

Criminal Procedure

Appeal Issues

[State v. Watlington](#), __ N.C. App. __, __ S.E.2d. __ (July 1, 2014) (No. COA13-661). The court denied the defendant's motion to strike the State's brief, which was filed in an untimely manner without any justification or excuse and after several extensions of the time within which it was authorized to do so had been obtained. However, the court "strongly admonished" counsel for the State "to refrain from engaging in such inexcusable conduct in the future" and that counsel "should understand that any repetition of the conduct disclosed by the present record will result in the imposition of significant sanctions upon both the State and himself personally."

Indictment Issues

[State v. Campbell](#), __ N.C. App. __, __ S.E.2d. __ (July 1, 2014). In a case involving a larceny from a church, the indictment was defective where it failed to allege the victim, Manna Baptist Church, was an entity capable of owning property. The fact that the indictment alleged a named natural person as a co-owner did not save the indictment: "If one of the owners were incapable of owning property, the State necessarily would be unable to prove that both alleged owners had a property interest."

Jury Argument

[State v. Watlington](#), __ N.C. App. __, __ S.E.2d. __ (July 1, 2014) (No. COA13-925). Although the prosecutor's statements during closing argument in a robbery case were improper, a new trial was not required. The prosecutor argued that if the defendant "had gotten hold" of a rifle loaded with 14 rounds, "one each for you jurors," "this might have been an entirely different case." The court held that "the remarks by the State were improper, and should have been precluded by the trial court." However, under the appropriate standards of review, a new trial was not required.

Jury Instructions

[State v. Watlington](#), __ N.C. App. __, __ S.E.2d. __ (July 1, 2014) (No. COA13-661). The trial court did not err by refusing to instruct the jury about the results of recent research into factors bearing upon the accuracy of eyewitness identification evidence. The eyewitness identification instruction requested by the defendant was eight pages long and strongly resembled a New Jersey jury instruction. The trial court declined to give the defendant's proffered instruction and gave an alternate one, as well as an instruction relating to the manner in which the jury should evaluate the validity of photographic identification procedures as required by G.S. 15A-284.52(d)(3), with this instruction including a lengthy recitation of the criteria for a proper identification procedure set out in G.S. 15A-284.52(b). Citing prior NC cases, the court held that "existing pattern jury instructions governing the manner in which jurors should evaluate the weight and credibility of the evidence and the necessity for the jury to find that the defendant perpetrated the crime charged beyond a reasonable doubt sufficiently address the issues

arising from the presentation of eyewitness identification testimony.” The court went on to note the absence of any evidentiary support for the requested instruction.

[*State v. Watlington*](#), __ N.C. App. __, __ S.E.2d. __ (July 1, 2014) (No. COA13-925). For the reasons discussed in the case summarized immediately above, the court held that the trial court did not err by refusing to give a jury instruction requested by the defendant.

Jury Deliberations

[*State v. Massenburg*](#), __ N.C. App. __, __ S.E.2d. __ (July 1, 2014). Where the trial court’s *Allen* charge was in substantial compliance with G.S. 15A-1235, no coercion of the verdict occurred. The defendant argued that because the *Allen* charge failed to instruct the jury in accordance with section G.S. 15A-1235(b)(3) that “a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous,” he was entitled to a new trial. Acknowledging that the charge failed to repeat G.S. 15A-1235(b)(3) verbatim, the court concluded that the trial court’s instructions contained the substance of the statute and fairly apprised the jurors of their duty to reach a consensus after open-minded debate and examination without sacrificing their individually held convictions merely for the sake of returning a verdict.

Sentencing

[*State v. Massenburg*](#), __ N.C. App. __, __ S.E.2d. __ (July 1, 2014). Where the defendant’s sentence was within the presumptive range, the trial court did not abuse its discretion by imposing an intermediate sanction of a term of special probation of 135 days in the Division of Adult Correction. The court rejected the defendant’s argument that the sentence was a discriminatory sentence predicated on poverty, namely that the trial court chose a sentence with active time as opposed to regular probation because the defendant would never make enough money at his current job to pay monies as required.

[*State v. Perkins*](#), __ N.C. App. __, __ S.E.2d. __ (July 1, 2014). The trial court did not err by using the defendant’s prior conviction for indecent liberties to calculate his PRL points. The defendant was charged with multiple counts of sexual assault on a child. His first trial resulted in a mistrial after the jury deadlocked. At his second trial he was convicted of indecent liberties but the jury failed to reach a verdict as to the remaining counts. Judgment was entered in 2011 for the indecent liberties conviction. In 2012, he was retried and convicted. The trial court did not err by counting the defendant’s prior indecent liberties conviction when calculating PRL points. The court distinguished *State v. West*, 180 N.C. App. 664, (2006), on grounds that in that case the convictions occurred at the same time but here the prior conviction was entered a year before the third trial. Further, the court noted, in this case the defendant stipulated to his prior conviction.

[*State v. Watlington*](#), __ N.C. App. __, __ S.E.2d. __ (July 1, 2014) (No. COA13-925). Citing, *State v. West*, 180 N.C. App. 664 (2006) (the same case cited in *Perkins* above), the court held that the trial court erred by increasing the defendant’s sentence based on convictions for charges that originally had been joined

for trial with the charges currently before the court. The charges were joined for trial and at the first trial, the defendant was found guilty of some charges, not guilty of others and there was a jury deadlock as to several others. The defendant was retried on charges that resulted in a deadlock and convicted. The trial court used the convictions from the first trial when calculating the defendant's PRL. [Author's note: This case was decided by a different panel than the one that decided *Perkins*, above.]

Evidence

Rule 609 (Prior Convictions)

[*State v. Perkins*](#), __ N.C. App. __, __ S.E.2d. __ (July 1, 2014). The trial court did not err by allowing the State to impeach the defendant with evidence of a prior conviction under Rule 609. The defendant was charged with multiple counts of sexual assault on the same child victim. His first trial resulted in a mistrial after the jury deadlocked. At his second trial he was convicted of indecent liberties but the jury failed to reach a verdict as to the remaining counts and a mistrial was declared as to these counts. Judgment was entered in 2011 for the indecent liberties conviction. In 2012, he was retried and convicted on four charges. At this third trial the State impeached the defendant, over his objection, with the 2011 indecent liberties conviction. The court rejected the defendant's argument that the indecent liberties conviction was not "prior conviction" within the meaning of Rule 609; the defendant had argued that the rule does not permit impeachment with a conviction that involved a charge that was indicted, joined for trial, and tried with the current charges.

Arrest, Search and Investigation

[*State v. Cottrell*](#), __ N.C. App. __, __ S.E.2d. __ (July 1, 2014). The trial court erred by denying the defendant's motion to suppress where the defendant was subjected to a seizure in violation of the Fourth Amendment. Specifically, the officer continued to detain the defendant after completing the original purpose of the stop without having reasonable, articulable suspicion of criminal activity. The officer initiated a traffic stop because of a headlights infraction and a potential noise violation. The defendant turned his headlights on before he stopped and apologized to the officer for not having his headlights on. The officer asked the defendant for his license and registration and said that if everything checked out, the defendant would soon be cleared to go. The defendant did not smell of alcohol, did not have glassy eyes, was not sweating or fidgeting, and made no contradictory statements. A check revealed that the defendant's license and registration were valid. However a criminal history check revealed that the defendant had a history of drug charges and felonies. When the officer re-approached the car, he told the defendant to keep his music down because of a noise ordinance. At this point the officer smelled a strong odor that he believed was a fragrance to cover up the smell of drugs. The officer asked the defendant about the odor, and the defendant showed him a small, clear glass bottle, stating that it was a body oil. Still holding the defendant's license and registration, the officer asked for consent to search. The defendant declined consent but after the officer said he would call for a drug dog, the defendant agreed to the search. Contraband was found and the defendant moved to suppress. The court began by following *State v. Myles*, 188 N.C. App. 42, *aff'd per curiam*, 362 N.C. 344 (2008), and concluding that the purpose of the initial stop was concluded by the time the officer asked for consent

to search. The court held that once the officer returned to the vehicle and told the defendant to keep his music down, the officer had completely addressed the original purpose for the stop. It continued:

Defendant had turned on his headlights, he had been warned about his music, his license and registration were valid, and he had no outstanding warrants. Consequently, [the officer] was then required to have "defendant's consent or 'grounds which provide a reasonable and articulable suspicion in order to justify further delay' before" asking defendant additional questions.

Next, the court held that the officer had no reasonable and articulable suspicion of criminal activity in order to extend the stop beyond its original scope: "a strong incense-like fragrance, which the officer believes to be a 'cover scent,' and a known felony and drug history are not, without more, sufficient to support a finding of reasonable suspicion of criminal activity."

Finally, the court rejected the argument that the detention of the defendant after the original purpose had ended was proper because it equated to a "de minimis" extension for a drug dog sniff. The court declined to extend the de minimis analysis to situations where—as here—no drug dog was at the scene prior to the completion of the purpose of the stop.

[State v. Veal](#), __ N.C. App. __, __ S.E.2d. __ (July 1, 2014). (1) No seizure occurred when an officer initially approached the defendant in response to a tip about an impaired driver. The officer used no physical force, approached the defendant's vehicle on foot and engaged in conversation with him. The officer did not activate his blue lights and there was no evidence that he removed his gun from his holster or used a threatening tone. Thus, the court concluded, the event was a voluntary encounter. (2) Reasonable suspicion supported the officer's later detention of the driver. During the voluntary encounter the officer noticed the odor of alcohol coming from the defendant and observed an unopened container of beer in his truck. These observations provide a sufficient basis for reasonable suspicion to support the subsequent stop. [Author's note: The court's opinion contains discussion of whether the original tip was anonymous or not and cites recent NC case law; it does not however mention the US Supreme Court's most recent anonymous tip case, *Navarette v. California*, 572 U.S. __ (April 22, 2014). In any event, this discussion does not seem to be integral the holding noted above and thus is not addressed here.]

Criminal Offenses

Sexual Assaults

[State v. McLamb](#), __ N.C. App. __, __ S.E.2d. __ (July 1, 2014). A defendant may be convicted of child abuse by sexual act under G.S. 14-318.4(a2) when the underlying sexual act is vaginal intercourse.

[State v. Godley](#), __ N.C. App. __, __ S.E.2d. __ (July 1, 2014). With respect to an indecent liberties charge, the State presented sufficient evidence that the defendant committed the relevant act for the purpose of arousing or gratifying sexual desire. The court noted the defendant's purpose "may be inferred from the evidence of the defendant's actions." Here, the victim stated that the defendant kissed her on the mouth, told her not to tell anyone about what happened, and continued to kiss her even after she asked him to stop. The victim told the police that the defendant made sexual advances

while he was drunk, kissed her, fondled her under her clothing, and touched her breasts and vagina. This evidence, along with other instances of the defendant's alleged sexual misconduct giving rise to first-degree rape charges, is sufficient evidence to infer the defendant's purpose.

Burglary & Related Offenses

[*State v. Campbell*](#), __ N.C. App. __, __ S.E.2d. __ (July 1, 2014). The trial court erred by denying the defendant's motion to dismiss a charge of felony breaking or entering a place of worship where there was insufficient evidence of the defendant's intent to commit a larceny therein. The defendant admitted entering the church in question, but he explained that he entered to seek sanctuary, drink water, and pray and without the intent to steal. None of the State's evidence contradicted this testimony and no evidence showed that the defendant ever possessed the missing items. Although the law holds that an intent to commit larceny may be reasonably inferred from an unlawful entry, here the evidence showed an innocent reason for the defendant's entering of the church and the inference did not apply.

Judicial Administration

Closing the Courtroom

[*State v. Godley*](#), __ N.C. App. __, __ S.E.2d. __ (July 1, 2014). On appeal after a remand for the trial court to conduct a hearing and make appropriate findings of fact and conclusions of law regarding a closure of the courtroom during testimony by a child sexual abuse victim, the court held that the closure of the courtroom was proper and that the defendant's constitutional right to a public trial was not violated.