

Criminal Procedure

Jury Instructions

[State v. Gosnell](#), __ N.C. App. __, __ S.E.2d __ (Dec. 3, 2013). Distinguishing *State v. McHone*, 174 N.C. App. 289, 294 (2005), the court held that no plain error occurred when the trial court failed to instruct that the jury would or must return a “not guilty” verdict if it did not conclude that the defendant committed first-degree murder on the basis of premeditation and deliberation. The court noted that the verdict sheet provided a space for a “not guilty” verdict and the trial court’s instructions on second-degree murder and the theory of lying in wait comported with the *McHone* final mandate requirement. With respect to premeditation and deliberation, the instruction stated, in part: “If you do not so find or have a reasonable doubt as to one or more of these things you would not return a verdict of “guilty of first-degree murder” on the basis of malice, premeditation and deliberation.”

[State v. Lalinde](#), __ N.C. App. __, __ S.E.2d __ (Dec. 3, 2013). Where the evidence showed that part of a child abduction occurred in North Carolina jurisdiction was established and no jury instruction on jurisdiction was required. The defendant took the child from North Carolina to Florida. The court noted that jurisdiction over interstate criminal cases is governed by G.S. 15A-134 (“[i]f a charged offense occurred in part in North Carolina and in part outside North Carolina, a person charged with that offense may be tried in this State”). It was undisputed that the defendant picked up the child in North Carolina. Therefore, the child abduction occurred, at least in part, in North Carolina.

Re-Sentencing

[State v. Powell](#), __ N.C. App. __, __ S.E.2d __ (Dec. 3, 2013). In a case where the trial court initially sentenced the defendant correctly but then erroneously thought it had used the wrong sentencing grid and re-sentenced the defendant to a lighter sentence using the wrong grid, the court remanded for imposition of the initial correct but more severe sentence. The court noted that G.S. 15A-1335 did not apply because the higher initial sentence was statutorily mandated.

Probation

[State v. Allah](#), __ N.C. App. __, __ S.E.2d __ (Dec. 3, 2013). The trial court did not abuse its discretion by ordering, as a condition of probation, that the defendant’s visits with his daughter be supervised, where the offense of conviction involved an attack on the mother of his child.

Sex Offenders

[State v. Jones](#), __ N.C. App. __, __ S.E.2d __ (Dec. 3, 2013). The trial court did not err by requiring the defendant to enroll in lifetime SBM. The court rejected the defendant’s argument that under *United States v. Jones* (U.S. 2012) (government’s installation of a GPS tracking device on a vehicle and its use of that device to monitor the vehicle’s movements on public streets constitutes a “search”), SBM was an unreasonable search and seizure. The court found *Jones* irrelevant to a civil SBM proceeding.

Evidence

[State v. Stewart](#), __ N.C. App. __, __ S.E.2d __ (Dec. 3, 2013). (1) In this multiple murder case where the defendant killed the victims with a shotgun, evidence of firearms and ammunition found in the defendant's residence, ammunition found in his truck, instructions for claymore mines found on his kitchen table, and unfruitful searches of two residences for such mines was relevant to show the defendant's advanced planning and state of mind. (2) The trial court properly admitted crime scene and autopsy photographs of the victims' bodies. Forty-two crime scene photos were admitted to illustrate the testimony of the crime scene investigator who processed the scene. The trial court also admitted crime scene diagrams containing seven photographs. Additionally autopsy photos were admitted. The court easily concluded that the photos were relevant. Furthermore, the trial court did not abuse its discretion by finding the photographs admissible over the defendant's Rule 403 objection.

Arrest Search and Investigation

[State v. Dahlquist](#), __ N.C. App. __, __ S.E.2d __ (Dec. 3, 2013). In this DWI case, the trial court properly denied the defendant's motion to suppress evidence obtained from blood samples taken at a hospital without a search warrant where probable cause and exigent circumstances supported the warrantless blood draw. Noting the U.S. Supreme Court's recent decision in *Missouri v. McNeely* (the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant), the court found that the totality of the circumstances supported the warrantless blood draw. Specifically, when the defendant pulled up to a checkpoint, an officer noticed the odor of alcohol and the defendant admitted to drinking five beers. After the defendant failed field sobriety tests, he refused to take an intoxilyzer test. The officer then took the defendant to the hospital to have a blood sample taken without first obtaining a search warrant. The officer did this because it would have taken 4-5 hours to get the sample if he first had to travel to a magistrate for a warrant. The court noted however that the "'video transmission' option that has been allowed by G.S. 15A-245(a)(3) [for communicating with a magistrate] . . . is a method that should be considered by arresting officers in cases such as this where the technology is available." It also advised: "[W]e believe the better practice in such cases might be for an arresting officer, where practical, to call the hospital and the [magistrate's office] to obtain information regarding the wait times on that specific night, rather than relying on previous experiences."

[State v. Benters](#), __ N.C. App. __, __ S.E.2d __ (Dec. 3, 2013). Over a dissent, the court held in this drug case that the trial court properly suppressed evidence after finding that no probable cause supported the search warrant. According to the affidavit, a confidential informant told the police that the defendant was growing marijuana indoors at a specified address. An officer, who knew that the defendant owned the premises, obtained power bills for the property. The bills showed power usage consistent with an indoor growing operation. Additionally, officers observed the premises from an open field and saw growing items, such as potting soil and starting fertilizer, and an unused greenhouse that

was in disrepair. The court noted, among other things, that although the affidavit asserted that the informant was reliable, no facts supported that assertion.

Criminal Offenses

Homicide

[*State v. Gosnell*](#), __ N.C. App. __, __ S.E.2d __ (Dec. 3, 2013). The evidence supported a jury instruction for first-degree murder by lying in wait. The evidence showed that the defendant parked outside the victim's house and waited for her. All of the following events occurred 15-20 minutes after the victim exited her home: the defendant confronted the victim and an argument ensued; the defendant shot the victim; a neighbor arrived and saw the victim on the ground; the defendant shot the victim again while she was lying on the ground; the neighbor drove away and called 911; and an officer arrived on the scene. This evidence suggests that the shooting immediately followed the defendant's ambush of the victim outside the house.

[*State v. Hatcher*](#), __ N.C. App. __, __ S.E.2d __ (Dec. 3, 2013). The trial court erred by denying the defendant's motion to dismiss a second-degree murder charge where there was insufficient evidence of malice and the evidence showed that the death resulted from a mishap with a gun. The court remanded for entry of judgment for involuntary manslaughter.

Assaults

[*State v. Stewart*](#), __ N.C. App. __, __ S.E.2d __ (Dec. 3, 2013). The evidence was sufficient to show an assault with intent to kill an officer when, after having fatally shot eight people, the defendant ignored the officer's instructions to drop his shotgun and continued to reload it. The defendant then turned toward the officer, lowered the shotgun, and fired one shot at the officer at the same time that the officer fired at the defendant.

Kidnapping and Related Offenses

[*State v. Lalinde*](#), __ N.C. App. __, __ S.E.2d __ (Dec. 3, 2013). In a felonious restraint case, the evidence was sufficient to show that the defendant restrained the victim by defrauding her into entering his car and driving to Florida with him. The defendant, a man in his thirties, formed an inappropriate relationship with the nine-year-old female victim. He gained her trust and strengthened the secret relationship over a five-year period. The victim confided to him that she had been sexually abused by her brother and that she feared he would rape her again when he moved back to North Carolina. When her brother tried to break into her room, the victim called the defendant, and he offered to get her and bring her to Florida to live with him. The court viewed this action as an offer to rescue the victim from her brother. When the victim met the defendant at the end of her street, he did not greet her in a sexual way, but rather gave her a "deceptively innocent kiss on the cheek." Then, shortly after arriving in Florida, he took away her clothes, pinned her to the bed, and had non-consensual sex with her. On these facts, a reasonable juror could conclude that the defendant duped the victim into getting into his car

and traveling to Florida by assuring her that his intent was to rescue her from further sexual assaults by her brother when instead his intent was to isolate her so that he could sexually assault her himself. Furthermore, a reasonable juror could conclude that the defendant's failure to tell the victim that he intended to have sex with her and his kiss on her cheek were each intended to conceal from her his true intentions and that she would not have gone with him had he been honest with her. The court rejected the defendant's argument that there is no evidence of fraud because his promise to help the victim escape from her brother was not false, reasoning that fraud may be based upon an omission.

Burglary

[*State v. Allah*](#), __ N.C. App. __, __ S.E.2d __ (Dec. 3, 2013). In a first-degree burglary case, the evidence was insufficient to establish that the defendant broke and entered an apartment with the intent to commit a felonious restraint inside. Felonious restraint requires that the defendant transport the person by motor vehicle or other conveyance. The evidence showed that the defendant left his car running when he entered the apartment, found the victim, pulled her to the vehicle and drove off. The court reasoned: "In view of the fact that the only vehicle in which Defendant could have intended to transport [the victim] was outside in a parking lot, the record provides no indication Defendant could have possibly intended to commit the offense of felonious restraint against [the victim] within the confines of [the] apartment structure" The court rejected the State's argument that the intent to commit a felony within the premises exists as long as the defendant commits any element of the intended offense inside.