Criminal Procedure

Motion to Continue

State v. Gray, __ N.C. App. __, __ S.E.2d __ (June 3, 2014). In an attempted armed robbery case where the defendant was alleged to have acted with others, the trial court did not abuse its discretion by denying the defendant's motion to continue, made shortly before trial and after a 24-hour continuance already had been granted to the defense. The defendant argued that the continuance was needed because of the late receipt of an accomplice's statement indicating that another accomplice had the gun during incident. The trial court denied the motion, reasoning that the statement was duplicative, did not introduce any new actors or witnesses, and did not significantly change the State's case against the defendant. The trial court explained that legally it did not matter who possessed the gun; if one of the perpetrators possessed a gun, all perpetrators were guilty to the same extent. Additionally, the trial court noted that it already had granted a defense motion to continue. The court of appeals agreed that the statement did not significantly change the case to the defendant's prejudice so as to require additional time to prepare for trial.

Motion to Suppress Procedure

State v. McFarland, __ N.C. App. __, __ S.E.2d __ (June 3, 2014). Although the trial court made findings of fact in its order denying the defendant's suppression motion, it erred by failing to make conclusions of law. The court remanded for appropriate conclusions of law.

Joinder

State v. McCanless, __ N.C. App. __, __ S.E.2d __ (June 3, 2014). The trial court did not err by joining for trial offenses committed on two different child victims. The State alleged that on 3 September 2010, the defendant committed indecent exposure by showing his privates to a child victim, M.S., and committed indecent liberties with M.S. It also alleged that on 1 July 2011 he engaged in a sexual act with a child victim, K.C., committed first-degree kidnapping, and committed indecent liberties on K.C. The evidence in the cases was similar with respect to victim, location, motive, and modus operandi. Both victims were prepubescent girls, the acts occurred within months of one another in a donation store while the girls were momentarily alone, and in both cases the defendant immediately fled the scene and engaged in sexual misconduct.

Jury Selection

State v. Gurkin, __ N.C. App. __, __ S.E.2d __ (June 3, 2014). (1) In this murder case, the trial court did not err by failing to make further inquiry when a prospective juror revealed during voir dire that prospective jurors were discussing the case in the jury room. Questioning of the juror revealed that "a few" prospective jurors spoke about whether they knew the defendant, what had happened, and news coverage of the crime. The juror indicated that no one knew the defendant or anything about the case. The trial court acted within its discretion by declining to conduct any further examination and limiting its

inquiry to the juror's voir dire. (2) Although the trial court erred by failing to follow the statutory procedure for jury selection in G.S. 15A-1214 (specifically, that the prosecutor must pass 12 jurors to the defense), the defendant failed to show prejudice. The court rejected the defendant's argument that the error was reversible per se.

Jury Instructions

State v. Gurkin, __ N.C. App. __, __ S.E.2d __ (June 3, 2014). (1) In this murder case, the trial court did not commit plain error by failing to submit involuntary manslaughter to the jury. The trial court submitted first-degree murder, second-degree murder, voluntary manslaughter, and not guilty to the jury. The jury found the defendant guilty of second-degree murder. By finding the defendant guilty of this offense, the jury necessarily found, beyond a reasonable doubt, that the defendant acted with malice. Involuntary manslaughter is a homicide without malice, a fact rejected by the jury. (2) The trial court did not err by denying the defendant's request to instruct the jury on self-defense and imperfect self-defense. The defendant never testified that he thought it was necessary or reasonably necessary to kill his wife, the victim, to protect himself from death or great bodily harm; he only testified that his wife was holding a stun gun and that he pushed her up against the bathroom cabinets to keep her from using it. The defendant was able to push the stun gun into his wife's side and ultimately subdued her. He did not state that he feared for his life or that he feared he might suffer great bodily harm.

State v. McGee, __ N.C. App. __, __ S.E.2d __ (June 3, 2014). (1) In an involuntary manslaughter case where a death occurred during a high speed chase by a bail bondsman in his efforts to arrest a principal, the trial court did not err by instructing the jury that bail bondsmen cannot violate motor vehicle laws in order to make an arrest. While the statute contains specific exemptions to the motor vehicle laws pertaining to speed for police, fire, and emergency service vehicles, no provision exempts a bail bondsman from complying with speed limits when pursuing a principal. (2) The trial court did not err by failing to submit to the jury the question whether the defendant's means in apprehending his principal were reasonable. Under the law the defendant bail bondsman was not authorized to operate his motor vehicle at a speed greater than was reasonable and prudent under the existing conditions because of his status as a bail bondsman. It concluded:

> Just as the bail bondsmen cannot enter the homes of third parties without their consent, a bail bondsmen pursuing a principal upon the highways of this State cannot engage in conduct that endangers the lives or property of third parties. Third parties have a right to expect that others using the public roads, including bail bondsmen, will follow the laws set forth in Chapter 20 of our General Statutes.

Sentencing

State v. Earls, __ N.C. App. __, __ S.E.2d __ (June 3, 2014). Although the trial court erred by referencing the Bible or divine judgment in sentencing, given the sentence imposed, the defendant failed to show prejudice or that his sentence was based on the trial court's religious invocation. Before pronouncing its

sentence on the defendant, who was found guilty of sexually abusing his children, the trial court addressed the defendant as follows:

> Well, let me say this: I think children are a gift of God and I think God expects when he gives us these gifts that we will treat them as more precious than gold, that we will keep them safe from harm the best as we're able and nurture them and the child holds a special place in this world. In the 19th chapter of Matthew Jesus tells his disciples, suffer the little children, to come unto me, forbid them not: for such is the kingdom of heaven. And the law in North Carolina, and as it is in most states, treats sexual abuse of children as one of the most serious crimes a person can commit, and rightfully so, because the damage that's inflicted in these cases is incalculable. It's murder of the human spirit in a lot of ways. I'm going to enter a judgment in just a moment. But some day you're going to stand before another judge far greater than me and you're going to have to answer to him why you violated his law and I hope you're ready when that day comes.

Although finding no basis for a new sentencing hearing, the court "remind[ed] trial courts that judges must take care to avoid using language that could give rise to an appearance that improper factors have played a role in the judge's decision-making process even when they have not." Slip Op. at 18 (quotation omitted).

State v. Hogan, __ N.C. App. __, __ S.E.2d __ (June 3, 2014). The trial court did not err in calculating the defendant's prior record level when it counted a New Jersey third-degree theft conviction as a Class I felony. The court rejected the defendant's argument that because New Jersey does not use the term "felony" to classify its offenses, the trial court could not determine that third-degree theft is a felony for sentencing purposes, noting that the State presented a certification that third-degree theft is considered a felony in New Jersey. The court also rejected the defendant's argument that the offense was substantially similar to misdemeanor larceny.

State v. Lucas, __ N.C. App. __, __ S.E.2d __ (June 3, 2014). In the face of the State's concession that there was no evidence supporting a restitution award, the court vacated the trial court's restitution order and remanded for a rehearing on the issue.

State v. Talbot, __ N.C. App. __, __ S.E.2d __ (June 3, 2014). In the face of the State's concession that there was no evidence supporting a restitution award, the court vacated the trial court's restitution order and remanded for a rehearing on the issue. The court noted: "In the interest of judicial economy, we urge prosecutors and trial judges to ensure that this minimal evidentiary threshold is met before entering restitution awards."

Sex Offenders

State v. Jones, __ N.C. App. __, __ S.E.2d __ (June 3, 2014). (1) The court rejected the defendant's argument that the trial court lacked subject matter jurisdiction to hold the SBM hearing in Craven County. The requirement that the SBM hearing be held in the county in which the defendant resides relates to venue and the defendant's failure to raise the issue before the trial court waives his ability to

raise it for the first time on appeal. (2) The trial court erred by requiring the defendant to enroll in lifetime SBM. Two of the trial court's additional findings supporting its order that the defendant—who tested at moderate-low risk on the Static 99—enroll in lifetime SBM were not supported by the evidence. Also, the additional finding that there was a short period of time between the end of probation for the defendant's 1994 nonsexual offense and committing the sexual offense at issue does not support the conclusion that he requires the highest possible level of supervision and monitoring. Although the 1994 offense was originally charged as a sexual offense, it was pleaded down to a non-sexual offense. The trial court may only consider the offense of conviction for purposes of the SBM determination.

Evidence

Authentication

State v. Gray, __ N.C. App. __, __ S.E.2d __ (June 3, 2014). The State adequately authenticated photographs of text messages sent between accomplices to an attempted robbery. A detective testified that he took pictures of text messages on an accomplice's cell phone while searching the phone incident to arrest. The detective identified the photographs in the exhibit as screen shots of the cell phone and testified that they were in substantially the same condition as when he obtained them. Another accomplice, with whom the first accomplice was communicating in the text messages, also testified to the authenticity of the exhibit. The court rejected the defendant's argument that to authenticate the text messages, the State had to call employees of the cell phone company.

State v. McCoy, __ N.C. App. __, __ S.E.2d __ (June 3, 2014). (1) An affidavit of indigency sworn to by the defendant before a court clerk was a self-authenticating document under Evidence Rule 902 and thus need not be authenticated under Rule 901. (2) The trial court properly allowed the jury to consider whether a signature on a pawn shop buy ticket matched the defendant's signature of his affidavit of indigency. The court compared the signatures and found that there was enough similarity between them for the documents to have been submitted to the jury for comparison.

Examination of Witnesses & Presentation of Evidence to the Jury

State v. Earls, __ N.C. App. __, __ S.E.2d __ (June 3, 2014). (1) The trial court did not abuse its discretion by allowing the prosecution to use leading questions when examining a child sexual assault victim. The prosecutor was attempting to ask a 14-year-old victim questions about her father's sexual conduct toward her. She was very reluctant to testify. The prosecutor repeatedly urged the victim to tell the truth, regardless of what her answer would be. The prosecutor attempted to refresh her recollection with her prior statements, but she still refused to specify what the defendant did. The court concluded: "Leading questions were clearly necessary here to develop the witness's testimony." (2) The trial court did not err by allowing the prosecutor to ask a 14-year-old child sexual assault victim to write down what the defendant did to her and then allowing the prosecutor to read the note to the jury. Although the child answered some questions, she was reluctant to verbally answer the prosecutor's question

about what the defendant did to her. The prosecutor then asked the victim to write down the answer to the question. The victim wrote that the defendant penetrated her vaginally.

Arrest Search and Investigation

***Miranda* Issues**

State v. Hogan, __ N.C. App. __, __ S.E.2d __ (June 3, 2014). The defendant's statements, made while a police officer who responded to a domestic violence scene questioned the defendant's girlfriend, were spontaneous and in not response to interrogation. The State conceded that the defendant was in custody at the time. The court rejected the defendant's argument that asking his girlfriend what happened in front of him was a coercive technique designed to elicit an incriminating statement. Conceding that the "case is a close one," the court concluded that the officer's question to the girlfriend did not constitute the functional equivalent of questioning because the officer's question did not call for a response from the defendant and therefore was not reasonably likely to elicit an incriminating response from him.

Confessions

State v. McCanless, __ N.C. App. __, __ S.E.2d __ (June 3, 2014). Rejecting the defendant's argument that that "[t]he detectives' lies, deceptions, and implantation of fear and hope established a coercive atmosphere", the court relied on the trial court's findings of fact and found that the defendant's statement was voluntary.

Criminal Offenses

Assaults

State v. Jamison, __ N.C. App. __, __ S.E.2d __ (June 3, 2014). (1) The evidence was sufficient to establish that the defendant inflicted serious bodily injury on the victim. The beating left the victim with broken bones in her face, a broken hand, a cracked knee, and an eye so beat up and swollen that she could not see properly out of it at the time of trial. The victim testified that her hand and eye "hurt all of the time." (2) The defendant could not be convicted and sentenced for both assault inflicting serious bodily injury and assault on a female when the convictions were based on the same conduct. The court concluded that language in the assault on a female statute ("[u]nless the conduct is covered under some other provision of law providing greater punishment . . . .") reflects a legislative intent to limit a trial court's authority to impose punishment for assault on a female when punishment is also imposed for higher class offenses that apply to the same conduct (here, assault inflicting serious bodily injury).

Burglary

State v. Lucas, __ N.C. App. __, __ S.E.2d __ (June 3, 2014). (1) In this burglary case, the evidence was insufficient to establish that the defendants entered the premises where it showed that the defendants used landscaping bricks and a fire pit bowl to break a back window of the home but no evidence showed

that any part of their bodies entered the home (no items inside the home were missing or had been tampered with) or that the instruments of breaking were used to commit an offense inside. (2) The evidence was sufficient to establish that the defendants intended to commit a felony or larceny in the home. Among other things, an eyewitness testified that the defendants were "casing" the neighborhood at night. Additionally, absent evidence of other intent or explanation for a breaking and entering at night, the jury may infer that the defendant intended to steal. (3) Although first-degree trespass is a lesser-included offense of felonious breaking or entering, the trial court did not err by failing to instruct the jury on the trespass offense when the evidence did not permit a reasonable inference that would dispute the State's contention that the defendants intended to commit a felony. (4) The trial court did not commit plain error by failing to define larceny in instructions it provided to the jury on burglary. Because evidence was presented permitting the inference that the defendants intended to steal property and there was no evidence suggesting that they intended to merely borrow it, the jury did not need a formal definition of the term "larceny" to understand its meaning and to apply that meaning to the evidence.

Sexual Assaults and Sex Offender Offenses

State v. McFarland, __ N.C. App. __, __ S.E.2d __ (June 3, 2014). (1) The court rejected the defendant's argument that G.S. 14-208.11 (2011) (failure to notify of a change in address) is void for vagueness as applied to him. He argued that because he is homeless, a person of ordinary intelligence person could not know what "address" means in his case. The court noted that in *State v. Abshire*, 363 N.C. 322 (2009), the N.C. Supreme Court clearly and unambiguously defined the term "address" as used in the statute well before the defendant was released from prison. It further noted that in *State v. Worley*, 198 N.C. App. 329 (2009), it rejected the defendant's argument that homeless sex offenders have no address for purposes of the registration statutes. It concluded:

> Even assuming that the language of the statute is ambiguous, defendant had full notice of what was required of him, given the judicial gloss that the appellate courts have put on it. Certainly after *Abshire* and *Worley*, if not before, a person of reasonable intelligence would understand that a sex offender is required to inform the local sheriff's office of the physical location where he resides within three business days of a change, even if that location changes from one bridge to another, or one couch to another. Although this obligation undoubtedly places a large burden on homeless sex offenders, it is clear that they bear such a burden under [G.S.] 14-208.9 and that under [G.S.] 14-208.11(a)(2) they may be punished for willfully failing to meet the obligation. Moreover, the fact that it may sometimes be difficult to discern when a homeless sex offender changes addresses does not make the statute unconstitutionally vague or relieve him of the obligation to inform the relevant sheriff's office when he changes addresses.

(Citations omitted) (2) The evidence was sufficient to convict the defendant for failing to notify of a change in address. Conceding that the State presented evidence that he was not residing at his registered address, the defendant argued that the State failed to presented evidence of where he was actually residing. The court rejected this argument, reasoning that the State is not required to prove the

defendant's new address, only that he failed to register a change of address. It stated: "proof that [the] defendant was not living at his registered address is proof that his address had changed."

State v. Stephens, __ N.C. App. __, __ S.E.2d __ (June 3, 2014). (1) In a multi-count indecent liberties with a student case, the trial court did not err by failing to instruct the jury using the specific acts alleged in the amended bill of particulars. The trial court properly instructed the jury that it could find the defendant guilty if it concluded that he willfully took "any immoral, improper, or indecent liberties" with the victim. The actual act by the defendant committed for the purpose of arousing himself or gratifying his sexual desire was immaterial. The victim's testimony included numerous acts, any one of which could have served as the basis for the offenses. (2)The court rejected the defendant's argument that the trial court erred by denying his motion to dismiss because there was insufficient evidence that the victim was a "student." The trial court instructed the jury that a "student," for purposes of G.S. 14-202.4(A), means "a person enrolled in kindergarten, or in grade one through 12 in any school." The court rejected the defendant's argument that a person is only "enrolled" during the academic year and that since the offenses occurred during the summer, the victim was not a student at the time.