Criminal Procedure

Capacity

State v. Minyard, __ N.C. App. __, __ S.E.2d __ (Jan. 7, 2014). Where the defendant voluntarily ingested a large quantity of sedative, hypnotic or anxiolytic medications and alcohol during jury deliberations of his non-capital trial, the trial court did not err by failing to conduct a sua sponte competency hearing. The court relied on the fact that the defendant voluntarily ingested the intoxicants in a short period of time apparently with the intent of affecting his competency.

Indictment Issues

State v. McRae, __ N.C. App. __, __ S.E.2d __ (Jan. 7, 2014). The trial court erred by denying the defendant's motion to dismiss a charge of first-degree kidnapping where the indictment alleged that the confinement, restraint, and removal was for the purpose of committing a felony larceny but the State failed to present evidence of that crime. Although the State is not required to allege the specific felony facilitated, when it does, it is bound by that allegation.

Jury Selection

State v. Sherman, __ N.C. App. __, __ S.E.2d __ (Jan. 7, 2014). The trial court did not abuse its discretion by denying the defendant's challenges for cause of two prospective jurors. The defendant asserted that the first juror stated that he would form opinions during trial. Because the juror stated upon further questioning that he would follow the judge's instructions, the trial court did not abuse its discretion by denying the challenge of this juror. Next, the defendant argued that the trial court erred when it denied his for-cause challenge to a second juror who was a Marine with orders to report to Quantico, Virginia, before the projected end of trial. The trial court did not abuse its discretion in refusing to allow the for-cause challenge where the juror twice asserted that despite his orders to report, he could focus on the trial if he was selected as a juror.

Trial in Absentia

State v. Minyard, __ N.C. App. __, __ S.E.2d __ (Jan. 7, 2014). Where the defendant voluntarily ingested a large quantity of sedative, hypnotic or anxiolytic medications and alcohol during the jury deliberation stage of his non-capital trial, he voluntarily waived his constitutional right to be present.

Jury Deliberations

State v. Snelling, __ N.C. App. __, __ S.E.2d __ (Jan. 7, 2014). Distinguishing *State v. Hockett*, 309 N.C. 794, 800 (1983) (trial court erred by refusing to answer deliberating jury's question), the court held that the trial court properly answered the jury's question about the State's proof regarding the weapon in a robbery charge.

Sentencing

State v. Stubbs, __ N.C. App. __, __ S.E.2d __ (Jan. 7, 2014). The trial court erred by concluding that the defendant's 1973 sentence of life in prison with the possibility of parole on a conviction of second-degree burglary, committed when he was 17 years old, violated the Eighth Amendment. The defendant brought a MAR challenging his sentence as unconstitutional. The court began by noting that the defendant's MAR claim was a valid under G.S. 15A-1415(b)(4) (unconstitutional conviction or sentence) and (8) (sentence illegal or invalid). On the substantive issue, the court found that unlike a life sentence without the possibility of parole, the defendant's sentence "allows for the realistic opportunity to obtain release before the end of his life." In fact, the defendant had been placed on parole in 2008, but it was revoked after he committed a DWI.

State v. Dahlquist, __ N.C. App. __, __ S.E.2d __ (Jan. 7, 2014). (1) The trial court did not abuse its discretion by failing to find two statutory mitigating factors with respect to a 17-year-old defendant: G.S. 15A-1340.16(e)(4) (defendant's "age, or immaturity, at the time of the commission of the offense significantly reduced defendant's culpability for the offense") and G.S. 15A-1340.16(e)(18) ("defendant has a support system in the community"). (2) The court rejected the defendant's argument that the trial court erred in connection with her sentencing hearing by relying on evidence obtained during the trial of one of her co-defendants and during the sentencing hearing of another co-defendant. Citing G.S. 15A-1443 (a defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct), the court rejected the defendant's argument, noting that defense counsel repeatedly relied on this same evidence at the sentencing hearing.

State v. Snelling, __ N.C. App. __, __ S.E.2d __ (Jan. 7, 2014). (1) The court rejected the defendant's argument that the trial court erred by sentencing the defendant as a PRL III offender without complying with G.S. 15A-1022.1 (procedure for admissions in connection with sentencing). At issue was a point assigned under G.S. 15A-1340.14 (b)(7) (offense committed while on probation). As a general rule, this point must be determined by a jury unless admitted to by the defendant pursuant to G.S. 15A-1022.1. However, the court noted, "these procedural requirements are not mandatory when the context clearly indicates that they are inappropriate" (quotation omitted). Relying on *State v. Marlow*, ___ N.C. App. ___, 747 S.E.2d 741, 748 (2013), the court noted that the defendant stipulated to being on probation when he committed the crimes, defense counsel signed the PRL worksheet agreeing to the PRL, and at sentencing, the defendant stipulated that he was a PRL III. (2) The trial court erred by sentencing the defendant as a PRL III offender when State failed to provide the notice required by G.S. 15A-1340.16(a6) and the defendant did not waive the required notice.

Sex Offenders

State v. Moir, __ N.C. App. __, __ S.E.2d __ (Jan. 7, 2014). In considering a petition to terminate registration, the trial court erred by concluding that the defendant was not a Tier 1 offender under the Adam Walsh Act. The Act, the court explained, defines offender status by the offense charged, not by

the facts underlying the case. Here, the trial court based its ruling on the facts underlying the plea, not on the pled-to offense of indecent liberties.

Evidence

404(b)

State v. Rayfield, __ N.C. App. __, __ S.E.2d __ (Jan. 7, 2014). (1) In a child sex case, the trial court did not err by admitting adult pornography found in the defendant's home to establish motive or intent where the defendant showed the victim both child and adult pornography. Furthermore the trial court did not abuse its discretion by admitting this evidence under Rule 403. The trial court limited the number of magazines that were admitted and gave an appropriate limiting instruction. (2) The trial court did not err by allowing a child witness, A.L., to testify to sexual intercourse with the defendant. The court found the incidents sufficiently similar, noting among other things, that A.L. was assaulted in the same car as K.C. Although A.L. testified that the sex was consensual, she was fourteen years old at the time and thus could not legally consent to the sexual intercourse. The court found the seven-year gap between the incidents did not make the incident with A.L. too remote.

Arrest Search and Investigation

Standing

State v. Rodelo, __ N.C. App. __, __ S.E.2d __ (Jan. 7, 2014). Where the defendant had no ownership or possessory interest in the warehouse that was searched, he had no standing to challenge the search on Fourth Amendment grounds.

Search Warrants

State v. McKinney, __ N.C. App. __, __ S.E.2d __ (Jan. 7, 2014). The trial court erred by denying the defendant's suppression motion where the search warrant, authorizing a search of the defendant's apartment, was not supported by probable cause. The application was based on the following evidence: an anonymous citizen reported observing suspected drug-related activity at and around the apartment; the officer then saw an individual named Foushee come to the apartment and leave after six minutes; Foushee was searched and, after he was found with marijuana and a large amount of cash, arrested; and a search of Fouchee's phone revealed text messages between Foushee and an individual named Chad proposing a drug transaction. The court acknowledged that this evidence established probable cause that Foushee had been involved in a recent drug transaction. However, it found the evidence insufficient to establish probable cause of illegal drugs at the defendant's apartment.

State v. Rayfield, __ N.C. App. __, __ S.E.2d __ (Jan. 7, 2014). In this child sex case, the trial court did not err by denying the defendant's motion to suppress evidence obtained pursuant to a search warrant authorizing a search of his house. The victim told the police about various incidents occurring in several locations (the defendant's home, a motel, etc.) from the time that she was eight years old until she was eleven. The affidavit alleged that the defendant had shown the victim pornographic videos and images

in his home. The affidavit noted that the defendant is a registered sex offender and requested a search warrant to search his home for magazines, videos, computers, cell phones, and thumb drives. The court first rejected the defendant's argument that the victim's information to the officers was stale, given the lengthy gap of time between when the defendant allegedly showed the victim the images and the actual search. It concluded: "Although [the victim] was generally unable to provide dates to the attesting officers . . . her allegations of inappropriate sexual touching by Defendant over a sustained period of time allowed the magistrate to reasonably conclude that probable cause was present to justify the search of Defendant's residence." It went on to note that "when items to be searched are not inherently incriminating [as here] and have enduring utility for the person to be searched, a reasonably prudent magistrate could conclude that the items can be found in the area to be searched." It concluded:

> There was no reason for the magistrate in this case to conclude that Defendant would have felt the need to dispose of the evidence sought even though acts associated with that evidence were committed years earlier. Indeed, a practical assessment of the information contained in the warrant would lead a reasonably prudent magistrate to conclude that the computers, cameras, accessories, and photographs were likely located in Defendant's home even though certain allegations made in the affidavit referred to acts committed years before.

The court also rejected the defendant's argument that the affidavit was based on false and misleading information, concluding that to the extent the officer-affiant made mistakes in the affidavit, they did not result from false and misleading information and that the affidavit's remaining content was sufficient to establish probable cause. Finally, the court held that although the magistrate violated G.S. 15A-245 by considering the officer's sworn testimony when determining whether probable cause supported the warrant but failing to record that testimony as required by the statute, this was not a basis for granting the suppression motion. Significantly, the trial court based its ruling solely on the filed affidavit, not the sworn testimony and the affidavit was sufficient to establish probable cause.

Criminal Offenses

Homicide

State v. Epps, __ N.C. App. __, __ S.E.2d __ (Jan. 7, 2014). In a first-degree murder case, the court held, over a dissent, that the trial court did not err by declining to instruct the jury on involuntary manslaughter. The evidence showed that the defendant fought with the victim in the yard. Sometime later the defendant returned to the house and the victim followed him. As the victim approached the screen door, the defendant stabbed and killed the victim through the screen door. The knife had a 10-12 inch blade, the defendant's arm went through the screen door up to the elbow, and the stab wound pierced the victim's lung, nearly pierced his heart and was approximately 4 1/2 inches deep. The court rejected the defendant's argument that his case was similar to those that required an involuntary manslaughter instruction where the "defendant instinctively or reflexively lashed out, involuntarily resulting in the victim's death." Here, the court held, the "defendant's conduct was entirely voluntary."

Sexual Assaults

State v. Minyard, __ N.C. App. __, __ S.E.2d __ (Jan. 7, 2014). (1) In a child sex case, the court held that the evidence was sufficient to support a charge of attempted first-degree statutory sexual offense. On the issue of intent to commit the crime, the court stated: "The act of placing one's penis on a child's buttocks provides substantive evidence of intent to commit a first degree sexual offense, specifically anal intercourse." (2) The evidence was sufficient to support five counts of indecent liberties with a minor where the child testified that the defendant touched the child's buttocks with his penis "four or five times." The court rejected the defendant's argument that this testimony did not support convictions on five counts or that the contact occurred during separate incidents. Acknowledging that the child's testimony showed neither that the alleged acts occurred either on the same evening or on separate occasions, the court noted that "no such requirement for discrete separate occasions is necessary when the alleged acts are more explicit than mere touchings." The court cited *State v. Williams*, 201 N.C. App. 161 (2009), for the proposition that unlike "mere touching" "multiple sexual acts, even in a single encounter, may form the basis for multiple indictments for indecent liberties."

Drugs

State v. Rodelo, __ N.C. App. __, __ S.E.2d __ (Jan. 7, 2014). (1) In a trafficking by possession case, there was sufficient evidence of constructive possession. The court rejected the defendant's argument that the State's evidence showed only "mere proximity" to the drugs. Among other things, the defendant hid from the agents when they entered the warehouse; he was discovered alone in a tractor-trailer where money was hidden; no one else was discovered in the warehouse; the cocaine was found in a car parked, with its doors open, in close proximity to the tractor-trailer containing the cash; the cash and the cocaine were packaged similarly; wrappings were all over the tractor-trailer, in which the defendant was hiding, and in the open area of a car parked close by; the defendant admitted knowing where the money was hidden; and the entire warehouse had a chemical smell of cocaine. (2) Conspiracy to traffic in cocaine is not a lesser-included offense of trafficking in cocaine. The former offense requires an agreement; the latter does not.