

## **Criminal Procedure**

### **Suppression Issues—Procedure**

[\*State v. Hargett\*](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (May 19, 2015). The denial of a motion to suppress does not preserve the issue for appellate review in the absence of a timely objection made when the evidence is introduced at trial.

### **Sequestration of Witnesses**

[\*State v. Jones\*](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (May 19, 2015). In this robbery case involving multiple victims, the trial court did not abuse its discretion by denying the defendant’s motion to sequester the victim-witnesses where the defendant offered no basis for his motion.

### **Motion to Dismiss—Procedure**

[\*State v. Kiselev\*](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (May 19, 2015). The State had no right to appeal the trial court’s order granting the defendant’s motion to dismiss for insufficient evidence, made after the close of all evidence where the trial court erred by taking the defendant’s motion under advisement and failing to rule until after the jury returned its verdict. Under G.S. 15A-1227(c), when a defendant moves to dismiss based on insufficient evidence, the trial court must rule on the motion “before the trial may proceed.” Here, after the defendant moved to dismiss the trial court determined that it needed to review the transcript of an officer’s trial testimony before ruling. While waiting for the court reporter to prepare the transcript, the trial court allowed the jury to begin deliberations. Shortly after the jury returned a guilty verdict, the court reporter completed the transcript and the trial court reviewed it. The trial court then granted the motion to dismiss, explaining that the transcript showed the State had not met its burden of proof. The trial court added that it considered its ruling as one made “at the close of all the evidence.” The State appealed. While double jeopardy prevents the State from appealing the grant of a motion to dismiss for insufficient evidence if it comes before the jury verdict, the State generally can appeal that ruling if it comes after the verdict (because, the court explained, if the State prevails, the trial court on remand can enter judgment consistent with the jury verdict without subjecting the defendant to a second trial). Here, the trial court’s violation of the statute prejudiced the defendant; had the trial court ruled at the proper time, no appeal would have been allowed. The court determined that the proper remedy was to preclude the State’s appeal.

### **Mistrial**

[\*State v. Jones\*](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (May 19, 2015). In this robbery case, the trial court did not err by denying the defendant’s mistrial motion made after an officer testified that the defendant told him that he was turning himself in on a failure to appear charge issued in connection with unrelated drug charges. The defendant failed to timely object to the officer’s testimony and any prejudice resulting from it was eliminated by the trial court’s curative instruction and the defendant’s own trial testimony.

## **Sentencing**

[\*State v. Godbey\*](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (May 19, 2015). Although the trial court erred when it based its imposition of sentence on the defendant's exercise of his right to appeal, the issue was moot because the defendant had served his sentence and could not be resentenced. Although the 120-day sentence was within the statutorily permissible range, the trial court changed its judgment from a split sentence of 30 days followed by probation to an active term in response to the defendant's decision to appeal.

[\*State v. Fennell\*](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (May 19, 2015). The trial court erred in calculating the amount of jail fees due where it used the daily rate provided in the wrong version of G.S. 7A-313. The court rejected the State's argument that because the defendant failed to object to the fees on this basis at sentencing, the issue was not properly before the court or, alternatively was barred by res judicata because of the defendant's prior appeals.

## **Evidence**

### **Opening the Door**

[\*State v. Godbey\*](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (May 19, 2015). In a case where the defendant was charged with assaulting a court security officer, no error occurred when the State was allowed to cross-examine the defendant about another criminal proceeding in which he was the prosecuting witness and that he referenced in his direct examination. On direct, the defendant explained that he was at the courthouse on the day in question to find out why the prior case had been dismissed. The court concluded that by testifying about the earlier case on direct, he opened the door to cross-examination. The court rejected the defendant's argument that the evidence detailing dismissal of the charge constituted a "judicial opinion" on his credibility, reasoning: "a charge may be dismissed for a variety of reasons; for example, a witness's unimpeached and credible testimony may simply not establish the elements of a criminal offense."

## **Arrest, Search and Investigation**

### **Stop, Frisk, Plain Feel**

[\*State v. Hargett\*](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (May 19, 2015). In the course of rejecting the defendant's ineffective assistance claim related to preserving a denial of a motion to suppress, the court held that no prejudice occurred because the trial court properly denied the motion. The officer received a report from an identified tipster that a window at a residence appeared to have been tampered with and the owner of the residence was incarcerated. After the officer confirmed that a window screen had been pushed aside and the window was open, he repeatedly knocked on the door. Initially there was no response. Finally, an individual inside asked, "Who's there?" The officer responded, "It's the police." The individual indicated, "Okay," came to the door and opened it. When the officer asked the person's identity, the individual gave a very long, slow response, finally gave his name but either would not or could not provide any ID. When asked who owned the house, he gave no answer. Although the

individual was asked repeatedly to keep his hands visible, he continued to put them in his pockets. These facts were sufficient to create reasonable suspicion that the defendant might have broken into the home and also justified the frisk. During the lawful frisk, the officer discovered and identified baggies of marijuana in the defendant's sock by plain feel.

## **Criminal Offenses**

### **Homicide**

[State v. English](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (May 19, 2015). The trial court did not err by denying the defendant's motion to dismiss a voluntary manslaughter charge. The court rejected the defendant's argument that there was insufficient evidence that she killed the victim by an intentional and unlawful act, noting that although there was no direct evidence that the defendant was aware that she hit the victim with her car until after it occurred, there was circumstantial evidence that she intentionally struck him. Specifically, the victim had a history, while under the influence of drugs and/or alcohol (as he was on the day in question), of acting emotionally and physically abusive towards the defendant; when the victim was angry, he would tell the defendant to "[g]et her stuff and get out," so the defendant felt "trapped"; on the day in question the victim drank alcohol and allegedly smoked crack before hitting the defendant in the face, knocking her from the porch to the yard; the defendant felt scared and went "to a different state of mind" after being hit; before driving forward in her vehicle, the defendant observed the victim standing in the yard, near the patio stairs; and the defendant struck the stairs because she "wanted to be evil too." The court concluded: "From this evidence, a jury could find Defendant felt trapped in a cycle of emotional and physical abuse, and after a particularly violent physical assault, she decided it was time to break free."

### **Robbery**

[State v. Jones](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (May 19, 2015). In a multi-count robbery case, there was sufficient evidence of common law robbery against victim Adrienne. Although Adrienne herself did not testify, the evidence showed that she was a resident of the mobile home where the robbery occurred, that another victim heard her screaming during the intrusion, her face was injured, two witnesses testified that Adrienne had been beaten, and there was evidence that her personal belongings were taken from on, in, or near a nightstand next to her bed.