Criminal Procedure

Counsel Issues

State v. Joiner, __ N.C. App. __, __ S.E.2d __ (Dec. 2, 2014). (1) Based on assessments from mental health professionals and the defendant's own behavior, the trial court did not abuse its discretion by ruling that the defendant was competent to represent himself at trial. (2) The court rejected the defendant's argument that the trial court failed to make the proper inquiry required by G.S. 15A-1242 before allowing him to proceed pro se, concluding that the defendant's actions "absolved the trial court from this requirement" and resulted in a forfeiture of the right to counsel. As recounted in the court's opinion, the defendant engaged in conduct that obstructed and delayed the proceedings. (3) Because the defendant would not allow the trial to proceed while representing himself, the trial court did not err by denying the defendant the right to continue representing himself and forcing him to accept the representation of a lawyer who had been serving as standby counsel.

Indictment & Charging Issues

State v. Mann, __ N.C. App. __, __ S.E.2d __ (Dec. 2, 2014). An indictment charging felony peeping was not defective. Rejecting the defendant's argument that the indictment was defective because it failed to allege that the defendant's conduct was done without the victim's consent, the court concluded that "any charge brought under N.C.G.S. § 14-202 denotes an act by which the defendant has spied upon another without that person's consent." Moreover, the charging language, which included the word "surreptitiously" gave the defendant adequate notice. Further, the element of "without consent" is adequately alleged in an indictment that indicates the defendant committed an act unlawfully, willfully, and feloniously.

State v. Roberts, __ N.C. App. __, __ S.E.2d __ (Dec. 2, 2014). In this DWI case, the court rejected the defendant's argument that the State deprived him of equal protection by initiating the proceeding using a presentment instead of a citation. A rational basis (judicial economy) supported use of a presentment.

Entry of an Order

State v. Chavez, __ N.C. App. __, __ S.E.2d __ (Dec. 2, 2014). The trial court's oral, in-court denial of the defendant's motions, memorialized on form AOC-CR-305 (Judgment/order or other disposition) constituted entry of an order notwithstanding the fact that the trial judge stated that "ADA Mark Stevens will prepare the order" and no such order was prepared.

Mistrial Motions

State v. Joiner, __ N.C. App. __, __ S.E.2d __ (Dec. 2, 2014). The trial court did not err by denying the defendant's motion for a mistrial where the motion was based on the defendant's own misconduct in the courtroom.

Expression of Opinion by Judge

State v. Roberts, __ N.C. App. __, __ S.E.2d __ (Dec. 2, 2014). In this DWI case, the trial court did not impermissibly express an opinion when instructing the jury regarding the admissibility of breath test results.

Final Argument

State v. Roberts, __ N.C. App. __, __ S.E.2d __ (Dec. 2, 2014). In this DWI case, the court rejected the defendant's argument that comments made during the prosecutor's final argument and detailed in the court's opinion were so grossly improper that the trial court should have intervened ex mero motu. Among the challenged comments were those relating to the defendant's status as an alcoholic and the extent to which he had developed a tolerance for alcoholic beverages. Finding that "the prosecutor might have been better advised to refrain from making some of the challenged comments," the court declined to find that the arguments were so grossly improper that the trial court should have intervened ex mero motu.

Sentencing

State v. Barksdale, __ N.C. App. __, __ S.E.2d __ (Dec. 2, 2014). The trial court did not improperly base its sentencing decision on the defendant's decision to reject an offered plea agreement and go to trial. However, the court repeated its admonition that "judges must take care to avoid using language that could give rise to an appearance that improper factors have played a role in the judge's decision-making process even when they have not."

State v. Roberts, __ N.C. App. __, __ S.E.2d __ (Dec. 2, 2014). (1) In this DWI case, the court rejected the defendant's invitation to decide whether G.S. 20-179(d)(1) (aggravating factor to be considered in sentencing of gross impairment or alcohol concentration of 0.15 or more) creates an unconstitutional mandatory presumption. Defendant challenged that portion of the statute that provides: "For purposes of this subdivision, the results of a chemical analysis presented at trial or sentencing shall be sufficient to prove the person's alcohol concentration, shall be conclusive, and shall not be subject to modification by any party, with or without approval by the court." In this case, instead of instructing the jury in accordance with the challenged language, the trial court refrained from incorporating any reference to the allegedly impermissible mandatory presumption and instructed the prosecutor to refrain from making any reference to the challenged language in the presence of the jury. Because the jury's decision to find the G.S. 20-179(d)(1) aggravating factor was not affected by the challenged statutory provision, the defendant lacked standing to challenge the constitutionality of the statutory provision. (2) The court rejected the defendant's argument that a double jeopardy violation occurred when the State used a breath test result to establish the factual basis for the defendant's plea and to support the aggravating factor used to enhance punishment. The court reasoned that the defendant was not subjected to multiple punishments for the same offense, stating: "instead of being punished twice, he has been

subjected to a more severe punishment for an underlying substantive offense based upon the fact that his blood alcohol level was higher than that needed to support his conviction for that offense."

Sex Offenders

State v. Davis, __ N.C. App. __, __ S.E.2d __ (Dec. 2, 2014). The State conceded and the court held that the trial court erred by requiring the defendant to submit to lifetime SBM. The trial court imposed SBM based on its determination that the defendant's conviction for first-degree rape constituted an "aggravated offense" as defined by G.S. 14-208.6(1a). However, this statute became effective on 1 October 2001 and applies only to offenses committed on or after that date. Because the date of the offense in this case was 22 September 2001, the trial court erred by utilizing an inapplicable statutory provision in its determination.

Ineffective Assistance Claims

State v. Barksdale, __ N.C. App. __, __ S.E.2d __ (Dec. 2, 2014). (1) Even if counsel provided deficient performance by informing the trial court, with the defendant's consent, that the defendant wanted to go to trial and "take the chance that maybe lightning strikes, or I get lucky, or something," no prejudice was shown. (2) The court declined the defendant's invitation to consider his ineffective assistance claim a conflict of interest that was per se prejudicial, noting that the court has limited such claims to cases involving representation of adverse parties.

Evidence

***Crawford* Issues**

State v. Gardner, __ N.C. App. __, __ S.E.2d __ (Dec. 2, 2014). In a sex offender residential restriction case, the court held that because GPS tracking reports were non-testimonial business records, their admission did not violate the defendant's confrontation rights. The GPS records were generated in connection with electronic monitoring of the defendant, who was on post-release supervision for a prior conviction. The court reasoned:

> [T]he GPS evidence admitted in this case was not generated purely for the purpose of establishing some fact at trial. Instead, it was generated to monitor defendant's compliance with his post-release supervision conditions. The GPS evidence was only pertinent at trial because defendant was alleged to have violated his post-release conditions. We hold that the GPS report was non-testimonial and its admission did not violate defendant's Confrontation Clause rights.

Relevancy

State v. Davis, __ N.C. App. __, __ S.E.2d __ (Dec. 2, 2014). In a sexual assault case involving DNA evidence, the trial court did not err by excluding as irrelevant defense evidence that police department evidence room refrigerators were moldy and that evidence was kept in a disorganized and non-sterile

environment where none of the material tested in the defendant's case was stored in those refrigerators during the relevant time period.

Rape Shield

State v. Davis, __ N.C. App. __, __ S.E.2d __ (Dec. 2, 2014). In a rape case, the trial court erred by excluding defense evidence that the victim and her neighbor had a consensual sexual encounter the day before the rape occurred. This prior sexual encounter was relevant because it may have provided an alternative explanation for the existence of semen in her vagina; "because the trial court excluded relevant evidence under Rule 412(b)(2), it committed error." However, the court went on to conclude that no prejudice occurred, in part because multiple DNA tests identified the defendant as the perpetrator.

Direct Examination & Opening the Door

State v. Mann, __ N.C. App. __, __ S.E.2d __ (Dec. 2, 2014). (1) In a peeping case, the trial court did not abuse its discretion by allowing the prosecutor to ask leading questions of the victim; the questions were not leading because they did not suggest an answer. (2) The trial court did not err by admitting the victim's prior statements to an officer for corroborative purposes where the defendant opened the door to admission of these statements. Even if he had not opened the door, the statements were properly admitted as corroboration.

Arrest, Search and Investigation

DWI Blood Draws & Tests

State v. Chavez, __ N.C. App. __, __ S.E.2d __ (Dec. 2, 2014). The court rejected the defendant's argument that the right to have a witness present for blood alcohol testing performed under G.S. 20-16.2 applies to blood draws taken pursuant to a search warrant. The court also rejected the defendant's argument that failure to allow a witness to be present for the blood draw violated his constitutional rights, holding that the defendant had no constitutional right to have a witness present for the execution of the search warrant.

State v. Roberts, __ N.C. App. __, __ S.E.2d __ (Dec. 2, 2014). The trial court properly denied the defendant's motion to suppress the results of the chemical analysis of his breath. The defendant argued that the officer failed to comply with the statutory requirement of a 15 minute "observation period" prior to the administration of the test. The observation period requirement ensures that "a chemical analyst observes the person or persons to be tested to determine that the person or persons has not ingested alcohol or other fluids, regurgitated, vomited, eaten, or smoked in the 15 minutes immediately prior to the collection of a breath specimen." However, that "nothing in the relevant regulatory language requires the analyst to stare at the person to be tested in an unwavering manner for a fifteen minute period prior to the administration of the test." Here, the officer observed the defendant for 21 minutes, during which the defendant did not ingest alcohol or other fluids, regurgitate, vomit, eat, or

smoke; during this time the officer lost direct sight of the defendant only for very brief intervals while attempting to ensure that his right to the presence of a witness was adequately protected. As such, the officer complied with the observation period requirement.

Fruit of the Poisonous Tree

State v. Friend, __ N.C. App. __, __ S.E.2d __ (Dec. 2, 2014). In an assault on an officer case, the court rejected the defendant's argument that evidence of his two assaults on law enforcement officers should be excluded as fruits of the poisonous tree because his initial arrest for resisting an officer was unlawful. The doctrine does not exclude evidence of attacks on police officers where those attacks occur while the officers are engaging in conduct that violates a defendant's Fourth Amendment rights; "[a]pplication of the exclusionary rule in such fashion would in effect give the victims of illegal searches a license to assault and murder the officers involved[.]" (quotation omitted). Thus the court held that even if the initial stop and arrest violated the defendant's Fourth Amendment rights, evidence of his subsequent assaults on officers were not "fruits" under the relevant doctrine.

Criminal Offenses

Kidnapping

State v. Barksdale, __ N.C. App. __, __ S.E.2d __ (Dec. 2, 2014). The State conceded and the court held that by sentencing the defendant for both first-degree kidnapping and the underlying sexual assault that was an element of the kidnapping charge a violation of double jeopardy occurred.

State v. Parker, __ N.C. App. __, __ S.E.2d __ (Dec. 2, 2014). In a case in which the defendant was convicted of kidnapping, rape and sexual assault, because the restraint supporting the kidnapping charge was inherent in the rape and sexual assault, the kidnapping conviction cannot stand. The court explained:

> Defendant grabbed Kelly from behind and forced her to the ground. Defendant put his knee to her chest. He grabbed her hair in order to turn her around after penetrating her vaginally from behind, and he put his hands around her throat as he penetrated her vaginally again and forced her to engage him in oral sex. Though the amount of force used by Defendant in restraining Kelly may have been more than necessary to accomplish the rapes and sexual assault, the restraint was inherent "in the actual commission" of those acts. Unlike in *Fulcher*, where the victims' hands were bound before any sexual offense was committed, Defendant's acts of restraint occurred as part of the commission of the sexual offenses. (citation omitted).

Assaults & Threats

State v. Friend, __ N.C. App. __, __ S.E.2d __ (Dec. 2, 2014). The court rejected the defendant's argument that the trial court erred by denying his motion to dismiss the charge of assault causing physical injury on a law enforcement officer, which occurred at the local jail. After arresting the

defendant, Captain Sumner transported the defendant to jail, escorted him to a holding cell, removed his handcuffs, and closed the door to the holding cell, believing it would lock behind him automatically. However, the door remained unlocked. When Sumner noticed the defendant standing in the holding cell doorway with the door open, he told the defendant to get back inside the cell. Instead, the defendant tackled Sumner. The defendant argued that there was insufficient evidence that the officer was discharging a duty of his office at the time. The court rejected this argument, concluding that "[b]y remaining at the jail to ensure the safety of other officers," Sumner was discharging the duties of his office. In the course of its holding, the court noted that "unlike the offense of resisting, delaying, or obstructing an officer, . . . criminal liability for the offense of assaulting an officer is not limited to situations where an officer is engaging in lawful conduct in the performance or attempted performance of his or her official duties."

State v. Jones, __ N.C. App. __, __ S.E.2d __ (Dec. 2, 2014). (1) The trial court erred by sentencing the defendant for both habitual misdemeanor assault and assault on a female where both convictions arose out of the same assault. The statute provides that "unless the conduct is covered under some other provision of law providing greater punishment," an assault on a female is a Class A1 misdemeanor. Here, the conduct was covered under another provision of law providing greater punishment, habitual misdemeanor assault, a Class H felony. (2) The trial court erred by entering judgment and sentencing the defendant on both three counts of habitual violation of a DVPO and one count of interfering with a witness based on the same conduct (sending three letters to the victim asking her not to show up for his court date). The DVPO statute states that "[u]nless covered under some other provision of law providing greater punishment," punishment for the offense at issue was a Class H felony. Here, the conduct was covered under a provision of law providing greater punishment, interfering with a witness, which is a Class G felony.

Resisting an Officer & Related Offenses

State v. Friend, __ N.C. App. __, __ S.E.2d __ (Dec. 2, 2014). The trial court properly denied the defendant's motion to dismiss the charge of resisting, delaying, or obstructing a public officer where the evidence showed that the defendant refused to provide the officer with his identification so that the officer could issue a citation for a seatbelt violation. The court held: "failure to provide information about one's identity during a lawful stop can constitute resistance, delay, or obstruction within the meaning of [G.S.] 14-223." It reasoned that unlike failing to provide a social security number, the "Defendant's refusal to provide identifying information did hinder [the] Officer . . . from completing the seatbelt citation." It continued:

> There are, of course, circumstances where one would be excused from providing his or her identity to an officer, and, therefore, not subject to prosecution under N.C. Gen. Stat. §14-223. For instance, the Fifth Amendment's protection against compelled self-incrimination might justify a refusal to provide such information; however, as the United States Supreme Court has observed, "[a]nswering a request to disclose a name is likely to be so insignificant in the scheme of things as to be incriminating only in unusual circumstances." Hiibel v. Sixth Judicial Dist. Court of Nev.,

542 U.S. 177, 191, 124 S. Ct. 2451, 2461, 159 L. Ed.2d 292, 306 (2004). In the present case, Defendant has not made any showing that he was justified in refusing to provide his identity to Officer Benton.

State v. Jones, __ N.C. App. __, __ S.E.2d __ (Dec. 2, 2014). In an interfering with a witness case, the trial court properly instructed the jury that the first element of the offense was that "a person was summoned as a witness in a court of this state. You are instructed that it is immaterial that the victim was regularly summoned or legally bound to attend." The second sentence properly informed the jury that the victim need only be a "prospective witness" for this element to be satisfied.

Animal Cruelty

State v. Gerberding, __ N.C. App. __, __ S.E.2d __ (Dec. 2, 2014). (1) In an animal cruelty case, the trial court did not err in defining the term "without justification or excuse" in response to a question posed by the jury. (2) The trial court did not err by instructing the jury that the defendant could be found guilty of felonious cruelty to animals if the jury found that she had acted with implied malice.