

Criminal Procedure

Waiver of Jury Trial

[*State v. Jones*](#), ___ N.C. App. ___, ___ S.E. 2d. ___ (July 19, 2016). (1) The court rejected the defendant’s argument that the trial court lacked authority to allow him to waive his right to a trial by jury because he was not arraigned before the effective date of the constitutional amendment and statute allowing such a waiver. The new provision on jury trial waivers became effective December 1, 2014 and applies to criminal cases arraigned in Superior Court on or after that date. The defendant never requested a formal arraignment pursuant to G.S. 15A-941; his arraignment occurred on the first day of trial, May 11, 2015. Because the defendant’s arraignment occurred after the effective date of the constitutional amendment and accompanying session law, the trial court was constitutionally authorized to accept the defendant’s waiver of jury trial. (2) The court rejected the defendant’s argument that because the trial judge had ruled in favor of the defendant’s pretrial motion in limine, excluding an involuntary confession, he was unable to serve as a fair and impartial factfinder and that the non-jury trial was “tainted” by the trial judge’s knowledge of the inadmissible statements. Because the defendant chose to waive his right to a trial by jury and proceed with a bench trial, he could not argue on appeal that he was prejudiced as a result of his own strategic decision. Furthermore, the trial court is presumed to disregard incompetent evidence in making decisions as a finder of fact.

Indictment Issues

[*State v. Jones*](#), ___ N.C. App. ___, ___ S.E. 2d. ___ (July 19, 2016). In this second-degree sexual exploitation of a minor case, there was no fatal variance between the indictments and the evidence presented at trial. The indictments alleged a receipt date of December 17, 2009; the evidence established the date of receipt as October 18, 2009. A variance regarding time becomes material if it deprives the defendant of his ability to prepare a defense. Here, the defendant did not advance an alibi or other time-based defense at trial.

Jury Instructions

[*State v. Campos*](#), ___ N.C. App. ___, ___ S.E. 2d. ___ (July 19, 2016). (1) In this child abuse case, the trial court committed prejudicial error by giving a flight instruction where there was no evidence upon which a reasonable theory of flight could be based. The court explained: “what the trial court deemed a ‘close call’ in terms of defendant’s alleged flight amounted to mere conjecture.” It rejected the State’s argument that the defendant’s refusal to speak with law enforcement on a voluntary, pre-arrest basis was evidence of flight. It also rejected the State’s argument that there was evidence that the defendant deviated from his normal pattern of behavior, showing efforts to avoid apprehension. (2) The trial court did not err by using the term “handling” to describe the element of intentional assault that was part of the child abuse charge. The trial court’s instruction was sufficient to explain the term assault as it related to the case.

Jury Argument

[*State v. Gordon*](#), ___ N.C. App. ___, ___ S.E. 2d. ___ (July 19, 2016). (1) The prosecutor’s statement, which was clarified after objection, was not in violation of the law or calculated to mislead or prejudice the jury. After the trial court sustained defense counsel’s objection to the prosecutor’s statement about the victim, “I think she is telling the truth,” the prosecutor clarified: “I’m just arguing they should think she’s telling the truth. I’m sorry, Judge, I misstated. You should be able to say, after watching her testify, that you think she is telling the truth.” (2) The court rejected the defendant’s argument that the trial

court erred by failing to give a curative instruction to the jury after sustaining defense counsel's objection, where the defendant had not asked for such an instruction. Additionally, the trial court had instructed the jury at the outset of the trial that when the court sustains an objection to a question, the jury must disregard the question and the answer. (3) The trial court did not err by failing to intervene ex mero motu when the prosecutor made his clarifying statement.

Arrest, Search & Investigation

Miranda

[State v. Barnes](#), ___ N.C. App. ___, ___ S.E. 2d. ___ (July 19, 2016). Although the defendant was in handcuffs at the time of the questioning, he was not, based on the totality of the circumstances, "in custody" for purposes of *Miranda*. While the defendant was visiting his cousin's house, a parole officer arrived to search of the cousin's home. The parole officer recognized the defendant as a probationer and the officer advised him that he was also subject to a warrantless search because of his probation status. The officer put the defendant in handcuffs "for officer safety" and seated the two men on the front porch while officers conducted a search. During the search, the parole officer found a jacket with what appeared to be crack cocaine inside a pocket. The officer asked the defendant and his cousin to identify the owner of the jacket. The defendant claimed the jacket and was charged with a drug offense. The court held: "Based on the totality of circumstances, we conclude that a reasonable person in Defendant's situation, though in handcuffs would *not* believe his restraint rose to the level of the restraint associated with a formal arrest." The court noted that the regular conditions of probation include the requirement that a probationer submit to warrantless searches. Also, the defendant was informed that he would be placed in handcuffs for officer safety and he was never told that his detention was anything other than temporary. Further, the court reasoned, "as a probationer subject to random searches as a condition of probation, Defendant would objectively understand the purpose of the restraints and the fact that the period of restraint was for a temporary duration."

Criminal Offenses

Kidnapping

[State v. Gordon](#), ___ N.C. App. ___, ___ S.E. 2d. ___ (July 19, 2016). In this kidnapping case, there was sufficient evidence that the defendant failed to release the victim in a safe place. The defendant left the victim in a clearing in the woods located near, but not easily visible from, a service road that extended off an interstate exit ramp. The area was described at trial as "very, very remote," "very, very secluded" and almost impossible to see from the highway. The victim "in a traumatized state, had to walk out of the clearing, down an embankment, and across a four-lane highway to get to her apartment. Defendant did not take any affirmative steps to release [her] in a location where she was no longer exposed to harm. He chose to abandon [her] in the same secluded location he had chosen to assault her."

Indecent Exposure

[State v. Hayes](#), ___ N.C. App. ___, ___ S.E. 2d. ___ (July 19, 2016). Where in the course of one instance the defendant exposed himself to multiple people, one of which was a minor and one of which was an adult, the defendant could not be found guilty of both misdemeanor indecent exposure under G.S. 14-190.9(a) and felonious indecent exposure under G.S. 14-190.9(a1). The misdemeanor indecent exposure statute provides in part: "Unless the conduct is punishable under subsection (a1) of this section" a person who exposes him or herself "in the presence of any other person or persons" shall be guilty of a

class 2 misdemeanor. Subsection (a1) makes it a felony to expose oneself, in certain circumstances, to a person less than 16 years of age. The defendant was convicted of a felony under subsection (a1) because one of the victims was under 16. However, subsection (a), by its terms, forbids conduct from being the basis of a misdemeanor conviction if it is also punishable as felony indecent exposure. The court framed the issue as one of statutory construction, not double jeopardy.

Sexual Exploitation of a Minor

[*State v. Jones*](#), ___ N.C. App. ___, ___ S.E. 2d. ___ (July 19, 2016). In this second-degree sexual exploitation of a minor case, there was sufficient evidence with respect to the knowledge element of the crime. The court disagreed with the defendant's argument that there was insufficient evidence tending to show that he was aware of the contents of the pornographic files found on his computer. Among other things, the titles of the files clearly indicated that they contained pornographic images of children.