

## **Criminal Procedure**

### **Indictment Issues**

[State v. Coakley](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Dec. 31, 2014). In this malicious maiming case, the trial court did not err by instructing the jury on a theory that was not alleged in the indictment. The indictment alleged that the defendant “put out” the victim’s eye. The jury instructions told the jury it could convict if it found that the defendant “disabled or put out” the victim’s eye. Given the evidence in the case—that the victim suffered complete blindness—term “disabled” as used in the instructions can only be interpreted to mean total loss of sight.

[State v. Pendergraft](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Dec. 31, 2014). Over a dissent the court held that an indictment alleging obtaining property by false pretenses was not fatally defective. After the defendant filed false documents purporting to give him a property interest in a home, he was found to be occupying the premises and arrested. The court rejected the defendant’s argument that the indictment was deficient because it failed to allege that he made a false representation. The indictment alleged that the false pretense consisted of the following: “The defendant moved into the house . . . with the intent to fraudulently convert the property to his own, when in fact the defendant knew that his actions to convert the property to his own were fraudulent.” Acknowledging that the indictment did not explicitly charge the defendant with having made any particular false representation, the court found that it “sufficiently apprise[d] the defendant about the nature of the false representation that he allegedly made,” namely that he falsely represented that he owned the property as part of an attempt to fraudulently obtain ownership or possession of it. The court also rejected the defendant’s argument that the indictment was defective in that it failed to allege the existence of a causal connection between any false representation by him and the attempt to obtain property, finding the charging language sufficient to imply causation.

### **Subpoenas and Related Issues**

[State v. Johnson](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Dec. 31, 2014). (1) The trial court erred by ordering, under threat of contempt, that defense counsel’s legal assistant appear as a witness for the State. The State served the assistant with a subpoena directing her to appear to testify on the weeks of Friday, November 8, 2013, Monday, December 2, 2013, and Monday, January 13, 2014. However, the trial did not begin on any of the dates listed on the subpoena; rather, it began on Monday, November 18, 2013 and ended on Wednesday, November 20, 2013. Because the assistant had not been properly subpoenaed to appear on Tuesday, November 19<sup>th</sup>, the trial court erred by ordering, under threat of contempt, that she appear on that day as a witness for the State. The court went on to find the error prejudicial and ordered a new trial. (2) The court held that if on re-trial the assistant again testifies for the State, the trial court must conduct a hearing to determine whether an actual conflict of interest exists that denies the defendant the right to effective assistance of counsel.

### **Jury Instructions**

[State v. Hinnant](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Dec. 31, 2014). (1) In this assault and second-degree murder case, the trial court did not err by refusing to instruct the jury on self-defense and by omitting an instruction on voluntary manslaughter. The court noted that the defendant himself testified that when he fired the gun he did not intend to shoot anyone and that he was only firing warning shots. It noted: “our Supreme Court has held that a defendant is not entitled to jury instructions on self-defense or voluntary manslaughter ‘while still insisting . . . that he did not intend to shoot anyone[.]’” (2) The trial court did not err by denying the defendant’s request to instruct the jury on involuntary manslaughter. Involuntary manslaughter is a killing without malice. However, where death results from the intentional use of a firearm or other deadly weapon, malice is presumed. Here, the defendant intentionally fired the gun under circumstances naturally dangerous to human life and the trial court did not err by refusing to give an instruction on involuntary manslaughter.

[State v. Pendergraft](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Dec. 31, 2014). (1) In an obtaining property by false pretenses case arising out of the defendant’s improper occupation of a home, the trial court did not err by denying the defendant’s request to instruct the jury regarding the defendant’s intent to adversely possess the property. The law of adverse possession has no bearing on guilt in this case. (2) The trial court did not improperly shift the burden of proof to the defendant. Consistent with the pattern instructions, the trial court’s instructions clearly placed the burden of proving that the defendant acted with the necessary intent to deceive upon the State.

### **Sentencing**

[State v. Ortiz](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Dec. 31, 2014). In this sexual assault case, the State was not excused by G.S. 130A-143 (prohibiting the public disclosure of the identity of persons with certain communicable diseases) from pleading in the indictment the existence of the non-statutory aggravating factor that the defendant committed the sexual assault knowing that he was HIV positive. The court disagreed with the State’s argument that alleging the non-statutory aggravating factor would have violated G.S. 130A-143. It explained:

This Court finds no inherent conflict between N.C. Gen. Stat. § 130A-143 and N.C. Gen. Stat. § 15A-1340.16(a4). We acknowledge that indictments are public records and as such, may generally be made available upon request by a citizen. However, if the State was concerned that including the aggravating factor in the indictment would violate N.C. Gen. Stat. § 130A-143, it could have requested a court order in accordance with N.C. Gen. Stat. § 130A-143(6), which allows for the release of such identifying information “pursuant to [a] subpoena or court order.” Alternatively, the State could have sought to seal the indictment. (citations omitted)

### **Probation**

[State v. Sitosky](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Dec. 31, 2014). (1) The trial court lacked jurisdiction to revoke the defendant’s probation and activate her suspended sentences where the defendant committed her offenses prior to 1 December 2009 but had her revocation hearing after 1 December

2009 and thus was not covered by either statutory provision—G.S. 15A-1344(d) or 15A-1344(g)—authorizing the tolling of probation periods for pending criminal charges. (2) The trial court erred by revoking her probation in other cases where it based the revocation, in part, on probation violations that were neither admitted by the defendant nor proven by the State at the probation hearing.

### **Sex Offenders**

[\*In re Hall\*](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Dec. 31, 2014). (1) The trial court did not err by relying on the federal SORNA statute to deny the defendant’s petition to terminate his sex offender registration. The language of G.S. 14-208.12A shows a clear intent by the legislature to incorporate the requirements of SORNA into NC’s statutory provisions governing the sex offender registration process and to retroactively apply those provisions to sex offenders currently on the registry. (2) The retroactive application of SORNA does not constitute an ex post facto violation. The court noted that it is well established that G.S. 14-208.12A creates a “non-punitive civil regulatory scheme.” It went on to reject the defendant’s argument that the statutory scheme is so punitive as to negate the legislature’s civil intent.

### **Evidence**

#### **Opinions**

[\*State v. Pierce\*](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Dec. 31, 2014). In this sexual assault case, no plain error occurred when a pediatric nurse practitioner testified to the opinion that her medical findings were consistent with the victim’s allegation of sexual abuse. The nurse performed a physical examination of the victim. She testified that in girls who are going through puberty, it is very rare to discover findings of sexual penetration. She testified that “the research, and, . . . this is thousands of studies, indicates that it’s five percent or less of the time that you would have findings in a case of sexual abuse -- confirmed sexual abuse.” With respect to the victim, the expert testified that her genital findings were normal and that such findings “would be still consistent with the possibility of sexual abuse.” The prosecutor then asked: “Were your medical findings consistent with her disclosure in the interview?” She answered that they were. The defendant argued that the expert’s opinion that her medical findings were consistent with the victim’s allegations impermissibly vouched for the victim’s credibility. Citing prior case law, the court noted that the expert “did not testify as to whether [the victim’s] account of what happened to her was true,” that she was believable or that she had in fact been sexually abused. “Rather, she merely testified that the lack of physical findings was consistent with, and did not contradict, [the victim’s] account.”

#### **404(b) Evidence**

[\*State v. Pierce\*](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Dec. 31, 2014). In this child sexual abuse case, the trial court properly admitted 404(b) evidence from several witnesses. As to two of the witnesses, the defendant argued that the incidents they described were too remote and insufficiently similar. The court concluded that although the sexual abuse of these witnesses occurred 10-20 years prior to trial, the

lapses of time between the instances of sexual misconduct involving the witnesses and the victims can be explained by the defendant's incarceration and lack of access to a victim. Furthermore, there are several similarities between what happened to the witnesses and what happened to the victims: each victim was a minor female who was either the daughter or the niece of the defendant's spouse or live-in girlfriend; the abuse frequently occurred at the defendant's residence, at night, and while others slept nearby; and the defendant threatened each victim not to tell anyone. When considered as a whole, the testimony shows that the defendant engaged in a pattern of conduct of sexual abuse over a long period of time and the evidence meets Rule 404(b)'s requirements of similarity and temporal proximity. Testimony by a third witness was properly admitted under Rule 404(b) where it "involved substantially similar acts by defendant against the same victim and within the same time period." The trial court also performed the proper Rule 403 balancing and gave a proper limiting instruction to the jury.

## **Arrest, Search and Investigation**

### **Blood Draw**

[\*State v. Sisk\*](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Dec. 31, 2014). In this habitual impaired driving case, the trial court did not err in admitting the defendant's blood test results into evidence. The court rejected the defendant's argument that the officer's failure to re-advise him of his implied consent rights before the blood draw violated both G.S. 20-16.2 and 20-139.1(b5). Distinguishing *State v. Williams*, \_\_\_ N.C. App. \_\_\_, 759 S.E.2d 350 (2014), the court noted that in this case the defendant—without any prompting—volunteered to submit to a blood test. The court concluded: "Because the prospect of Defendant submitting to a blood test originated with Defendant—as opposed to originating with [the officer]—we are satisfied that Defendant's statutory right to be readvised of his implied consent rights was not triggered."

## **Criminal Offenses**

### **Sexual Assaults**

[\*State v. Pierce\*](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Dec. 31, 2014). (1) The defendant was properly convicted of two counts of indecent liberties with victim Melissa in Caldwell County. The State presented evidence that the defendant had sex with his girlfriend in the presence of Melissa, performed oral sex on Melissa, and then forced his girlfriend to perform oral sex on Melissa while he watched. The defendant argued that this evidence only supports one count of indecent liberties with a child. The court disagreed, holding that pursuant to *State v. James*, 182 N.C. App. 698 (2007), multiple sexual acts during a single encounter may form the basis for multiple counts of indecent liberties. (2) With respect to a sexual offense charge allegedly committed on Melissa in Burke County, the court held that the State failed to present substantial evidence that a sexual act occurred. The only evidence presented by the State regarding a sexual act that occurred was Melissa's testimony that the defendant placed his finger inside her vagina. However, this evidence was not admitted as substantive evidence. The State presented specific evidence that the defendant performed oral sex on Melissa—a sexual act under the statute—but that act occurred in Caldwell County, not Burke. Although Melissa also testified generally that she was "sexually assaulted" more than 10 times, presumably in Burke County, nothing in her

testimony clarified whether the phrase "sexual assault," referred to sexual acts within the meaning of G.S. 14-27.4A, vaginal intercourse, or acts amounting only to indecent liberties with a child. Thus, the court concluded the evidence is insufficient to support the Burke County sexual offense conviction.

### **Robberies & Assaults**

[State v. Coakley](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Dec. 31, 2014). The trial court erred by sentencing the defendant for both assault inflicting serious bodily injury under G.S. 14-32.4(a) and assault with a deadly weapon inflicting serious injury under G.S. 14-32(b), when both charges arose from the same assault. The court reasoned that G.S. 14-32(b) prohibits punishment of any person convicted under its provisions if "the conduct is covered under some other provision of law providing greater punishment." Here, the defendant's conduct pertaining to his charge for and conviction of assault with a deadly weapon inflicting serious injury was covered by the provisions of G.S. 14-32(b), which permits a greater punishment than that provided for in G.S. 14-32.4(a).

[State v. Ortiz](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Dec. 31, 2014). The trial court did not err by convicting the defendant of both robbery with a dangerous weapon and assault with a deadly weapon where each conviction arose from discreet conduct.

### **Maiming**

[State v. Coakley](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Dec. 31, 2014). In this malicious maiming case, the court rejected the defendant's argument that the trial court erred by disjunctively instructing the jury that it could convict him if it found that he had "disabled or put out" the victim's eye. Relying on cases from other jurisdictions, the court held that the total loss of eyesight, without actual physical removal, is sufficient to support a finding that an eye was "put out" and, therefore, is sufficient to support a conviction for malicious maiming under G.S. 14-30. It went on to reject the defendant's argument that because the term disabled could have been interpreted as something less than complete blindness, the trial court's instructions were erroneous. The court reasoned that based on the evidence in the case—it was uncontroverted that the victim completely lost his eyesight because of the defendant's actions—the jury could not have concluded that the term disabled meant something other than complete blindness. Thus, the court concluded that it need not decide whether partial or temporary blindness constitutes malicious maiming under the statute.

### **Frauds**

[State v. Pendergraft](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Dec. 31, 2014). The evidence was sufficient to establish obtaining property by false pretenses. After the defendant filed false documents purporting to give him a property interest in a home, he was found to be occupying the premises and arrested. The court rejected the defendant's argument that the evidence shows that he honestly, albeit mistakenly, believed that he could obtain title to the property by adverse possession and that such a showing precluded the jury from convicting him of obtaining property by false pretenses. The court rejected the

assertion that anyone who attempts to adversely possess a tract of property does not possess the intent necessary for a finding of guilt, a position it described as tantamount to making an intention to adversely possess a tract of property an affirmative defense to a false pretenses charge.