

Criminal Procedure

Appeal Issues

[*State v. Berry*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 5, 2014). Plain error does not apply to stipulations entered into at trial.

Indictment Issues

[*State v. Simpson*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 5, 2014). An indictment charging the defendant with violating G.S. 14-208.18(a) (prohibiting registered sex offenders from being “[w]ithin 300 feet of any location intended primarily for the use, care, or supervision of minors when the place is located on premises that are not intended primarily for the use, care, or supervision of minors”) was not defective. The charges arose out of the defendant’s presence at a Wilkesboro public park, specifically, sitting on a bench within the premises of the park and in close proximity to the park’s batting cage and ball field. The indictment alleged, in relevant part, that the defendant was “within 300 feet of a location intended primarily for the use, care, or supervision of minors, to wit: a batting cage and ball field of Cub Creek Park located in Wilkesboro, North Carolina.” The court rejected the defendant’s argument that the indictment was defective because it failed to allege that the batting cages and ball field were located on a premise not intended primarily for the use, care, or supervision of minors.

Restraining the Defendant during Trial

[*State v. Jackson*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 5, 2014). In a first-degree murder case, the trial court did not abuse its discretion or violate defendant’s constitutional rights by ordering the defendant to be physically restrained during trial after the defendant attempted to escape mid-trial, causing a lockdown of the courthouse. [Author’s note: For more detail about restraining a defendant during trial, see my Benchbook chapter [here](#).]

Judge’s Conduct during Trial

[*State v. Berry*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 5, 2014). Over a dissent, the court held that the trial court did not express an opinion on a question of fact to be decided by the jury in violation of G.S. 15A-1222 or express an opinion as to whether a fact had been proved in violation of G.S. 15A-1232 when accepting the parties’ stipulation and instructing the jury on how to consider the stipulation.

[*State v. Jackson*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 5, 2014). In a first-degree murder case, the court rejected the defendant’s argument that the trial court made an improper judicial comment on his dangerousness in violation G.S. 15A-1222 and -1232. The defendant had argued that the trial court’s decision to order additional security after his mid-trial escape attempt, including physical restraints and an escort for the jury, was akin to a statement that defendant was highly dangerous and probably guilty. The court rejected this argument, concluding that the trial court did not abuse its discretion or violate the defendant’s constitutional rights by ordering additional security measures after the defendant

attempted to escape, causing a lockdown of the courthouse. The court also rejected the defendant's argument that the trial court should have instructed the jury that they should not consider the fact that they had been escorted to their cars or the additional security personnel in the courtroom.

Jury's Exposure to Media Coverage

[*State v. Jackson*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 5, 2014). In a first-degree murder case where the defendant attempted to escape mid-trial, causing a lockdown of the courthouse and the trial court to order a security escort for the jury, the trial court's procedure for inquiring about the juror's exposure to media coverage was adequate. When court reconvened the next day, the trial court had the bailiff ask the jurors whether any of them had seen any reports about the events of the previous day. None indicated that they had. The trial court decided that it was unnecessary to individually inquire of the jurors and once the jury was back in the courtroom, the trial court asked them, as a whole, whether they had followed the court's instructions to avoid any coverage of the trial. None indicated that they had violated the court's instructions.

Jury Instructions

[*State v. Clapp*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 5, 2014). (1) In a child sexual assault case, the trial court did not err by refusing the defendant's request to instruct the jury that it could consider evidence concerning his character for honesty and trustworthiness as substantive evidence of his guilt or innocence. At trial, five witnesses testified that the defendant was honest and trustworthy. The defendant requested an instruction in accordance with N.C.P.J.I. 105.60, informing the jury that a person having a particular character trait "may be less likely to commit the alleged crime(s) than one who lacks the character trait" and telling the jury that, if it "believe[d] from the evidence [that the defendant] possessed the character trait" in question, it "may consider this in [its] determination of [Defendant's] guilt or innocence[.]" The trial court would have been required to deliver the requested instruction if the jury could reasonably find that an honest and trustworthy person was less likely to commit the crimes at issue in this case than a person who lacked those character traits. Although "an individual's honesty and trustworthiness are certainly relevant to an individual's credibility, we are unable to say that a person exhibiting those character traits is less likely than others to commit a sexual offense [such as the ones charged in this case]." (2) In a child sexual assault case, the trial court did not err by failing to instruct the jury on the defense of accident as requested by the defendant. The defendant, who assisted high school sports teams, was charged with sexual offense and indecent liberties with students in connection with stretching and massages he provided to injured student athletes. The trial court properly denied the defendant's request for the instruction "given the complete absence of any evidence tending to show that he digitally penetrated [the victim's] vagina with his fingers in an accidental manner." The court noted that at trial the defendant denied doing the acts in question.

[*State v. Foster*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 5, 2014). (1) In a delivery of cocaine case where the defendant presented sufficient evidence of the essential elements of entrapment, the trial court erred by refusing to instruct the jury on that defense. The defendant's evidence showed that an undercover officer tricked the defendant into believing that the officer was romantically interested in the defendant in order to persuade the defendant to obtain cocaine for him, that the defendant had no predisposition to commit a drug offense such as delivering cocaine, and that the criminal design originated solely with the officer. The court rejected the State's argument that the evidence showed that the officer merely afforded the defendant the opportunity to commit the offense. (2) The trial court abused its discretion by denying the defendant's request for an entrapment instruction as a sanction under G.S. 15A-910(a) for failure to provide "specific information as to the nature and extent of the defense" as required by G.S. 15A-905(c)(1)(b). The trial court made no findings of fact to justify the sanction and the State did not show prejudice from the lack of detail in the notice filed eight months prior to trial. The court held:

[I]n considering the totality of the circumstances prior to imposing sanctions on a defendant, relevant factors for the trial court to consider include without limitation: (1) the defendant's explanation for the discovery violation including whether the discovery violation constituted willful misconduct on the part of the defendant or whether the defendant sought to gain a tactical advantage by committing the discovery violation, (2) the State's role, if any, in bringing about the violation, (3) the prejudice to the State resulting from the defendant's discovery violation, (4) the prejudice to the defendant resulting from the sanction, including whether the sanction could interfere with any fundamental rights of the defendant, and (5) the possibility of imposing a less severe sanction on the defendant.

Slip op. at pp. 29-30. The court continued, holding that assuming that the defendant's notice constituted a discovery violation, the trial court abused its discretion by refusing to instruct on entrapment as a sanction.

Verdicts

[*State v. Mosher*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 5, 2014). The jury did not return mutually exclusive verdicts when it found the defendant guilty of felony child abuse in violation of G.S. 14-318.4(a3) (the intentional injury version of this offense) and felony child abuse resulting in violation of G.S. 14-318.4(a4) (the willful act or grossly negligent omission version of this offense). The charges arose out of an incident where the victim was severely burned in a bathtub while under the defendant's care. Citing *State v. Mumford*, 364 N.C. 394, 400 (2010), the court noted that criminal offenses are mutually exclusive if "guilt of one necessarily excludes guilt of the other." The defendant argued that the mens rea component of the two offenses makes them mutually exclusive. The court concluded, however, that substantial evidence permitted the jury to find that two separate offenses occurred in succession such that the two charges were not mutually exclusive. Specifically, that the defendant acted in reckless disregard for human life by initially leaving the victim and her brother unattended in a tub of scalding hot water and that after a period of time, the defendant returned to the tub and intentionally held the victim in that water.

Evidence

Character Evidence

[State v. Clapp](#), ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 5, 2014). In a child sexual assault case, in which the defendant was charged with having sexual contact with student athletes who came to him for help with sports injuries, the trial court did not err by refusing to allow a defense witness to testify that the defendant possessed the character trait of working well with children and not having an unnatural lust or desire to have sexual relations with children. The defendant argued that the evidence should have been admitted since it related to a pertinent character trait that had a special relationship to the charged crimes. Citing *State v. Wagoner*, 131 N.C. App. 285, 293 (1998) (the trial court properly excluded evidence showing the defendant's "psychological make-up," including testimony that he was not a high-risk sexual offender, on the theory that such evidence, which amounted to proof of the defendant's normality, did not tend to show the existence or non-existence of a pertinent character trait), the court concluded that the evidence in question "constituted nothing more than an attestation to Defendant's normalcy" and was properly excluded. [Author's note: For a review of the evidence rules on character evidence and a "cheat sheet" chart of those rules, see my Benchbook chapter [here](#)]

Rule 403 Balancing

[State v. Jackson](#), ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 5, 2014). (1) In a first-degree murder trial, the trial court did not abuse its discretion by declining to exclude, under Rule 403, evidence of the defendant's mid-trial escape attempt. The court reasoned: "[T]he jury may have inferred from the fact that defendant attempted to escape that defendant was guilty of the charges against him. That inference is precisely the inference that makes evidence of flight relevant and it is not an unfair inference to draw." (2) The trial court did not err by admitting a jail letter that the defendant wrote to an accomplice in "Crip" gang code. In the letter, the defendant asked the accomplice to kill a third accomplice because he was talking to police. Rejecting the defendant's argument that the evidence should have been excluded under Rule 403, the court determined that the fact that the defendant solicited the murder of a State's witness was highly relevant and that the defendant's gang membership was necessary to understand the context and relevance of the letter, which had to be translated by an accomplice. Additionally, the trial court repeatedly instructed the jury that they were only to consider the gang evidence as an explanation for the note.

Criminal Offenses

Sex Offender Crimes

[State v. Simpson](#), ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 5, 2014). The trial court erred by denying the defendant's motion to dismiss a charge that the defendant was a registered sex offender unlawfully on premises used by minors in violation of G.S. 14-208.18(a). The statute prohibits registered sex offenders from being "[w]ithin 300 feet of any location intended primarily for the use, care, or supervision of minors when the place is located on premises that are not intended primarily for the use, care, or supervision of minors[.]" The charges arose out of the defendant's presence at a public park, specifically,

sitting on a bench within the premises of the park and in close proximity to the park's batting cage and ball field. The court agreed with the defendant that the State failed to present substantial evidence that the batting cages and ball fields constituted locations that were primarily intended for use by minors. At most, the State's evidence established that these places were sometimes used by minors.