Criminal Procedure

Motion to Continue

State v. Blow, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 4, 2014). In a child sexual assault case, the trial court did not err by denying the defendant's motion to continue, made on grounds that defense counsel learned of a potential defense witness on the eve of trial. Specifically, defense counsel learned that a psychologist prepared reports on the defendant and the victim in connection with a prior custody determination. However, the defendant knew about the psychologist's work given his participation in it and defense counsel had two months to confer with the defendant and prepare the case for trial.

Arrest, Search and Investigation

State v. Shepley, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 4, 2014). (1) Relying on *State v. Drdak*, 330 N.C. 587, 592-93 (1992), and *State v. Davis*, 142 N.C. App. 81 (2001), the court held that where an officer obtained a blood sample from the defendant pursuant to a search warrant after the defendant refused to submit to a breath test of his blood alcohol level, the results were admissible under G.S. 20-139.1(a) and the procedures for obtaining the blood sample did not have to comply with G.S. 20-16.2. (2) The officer had reasonable suspicion to stop the defendant's moped based on a helmet infraction.

Criminal Offenses

Sexual Assaults

State v. Blow, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 4, 2014). In a child sexual assault case in which the defendant was convicted of three counts of first-degree rape, the court held, over a dissent, that the trial court erred by failing to dismiss one of the rape charges. The court agreed with the defendant that because the victim testified that the defendant inserted his penis into her vagina "a couple" of times, without identifying more than two acts of penetration, the State failed to present substantial evidence of three counts of rape. The court found that the defendant's admission to three instances of "sex" with the victim was not an admission of vaginal intercourse because the defendant openly admitted to performing oral sex and other acts on the victim but denied penetrating her vagina with his penis.

State v. Miles, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 4, 2014). In a case where the defendant was convicted of second-degree rape, breaking or entering, and two counts of attempted second-degree sexual offense, the trial court did not err by denying the defendant's motion to dismiss one count of attempted second-degree sexual offense. The defendant asserted that the evidence did not show an intent to commit the act by force and against the victim's will. The court disagreed:

> [W]here the request for fellatio is immediately preceded by defendant tricking the victim into letting him into her apartment, raping her, pulling her hair, choking her, flipping her upside down, jabbing at her with a screwdriver, refusing to allow her to leave, pulling her out of her car, taking her car keys, dragging her to his apartment, slapping her so hard that her braces cut the inside of her mouth, screaming at her, and immediately after her denial of his request, raping her again, we hold that this request is

accompanied by a threat and a show of force and thus amounts to an attempt. Had [the victim] complied with defendant's request, thus completing the sexual act, we cannot imagine that the jury would have found that she had consented to perform fellatio. Given the violent, threatening context, defendant's request and presentation of his penis to [the victim] amounted to an attempt to engage [the victim] in a sexual act by force and against her will.