex case, the trial court committed prejudicial error by excluding opinion testimony that the defendant was respectful around children and interacted in a positive way with children. The court reasoned:

Testimony of Defendant's character for respectful treatment of children is relevant because it has a tendency to make the existence of "any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evidence of character for respectful treatment of children tends to make the facts central to the charges, that Defendant committed, inter alia, first-degree statutory rape of a child, less probable than they would be without such evidence. Testimony of this character trait is therefore relevant and "pertinent."

Slip Op. at p. 10 (citation omitted).

Authentication

[*State v. Murray*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 20, 2013). In this drug case where the defendant denied being the perpetrator and suggested that the drugs were sold by one of his sons, the State failed

to properly authenticate two photographs used in photographic lineups as being of the defendant's sons. An informant involved in the drug buy testified that he had purchased drugs from the people depicted in the photos on previous occasions but not on the occasion in question. The State then offered an officer to establish that the photos depicted the defendant's sons. However, the officer testified that he wasn't sure that the photos depicted the defendant's sons. Given this lack of authentication, the court also held that the photos were irrelevant and should not have been admitted.

Opinions

[State v. Perry](#), __ N.C. App. __, __ S.E.2d __ (Aug. 20, 2013). In a child homicide case, the trial court did not commit plain error by allowing the State's medical experts to testify that their review of the medical records and other available information indicated that the victim's injuries were consistent with previously observed cases involving intentionally inflicted injuries and were inconsistent with previously observed cases involving accidentally inflicted injuries. The defendant asserted that these opinions rested "on previously accepted medical science that is now in doubt" and that, because "[c]urrent medical science has cast significant doubt" on previously accepted theories regarding the possible causes of brain injuries in children, there is currently "no medical certainty around these topics." The court rejected this argument, noting that there was no information in the record about the state of "current medical science" or the degree to which "significant doubt" has arisen with respect to the manner in which brain injuries in young children occur.

[State v. Walston](#), __ N.C. App. __, __ S.E.2d __ (Aug. 20, 2013). For purposes of applying the effective date of the amendment to Rule 702 (the amended rule applies to actions "arising on or after" 1 October 2011), in a case where a superseding indictment is used, the relevant date is the date the superseding indictment is filed, not the filing date of the original indictment.

Proffer of Evidence

[State v. Walston](#), __ N.C. App. __, __ S.E.2d __ (Aug. 20, 2013). The trial court incorrectly denied defense counsel's request to make a proffer of excluded character evidence.

Arrest Search and Investigation

[State v. Knudsen](#), __ N.C. App. __, __ S.E.2d __ (Aug. 20, 2013). (1) The trial court did not err by determining that the defendant was seized while walking on a sidewalk. Although the officers used no physical force to restrain the defendant, both were in uniform and had weapons. One officer blocked the sidewalk with his vehicle and another used his bicycle to block the defendant's pedestrian travel on the sidewalk. (2) The trial court did not err by concluding that the seizure was unsupported by reasonable suspicion. The officers observed the defendant walking down the sidewalk with a clear plastic cup in his hands filled with a clear liquid. The defendant entered his vehicle, remained in it for a period of time, and then exited his vehicle and began walking down the sidewalk, where he was

stopped. The officers stopped and questioned the defendant because he was walking on the sidewalk with the cup and the officers wanted to know what was in the cup.

Criminal Offenses

Homicides

[*State v. Perry*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 20, 2013). In this child homicide case, the trial court did not err by denying the defendant's motion to dismiss a charge of felony-murder based on an underlying felony child abuse. Prior to the incident in question the victim was a normal, healthy baby. After having been left alone with the defendant, the victim was found unconscious, unresponsive, and barely breathing. The child's body had bruises and scratches, including unusual bruises on her buttocks that were not "typical" of the bruises that usually resulted from a fall and a recently inflicted blunt force injury to her ribs that did not appear to have resulted from the administration of CPR. An internal examination showed extensive bilateral retinal hemorrhages in multiple layers of the retinae, significant cerebral edema or swelling, and extensive bleeding or subdural hemorrhage in the brain indicating that her head had been subjected to a number of individual and separate blunt force injuries that were sufficiently significant to damage her brain and to cause a leakage of blood. Her injuries, which could have been caused by human hands, did not result from medical treatment or a mere fall from a couch onto a carpeted floor.

Sexual Assaults & Related Offenses

[*State v. Green*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 20, 2013). Deciding an issue of first impression, the court held that the defendant's act of forcing the victim at gunpoint to penetrate her own vagina with her own fingers constitutes a sexual act supporting a conviction for first-degree sexual offense.

[*State v. Agustin*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 20, 2013). (1) The trial court did not err by denying the defendant's motion to dismiss a charge of rape of a child by an adult under G.S. 14-27.2A(a). The defendant had argued that there was insufficient evidence to establish that the offense occurred on or after December 1, 2008, the statute's effective date. (2) The trial court did not err in sentencing the defendant to 300-369 months imprisonment on this charge. The court rejected the defendant's argument that the trial court had discretion to sentence the defendant to less than 300 months.

[*State v. Packingham*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 20, 2013). The court held that G.S. 14-202.5, proscribing the crime of accessing a commercial social networking Web site by a sex offender, is unconstitutional. The court held that the statute violated the defendant's First Amendment Rights, finding that the content-neutral regulation of speech was not narrowly tailored, and that it is unconstitutionally vague on its face and overbroad as applied.

Defenses

Self-Defense

[*State v. Presson*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 20, 2013). (1) The trial court did not err by denying the defendant's motion to dismiss homicide charges. The defendant argued that the evidence showed perfect self-defense. Noting that there was some evidence favorable to the defendant as to each of the elements of perfect self-defense, the court concluded that there was also evidence favorable to the State showing that the defendant's belief that it was necessary to kill was not reasonable, and that defendant was the aggressor or used excessive force. (2) The trial court did not commit plain error by instructing the jury that the defendant would lose the right to self-defense if he was the aggressor. The defendant had argued that the State failed to put forth evidence that the defendant was the aggressor.

Post-Conviction

MARs

[*State v. Marino*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 20, 2013). The trial court did not err by rejecting the defendant's G.S. 15A-1414 MAR without an evidentiary hearing.