**Criminal Procedure**

**Indictments & Related Issues**

*In re J.F.*, __ N.C. App. __, __ S.E.2d __ (Nov. 18, 2014). Noting that the sufficiency of a petition alleging a juvenile to be delinquent is evaluated by the same standards that apply to indictments, the court held that petitions alleging two acts of sexual offense and two acts of crime against nature were sufficient. In addition to tracking the statutory language, one sexual offense and one crime against nature petition alleged that the juvenile performed fellatio on the victim; the other sexual offense and crime against nature petitions alleged that the victim performed fellatio on the juvenile. The court rejected the defendant's argument that any more detail was required, noting that if the juvenile wanted more information about the factual circumstances underlying each charge he should have moved for a bill of particulars.

*State v. Henry*, __ N.C. App. __, __ S.E.2d __ (Nov. 18, 2014). There was no fatal variance in a resisting an officer case where the indictment alleged that the defendant refused to drop what was in his hands (plural) and the evidence showed that he refused to drop what was in his hand (singular). The variance was not material.

**Joinder**

*State v. Larkin*, __ N.C. App. __, __ S.E.2d __ (Nov. 18, 2014). The trial court did not abuse its discretion by denying the defendant's motion to sever where the offenses had a transactional connection (he was charged with breaking into three beachfront residences within 2.5 miles of each other and within a three-day span).

**Counsel Issues**

*State v. Jastrow*, __ N.C. App. __, __ S.E.2d __ (Nov. 18, 2014). The trial court did not err by allowing the defendant to waive his right to counsel and proceed pro se. Notwithstanding the defendant's refusal to acknowledge that he was subject to court's jurisdiction, the trial court was able to conduct a colloquy that complied with G.S. 15A-1242. The court reminded trial judges, however, that "our Supreme Court has approved a series of 14 questions that can be used to satisfy the requirements of Section 15A-1242." "[B]est practice," it continued "is for trial courts to use the 14 questions . . . which are set out in

the Superior Court Judges' Benchbook provided by the University of North Carolina at Chapel Hill School of Government." [Author's note: The benchbook is available here; the section noted by the court is here]

**Closing the Courtroom**

*State v. Spence*, __ N.C. App. __, __ S.E.2d __ (Nov. 18, 2014). In a child sexual abuse case, the trial court did not violate the defendant's right to a public trial by closing the courtroom for part of the victim's testimony. The trial court made the requisite inquiries under *Waller* and made appropriate findings of fact supporting closure.

**Recess and Re-Opening Evidence**

*State v. McClaudle*, __ N.C. App. __, __ S.E.2d __ (Nov. 18, 2014). In this drug and drug conspiracy case, the trial court did not abuse its discretion by denying the defendant's request for additional time to locate an alleged co-conspirator and his motion to reopen the evidence so that witness could testify when he was located after the jury reached a verdict. The trial court acted within its authority given that the witness had not been subpoenaed (and thus was not required to be present) and his attorney indicated that he would not testify.

**Jury Instructions**

*State v. Spence*, __ N.C. App. __, __ S.E.2d __ (Nov. 18, 2014). In this child sexual abuse case, the trial court did not err by referring to the victim as the "alleged victim" in its opening remarks to the jury and referring to her as "the victim" in its final jury instructions. The court distinguished *State v. Walston*, ___ N.C. App. ___, ___, 747 S.E.2d 720, 728 (2013), on grounds that in this case the defendant failed to object at trial and thus the plain error standard applied. Moreover, given the evidence, the court could not conclude that the trial court's word choice had a probable impact on the jury's finding of guilt.

*State v. Turner*, __ N.C. App. __, __ S.E.2d __ (Nov. 18, 2014). (1) No plain error occurred when the indictment charged the defendant with possession with intent to sell and deliver but the trial court instructed the jury that it could find the defendant guilty if she possessed the controlled substance with intent to manufacture, sell, or deliver. Because no evidence was presented regarding an intent to

manufacture, inclusion of the word manufacture in the instructions was harmless error. (2) No plain error occurred when the trial court in its preliminary instructions before jury selection referred to reasonable doubt as "fair doubt" but correctly defined that term in its final instructions to the jury.

### Post-Conviction DNA Testing

*State v. Floyd*, __ N.C. App. __, __ S.E.2d __ (Nov. 18, 2014). (1) The trial court properly denied the defendant's motion for post-conviction DNA testing. The defendant was convicted of murdering his wife; her body was discovered in a utility shop behind their home. He sought DNA testing of five cigarettes and a beer can that were found in the utility shop, arguing that Karen Fowler, with whom the defendant had an affair, or her sons committed the murder. He asserted that testing may show the presence of DNA from Fowler or her sons at the scene. The defendant failed to prove the materiality of sought-for evidence, given the overwhelming evidence of guilt and the fact that DNA testing would not reveal who brought the items into the utility shop or when they were left there. The court noted: "While the results from DNA testing might be considered 'relevant,' had they been offered at trial, they are not 'material' in this postconviction setting." (2) The post-conviction DNA testing statute does not require the trial court to make findings of fact when denying a motion. "A trial court's order is sufficient so long as it states that the court reviewed the defendant's motion, cites the statutory requirements for granting the motion, and concludes that the defendant failed to show that all the required conditions were met." (3) The court held that trial court was not required to hold an evidentiary hearing on the defendant's motion, noting:

> [A] trial court is not required to conduct an evidentiary hearing where it can determine from the trial record and the information in the motion that the defendant has failed to meet his burden of showing any evidence resulting from the DNA testing being sought would be material. A trial court is not required to conduct an evidentiary hearing on the motion where the moving defendant fails to describe the nature of the evidence he would present at such a hearing which would indicate that a reasonable probability exists that the DNA testing sought would produce evidence that would be material to his defense.

## Evidence

### Field Tests

*State v. Carter*, __ N.C. App. __, __ S.E.2d __ (Nov. 18, 2014). Relying on *State v. Meadows*, 201 N.C. App. 707 (2010) (trial court abused its discretion by allowing an officer to testify that substances were

cocaine based on NarTest field test), the court held that the trial abused its discretion by admitting an officer's testimony that narcotics indicator field test kits indicated the presence of cocaine in the residence in question.

### Shoeprint Evidence

*State v. Larkin*, __ N.C. App. __, __ S.E.2d __ (Nov. 18, 2014). In a burglary and felony larceny case, an officer properly offered lay opinion testimony regarding a shoeprint found near the scene. The court found that the shoeprint evidence satisfied the *Palmer* "triple inference" test:

> [E]vidence of shoeprints has no legitimate or logical tendency to identify an accused as the perpetrator of a crime unless the attendant circumstances support this triple inference: (1) that the shoeprints were found at or near the place of the crime; (2) that the shoeprints were made at the time of the crime; and (3) that the shoeprints correspond to shoes worn by the accused at the time of the crime.

### *Crawford* Issues

*State v. Carter*, __ N.C. App. __, __ S.E.2d __ (Nov. 18, 2014). Where no hearsay statements were admitted at trial, the confrontation clause was not implicated.

## Arrest, Search and Investigation

### Interrogation & Confessions

*State v. Flood*, __ N.C. App. __, __ S.E.2d __ (Nov. 18, 2014). In a child sexual assault case, the trial court erred by finding that the defendant's statements were made involuntarily. Although the court found that an officer made improper promises to the defendant, it held, based on the totality of the circumstances, that the statement was voluntarily. Regarding the improper promises, Agent Oaks suggested to the defendant during the interview that she would work with and help the defendant if he confessed and that she "would recommend . . . that [the defendant] get treatment" instead of jail time. She also asserted that Detective Schwab "can ask for, you know, leniency, give you this, do this. He can ask the District Attorney's Office for certain things. It's totally up to them [what] they do with that but they're going to look for recommendations[.]" Oaks told the defendant that if he "admit[s] to what happened here," Schwab is "going to probably talk to the District Attorney and say, 'hey, this is my

recommendation. Hey, this guy was honest with us. This guy has done everything we've asked him to do. What can we do?' and talk about it." Because it is clear that the purpose of Oaks' statements "was to improperly induce in Defendant a belief that he might obtain some kind of relief from criminal charges if he confessed," they were improper promises. However, viewing the totality of the circumstances (length of the interview, the defendant's extensive experience with the criminal justice system given his prior service as a law enforcement officer, etc.), the court found his statement to be voluntarily.

**Searches**

*State v. Gentile*, __ N.C. App. __, __ S.E.2d __ (Nov. 18, 2014). A search of the defendant's garage pursuant to a search warrant was improper. Following up on a tip that the defendant was growing marijuana on his property, officers went to his residence. They knocked on the front door but received no response. They then went to the back of the house because they heard barking dogs and thought that an occupant might not have heard them knock. Once there they smelled marijuana coming from the garage and this discovery formed the basis for the search warrant. The court concluded that "the sound of barking dogs, alone, was not sufficient to support the detectives' decision to enter the curtilage of defendant's property by walking into the back yard of the home and the area on the driveway within ten feet of the garage." The court went on to conclude that when the detectives smelled the odor of marijuana, "their purported general inquiry about the information received from the anonymous tip was in fact a trespassory invasion of defendant's curtilage, and they had no legal right to be in that location." The subsequent search based, in part, on the odor of marijuana was unlawful.

**Stop & Frisk**

*State v. Henry*, __ N.C. App. __, __ S.E.2d __ (Nov. 18, 2014). (1) Even if the defendant had properly preserved the issue, a frisk conducted during a valid traffic stop was proper where the officer knew that the defendant had prior drug convictions; the defendant appeared nervous; the defendant deliberately concealed his right hand and refused to open it despite repeated requests; and the officer knew from his training and experience that people who deal drugs frequently carry weapons and that weapons can be concealed in a hand. (2) Even if the defendant had properly preserved the issue, the officer did not use excessive force by taking the defendant to the ground during a valid traffic stop.

**Inevitable Discovery**

*State v. Larkin*, __ N.C. App. __, __ S.E.2d __ (Nov. 18, 2014). The trial court did not err by denying the defendant's motion to suppress. The State established inevitable discovery with respect to a search of the defendant's vehicle that had previously been illegally seized where the evidence showed that an officer obtained the search warrant for the vehicle based on untainted evidence.

**Criminal Offenses**

**Larceny**

*State v. Larkin*, __ N.C. App. __, __ S.E.2d __ (Nov. 18, 2014). Shoeprint evidence and evidence that the defendant possessed the victim's Bose CD changer and radio five months after they were stolen was sufficient to sustain the defendant's convictions for burglary and larceny.

**Robbery**

*State v. Jastrow*, __ N.C. App. __, __ S.E.2d __ (Nov. 18, 2014). (1) Where the defendant and his accomplices attempted to rob two victims inside a residence, the trial court properly denied the defendant's motion to dismiss one of the charges. The defendant argued that because only one residence was involved, only one charge was proper. Distinguishing cases holding that only one robbery occurs when the defendant robs a business of its property by taking it from multiple employees, the court noted that here the defendant and his accomplices demanded that both victims turn over their own personal property. (2) Although the group initially planned to rob just one person, the defendant properly was convicted of attempting to rob a second person they found at the residence. The attempted robbery of the second person was in pursuit of the group's common plan.

**Sexual Assaults**

*State v. Spence*, __ N.C. App. __, __ S.E.2d __ (Nov. 18, 2014). In this child sexual abuse case, the trial court erred by denying the defendant's motion to dismiss first-degree sex offense charges where there was no substantive evidence of a sexual act; the evidence indicated only vaginal penetration, which cannot support a conviction of sexual offense.

*In re J.F.*, __ N.C. App. __, __ S.E.2d __ (Nov. 18, 2014). (1) In a delinquency case where the petitions alleged sexual offense and crime against nature in that the victim performed fellatio on the juvenile, the court rejected the juvenile's argument that the petitions failed to allege a crime because the victim "was the actor." Sexual offense and crime against nature do not require that the accused perform a sexual act on the victim, but rather that the accused engage in a sexual act with the victim. (2) The court rejected the juvenile's argument that to prove first-degree statutory sexual offense and crime against nature the prosecution had to show that the defendant acted with a sexual purpose. (3) In a sexual offense case involving fellatio, proof of penetration is not required. (4) Penetration is a required element of crime against nature and in this case insufficient evidence was presented on that issue. The victim testified that he licked but did not suck the juvenile's penis. Distinguishing *In re Heil*, 145 N.C. App. 24 (2001) (concluding that based on the size difference between the juvenile and the victim and "the fact that the incident occurred in the presumably close quarters of a closet, it was reasonable for the trial court to find . . . that there was some penetration, albeit slight, of juvenile's penis into [the four-year-old victim's] mouth"), the court declined the State's invitation to infer penetration based on the surrounding circumstances.

**Resisting an Officer**

*State v. Carter*, __ N.C. App. __, __ S.E.2d __ (Nov. 18, 2014). There was insufficient evidence to support a conviction of resisting an officer in a case that arose out of the defendant's refusal to allow the officer to search him pursuant to a search warrant. Because the arresting officer did not read or produce a copy of the warrant to the defendant prior to seeking to search the defendant's person as required by G.S. 15A-252, the officer was not engaged in lawful conduct and therefore the evidence was insufficient to support a conviction.

**Gambling Offenses**

*State v. Spruill*, __ N.C. App. __, __ S.E.2d __ (Nov. 18, 2014). There was sufficient evidence that the defendants conducted a sweepstakes through the use of an entertaining display, including the entry process or the revealing of a prize in violation of G.S. 14-306.4. The court rejected the defendants' argument that because the prize was revealed to the patron prior to an opportunity to play a game, they did not run afoul of the statute.

**Drug Offenses**

*State v. Henry*, __ N.C. App. __, __ S.E.2d __ (Nov. 18, 2014). In a possession of cocaine case, the evidence was sufficient to prove that the defendant constructively possessed cocaine. The drugs were found on the ground near the rear driver's side of the defendant's car after an officer had struggled with the defendant. Among other things, video from the officer's squad car showed that during the struggle the defendant dropped something that looked like an off-white rock near rear driver's side of the vehicle. This and other facts constituted sufficient evidence of other incriminating circumstances to establish constructive possession.

*State v. McClaudle*, __ N.C. App. __, __ S.E.2d __ (Nov. 18, 2014). Finding *State v. Euceda-Valle,* 182 N.C. App. 268, 276 (2007), controlling, the court held that there was insufficient evidence that the defendant and another person named Hall conspired to sell and deliver cocaine. The evidence showed only that the drugs were found in a car driven by Hall in which the defendant was a passenger.

**Motor Vehicle Offenses**

*State v. Ricks*, __ N.C. App. __, __ S.E.2d __ (Nov. 18, 2014). (1) In this impaired driving case, there was insufficient evidence that a cut through on a vacant lot was a public vehicular area within the meaning of G.S. 20-4.01(32). The State argued that the cut through was a public vehicular area because it was an area "used by the public for vehicular traffic at any time" under G.S. 20-4.01(32)(a). The court concluded that the definition of a public vehicular area in that subsection "contemplates areas generally open to and used by the public for vehicular traffic as a matter of right or areas used for vehicular traffic that are associated with places generally open to and used by the public, such as driveways and parking lots to institutions and businesses open to the public." In this case there was no evidence concerning the lot's ownership or that it had been designated as a public vehicular area by the owner. (2) Even if there had been sufficient evidence to submit the issue to the jury, the trial court erred in its jury instructions. The trial court instructed the jury that a public vehicular area is "any area within the State of North Carolina used by the public for vehicular traffic at any time including by way of illustration and not limitation any drive, driveway, road, roadway, street, alley or parking lot." The court noted that

> the entire definition of public vehicular area in [G.S.] 20-4.01(32)(a) is significant to a determination of whether an area meets the definition of a public vehicular area; the examples are not separable from the statute. . . . [As such] the trial court erred in abbreviating the definition of public vehicular area in the instructions to the jury and by preventing defendant from arguing his position in accordance with [G.S.] 20-4.01(32)(a)."