Criminal Procedure

Joinder

State v. Alston, __ N.C. App. __, __ S.E.2d __ (April 1, 2014). The court rejected the defendant's argument that he received ineffective assistance of counsel when his lawyer failed to object to joinder of the defendant's charges of armed robbery and possession of a firearm by a felon. The defendant argued that the felon in possession statute was a "civil regulatory measure" that could not be joined with a criminal charge. The court held that felon in possession is a criminal offense that was properly joined for trial.

Pleading and Proof of Prior Convictions

State v. Alston, __ N.C. App. __, __ S.E.2d __ (April 1, 2014). Following *State v. Jeffers*, 48 N.C. App. 663, 665-66 (1980), the court held that G.S. 15A-928 (allegation and proof of previous convictions in superior court) does not apply to the crime of felon in possession of a firearm.

Jury Instructions

State v. Beck, __ N.C. App. __, __ S.E.2d __ (April 1, 2014). In this impaired driving case, the trial court did not err by denying the defendant's requested special jury instruction and instructing instead using Pattern Jury Instruction 270.20A. The special instructions would have informed the jury that the results of the chemical analysis did not create a presumption that the defendant was impaired or that the defendant had an alcohol concentration of .08 or greater; the jury was permitted to find that the defendant had an alcohol concentration of .08 or greater based on the results of the chemical analysis but was not required to do so; and the jury was allowed to consider the credibility and weight to be accorded to the results of the chemical analysis.

Merger Rule

State v. Marion, __ N.C. App. __, __ S.E.2d __ (April 1, 2014). The trial court erred by failing to arrest judgment on one of the underlying felonies supporting the defendant's felony-murder convictions. The court rejected the defendant's argument that judgment must be arrested on all of the felony convictions. The defendant asserted that because the trial court's instructions were disjunctive and permitted the jury to find her guilty of felony-murder if it found that she committed "the felony of robbery with a firearm, burglary, and/or kidnapping," the trial court should have arrested judgment on all of the felony convictions on the theory that they all could have served as the basis for the felony murder convictions. Citing prior case law the court rejected this argument, stating that "[i]n cases where the jury does not specifically determine which conviction serves as the underlying felony, we have held that the trial court may, in its discretion, select the felony judgment to arrest."

Sentencing Issues

State v. Geisslercrain, __ N.C. App. __, __ S.E.2d __ (April 1, 2014). (1) In this DWI case the trial court committed a *Blakely* error by finding an aggravating factor. The trial court found the aggravating factor, determined that it was counterbalanced by a mitigating factor and sentenced the defendant at Level Four. If the aggravating factor had not been considered the trial court would have been required to sentence the defendant to a Level Five punishment. Thus, the aggravating factor, which was improperly found by the judge, increased the penalty for the crime beyond the prescribed maximum. (2) The State failed to provide notice that it intended to seek aggravating factors as required by G.S. 20-179(a1)(1).

Sex Offenders

State v. Talbert, __ N.C. App. __, __ S.E.2d __ (April 1, 2014). The trial court did not err by requiring the defendant to enroll in lifetime SBM after finding at the bring-back hearing that he committed an aggravated offense, second-degree rape on a physically helpless victim (G.S. 14-27.3(a)(2)). The court followed *State v. Oxendine*, 206 N.C. App. 205 (2010), and held that second-degree rape was an aggravated offense.

Evidence

Introduction of Civil Judgment and Pleadings

State v. Young, __ N.C. App. __, __ S.E.2d __ (April 1, 2014). (1) In this murder trial where the defendant was charged with killing his wife, the trial court committed reversible error by allowing into evidence a default judgment and complaint in a wrongful death suit stating that the defendant killed the victim. Admission of this evidence violated G.S. 1-149 (providing that "[n]o pleading can be used in a criminal prosecution against the party as proof of a fact admitted or alleged in it"). Although the State offered several cases where civil pleadings and judgments were admitted in subsequent criminal trials, the court noted that none of them "[i]involve default judgments against a defendant, wrongful death judgments against a defendant, or non-testifying defendants." Slip Op. at 33. Additionally, it noted, "these cases involve admitting pleadings and/or judgments in a civil case at a subsequent criminal trial for a different purpose than as proof of a fact alleged in the criminal trial." *Id.* (2) For the same reason, the trial court committed reversible error by allowing into evidence a child custody complaint that included statements that the defendant had killed is wife.

Rule 401 (Relevance)

State v. Gayles, __ N.C. App. __, __ S.E.2d __ (April 1, 2014). In this murder case, the trial court did not err by excluding the defendant's proffered evidence about the victim's gang membership. The defendant asserted that the evidence was relevant to self-defense. However, none of the proffered evidence pertained to anything that the defendant actually knew at the time of the incident.

State v. Young, __ N.C. App. __, __ S.E.2d __ (April 1, 2014). In this murder case where the defendant was charged with killing his wife, statements by the couple's child to daycare workers were relevant to the identity of the assailant. The child's daycare teacher testified that the child asked her for "the

mommy doll." When the teacher gave the child a bucket of dolls, the child picked two dolls, one female with long hair and one with short hair, and hit them together. The teacher testified that she saw the child strike a "mommy doll" against another doll and a dollhouse chair while saying, "[M]ommy has boo-boos all over" and "[M]ommy's getting a spanking for biting. . . . [M]ommy has boo-boos all over, mommy has red stuff all over."

Rule 609 (Impeachment by Evidence of Conviction of Crime)

State v. Gayles, __ N.C. App. __, __ S.E.2d __ (April 1, 2014). (1) Under Rule 609, a party is not required to establish a prior conviction before cross-examining a witness about the offense. (2) Although cross-examination under Rule 609 is generally limited to the name of the crime, the time and place of the conviction, and the punishment imposed, broader cross-examination may be allowed when the defendant opens the door. Here that occurred when the defendant tried to minimize his criminal record. (3) The trial court did not err by allowing the State to impeach the defendant with prior convictions when the defendant had stipulated that he was a convicted felon for purposes of a felon in possession of a firearm charge. The court declined to apply *Old Chief v. United States,* 519 U.S. 172 (1997), to this case where the defendant testified at trial and was subject to impeachment under Rule 609. [**Author's note:** For an extensive discussion of Rule 609, see my judges' benchbook chapter here. For a discussion of *Old Chief* and its application under N.C. Rule 403 with respect to the State's evidence of prior convictions when the defense stipulates to the prior, see my benchook chapter here]

Hearsay Issues

State v. Marion, __ N.C. App. __, __ S.E.2d __ (April 1, 2014). The defendant's own statements were admissible under the hearsay rule. The statements were recorded by a police officer while transporting the defendant from Georgia to North Carolina. The court noted that "[a] defendant's statement that is not purported to be a written confession is admissible under the exception to the hearsay rule for statements by a party-opponent and does not require the defendant's acknowledgement or adoption." Slip Op. at 8.

State v. Young, __ N.C. App. __, __ S.E.2d __ (April 1, 2014). In this murder case where the defendant was charged with killing his wife, statements by the couple's child to daycare workers made six days after her mother was killed were admissible as excited utterances. The child's daycare teacher testified that the child asked her for "the mommy doll." When the teacher gave the child a bucket of dolls, the child picked two dolls, one female with long hair and one with short hair, and hit them together. The teacher testified that she saw the child strike a "mommy doll" against another doll and a dollhouse chair while saying, "[M]ommy has boo-boos all over" and "[M]ommy's getting a spanking for biting. . . . [M]ommy has boo-boos all over, mommy has red stuff all over."

Comment on Defendant's Right to Remain Silent

State v. Young, __ N.C. App. __, __ S.E.2d __ (April 1, 2014). The trial court did not err by instructing the jury that "[e]xcept as it relates to the defendant's truthfulness, you may not consider the defendant's refusal to answer police questions as evidence of guilt in this case" but that "this Fifth Amendment protection applies only to police questioning. It does not apply to questions asked by civilians, including friends and family of the defendant and friends and family of the victim." The court rejected the defendant's argument that the trial court committed plain error by instructing the jury that it could consider his failure to speak with friends and family as substantive evidence of guilt, noting that the Fifth Amendment's protection against self-incrimination does not extend to questions asked by civilians.

Confrontation Issues

State v. Alston, __ N.C. App. __, __ S.E.2d __ (April 1, 2014). The trial court did not violate the defendant's confrontation rights by barring him from cross-examining two of the State's witnesses, Moore and Jarrell, about criminal charges pending against them in counties in different prosecutorial districts than the district in which defendant was tried. The court noted that the Sixth Amendment right to confrontation generally protects a defendant's right to cross-examine a State's witness about pending charges in the same prosecutorial district as the trial to show bias in favor of the State, since the jury may understand that pending charges may be used by the State as a weapon to control the witness. However, the trial judge has wide latitude to impose reasonable limits on such cross-examination based on, for example, concern that such interrogation is only marginally relevant. Here, the defendant failed to provide any evidence of discussions between the district attorney's office in the trial county and district attorneys' offices in the other counties where the two had pending charges. Additionally, Jarrell testified on cross-examination and Moore testified on voir dire that each did not believe testifying in this case could help them in any way with proceedings in other counties. On these facts, the court concluded that testimony regarding the witnesses' pending charges in other counties was, at best, marginally relevant. Moreover, the court noted, both Jarrell and Moore were thoroughly impeached on a number of other bases separate from their pending charges in other counties.

Arrest Search and Investigation

Stops

State v. Price, __ N.C. App. __, __ S.E.2d __ (April 1, 2014). The trial court erred by granting the defendant's motion to suppress. A wildlife officer stopped the armed defendant and asked to see his hunting license. After the defendant showed his license, the officer asked whether the defendant was a convicted felon. The defendant admitted that he was. The officer seized the weapon and the defendant was later charged with being a felon in possession of a firearm. The court defined the issue as whether the officer exceeded the scope of a valid stop when he asked the defendant if he was a convicted felon. It concluded that the defendant was neither seized nor in custody when the officer asked about his criminal history and that therefore the trial court erred by granting the motion to suppress. The court further noted that the officer had authority to seize the defendant's rifle without a warrant under the plain view doctrine.

Criminal Offenses

Participants

State v. Marion, __ N.C. App. __, __ S.E.2d __ (April 1, 2014). The evidence was sufficient to support convictions for murder, burglary, and armed robbery on theories of acting in concert and aiding and abetting. The court noted that neither acting in concert nor aiding and abetting require a defendant to expressly vocalize her assent to the criminal conduct; all that is required is an implied mutual understanding or agreement. The State's evidence showed that the defendant was present for the discussions and aware of the group's plan to rob the victim Wiggins; she noticed an accomplice's gun; she was sitting next to another accomplice in a van when he loaded his shotgun; she told the group that she did not want to go up to the house but remained outside the van; she walked toward the house to inform the others that two victims had fled; she told two accomplices "y'all need to come on;" she attempted to start the van when an accomplice returned but could not release the parking brake; and she assisted in unloading the goods stolen from Wiggins' house into an accomplice's apartment after the incident.

Attempt

State v. Marion, __ N.C. App. __, __ S.E.2d __ (April 1, 2014). Because attempted first-degree felony murder does not exist under the laws of North Carolina, the court vacated the defendant's conviction with respect to this charge.

Weapons Offenses

State v. Price, __ N.C. App. __, __ S.E.2d __ (April 1, 2014). The trial court erred by dismissing a charge of felon in possession of a firearm on the basis that the statute was unconstitutional as applied to the defendant under a *Britt* analysis. Here, the defendant had two felony convictions for selling a controlled substance and one for felony attempted assault with a deadly weapon. While the defendant was convicted of the drug offenses in 1989, he was more recently convicted of the attempted assault with a deadly weapon in 2003. Although there was no evidence to suggest that the defendant misused firearms, there also was no evidence that the defendant attempted to comply with the 2004 amendment to the felon in possession statute. The court noted that the defendant completed his sentence for the assault in 2005, after the 2004 amendment to the statute was enacted. Thus, he was on notice of the changes in the legislation, yet took no action to relinquish his hunting rifle on his own accord.

Motor Vehicle Offenses

State v. Geisslercrain, __ N.C. App. __, __ S.E.2d __ (April 1, 2014). There was sufficient evidence of reckless driving where the defendant was intoxicated; all four tires of her vehicle went off the road; distinctive "yaw" marks on the road indicated that she lost control of the vehicle; the defendant's

vehicle overturned twice; and the vehicle traveled 131 feet from the point it went off the road before it flipped, and another 108 feet after it flipped.