Criminal Procedure

Venue

State v. Borders, __ N.C. App. __, __ S.E.2d. __ (Sept. 2, 2014). In this rape and murder case, the trial court did not abuse its discretion by denying the defendant's motion to change venue. All of the jurors either indicated that they had no prior knowledge of the incident or if they had read about it, they could put aside their knowledge about the case. The court distinguished *State v. Jerrett*, 309 N.C. 239 (1983), on grounds that here, six of the jurors had no knowledge of the case prior to jury selection, neither of the alternate jurors knew about the case prior to that time, individual voir dire was used, none of the jurors seated knew any of the State's witnesses, and the population of the county where trial occurred was significantly larger than the county at issue in *Jerrett.*

Habitual Felon Proceedings

State v. Rogers, __ N.C. App. __, __ S.E.2d. __ (Sept. 2, 2014). The trial court committed reversible error by failing to instruct the jury to disregard evidence about the defendant's habitual felon indictment when that evidence was elicited during the trial on the underlying charges. Although the trial court sustained defense counsel's objection and instructed the jury to strike a portion of the testimony given by an officer, it was required to give a curative instruction as to additional testimony offered by the officer.

Evidence

Expert Opinions

State v. Borders, __ N.C. App. __, __ S.E.2d. __ (Sept. 2, 2014). In this rape and murder case in which the old "*Howerton*" version of Rule 702 applied, the court rejected the defendant's argument that opinion testimony by the State's medical examiner experts as to cause of death was unreliable and should not have been admitted. The court concluded:

> [T]he forensic pathologists examined the body and eliminated other causes of death while drawing upon their experience, education, knowledge, skill, and training. Both doctors knew from the criminal investigation into her death that [the victim's] home was broken into, that she had been badly bruised, that she had abrasions on her arm and vagina, that her panties were torn, and that DNA obtained from a vaginal swab containing sperm matched Defendant's DNA samples. The doctors' physical examination did not show a cause of death, but both doctors drew upon their experience performing such autopsies in stating that suffocation victims often do not show physical signs of asphyxiation. The doctors also eliminated all other causes of death before arriving at asphyxiation, which Defendant contends is not a scientifically established technique. However, the reliability criterion at issue here is nothing more than a preliminary inquiry into the adequacy of the expert's testimony. Accordingly, the doctors' testimony met the first prong of *Howerton* so that "any lingering questions or controversy concerning

the quality of the expert's conclusions go to the weight of the testimony rather than its admissibility." (citations omitted)

The court then concluded that the witnesses were properly qualified as experts in forensic pathology.

Cross-Examination

State v. Triplett, __ N.C. App. __, __ S.E.2d. __ (Sept. 2, 2014). In this murder case the trial court committed reversible error by prohibiting—under Rules 402 and 403--the defendant from introducing a tape-recorded voice mail message by the defendant's sister, a key witness for the State, to show her bias and attack her credibility.

Arrest, Search and Investigation

Search & Seizure

State v. Allah, __ N.C. App. __, __ S.E.2d. __ (Sept. 2, 2014). (1) A search of the defendant's living area, which was connected to his wife's permitted ABC store, was valid where his wife consented to the ALE officers' request to search the living area. (2) A search of the defendant's recording studio, also connected to the ABC store, was proper. After the officers developed probable cause to search the recording studio but the defendant declined to give consent to search, the officers "froze" the scene and properly obtained a search warrant to search the studio.

State v. Armstrong, __ N.C. App. __, __ S.E.2d. __ (Sept. 2, 2014). Although a search of the defendant's vehicle was not proper under *Gant*, it was authorized under the automobile exception where officers had probable cause that the vehicle contained marijuana. After officers saw a vehicle execute a three-point turn in the middle of an intersection, strike a parked vehicle, and continue traveling on the left side of the road, they activated their blue lights to initiate a traffic stop. Before the vehicle stopped, they saw a brown beer bottle thrown from the driver's side window. After the driver and passenger exited the vehicle, the officers detected an odor of alcohol and marijuana from the inside of the car and discovered a partially consumed bottle of beer in the center console. The defendant was arrested for hit and run and possession of an open container, put in handcuffs, and placed in the back of the officers' cruiser. One of the officers searched the vehicle and retrieved the beer bottle from the center console, a grocery bag containing more beer, and a plastic baggie containing several white rocks, which turned out to be cocaine, in car's glove compartment. After the defendant was charged with possession of cocaine and other offenses, he moved to suppress the evidence found pursuant to the search of his car. The court concluded that although a search of the car was not proper under *Gant,* it was proper under the automobile exception. Specifically, the fact that the officers smelled a strong odor of marijuana inside the vehicle provided probable cause to search.

State v. Bernard, __ N.C. App. __, __ S.E.2d. __ (Sept. 2, 2014). (1) In a case involving unlawful access to computers and identity theft, a search warrant authorizing a search of the defendant and her home and vehicle was supported by probable cause. The court rejected the defendant's argument that hearsay evidence was improperly considered in the probable cause determination. It went on to conclude that

the warrant was supported by probable cause where the defendant's home was connected to an IP address used to unlawfully access an email account of a NC A&T employee. (2) NC A&T campus police had territorial jurisdiction to execute a search warrant at the defendant's off-campus private residence where A&T had entered into a Mutual Aid agreement with local police. The Agreement gave campus police authority to act off-campus with respect to offenses committed on campus. Here, the statutes governing unauthorized access to a computer—the crime in question—provide that any offense "committed by the use of electronic communication may be deemed to have been committed where the electronic communication was originally sent or where it was originally received." Here, the defendant "sent" an "electronic communication" when she accessed the email account of an A&T employee and sent a false email. The court continued, concluding that the offenses were "committed on Campus" because she sent the email through the A&T campus computer servers. (3) Although an officer "inappropriately" took documents related to the defendant's civil action against A&T and covered by the attorney-client privilege during his search of her residence, the trial court properly suppressed this material and the officer's actions did not otherwise invalidate the search warrant or its execution.

State v. Borders, __ N.C. App. __, __ S.E.2d. __ (Sept. 2, 2014). In this rape and murder case, no Fourth Amendment violation occurred when an officer seized a cigarette butt containing the defendant's DNA. The defendant, a suspect in a murder case, refused four requests by the police to provide a DNA sample. Acting with the primary purpose of obtaining a sample of the defendant's DNA to compare to DNA from the victim's rape kit, officers went to his residence to execute an unrelated arrest warrant. After the defendant was handcuffed and taken outside to the driveway, an officer asked him if he wanted to smoke a cigarette. The defendant said yes and after he took several drags from the cigarette the officer asked if he could take the cigarette to throw it away for the defendant. The defendant said yes but instead of throwing away the cigarette, the officer extinguished it and placed it in an evidence bag. The DNA on the cigarette butt came back as a match to the rape kit DNA. The court acknowledged that if the defendant had discarded the cigarette himself within the curtilage of the premises, the officers could not have seized it. However, the defendant voluntarily accepted the officer's offer to throw away the cigarette butt. The court continued, rejecting the defendant's argument that he had a reasonable expectation of privacy in the cigarette butt. When the defendant, while under arrest and handcuffed, placed the cigarette butt in the officer's gloved hand—instead of on the ground or in some other object within the curtilage--the defendant relinquished possession of the butt and any reasonable expectation of privacy in it. Finally, although indicating that it was "troubled" by the officers' trickery, the court concluded that the officers' actions did not require suppression of the DNA evidence. The court reasoned that because "the police did not commit an illegal act in effectuating the valid arrest warrant and because the subjective motives of police do not affect the validity of serving the underlying arrest warrant," suppression was not required.

Identification

State v. Macon, __ N.C. App. __, __ S.E.2d. __ (Sept. 2, 2014). The trial court did not err by admitting in-court identification of the defendant by two officers. The defendant argued that the trial court erred in denying his motion to suppress the officers' in-court identifications because the procedure they used to

identify him violated the Eyewitness Identification Reform Act (EIRA) and his constitutional due process rights. After the officers observed the defendant at the scene, they returned to the police station and put the suspect's name into their computer database. When a picture appeared, both officers identified the defendant as the perpetrator. The officers then pulled up another photograph of the defendant and confirmed that he was the perpetrator. This occurred within 10-15 minutes of the incident in question. The court concluded that the identification based on two photographs was not a "lineup" and therefore was not subject to the EIRA. Next, the court held that even assuming the procedure was impermissibly suggestive, the officers' in-court identification was admissible because it was based on an independent source, their clear, close and unobstructed view of the suspect at the scene.

Criminal Offenses

Motor Vehicle Offenses

State v. Hawk, __ N.C. App. __, __ S.E.2d. __ (Sept. 2, 2014). In this felony death by vehicle case, even without evidence of the defendant's blood-alcohol, the evidence was sufficient to establish that the defendant was impaired. When an officer interviewed the defendant at the hospital, she admitted drinking "at least a 12-pack." The defendant admitted at trial that she drank at least seven or eight beers, though she denied being impaired. The first responding officer testified that when he arrived on the scene, he noticed the strong odor of alcohol and when he spoke with defendant, she kept asking for a cigarette, slurring her words. He opined that she seemed intoxicated. Finally, the doctor who treated the defendant at the hospital diagnosed her with alcohol intoxication, largely based on her behavior.