Criminal Law Update

For Magistrates
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CRIMES AND ELEMENTS

State v. Rankin, __ N.C. __, 821 S.E.2d 787 (2018). The defendant dumped the contents of a metal oil tank into the front yard of a residence. She was charged with felony littering of hazardous waste under G.S. 14-399(e). The statute prohibits littering except, among other circumstances, "[w]hen the property is designated by the State . . . for the disposal of garbage . . . and the person is authorized to use the property." The indictment didn't allege that the front yard wasn't a garbage dump, and the defendant argued on appeal that it therefore omitted an essential element. The state supreme court agreed, finding that the provision regarding garbage dumps is an element rather than an exception or a defense. Because the element was omitted, "the trial court had no jurisdiction" over the offense. NCAOC legal has revised the charging language in NCAWARE to comply with this opinion. I blogged about this case here.

State v. Melton, __ N.C. __, 821 S.E.2d 424 (2018). The defendant "hired" a law enforcement officer posing as a hitman to kill the defendant's wife. The defendant was convicted of attempted murder and of solicitation of murder. The defendant argued that there was insufficient evidence of attempted murder because there was no "overt act" that went beyond preparation and towards execution of the crime. The court of appeals disagreed, citing cases from other states holding that hiring a hitman is attempted murder, but the state supreme court reversed, finding that North Carolina sets a higher standard for attempt than many other states. Phil Dixon blogged about this case here.

State v. Cox, __ N.C. App. __, __ S.E.2d __, 2019 WL 1028643 (Mar. 5, 2019). The defendant and another man gave a woman money to buy drugs for them. The woman didn't buy drugs for them and instead kept the money. The defendant, his girlfriend, and the other man went to the woman's home, forced their way in, demanded the money back, and assaulted her. The defendant brandished a firearm during the encounter. Based on these events,

[1] This document includes cases relevant to magistrates decided between October 2018 and March 2019. Because the magistrates' conference scheduled for October 2018 was cancelled, this document also includes a few key cases decided between March 2018 and October 2018. Those cases are highlighted in gray for ease of reference.

[2] Some of the case summaries in this document are edited versions of case summaries prepared by Jessica Smith.

the defendant was convicted of conspiracy to commit armed robbery and felony breaking or entering. The court of appeals ruled that there was insufficient evidence of wrongful intent to support the convictions because the defendant was seeking to recover his own property, not to take property that belonged to another. State supreme court precedent provides that when a defendant has a "bona fide claim of right or title" to property, he or she lacks the wrongful intent necessary to commit robbery.

State v. Corbett, __ N.C. App. __, __ S.E.2d __, 2019 WL 661148 (Feb. 19, 2019). The defendant sexually abused his daughter and took inappropriate photographs of her. He was convicted of several crimes including first- and second-degree sexual exploitation of a minor. On appeal, he argued that the evidence was insufficient to support the sexual exploitation charges, which were based on a photograph of the victim standing naked in the defendant's bedroom, attempting to cover her genitals with her hands. The defendant argued that the photograph did not depict "sexual activity," a term defined in the relevant statute to include the "lascivious exhibition of the genitals or pubic area." The court of appeals found the evidence sufficient, noting that "[t]he focal point of the picture is [the victim's] naked body," that she is in a "bedroom, a setting generally associated with sexual activity," that she "is fully nude" and that "the photograph is clearly intended to elicit a sexual response based upon the context in which it was taken, which included Defendant's repeated attempts to touch [the victim] sexually." The defendant also argued that the photograph did not actually show the victim's genitals or pubic area. However, the court found that while the victim's "hands are positioned over her genitalia in the photograph, the fingers of her left hand are spread far enough apart that clearly visible gaps exist between them such that her pubic area is at least partially visible."

State v. Heelan, __ N.C. App. __, 823 S.E.2d 106 (2018). The defendant posted an ad on Craigslist seeking a female "24 or younger" with whom to have sex. A police officer responded, posing as a fictitious 14-year-old girl named "Brittany Duncan." The defendant agreed to meet "Brittany" for sex, but when he arrived at the meeting place, he was arrested and charged with taking indecent liberties with a child. He was indicted, the indictment alleging that he "did take and attempt to take immoral, improper, and indecent liberties with 'Brittany Duncan,' the name of the alias used by Detective Jason Reid of the Boone Police Department, a child the defendant believed to be under the age of 16 years at the time of the offense, for the purpose of arousing and gratifying sexual desire." The defendant contended that the indictment should have been quashed and the charges dismissed because there was no actual child victim, but the court of appeals ruled that because the indecent liberties statute criminalizes taking *or attempting to take* indecent liberties, "an actual child victim is not required to sustain" an indecent liberties conviction.

State v. Gorham, __ N.C. App. __, 822 S.E.2d 313 (2018). An officer investigating a stolen vehicle attempted to stop the defendant, who was driving a vehicle that matched the description of the one that had been stolen. The defendant did not stop, instead leading a high-speed chase across several counties. The defendant hit a guardrail and later drove *through* a house, and the police ceased pursuit. However, the defendant was later apprehended and charged with felony fleeing to elude arrest. One of the aggravating factors making the offense a felony was property damage of more than $1,000. The defendant argued on appeal that there was insufficient evidence of the amount of damage done; the only testimony directly about value was the lead officer's opinion that the damage was worth more than $1,000. However, the court found the evidence "more than sufficient." The officer's testimony, combined with the photographs of the damage, and jurors' "experiences of everyday life" were sufficient to support a finding that the "damages from driving through a house alone would be in excess of $1,000."

State v. Buchanan, __ N.C. App. __, 821 S.E.2d 890 (2018). The defendant wrote three checks, then signed an affidavit with his bank alleging that the three checks were frauds or forgeries. He was charged with and convicted

of two counts of obtaining property by false pretenses, but the court of appeals ruled that he should have been convicted of a single count under the "single taking rule," as the defendant "committed only one act, making a single false representation."

State v. Osborne, __ N.C. App. __, 821 S.E.2d 268 (2018). "Law enforcement found [the defendant] unconscious in a hotel room and, after emergency responders revived her, she admitted she used heroin. Officers searched the hotel room and found syringes, spoons with burn marks and residue, and a rocklike substance." The defendant was charged with and convicted of possession of heroin based on her statements and officers' description of the substance they found and the results of field tests on the substance. The court of appeals found this evidence insufficient, because there was no laboratory test and the defendant "never identified the seized substance as heroin—she told officers only that she had used heroin before losing consciousness." This was enough to "strongly suggest[]" that the seized substance was heroin but not enough to prove it beyond a reasonable doubt. Phil Dixon blogged about this case here.

State v. Shelton, __ N.C. App. __, __ S.E.2d __, 2019 WL 436690 (Feb. 5, 2019). The defendant took Oxycodone and Tramadol as prescribed. Later, while he was driving, the vehicle in front of him slowed; the brakes failed on his truck; he swerved to avoid hitting the leading vehicle; he struck and killed a pedestrian that he had not noticed at the roadside; and he drove away from the scene. He was charged with felony death by vehicle based on appreciable impairment by controlled substances. The state's expert testified that she couldn't determine the precise amounts of Oxycodone and Tramadol in the defendant's blood and couldn't say whether he was impaired at the time of the incident. The defendant's expert testified that detectable amounts of the substances in question are not necessarily impairing. The defendant was convicted and the court of appeals affirmed, emphasizing (1) that the substances in question are potentially impairing, (2) that the defendant did not notice the pedestrian while other drivers on the scene did, suggesting reduced alertness, (3) that the defendant did not notice that he had struck the pedestrian, despite throwing her body more than 50 feet in the air, and (4) that the defendant drove away from the scene despite his truck's brakes not working. Collectively, these facts were sufficient evidence for the jury to find impairment. Shea Denning blogged about this case here.

State v. Harding, ___ N.C. App. ___, 813 S.E.2d 254 (2018). The trial court did not err by sentencing the defendant for both assault on a female and assault by strangulation. Prefatory language in G.S. 14-33(c) provides that "Unless the conduct is covered under some other provision of law providing greater punishment," assault on a female is punished as a Class A1 misdemeanor. Here, the defendant was also punished for the higher class offense of assault by strangulation. However, the court emphasized that the prefatory clause of G.S. 14-33(c) only applies when both assaults are based on the same conduct, and it found that the assault convictions in this case were based on different conduct. The defendant's act of pinning down the victim and choking her to stop her from screaming supported the assault by strangulation conviction. His acts of grabbing her hair, tossing her down a rocky embankment, and punching her face and head multiple times supported the assault on a female conviction. The two assaults were sufficiently separate and distinct because they required different thought processes and were distinct in time. After the defendant's initial physical assault and strangulation of the victim, he briefly ceased his assault when she stopped screaming and resisting, but when she resumed screaming and he again hit her in the head multiple times. The court also noted that the victim sustained injuries to different parts of her body.

State v. Rogers, __ N.C. __, 817 S.E.2d 150 (2018). The defendant was properly convicted of keeping/maintaining a vehicle for keeping/selling controlled substances. The court ruled that "keeping" a vehicle requires possessing it for a period of time, or at least with the intent to possess it for a period of time in the future. By contrast, it also held, disavowing prior precedent, that "keeping" controlled substances merely means storing them, *regardless of duration*. Therefore, it did not matter whether the defendant stored cocaine only briefly in the gas cap

compartment of his car – even if he did, the evidence was sufficient to sustain his conviction. Jessie Smith blogged about this case here.

State v. Allen, ___ N.C. App. ___, 812 S.E.2d 192 (2018). After detaining the defendant for larceny, a Belk loss prevention associate in Hickory entered the defendant's name in a store database. The associate found an entry stating that the defendant had been banned from Belk stores for a period of 50 years following an incident a Charlotte store. The defendant had been issued, and had signed, a notice regarding the prohibition. Based on these facts, the defendant was charged with and convicted of felonious breaking or entering by entering the Hickory store after having been banned. On appeal, the defendant argued that the evidence was insufficient because it showed that he entered a public area of the store during regular business hours. The court of appeals disagreed. Belk did not consent to the defendant's entry, and indeed, had forbidden him from entering. The loss prevention associate testified that no one expressly allowed the defendant to return to store property, and that no one gave the defendant permission to enter the store on the date in question.

CHARGING DOCUMENTS

State v. Shuler, __ N.C. App. __, 822 S.E.2d 737 (2018). The defendant was charged with and convicted of statutory rape of a 13, 14, or 15 year old. The indictment did "not identify the victim by name, but identifie[d] her merely as 'Victim #1.'" The court of appeals ruled that an indictment must name the victim, so this indictment was fatally defective. Although initials may be used to identify victims of sexual assault, "victim #1" fails to provide adequate notice to the defendant and fails to protect against double jeopardy.

State v. Jones, __ N.C. __, 819 S.E.2d 340 (2018). An officer issued the defendant a citation alleging that the defendant "did unlawfully and willfully WITH AN OPEN CONTAINER OF ALCOHOLIC BEVERAGE AFTER DRINKING (G.S. 20-138.7(A)." The citation omitted most of the elements of the offense, including that the defendant was (1) driving (2) a motor vehicle (3) on a public street or highway, and (4) that the open container was in the passenger compartment of the vehicle. The state supreme court ruled that under the relaxed pleading standards applicable to citations, the citation was sufficient. The court noted that e a defendant has a statutory right to object to a trial on a citation and to require a more formal pleading. Shea Denning blogged about this case here.

State v. Booker, __ N.C. App. __, 821 S.E.2d 877 (2018). The defendant was charged with embezzling funds from the battery store where she worked. The indictment read in part that she did "embezzle . . . $3,957.81 in good and lawful United States currency belonging to AMPZ, LLC d/b/a Interstate All Battery Center." She contended that this "failed to adequately allege that she acted with fraudulent intent" and so omitted an essential element of the offense, but the court of appeals ruled that "the concept of fraudulent intent is already contained within the ordinary meaning of the term 'embezzle.'"

State v. Brawley, 370 N.C. 626 (2018). A larceny from a merchant indictment named the victim as "Belk's Department Stores, an entity capable of owning property." The court of appeals ruled that that this failed to adequately identify the victim as "a legal entity capable of owning property" but the state supreme court reversed for the reasons given by the court of appeals dissent, namely: "Given the complexity of corporate structures in today's society . . . an allegation that the merchant named in the indictment is a legal entity capable of owning property is sufficient to meet the requirements that an indictment apprise the defendant of the conduct which is the subject of the accusation." Shea Denning blogged about this case here.

SEARCH WARRANTS AND INVESTIGATION

State v. Teague, ___ N.C. App. ___, 817 S.E.2d 239 (2018). An officer applied for a search warrant stating that after the officer received an anonymous tip that drugs were being sold at a residence, he conducted a "refuse investigation" at the premises and found in the trash can a cup containing marijuana residue, plastic bags containing marijuana residue and a butane gas container that the officer believed to be consistent with potential manufacturing of butane hash oil. The affidavit stated that the officer conducted the refuse investigation on Thursday, "regular refuse day." The defendant asserted that this information was stale because it did not specify the Thursday on which the officer conducted the investigation. The court of appeals disagreed, finding that a common sense reading of the affidavit would indicate that the statement referred to the most recent Thursday, the date the affidavit was completed. Thus, the circumstances taken together supported probable cause for the issuance of the warrant. I referred to this case in a blog post here.

Carpenter v. United States, 585 U.S. ___, 138 S.Ct. 2206 (2018). The defendant robbed several stores. Law enforcement used court orders to obtain more than 100 days' worth of cell site location information (CSLI) regarding his cell phone from his carrier , and used that information to connect him to the robberies. The court orders were based on less than probable cause, but the Supreme Court ultimately ruled that obtaining long-term CSLI is sufficiently invasive that is a "search" under the Fourth Amendment and normally requires a search warrant. The Court rejected the argument that CSLI belongs to the carrier and is not subject to a subscriber's reasonable expectation of privacy. The extent to which this ruling applies to short-term CSLI acquisition, cell tower dumps, and similar investigative techniques is not yet settled, but the decision appears to reverse prior North Carolina case law. I blogged about this case here.

FINES, FEES, AND FORFEITURES

Timbs v. Indiana, __ U.S. __, __ S.Ct. __, 2019 WL 691578 (Feb. 20, 2019). An Indiana defendant was convicted of selling drugs and was sentenced to a year of home detention plus probation. The state also obtained forfeiture of his $42,000 Land Rover, which he had purchased with legitimate funds but had used to transport drugs. The Supreme Court ruled that the Eighth Amendment's Excessive Fines Clause applies to the states and remanded the case for further consideration of whether the forfeiture was an excessive fine. North Carolina already prohibits excessive fines under the state constitution, so the direct impact of the case may be limited. However, it is part of a general trend of increasing scrutiny of money in the criminal justice system, whether costs, fines, fees, or bail. Jamie Markham blogged about this case here.