Criminal Procedure

Pleas

State v. Ross, ___ N.C. ___, ___ S.E.2d ___ (Dec. 21, 2016). Reversing the Court of Appeals, the court held that the defendant's plea was knowing involuntary. The Court of Appeals had held that because the defendant conditioned his plea on the appealability of an issue that was not appealable, the plea was not knowing and involuntary. The court however concluded that the defendant's plea was not conditionally entered on such a right of appeal. Thus, the terms and conditions of the plea agreement did not attempt to preserve the right to appellate review of a non-appealable matter.

Absolute Impasse

State v. Floyd, ___ N.C. ___, ___ S.E.2d ___ (Dec. 21, 2016). The court reversed the Court of Appeals' determination that the defendant was entitled to a new trial based on the trial court's alleged failure to recognize and address an impasse between the defendant and his attorney during trial. The court concluded that the record did not allow it to determine whether the defendant had a serious disagreement with his attorney regarding trial strategy or whether he simply sought to hinder the proceedings. It remanded for entry of an order dismissing the defendant's ineffective assistance of counsel claim without prejudice to his right to assert it in a motion for appropriate relief.

Jury Argument

State v. Dalton, ___ N.C. ___, ___ S.E.2d ___ (Dec. 21, 2016). Affirming the Court of Appeals in this murder case, the court held that the prosecutor's closing argument exaggerating the defendant's likelihood of being released from civil commitment upon a finding of not guilty by reason of insanity and constituted prejudicial error requiring a new trial. At trial the defendant asserted the insanity defense. At the charge conference, the prosecutor asked the trial court if he could comment on the civil commitment procedures that would apply if the defendant was found not guilty by reason of insanity. The trial court agreed to permit the comment, but cautioned the prosecutor not to exaggerate the defendant's chance of being released after 50 days. During closing arguments the prosecutor stated that it was "very possible that in 50 days, if she shows by a preponderance of the evidence that she is not a threat to anyone else or herself, she will be back home." The defendant unsuccessfully objected to this comment and the prosecutor continued, arguing "She very well could be back home in less than two months." The court began by rejecting the State's argument that because the defendant failed to object to the prosecutor's second statement, that statement should be reviewed under a stricter standard of review. The court concluded that the second statement was not separate and distinct from the first. Turning to the propriety of the prosecutor's argument, it noted that if the jury finds a defendant not guilty by reason of insanity, the trial court must order the defendant civilly committed. Within 50 days of commitment, the trial court must provide the defendant with a hearing. If at that time the defendant shows by a preponderance of the evidence that she no longer has a mental illness or is dangerous to others the court will release the defendant. Clear, cogent and convincing evidence that an individual has committed homicide in the relevant past is prima facie evidence of dangerousness to others. Here, the evidence did not support the prosecutor's assertion that if the defendant was found not guilty by reason of insanity it is "very possible" that she would be released in 50 days. Instead, it demonstrated that the defendant will suffer from mental illness and addiction "for the rest of her life" and that her "risk of recidivism would significantly increase if she were untreated and resumed her highly unstable lifestyle." Additionally, the homicide for which she was convicted is prima facie evidence of dangerousness to others. Therefore the only reasonable inference from the evidence is that it is highly unlikely that the

defendant would be able to demonstrate by a preponderance of the evidence within 50 days that she no longer is dangerous to others.

Jury Instructions

State v. Juarez, ___ N.C. ___, ___ S.E.2d ___ (Dec. 21, 2016). (1) Reversing the Court of Appeals in this first-degree felony murder case, the court held that the trial court did not commit reversible error by failing to instruct the jury on the lesser included offenses of second-degree murder and voluntary manslaughter. The underlying felony for first-degree felony murder was discharging a firearm into an occupied vehicle in operation. The trial court denied the defendant's request for instructions on second-degree murder and voluntary manslaughter. The Court of Appeals held that it was error not to instruct on the lessers because the evidence was conflicting as to whether the defendant acted in self-defense. The court found this reasoning incorrect, noting that self-defense is not a defense to felony murder. Perfect self-defense may be a defense to the underlying felony, which would defeat the felony murder charge. Imperfect self-defense however is not available as a defense to the underlying felony use to support a felony murder charge because allowing such a defense when the defendant is in some manner at fault "would defeat the purpose of the felony murder rule." In order to be entitled to instructions on the lesser included offenses, "the conflicting evidence must relate to whether defendant *committed* the crime charged, not whether defendant was legally *justified* in committing the crime." Here, there is no conflict regarding whether the defendant committed the underlying felony. The defendant does not dispute that he committed this crime; rather he claims only that his conduct was justified because he was acting in self-defense. (2) Reversing the Court of Appeals, the court held that the trial court did not commit plain error when it instructed the jury on the aggressor doctrine of self-defense. The trial court instructed the jury on perfect self-defense including the aggressor doctrine (that a defendant is not entitled to the benefit of self-defense if he was the aggressor); the defendant did not object. When there is no evidence that a defendant was the initial aggressor, it is reversible error for the trial court to instruct on the aggressor doctrine. The Court of Appeals determined that there was no evidence that the defendant was the aggressor. It failed however to analyze whether such error had the type of prejudicial impact that seriously affected the fairness, integrity or public reputation of the judicial proceeding. Therefore, that court's analysis was insufficient to conclude that the alleged error constituted plain error. The court found it unnecessary to decide whether an instruction on the aggressor doctrine was improper because the defendant failed to show that the alleged error was so fundamentally prejudicial as to constitute plain error.

Sentencing

State v. Perry, ___ N.C. ___, ___ S.E.2d ___ (Dec. 21, 2016). The State conceded and the court agreed that pursuant to *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (holding that imposition of a mandatory sentence of life in prison without the possibility of parole upon a juvenile violates the Eighth Amendment), applies retroactively to cases that became final before *Miller* was decided.

State v. Young, ___ N.C. ___, ___ S.E.2d ___ (Dec. 21, 2016). The State conceded and the court agreed that pursuant to *Montgomery*, *Miller* applies retroactively. The court further rejected the State's argument that the defendant's sentence was not in violation of *Miller* because it allowed for a meaningful opportunity for the defendant to obtain release. The State argued that the defendant had an opportunity for release under G.S. 15A-1380.5, a repealed statue which applied to the defendant's case. Recognizing that the statute might increase the chance for a sentence to be altered or commuted, the

court rejected the argument that the defendant's sentence did not violate *Miller*. It noted that under the statute although a defendant is entitled to review of the sentence by the trial court, the statute guarantees no hearing, no notice, and no procedural rights. Furthermore, it provides minimal guidance as to what type of circumstances would support alteration or commutation, it requires only that the judge "consider the trial record," and notes that the judge "may" review other information "in his or her discretion." Ultimately the decision of what to recommend is in the judge's discretion and the only effect of the judge's recommendation is that the Governor or a designated executive agency must "consider" that recommendation. The court stated:

> Because of these provisions, the possibility of alteration or commutation pursuant to section 15A-1380.5 is deeply uncertain and is rooted in essentially unguided discretion. Accordingly, this section does not reduce to any meaningful degree the severity of a sentence of life imprisonment without the possibility of parole.
>
> Moreover, section 15A-1380.5 does not address the central concern of *Miller*—that a sentencing court cannot treat minors like adults when imposing a sentence of life imprisonment without the possibility of parole. (citations omitted).

The court noted that the Supreme Court's "foundational concern" in *Miller* was "that at some point during the minor offender's term of imprisonment, a reviewing body will consider the possibility that he or she has matured." It concluded:

> Nothing in section 15A-1380.5 requires consideration of this factor. In fact, after the judge's recommendation is submitted to "[t]he Governor or an executive agency designated under this section," N.C.G.S. § 15A-1380.5(e), nothing in section 15A-1380.5 gives any guidance to the final decision maker because this framework simply was not developed to address the concerns the Supreme Court raised in *Miller* and *Montgomery*.

State v. Seam, ___ N.C. ___, ___ S.E.2d ___ (Dec. 21, 2016). In a per curiam opinion, and for the reasons stated in *Young* (summarized immediately above), the court affirmed the trial court and remanded for resentencing.

State v. Barnett, ___ N.C. ___, ___ S.E.2d ___ (Dec. 21, 2016). If supported by appropriate findings as required by the statute, the trial court has authority to enter a "Convicted Sex Offender Permanent No Contact Order" under G.S. 15A-1340.50 prohibiting the defendant from any interaction with a rape victim's minor children. The defendant was convicted of a number of offenses including attempted second-degree rape. At sentencing the trial court entered a no contact order under the statute, stating that the order included the victim's minor children. The Court of Appeals vacated the no contact order and remanded for the trial court to remove mention of individuals other than the victim, concluding that the trial court lacked authority to enter a no contact order including persons who were not victims of the sex offense. On the State's petition for discretionary review, the court agreed that the statute protects victims of sex offense and not third parties and that its catchall provision cannot be read to expand the statute's reach. However, it held that the statute can authorize protection for the victim from indirect contact by the defendant to the victim's family or friends when appropriate findings are made. It specified: "By 'appropriate findings,' we mean findings indicating that the defendant's contact with specific individuals would constitute indirect engagement of any of the actions prohibited in subsections (f)(1) through (f)(7) [of the statute]." The court remanded for further proceedings.

Sex Offenders

Termination of Registration

State v. Moir, ___ N.C. ___, ___ S.E.2d ___ (Dec. 21, 2016). In determining whether the defendant's convictions for taking indecent liberties with a child suffice to make him a Tier II offender as defined in 42 U.S.C. § 16911(3)(A)(iv), the court held that it was required to utilize the categorical approach, as supplemented by the "modified categorical approach" in the event that the defendant was convicted of violating a divisible statute. However, the court concluded that because it did not have the benefit of briefing and argument concerning numerous legal questions of first impression which must be resolved in order to determine the defendant's eligibility for removal from the registry, remand was required. It noted, among other things, that the trial court failed to determine whether the statute was a divisible one and whether a conviction requires proof that the defendant intentionally touched the victim in a specified manner. The court thus affirmed the Court of Appeals' decision that the trial court erred by applying the circumstance-specific approach in determining whether the defendant should be deemed eligible to terminate registration. However, it modified the Court of Appeals' decision to require the use of the modified categorical approach rather than the pure categorical approach in cases involving divisible statutes and remanded to the trial court for further proceedings. It specifically instructed:

> On remand, the trial court should consider whether N.C.G.S. § 14-202.1 is a divisible statute. If the trial court deems N.C.G.S. § 14-202.1 to be divisible, it must then consider whether guilt of any separate offense set out in N.C.G.S. § 14-202.1(a)(2) requires proof of a physical touching and whether any such physical touching requirement necessitates proof that the defendant "intentional[ly] touch[ed], either directly or through the clothing, [ ] the genitalia, anus, groin, breast, inner thigh, or buttocks of" the victim. Finally, if guilt of any separate offense set out in N.C.G.S. § 14-202.1(a)(2) requires proof that defendant "intentional[ly] touch[ed], either directly or through the clothing, [ ] the genitalia, anus, groin, breast, inner thigh, or buttocks of" the victim, the trial court must determine whether any document that the trial court is authorized to consider under *Shepard* permits a determination that defendant was convicted of violating N.C.G.S. § 14-202.1(a)(2) rather than any specific offense set out in N.C.G.S. § 14-202.1(a)(1) or any generic offense made punishable pursuant to N.C.G.S. § 14-202.1(a). Finally, if necessary, the trial court should consider, in the exercise of its discretion, whether it should terminate defendant's obligation to register as a sex offender.

Evidence

404(b)

State v. Carvalho, ___ N.C. ___, ___ S.E.2d ___ (Dec. 21, 2016). The court per curiam affirmed the Court of Appeals in ___, N.C. App. ___, 777 S.E.2d 78 (Oct. 6, 2015). In this murder case, the Court of Appeals held, over a dissent, that the trial court did not err by admitting under Rule 404(b) portions of an audiotape and a corresponding transcript, which included a conversation between the defendant and an individual, Anderson, with whom the defendant was incarcerated. Anderson was a key witness for the State and his credibility was crucial. The 404(b) evidence was not admitted for propensity but rather to show: that the defendant trusted and confided in Anderson; the nature of their relationship, in that the defendant was willing to discuss commission of the crimes at issue with Anderson; and relevant factual information to the murder charge for which the defendant was on trial. These were proper purposes. Additionally, the trial court did not abuse its discretion in admitting this evidence under the Rule 403 balancing test.

Arrest, Search & Investigation

Search Warrants

State v. Lowe, ___ N.C. ___, ___ S.E.2d ___ (Dec. 21, 2016). (1) Affirming the Court of Appeals, the court held that a search warrant authorizing a search of the premises where the defendant was arrested was supported by probable cause. The affidavit stated that officers received an anonymous tip that Michael Turner was selling, using and storing narcotics at his house; that Turner had a history of drug related arrests; and that a detective discovered marijuana residue in the trash from Turner's residence, along with correspondence addressed to Turner. Under the totality of the circumstances there was probable cause to search the home for controlled substances. (2) Reversing the Court of Appeals, the court held that a search of a vehicle located on the premises was within the scope of the warrant. The vehicle in question was parked in the curtilage of the residence and was a rental car of the defendant, an overnight guest at the house. If a search warrant validly describes the premises to be searched, a car on the premises may be searched even though the warrant contains no description of the car. In departing from this general rule, the Court of Appeals held that the search of the car was invalid because the officers knew that the vehicle in question did not belong to the suspect in the drug investigation. Noting that the record was unclear as to what the officers knew about ownership and control of the vehicle, the court concluded; "Nonetheless, regardless of whether the officers knew the car was a rental, we hold that the search was within the scope of the warrant."

State v. Allman, ___ N.C. ___, ___ S.E.2d ___ (Dec. 21, 2016). Reversing the Court of Appeals, the court held that because the magistrate had a substantial basis to find that probable cause existed to issue the search warrant, the trial court erred by granting the defendant's motion to suppress. The affidavit stated that an officer stopped a car driven by Jeremy Black. Black's half-brother Sean Whitehead was a passenger. After K-9 alerted on the car, a search found 8.1 ounces of marijuana packaged in a Ziploc bag and $1600 in cash. The Ziploc bag containing marijuana was inside a vacuum sealed bag, which in turn was inside a manila envelope. Both individuals had previously been charged on several occasions with drug crimes. Whitehead maintained that the two lived at Twin Oaks Dr. The officer went to that address and found that although neither individual lived there, their mother did. The mother informed the officer that the men lived at 4844 Acres Drive and had not lived at Twin Oaks Drive for years. Another officer went to the Acres Drive premises and determined that its description matched that given by the mother and that a truck outside the house was registered to Black. The officer had experience with drug investigations and, based on his training and experience, knew that drug dealers typically keep evidence of drug dealing at their homes. Supported by the affidavit, the officer applied for and received a search warrant to search the Acres Drive home. Drugs and paraphernalia were found. Based on the quantity of marijuana and the amount of cash found in the car, the fact that the marijuana appeared to be packaged for sale, and Whitehead's and Black's criminal histories, it was reasonable for the magistrate to infer that the brothers were drug dealers. Based on the mother's statement that the two lived at the Acres Drive premises, the fact that her description of that home matched its actual appearance, and that one of the trucks there was registered to Black, it was reasonable for the magistrate to infer that the two lived there. And based on the insight from the officer's training and experience that evidence of drug dealing was likely to be found at their home and that Whitehead lied about where the two lived, it was reasonable for the magistrate to infer that there could be evidence of drug dealing at the Acres Drive premises. Although nothing in the affidavit directly connected the defendant's home with evidence of drug dealing, federal circuit courts have held that a suspect drug dealer's lie about his address in combination with other evidence of drug dealing can give rise to probable cause to search his home. Thus, under the totality of the circumstances there was probable cause to support search warrant.

Juveniles

State v. Saldierna, ___ N.C. ___, ___ S.E.2d ___ (Dec. 21, 2016). Reversing the Court of Appeals, the court held that the juvenile defendant's request to telephone his mother while undergoing custodial questioning by police investigators was not a clear indication of his right to consult with a parent or guardian before proceeding with the questioning. The trial court had found that the defendant was advised of his juvenile rights and after receiving forms setting out these rights, indicated that he understood them; that the juvenile informed the officer that he wished to waive his juvenile rights and signed a form to that effect; and that although the defendant unsuccessfully tried to contact his mother by telephone, he did not at any time indicate that he had changed his mind regarding his desire to speak to the officer, indicate that he revoked his waiver of rights, or make an unambiguous request to have his mother present during questioning. The trial court thus found that the defendant's rights were not violated under G.S. 7B-2101 or the constitution. The Court of Appeals had concluded that a juvenile need not make a clear and unequivocal request in order to exercise his or her right to have a parent present during questioning. Instead, it concluded that when a juvenile between the ages of 14 and 18 makes an ambiguous statement that potentially pertains to the right to have a parent present, an interviewing officer must clarify the juvenile's meaning before proceeding with questioning. The court granted the State's petition for discretionary review. It first held that the defendant's statement--"Um. Can I call my mom?"--was not a clear and unambiguous invocation of his right to have his parent or guardian present during questioning and thus his rights under G.S. 7B-2101 were not violated. The court remanded for a determination of whether the defendant knowingly, willingly, and understandingly waived his rights.

Criminal Offenses

Attempt

State v. Floyd, ___ N.C. ___, ___ S.E.2d ___ (Dec. 21, 2016). The Court of Appeals improperly found that attempted assault is not a recognized criminal offense in North Carolina. The court rejected the notion that attempted assault is an "attempt of an attempt." Thus, a prior conviction for attempted assault with a deadly weapon inflicting serious injury can support a later charge of possession of a firearm by a felon and serve as a prior conviction for purposes of habitual felon status.

Kidnapping

State v. Curtis, ___ N.C. ___, ___ S.E.2d ___ (Dec. 21, 2016). The court per curiam affirmed the Court of Appeals, ___ N.C. App. ___, 782 S.E.2d 522 (2016). The Court of Appeals had held, over a dissent, that where the restraint and removal of the victims was separate and apart from an armed robbery that occurred at the premises, the trial court did not err by denying the defendant's motion to dismiss kidnapping charges. The defendant and his accomplices broke into a home where two people were sleeping upstairs and two others--Cowles and Pina-- were downstairs. The accomplices first robbed or attempted to rob Cowles and Pina and then moved them upstairs, where they restrained them while assaulting a third resident and searching the premises for items that were later stolen. The robberies or attempted robberies of Cowles and Pina occurred entirely downstairs; there was no evidence that any other items were demanded from these two at any other time. Thus, the court could not accept the defendant's argument that the movement of Cowles and Pina was integral to the robberies of them. Because the removal of Cowles and Pina from the downstairs to the upstairs was significant, the case was distinguishable from others where the removal was slight. The only reason to remove Cowles and Pina to the upstairs was to prevent them from hindering the subsequent robberies of the upstairs residents and no evidence showed that it was necessary to move them upstairs to complete those

robberies. Finally, the court noted that the removal of Cowles and Pina to the upstairs subjected them to greater danger.