Criminal Procedure

Indictment Issues

State v. Barnett, ___ N.C. App. ___, ___ S.E.2d ___ (Jan. 19, 2016). (1) The State was not required to prove a specific case number alleged in an indictment charging deterring an appearance by a State witness in violation of G.S. 14-226(a). The case number was not an element of the offense and the allegation was mere surplusage. (2) A two-count indictment properly alleged habitual misdemeanor assault. Count one alleged assault on a female, alleging among other things that the defendant's conduct violated G.S. 14-33 and identifying the specific injury to the victim. The defendant did not contest the validity of this count. Instead, he argued that count two, alleging habitual misdemeanor assault, was defective because it failed to allege a violation of G.S. 14-33 and that physical injury had occurred. Finding *State v. Lobohe*, 143 N.C. App. 555 (2001) (habitual impaired driving case following the format of the indictment at issue in this case), controlling the court held that the indictment complied with G.S. 15A-924 & -928.

Sentencing--Sex Offenders

State v. Barnett, ___ N.C. App. ___, ___ S.E.2d ___ (Jan. 19, 2016). (1) The trial court erroneously concluded that attempted second-degree rape is an aggravated offense for purposes of lifetime SBM and lifetime sex offender registration. Pursuant to the statute, an aggravated offense requires a sexual act involving an element of penetration. Here, the defendant was convicted of attempted rape, an offense that does not require penetration and thus does not fall within the statutory definition of an aggravated offense. (2) Deciding an issue of 1st impression, the court held that the trial court erred when it entered a permanent no contact order, under G.S. 15A-1340.50, preventing the defendant from contacting the victim as well as her three children. "[T]he plain language of the statute limits the trial court's authority to enter a no contact order protecting anyone other than the victim."

Arrest, Search & Investigation

State v. Travis, ___ N.C. App. ___, ___ S.E.2d ___ (Jan. 19, 2016). In this drug case, the officer had reasonable suspicion for the stop. The officer, who was in an unmarked patrol vehicle in the parking lot of a local post office, saw the defendant pull into the lot. The officer knew the defendant because he previously worked for the officer as an informant and had executed controlled buys. When the defendant pulled up to the passenger side of another vehicle, the passenger of the other vehicle rolled down his window. The officer saw the defendant and the passenger extend their arms to one another and touch hands. The vehicles then left the premises. The entire episode lasted less than a minute, with no one from either vehicle entering the post office. The area in question was not known to be a crime area. Based on his training and experience, the officer believed he had witnessed hand-to-hand drug transaction and the defendant's vehicle was stopped. Based on items found during the search of the vehicle, the defendant was charged with drug crimes. The trial court denied the defendant's motion to suppress. Although it found the case to be a "close" one, the court found that reasonable suspicion supported the stop. Noting that it had previously held that reasonable suspicion supported a stop where

officers witnessed acts that they believed to be drug transactions, the court acknowledged that the present facts differed from those earlier cases, specifically that the transaction in question occurred in daylight in an area that was not known for drug activity. Also, because there was no indication that the defendant was aware of the officer's presence, there was no evidence that he displayed signs of nervousness or took evasive action to avoid the officer. However, the court concluded that reasonable suspicion existed. It noted that the actions of the defendant and the occupant of the other car "may or may not have appeared suspicious to a layperson," but they were sufficient to permit a reasonable inference by a trained officer that a drug transaction had occurred. The court thought it significant that the officer recognized the defendant and had past experience with him as an informant in connection with controlled drug transactions. Finally, the court noted that a determination that reasonable suspicion exists need not rule out the possibility of innocent conduct.

Criminal Offenses

Rape

State v. Baker, ___ N.C. App. ___, ___ S.E.2d ___ (Jan. 19, 2016). The trial court erred by denying the defendant's motion to dismiss an attempted statutory rape charge. The parties agreed that there were only two events upon which the attempted rape conviction could be based: an incident that occurred in a bedroom, and one that occurred on a couch. The court agreed with the defendant that all of the evidence regarding the bedroom incident would have supported only a conviction for first-degree rape, not attempted rape. The court also agreed with the defendant that as to the couch incident, the trial testimony could, at most, support an indecent liberties conviction, not an attempted rape conviction. The evidence as to this incident showed that the defendant, who appeared drunk, sat down next to the victim on the couch, touched her shoulder and chest, and tried to get her to lie down. The victim testified that she "sort of" lay down, but then the defendant fell asleep, so she moved. While sufficient to show indecent liberties, this evidence was insufficient to show attempted rape.

Obstruction and Related Offenses

State v. Barnett, ___ N.C. App. ___, ___ S.E.2d ___ (Jan. 19, 2016). (1) The evidence was sufficient to support a conviction for deterring an appearance by a witness under G.S. 14-226(a). After the defendant was arrested and charged with assaulting, kidnapping, and raping the victim, he began sending her threatening letters from jail. The court concluded that the jury could reasonably have interpreted the letters as containing threats of bodily harm or death against the victim while she was acting as a witness for the prosecution. The court rejected the defendant's contention that the state was required to prove the specific court proceeding that he attempted to deter the victim from attending, simply because the case number was listed in the indictment. The specific case number identified in the indictment "is not necessary to support an essential element of the crime" and "is merely surplusage." In the course of its ruling, the court noted that the victim did not receive certain letters was irrelevant because the crime "may be shown by actual intimidation or attempts at intimidation." (2) The trial court did not commit plain error in its jury instructions on the charges of deterring a witness. Although the trial court fully instructed the jury as to the elements of the offense, in its final mandate it omitted the language that

the defendant must have acted “by threats.” The court found that in light of the trial court’s thorough instructions on the elements of the charges, the defendant’s argument was without merit. Nor did the trial court commit plain error by declining to reiterate the entire instruction for each of the two separate charges of deterring a witness and instead informing the jury that the law was the same for both counts.