Criminal Procedure

Appeal Issues

State v. Shaw, __ N.C. App. __, __ S.E.2d __ (Sept. 16, 2014). The defendant had no statutory right to appeal from a guilty plea to DWI where none of the exceptions to G.S. 15A-1444(e) applied.

Charging Instruments

State v. Wilson, __ N.C. App. __, __ S.E.2d __ (Sept. 16, 2014). A short form indictment charging the defendant with attempted first degree murder was defective. The indictment failed to allege that the defendant acted with "malice aforethought" as required by G.S. 15-144 (short form murder indictment). The court remanded for entry of judgment on the lesser of voluntary manslaughter.

State v. Harris, __ N.C. App. __, __ S.E.2d __ (Sept. 16, 2014). Where the warrant charging contributing to the abuse or neglect of a juvenile alleged, in part, that the defendant knowingly caused, encouraged, and aided the child "to commit an act, consume alcoholic beverage," the State was not prohibited from showing that the defendant also contributed to the abuse or neglect of the juvenile by engaging her in sexual acts. The court noted that an indictment that fails to allege the exact manner in which the defendant contributed to the delinquency, abuse, or neglect of a minor is not fatally defective.

Pretrial Release Issues

State v. Townsend, __ N.C. App. __, __ S.E.2d __ (Sept. 16, 2014). (1) The trial court properly denied the defendant's *Knoll* motion, in which the defendant argued that he was denied his right to communicate with counsel and friends. The defendant had several opportunities to call counsel and friends to observe him and help him obtain an independent chemical analysis, but the defendant failed to do so. In fact, the defendant asked that his wife be called, but only to tell her that he had been arrested. Thus, the defendant was not denied his rights under *Knoll*. (2) Even if the magistrate erred by ordering an "option bond" that gave the defendant a choice between paying a $1,000 secured bond or a $1,000 "unsecured bond and being released to a sober, responsible adult" without making written findings of fact to support the secured bond, the defendant failed to show how he was prejudiced where he was released on an unsecured bond to his wife.

Motions Practice

State v. Overocker, __ N.C. App. __, __ S.E.2d __ (Sept. 16, 2014). After granting the defendant's motion to suppress, the trial court erred by dismissing the charges where the defendant made no written or oral motion to dismiss.

Counsel Issues

State v. Wilson, __ N.C. App. __, __ S.E.2d __ (Sept. 16, 2014). In an attempted murder case, counsel did not commit a *Harbison* error when he stated during closing argument: "You have heard my client basically admit that while pointing the gun at someone, he basically committed a crime: Assault by pointing a gun." Because assault by pointing a gun is not a lesser-included of the charged offense, counsel's statement fell outside of *Harbison.*

Arguments to the Jury

State v. Harris, __ N.C. App. __, __ S.E.2d __ (Sept. 16, 2014). In a case where the defendant was convicted of sexual battery and contributing to the abuse or neglect of a juvenile, the trial court did not err by failing to intervene ex mero motu during the prosecutor's final argument to the jury. The defendant challenged the prosecutor's statement that he had ruined the victim's childhood and that if it failed to find the victim's testimony credible, it would be sending a message that she would need to be hurt, raped, or murdered before an alleged abuser could be convicted.

Jury Instructions

State v. Rawlings, __ N.C. App. __, __ S.E.2d __ (Sept. 16, 2014). The trial court erred by instructing the defendant pursuant to G.S. 14-51.4 (justification for defensive force not available) where the statute, enacted in 2011, did not apply to the 2006 incident in question.

Clerical Errors

State v. Rawlings, __ N.C. App. __, __ S.E.2d __ (Sept. 16, 2014). The court remanded for correction of a clerical error where the defendant was convicted of assault with a deadly weapon but the trial court entered judgment for AWDWIK.

Evidence

Opinion Testimony

State v. Harris, __ N.C. App. __, __ S.E.2d __ (Sept. 16, 2014). In a case where the defendant was convicted of sexual battery and contributing to the abuse or neglect of a juvenile, the victim's grandmother did not give improper lay opinion testimony. The court rejected the defendant's argument that the witness vouched for the victim's credibility.

Alco-Sensor Results

State v. Townsend, __ N.C. App. __, __ S.E.2d __ (Sept. 16, 2014). Although the trial court erred by admitting evidence of the numerical result of an Alco-sensor test during a pretrial hearing on the defendant's motion to suppress, a new trial was not warranted. The numerical results were admitted only in the pre-trial hearing, not at trial and even without the numerical result, the State presented sufficient evidence to defeat the suppression motion.

Arrest, Search and Investigation

Arrests & Checkpoints

State v. Overocker, __ N.C. App. __, __ S.E.2d __ (Sept. 16, 2014). The trial court properly granted the defendant's motion to suppress where no probable cause supported the defendant's arrest for impaired driving and unsafe movement. The defendant was arrested after he left a bar, got in his SUV and backed into a motorcycle that was illegally parked behind him. The officer relied on the following facts to support probable cause: the accident, the fact that the defendant had been at a bar and admitted to having three drinks (in fact he had four), the defendant's performance tests, and the odor of alcohol on the defendant. However, the trial court found that the officer testified that the alcohol odor was "light." Additionally, none of the officers on the scene observed the defendant staggering or stumbling, and his speech was not slurred. Also, the only error the defendant committed in the field sobriety tests was to ask the officer half-way through each test what to do next. When instructed to finish the tests, the defendant did so. The court concluded:

> [W]hile defendant had had four drinks in a bar over a four-hour time frame, the traffic accident . . . was due to illegal parking by another person and was not the result of unsafe movement by defendant. Further, defendant's performance on the field sobriety tests and his behavior at the accident scene did not suggest impairment. A light odor of alcohol, drinks at a bar, and an accident that was not defendant's fault were not sufficient circumstances, without more, to provide probable cause to believe defendant was driving while impaired.

The court also rejected the State's argument that the fact that the officer knew the defendant's numerical reading from a portable breath test supported the arrest, noting that under G.S. 20-16.3(d), the alcohol concentration result from an alcohol screening test may not be used by an officer in determining if there are reasonable grounds to believe that the driver committed an implied consent offense, such as driving while impaired.

State v. Townsend, __ N.C. App. __, __ S.E.2d __ (Sept. 16, 2014). (1) Probable cause supported the defendant's arrest for DWI. When the officer stopped the defendant at a checkpoint, the defendant had bloodshot eyes and a moderate odor of alcohol. The defendant admitted to "drinking a couple of beers earlier" and that he "stopped drinking about an hour" before being stopped. Two alco-sensor tests yielded positive results and the defendant exhibited clues indicating impairment on three field sobriety tests. The court rejected the defendant's argument that because he did not exhibit signs of intoxication such as slurred speech, glassy eyes, or physical instability, there was insufficient probable cause, stating: "as this Court has held, the odor of alcohol on a defendant's breath, coupled with a positive alco-sensor result, is sufficient for probable cause to arrest a defendant for driving while impaired." (2) The trial court did not err by denying the defendant's motion to suppress evidence obtained as a result of a vehicle checkpoint. The checkpoint was conducted for a legitimate primary purpose of checking all passing drivers for DWI violations and was reasonable.

Criminal Offenses

Larceny

State v. Hull, __ N.C. App. __, __ S.E.2d __ (Sept. 16, 2014). The evidence was sufficient to show that a larceny of a laptop was from the victim's person. At the time the laptop was taken, the victim took a momentary break from doing her homework on the laptop and she was about three feet away from it. Thus, the court found that the laptop was within her protection and presence at the time it was taken.

State v. Robinson, __ N.C. App. __, __ S.E.2d __ (Sept. 16, 2014). Following *State v. Oliver*, __ N.C. App. __, 718 S.E.2d 731 (2011), the court determined that unauthorized use of a stolen vehicle is not a lesser-included offense of possession of a stolen vehicle. However, the court found that *Oliver* had mistakenly relied on *State v. Nick*erson, 365 N.C. 279 (2011), "for a proposition not addressed, nor a holding reached, in that case." Concluding that it was bound by *Oliver,* the court expressed the hope that "the Supreme Court may take this opportunity to clarify our case law" and decide whether unauthorized use of a motor vehicle is a lesser-included offense of possession of a stolen motor vehicle.

Abuse and Neglect

State v. Harris, __ N.C. App. __, __ S.E.2d __ (Sept. 16, 2014). (1) Following, *State v. Stevens*, ___ N.C. App. ___, 745 S.E.2d 64, 67 (2013), the court held that the offense of contributing to a juvenile's being delinquent, undisciplined, abused or neglected (G.S. 14-316.1) does not require the defendant to be the juvenile's parent, guardian, custodian, or caretaker; the defendant need only be a person who causes a juvenile to be in a place or condition where the juvenile does not receive proper care from a caretaker or is not provided necessary medical care. (2) The evidence was sufficient to show that the defendant placed the child in a position in which she could be found to be abused or neglected. The defendant entered the child's bedroom when she was trying to sleep, tried to get her to drink alcohol, squeezed her buttocks, asked her to suck his thumb and asked to suck her chest. (3) Although the trial court's jury instructions on the G.S. 14-316.1 charge were erroneous, the error did not rise to the level of plain error. [Author's note: In footnote 4, the court indicated that the trial court's instructions were "consistent with the applicable pattern jury instructions" but nevertheless "clearly misstated the law." I have informed the Criminal Pattern Jury Committee of this language in the court's opinion but judges should carefully review the pattern instruction until any necessary changes can be made to the pattern instruction.]

Drug Offenses

State v. Davis, __ N.C. App. __, __ S.E.2d __ (Sept. 16, 2014). (1) There was sufficient evidence of manufacturing methamphetamine. An officer observed the defendant and another person at the scene for approximately 40 minutes. Among the items recovered were a handbag containing a syringe and methamphetamine, a duffle bag containing a clear two liter bottle containing methamphetamine, empty boxes and blister packs of pseudoephedrine, a full pseudoephedrine blister pack, an empty pack of lithium batteries, a lithium battery from which the lithium had been removed, iodized salt, sodium hydroxide, drain opener, funnels, tubing, coffee filters, syringes, various items of clothing, and a plastic

bottle containing white and pink granular material. The defendant's presence at the scene, the evidence recovered, the officer's testimony that the defendant and his accomplice were going back and forth in the area, moving bottles, and testimony that the defendant gave instructions to his accomplice to keep the smoke out of her eyes was sufficient evidence of manufacturing. (2) The evidence was sufficient to establish that the defendant constructively possessed the methamphetamine and drug paraphernalia. Agreeing with the defendant that the evidence tended to show that methamphetamine found in a handbag belonged to the defendant's accomplice, the court found there was sufficient evidence that he constructively possessed methamphetamine found in a duffle bag. Among other things, the defendant and his accomplice were the only people observed by officers at the scene of the "one pot" outdoor meth lab, the officer watched the two for approximately forty minutes and both parties moved freely about the site where all of the items were laid out on a blanket. (3) The evidence was sufficient to show a drug trafficking conspiracy where there was evidence of an implied agreement between the defendant and his accomplice. The defendant was present at the scene and aware that his accomplice was involved producing methamphetamine and there was sufficient evidence that the defendant himself was involved in the manufacturing process. The court concluded: "Where two subjects are involved together in the manufacture of methamphetamine and the methamphetamine recovered is enough to sustain trafficking charges, we hold the evidence sufficient to infer an implied agreement between the subjects to traffic in methamphetamine by manufacture and withstand a motion to dismiss." (4) The evidence was sufficient to prove a trafficking amount of methamphetamine. The court rejected the defendant's argument that the entire weight of a mixture containing methamphetamine at an intermediate stage in the manufacturing process cannot be used to support trafficking charges because the mixture is not ingestible, is unstable, and is not ready for distribution. The defendant admitted that the methamphetamine had already been formed in the liquid and it was only a matter of extracting it from the mixture. Also, the statute covers mixtures.