Criminal Procedure

Double Jeopardy

State v. Banks, ___ N.C. ___, ___ S.E.2d ___ (Dec. 19, 2014). Because the defendant was properly convicted and sentenced for both statutory rape and second-degree rape when the convictions were based on a single act of sexual intercourse, counsel was not ineffective by failing to make a double jeopardy objection. The defendant was convicted of statutory rape of a 15-year-old and second-degree rape of a mentally disabled person for engaging in a single act of vaginal intercourse with the victim, who suffers from various mental disorders and is mildly to moderately mentally disabled. At the time, the defendant was 29 years old and the victim was 15. The court concluded that although based on the same act, the two offenses are separate and distinct under the *Blockburger* "same offense" test because each requires proof of an element that the other does not. Specifically, statutory rape involves an age component and second-degree rape involves the act of intercourse with a victim who suffers from a mental disability or mental incapacity. It continued:

> Given the elements of second-degree rape and statutory rape, it is clear that the legislature intended to separately punish the act of intercourse with a victim who, because of her age, is unable to consent to the act, and the act of intercourse with a victim who, because of a mental disability or mental incapacity, is unable to consent to the act. . . .
>
> Because it is the General Assembly's intent for defendants to be separately punished for a violation of the second-degree rape and statutory rape statutes arising from a single act of sexual intercourse when the elements of each offense are satisfied, defendant's argument that he was prejudiced by counsel's failure to raise the argument of double jeopardy would fail. We therefore conclude that defendant was not prejudiced.

Counsel Issues

State v. Hunt, ___ N.C. ___, ___ S.E.2d ___ (Dec. 19, 2014). The court affirmed per curiam that aspect of the decision below that generated a dissenting opinion. In the decision below, *State v. Hunt*, __ N.C. App. __, 728 S.E. 2d 409 (July 17, 2012), the court of appeals held, over a dissent, that the trial court did not err by conducting a voir dire when an issue of attorney conflict of interest arose and denying the defendant's mistrial motion. A dissenting judge believed that the trial court erred by failing to conduct an evidentiary hearing to determine whether defense counsel's conflict of interest required a mistrial.

Jury Instructions

State v. Walston, ___ N.C. ___, ___ S.E.2d ___ (Dec. 19, 2014). Based on long-standing precedent, the trial court's use of the term "victim" in the jury instructions was not impermissible commentary on a disputed issue of fact and the trial court did not err by denying the defendant's request to use the words "alleged victim" instead of "victim" in the jury charge in this child sexual abuse case. The court continued:

> We stress, however, when the State offers no physical evidence of injury to the complaining witnesses and no corroborating eyewitness testimony, the best practice would be for the trial court to modify the pattern jury instructions at defendant's request to use the phrase "alleged victim" or "prosecuting witness" instead of "victim."

State v. Grainger, ___ N.C. ___, ___ S.E.2d ___ (Dec. 19, 2014). In this murder case, the trial court did not err by denying the defendant's request for a jury instruction on accessory before the fact. Because the defendant was convicted of first-degree murder under theories of both premeditation and deliberation and the felony murder rule and the defendant's conviction for first-degree murder under the theory of felony murder is supported by the evidence (including the defendant's own statements to the police and thus not solely based on the uncorroborated testimony of the principal), the court of appeals erred by concluding that a new trial was required.

Sentencing

State v. Sanders, ___ N.C. ___, ___ S.E.2d ___ (Dec. 19, 2014). (1) The trial court erred by determining that a Tennessee offense of "domestic assault" was substantially similar to the North Carolina offense of assault on a female without reviewing all relevant sections of the Tennessee code. Section 39-13-111 of the Tennessee Code provides that "[a] person commits domestic assault who commits an assault as defined in § 39-13-101 against a domestic abuse victim." Section 39-13-101 defines when someone commits an "assault." Here the State provided the trial court with a photocopy section 39-13-111 but did not give the trial court a photocopy of section 39-13-101. The court held: "We agree with the Court of Appeals that for a party to meet its burden of establishing substantial similarity of an out-of-state offense to a North Carolina offense by the preponderance of the evidence, the party seeking the determination of substantial similarity must provide evidence of the applicable law." (2) Comparing the elements of the offenses, the court held that they are not substantially similar under G.S. 15A-1340.14(e). The North Carolina offenses does not require any type of relationship between the perpetrator and the victim but the Tennessee statutes does. The court noted: "Indeed, a woman assaulting her child or her husband could be convicted of "domestic assault" in Tennessee, but could not be convicted of "assault on a female" in North Carolina. A male stranger who assaults a woman on the street could be convicted of "assault on a female" in North Carolina, but could not be convicted of "domestic assault" in Tennessee."

State v. Bowden, ___ N.C. ___, ___ S.E.2d ___ (Dec. 19, 2014). Reversing the court of appeals, the court held that the defendant, who was in the class of inmates whose life sentence was deemed to be a sentence of 80 years, was not entitled to immediate release. The defendant argued that various credits he accumulated during his incarceration (good time, gain time, and merit time) must be applied to reduce his sentence of life imprisonment, thereby entitling him to immediate and unconditional release. The DOC has applied these credits towards privileges like obtaining a lower custody grade or earlier parole eligibility, but not towards the calculation of an unconditional release date. The court found the case indistinguishable from its prior decision in *Jones v. Keller*, 364 N.C. 249, 254 (2010).

Evidence

Character Evidence

State v. Walston, ___ N.C. ___, ___ S.E.2d ___ (Dec. 19, 2014). In a child sexual abuse case, although evidence of the defendant's law abidingness was admissible under Rule 404(a)(1), evidence of his general good character and being respectful towards children was not admissible. On appeal, the defendant's argument focused on the exclusion of character evidence that he was respectful towards children. The court found that this evidence did not relate to a pertinent character trait, stating: "Being respectful towards children does not bear a special relationship to the charges of child sexual abuse . . . nor is the proposed trait sufficiently tailored to those charges." It continued:

> Such evidence would only be relevant if defendant were accused in some way of being disrespectful towards children or if defendant had demonstrated further in his proffer that a person who is respectful is less likely to be a sexual predator. Defendant provided no evidence that there was a correlation between the two or that the trait of respectfulness has any bearing on a person's tendency to sexually abuse children.

[Author's note: For a discussion of character evidence generally, see my judges' Benchbook chapter here]

Arrest, Search and Investigation

Search Warrants

State v. Benters, ___ N.C. ___, ___ S.E.2d ___ (Dec. 19, 2014). The court held that an affidavit supporting a search warrant failed to provide a substantial basis for the magistrate to conclude that probable cause existed. In the affidavit, the affiant officer stated that another officer conveyed to him a tip from a confidential informant that the suspect was growing marijuana at a specified premises. The affiant then recounted certain corroboration done by officers. The court first held that the tipster would be treated as anonymous, not one who is confidential and reliable. It explained: "It is clear from the affidavit that the information provided does not contain a statement against the source's penal interest. Nor does the affidavit indicate that the source previously provided reliable information so as to have an established 'track record.' Thus, the source cannot be treated as a confidential and reliable informant on these two bases." The court rejected the State's argument that because an officer met "face-to-face" with the source, the source should be considered more reliable, reasoning: "affidavit does not suggest [the affiant] was acquainted with or knew anything about [the] source or could rely on anything other than [the other officer's] statement that the source was confidential and reliable." Treating the source as an anonymous tipster, the court found that the tip was supported by insufficient corroboration. The State argued that the following corroboration supported the tip: the affiant's knowledge of the defendant and his property resulting "from a criminal case involving a stolen flatbed trailer"; subpoenaed utility records indicating that the defendant was the current subscriber and the kilowatt usage hours are indicative of a marijuana grow operation; and officers' observations of items at the premises indicative of an indoor marijuana growing operation, including potting soil, starting fertilizer, seed starting trays, plastic cups, metal storage racks, and portable pump type sprayers. Considering the novel issue of utility records offered in support of probable cause, the court noted that "[t]he weight given to power records

increases when meaningful comparisons are made between a suspect's current electricity consumption and prior consumption, or between a suspect's consumption and that of nearby, similar properties." It continued: "By contrast, little to no value should be accorded to wholly conclusory, non-comparative allegations regarding energy usage records." Here, the affidavit summarily concluded that kilowatt usage was indicative of a marijuana grow operation and "the absence of any comparative analysis severely limits the potentially significant value of defendant's utility records." Thus, the court concluded: "these unsupported allegations do little to establish probable cause independently or by corroborating the anonymous tip." The court was similarly unimpressed by the officers' observation of plant growing items, noting:

> The affidavit does not state whether or when the gardening supplies were, or appeared to have been, used, or whether the supplies appeared to be new, or old and in disrepair. Thus, amid a field of speculative possibilities, the affidavit impermissibly requires the magistrate to make what otherwise might be reasonable inferences based on conclusory allegations rather than sufficient underlying circumstances. This we cannot abide.

As to the affidavit's extensive recounting of the officers' experience, the court held:

> We are not convinced that these officers' training and experience are sufficient to balance the quantitative and qualitative deficit left by an anonymous tip amounting to little more than a rumor, limited corroboration of facts, non-comparative utility records, observations of innocuous gardening supplies, and a compilation of conclusory allegations.

Canines

State v. Miller, ___ N.C. ___, ___ S.E.2d ___ (Dec. 19, 2014). The court held that a police dog's instinctive action, unguided and undirected by the police, that brings evidence not otherwise in plain view into plain view is not a search within the meaning of the Fourth Amendment. Responding to a burglar alarm, officers arrived at the defendant's home with a police dog, Jack. The officers deployed Jack to search the premises for intruders. Jack went from room to room until he reached a side bedroom where he remained. When an officer entered to investigate, Jack was sitting on the bedroom floor staring at a dresser drawer, alerting the officer to the presence of drugs. The officer opened the drawer and found a brick of marijuana. Leaving the drugs there, the officer and Jack continued the protective sweep. Jack stopped in front of a closet and began barking at the closet door, alerting the officer to the presence of a human suspect. Unlike the passive sit and stare alert that Jack used to signal for the presence of narcotics, Jack was trained to bark to signal the presence of human suspects. Officers opened the closet and found two large black trash bags on the closet floor. When Jack nuzzled a bag, marijuana was visible. The officers secured the premises and obtained a search warrant. At issue on appeal was whether Jack's nuzzling of the bags in the closet violated the Fourth Amendment. The court of appeals determined that Jack's nuzzling of the bags was an action unrelated to the objectives of the authorized intrusion that created a new invasion of the defendant's privacy unjustified by the exigent circumstance that validated the entry. That court viewed Jack as an

instrumentality of the police and concluded that "his actions, regardless of whether they are instinctive or not, are no different than those undertaken by an officer." The Supreme Court disagreed, concluding that "Jack's actions are different from the actions of an officer, particularly if the dog's actions were instinctive, undirected, and unguided by the police." It held:

> If a police dog is acting without assistance, facilitation, or other intentional action by its handler (. . . acting "instinctively"), it cannot be said that a State or governmental actor intends to do anything. In such a case, the dog is simply being a dog. If, however, police misconduct is present, or if the dog is acting at the direction or guidance of its handler, then it can be readily inferred from the dog's action that there is an intent to find something or to obtain information. In short, we hold that a police dog's instinctive action, unguided and undirected by the police, that brings evidence not otherwise in plain view into plain view is not a search within the meaning of the Fourth Amendment or Article I, Section 20 of the North Carolina Constitution. Therefore, the decision of the Court of Appeals that Jack was an instrumentality of the police, regardless of whether his actions were instinctive, is reversed. (citation omitted)

Ultimately, the court remanded for the trial court to decide whether Jack's nuzzling in this case was in fact instinctive, undirected, and unguided by the officers.

Criminal Offenses

Homicide

State v. Childress, ___ N.C. ___, ___ S.E.2d ___ (Dec. 19, 2014). The defendant's actions provided sufficient evidence of premeditation and deliberation to survive a motion to dismiss an attempted murder charge. From the safety of a car, the defendant drove by the victim's home, shouted a phrase used by gang members, and then returned to shoot at her and repeatedly fire bullets into her home when she retreated from his attack. The court noted that the victim did not provoke the defendant in any way and was unarmed; the defendant drove by the victim's home before returning and shooting at her; during this initial drive-by, the defendant or a companion in his car yelled out "[W]hat's popping," a phrase associated with gang activity that a jury may interpret as a threat; the defendant had a firearm with him; and the defendant fired multiple shots toward the victim and her home. This evidence supported an inference that the defendant deliberately and with premeditation set out to kill the victim.