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Criminal Case Law Update

2014 Summer District Court Judges' Conference

(Includes selected cases decided between June 3, 2014 and September 16, 2014)

The summaries are drawn from criminal case summaries prepared by Jessica Smith. To view all of the summaries, go to www.sog.unc.edu/programs/crimlaw. To obtain the summaries automatically by email, go to the above site and click on Sign Up for Criminal Law Listserv.

Investigation Issues

Seizures

Continued detention of defendant after completion of original purpose of stop violated Fourth Amendment

State v. Cottrell, __ N.C. App. __, 760 S.E.2d 274 (July 1, 2014). The trial court erred by denying the defendant's motion to suppress where the defendant was subjected to a seizure in violation of the Fourth Amendment. Specifically, the officer continued to detain the defendant after completing the original purpose of the stop without having reasonable, articulable suspicion of criminal activity. The officer initiated a traffic stop because of a headlights infraction and a potential noise violation. The defendant turned his headlights on before he stopped and apologized to the officer for not having his headlights on. The officer asked the defendant for his license and registration and said that if everything checked out, the defendant would soon be cleared to go. The defendant did not smell of alcohol, did not have glassy eyes, was not sweating or fidgeting, and made no contradictory statements. A check revealed that the defendant's license and registration were valid. However a criminal history check revealed that the defendant had a history of drug charges and felonies. When the officer re-approached the car, he told the defendant to keep his music down because of a noise ordinance. At this point the officer smelled a strong odor that he believed was a fragrance to cover up the smell of drugs. The officer asked the defendant about the odor, and the defendant showed him a small, clear glass bottle, stating that it was a body oil. Still holding the defendant's license and registration, the officer asked for consent to search. The defendant declined consent but after the officer said he would call for a drug dog, the defendant agreed to the search. Contraband was found and the defendant moved to suppress. The court began by following *State v. Myles*, 188 N.C. App. 42, *aff'd per curiam*, 362 N.C. 344 (2008), and concluding that the purpose of the initial stop was concluded by the time the officer asked for consent

to search. The court held that once the officer returned to the vehicle and told the defendant to keep his music down, the officer had completely addressed the original purpose for the stop. It continued:

> Defendant had turned on his headlights, he had been warned about his music, his license and registration were valid, and he had no outstanding warrants. Consequently, [the officer] was then required to have "defendant's consent or 'grounds which provide a reasonable and articulable suspicion in order to justify further delay' before" asking defendant additional questions.

Next, the court held that the officer had no reasonable and articulable suspicion of criminal activity in order to extend the stop beyond its original scope: "a strong incense-like fragrance, which the officer believes to be a 'cover scent,' and a known felony and drug history are not, without more, sufficient to support a finding of reasonable suspicion of criminal activity." Finally, the court rejected the argument that the detention of the defendant after the original purpose had ended was proper because it equated to a "de minimis" extension for a drug dog sniff. The court declined to extend the de minimis analysis to situations where—as here—no drug dog was at the scene prior to the completion of the purpose of the stop.

(1) Driver was not seized when officer approached his vehicle on foot, did not use his blue lights, and did not use or threaten physical force; (2) Reasonable suspicion supported subsequent detention of driver

State v. Veal, __ N.C. App. __, 760 S.E.2d 43 (July 1, 2014). (1) No seizure occurred when an officer initially approached the defendant in response to a tip about an impaired driver. The officer used no physical force, approached the defendant's vehicle on foot, and engaged in conversation with him. The officer did not activate his blue lights and there was no evidence that he removed his gun from his holster or used a threatening tone. Thus, the court concluded, the event was a voluntary encounter. (2) Reasonable suspicion supported the officer's later detention of the driver. During the voluntary encounter the officer noticed the odor of alcohol coming from the defendant and observed an unopened container of beer in his truck. These observations provide a sufficient basis for reasonable suspicion to support the subsequent stop.

(1) No probable cause supported arrest of defendant for impaired driving after left a bar, got in his SUV, and backed into a motorcycle that was illegally parked behind him; (2) Trial court erred, however, in dismissing case after granting motion to suppress

State v. Overocker, __ N.C. App. __, __ S.E.2d __ (Sept. 16, 2014). (1) The trial court properly granted the defendant's motion to suppress where no probable cause supported the defendant's arrest for impaired driving and unsafe movement. The defendant was arrested after he left a bar, got in his SUV, and backed into a motorcycle that was illegally parked behind him. The officer relied on the following facts to support probable cause: the accident, the fact that the defendant had been at a bar and admitted to having three drinks (in fact he had four), the defendant's performance tests, and the odor of alcohol on

the defendant. However, the trial court found that the officer testified that the alcohol odor was "light." Additionally, none of the officers on the scene observed the defendant staggering or stumbling, and his speech was not slurred. Also, the only error the defendant committed in the field sobriety tests was to ask the officer half-way through each test what to do next. When instructed to finish the tests, the defendant did so. The court concluded:

> [W]hile defendant had had four drinks in a bar over a four-hour time frame, the traffic accident . . . was due to illegal parking by another person and was not the result of unsafe movement by defendant. Further, defendant's performance on the field sobriety tests and his behavior at the accident scene did not suggest impairment. A light odor of alcohol, drinks at a bar, and an accident that was not defendant's fault were not sufficient circumstances, without more, to provide probable cause to believe defendant was driving while impaired.

The court also rejected the State's argument that the fact that the officer knew the defendant's numerical reading from a portable breath test supported the arrest, noting that under G.S. 20-16.3(d), the alcohol concentration result from an alcohol screening test may not be used by an officer in determining if there are reasonable grounds to believe that the driver committed an implied consent offense, such as driving while impaired.

(2) After granting the defendant's motion to suppress, however, the trial court erred by dismissing the charges where the defendant made no written or oral motion to dismiss.

Probable cause supported arrest of defendant for impaired driving after he was stopped at a checkpoint, had a moderate odor of alcohol, admitting to drinking, tested positive on a portable breath test and performed poorly on field sobriety tests

State v. Townsend, __ N.C. App. __, __ S.E.2d __ (Sept. 16, 2014). (1) Probable cause supported the defendant's arrest for DWI. When the officer stopped the defendant at a checkpoint, the defendant had bloodshot eyes and a moderate odor of alcohol. The defendant admitted to "drinking a couple of beers earlier" and that he "stopped drinking about an hour" before being stopped. Two alco-sensor tests yielded positive results and the defendant exhibited clues indicating impairment on three field sobriety tests. The court rejected the defendant's argument that because he did not exhibit signs of intoxication such as slurred speech, glassy eyes, or physical instability, there was insufficient probable cause. (2) The trial court did not err by denying the defendant's motion to suppress evidence obtained as a result of a vehicle checkpoint. The checkpoint was conducted for a legitimate primary purpose of checking all passing drivers for DWI violations and was reasonable.

Grounds for Stop

Trial court properly denied defendant's motion to suppress as police had reasonable suspicion to stop vehicle based on information that firefighter transmitted to the police officers before the firefighter himself stopped the vehicle

State v. Verkerk, __ N.C. __, 758 S.E.2d 387 (June 12 2014). Reversing the court of appeals in a DWI case where the defendant was initially stopped by a firefighter, the court determined that the trial court properly denied the defendant's motion to suppress which challenged the firefighter's authority to make the initial stop. After observing the defendant's erratic driving and transmitting this information to the local police department, the firefighter stopped the defendant's vehicle. After some conversation, the driver drove away. When police officers arrived on the scene, the firefighter indicated where the vehicle had gone. The officers located the defendant, investigated her condition, and charged her with DWI. On appeal, the defendant argued that because the firefighter had no authority to stop her, evidence from the first stop was improperly obtained. However, the court determined that it need not consider the extent of the firefighter's authority to conduct a traffic stop or even whether the encounter with him amounted to a "legal stop." The court reasoned that the firefighter's observations of the defendant's driving, which were transmitted to the police before making the stop, established that the police officers had reasonable suspicion to stop the defendant. The court noted that this evidence was independent of any evidence derived from the firefighter's stop.

Searches

The police may not, without a warrant, search digital information on a cell phone seized from an individual who has been arrested

Riley v. California, 573 U.S. __ (June 25, 2014). This decision involved a pair of cases in which both defendants were arrested and cell phones were seized. In both cases, officers examined electronic data on the phones without a warrant as a search incident to arrest. The Court held that "officers must generally secure a warrant before conducting such a search." The Court noted that "the interest in protecting officer safety does not justify dispensing with the warrant requirement across the board." In this regard it added however that "[t]o the extent dangers to arresting officers may be implicated in a particular way in a particular case, they are better addressed through consideration of case-specific exceptions to the warrant requirement, such as the one for exigent circumstances." Next, the Court rejected the argument that preventing the destruction of evidence justified the search. It was unpersuaded by the prosecution's argument that a different result should obtain because remote wiping and data encryption may be used to destroy digital evidence. The Court noted that "[t]o the extent that law enforcement still has specific concerns about the potential loss of evidence in a particular case, there remain more targeted ways to address those concerns. If the police are truly confronted with a 'now or never' situation—for example, circumstances suggesting that a defendant's phone will be the target of an imminent remote-wipe attempt—they may be able to rely on exigent

circumstances to search the phone immediately" (quotation omitted). Alternatively, the Court noted, "if officers happen to seize a phone in an unlocked state, they may be able to disable a phone's automatic-lock feature in order to prevent the phone from locking and encrypting data." The Court noted that such a procedure would be assessed under case law allowing reasonable steps to secure a scene to preserve evidence while procuring a warrant. Turning from an examination of the government interests at stake to the privacy issues associated with a warrantless cell phone search, the Court rejected the government's argument that a search of all data stored on a cell phone is materially indistinguishable the other types of personal items, such as wallets and purses. The Court noted that "[m]odern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse" and that they "differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person." It also noted the complicating factor that much of the data viewed on a cell phone is not stored on the device itself, but rather remotely through cloud computing. Concluding, the Court noted:

> We cannot deny that our decision today will have an impact on the ability of law enforcement to combat crime. Cell phones have become important tools in facilitating coordination and communication among members of criminal enterprises, and can provide valuable incriminating information about dangerous criminals. Privacy comes at a cost.
>
> Our holding, of course, is not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest.

(Slip Op at. p. 25). And finally, the Court noted that even though the search incident to arrest does not apply to cell phones, other exceptions may still justify a warrantless search of a particular phone, such as exigent circumstances.

Defendant entitled to suppression of blood test results as State did not re-advise the defendant, who had refused a breath test, of his implied consent rights before requesting that he take a blood test

State v. Williams, __ N.C. App. __, 759 S.E.2d 350 (June 17, 2014). In an impaired driving case involving a fatality, the trial court properly granted the defendant's motion to suppress blood test results. The defendant was taken to a breath-testing room where an officer read and gave the defendant a copy of his implied consent rights. The defendant signed the implied consent rights form acknowledging that he understood his rights. After thirty minutes, the officer, a certified chemical analyst, asked the defendant to submit to a chemical analysis of his breath, but the defendant refused. The officer then requested that a blood testing kit be brought to the office. Although the officer did not re-advise the defendant of his implied consent rights for the blood test, he gave the defendant a consent form for the testing, which the defendant signed. The defendant's blood was then drawn. Challenging the trial court's suppression ruling, the State argued that evidence of the results of the blood test was admissible because the defendant signed a consent form for the testing. The court rejected this argument,

concluding that although the State could seek to administer a blood test after the defendant refused to take a breath test, it was required, pursuant to G.S. 20-16.2(a) and G.S. 20-139.1(b5), to re-advise the defendant of his implied consent rights before requesting he take a blood test. The court also rejected the State's argument that any statutory violation was technical and not substantial and no prejudice occurred because the defendant had been advised of his implied consent rights as to the breath test less than an hour before the blood test. It reasoned: "A failure to advise cannot be deemed a mere technical and insubstantial violation."

Exigent circumstances justified the warrantless withdrawal of blood from a defendant who was hospitalized after wreck

State v. Granger, __ N.C. App. __, 761 S.E.2d 923 (July 15, 2014). In this DWI case, the court held that under *Missouri v. McNeely* (the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant), exigent circumstances justified the warrantless blood draw. The officer was concerned about the dissipation of alcohol from the defendant's blood because it took over an hour for the officer to establish probable cause to make his request for the defendant's blood. The delay occurred because the defendant's injuries and need for medical care prevented the officer from investigating the matter until he arrived at the hospital, where the defendant was taken after his accident. The officer was concerned about the delay in getting a warrant (about 40 minutes), including the need to wait for another officer to come to the hospital and stay with the defendant while he left to get the warrant. Additionally, the officer was concerned that if he waited for a warrant, the defendant would receive pain medication for his injuries, contaminating his blood sample.

(1) Search of defendant's living area that was connected to wife's permitted ABC store was lawful based on wife's consent; (2) Search of defendant's recording studio was lawful based on search warrant

State v. Allah, __ N.C. App. __, __ S.E.2d. __ (Sept. 2, 2014). (1) A search of the defendant's living area, which was connected to his wife's permitted ABC store, was valid where his wife consented to the ALE officers' request to search the living area. (2) A search of the defendant's recording studio, also connected to the ABC store, was proper. After the officers developed probable cause to search the recording studio but the defendant declined to give consent to search, the officers "froze" the scene and properly obtained a search warrant to search the studio.

Search of defendant's vehicle permissible under automobile exception where officer had probable cause that vehicle contained marijuana

State v. Armstrong, __ N.C. App. __, __ S.E.2d. __ (Sept. 2, 2014). Although a search of the defendant's vehicle was not proper under *Arizona v. Gant*, it was authorized under the automobile exception as officers had probable cause that the vehicle contained marijuana. After officers saw a vehicle execute a three-point turn in the middle of an intersection, strike a parked vehicle, and continue traveling on the left side of the road, they activated their blue lights to initiate a traffic stop. Before the vehicle stopped,

they saw a brown beer bottle thrown from the driver's side window. After the driver and passenger exited the vehicle, the officers detected an odor of alcohol and marijuana from the inside of the car and discovered a partially consumed bottle of beer in the center console. The defendant was arrested for hit and run and possession of an open container, put in handcuffs, and placed in the back of the officers' cruiser. One of the officers searched the vehicle and retrieved the beer bottle from the center console, a grocery bag containing more beer, and a plastic baggie containing several white rocks, which turned out to be cocaine, in the car's glove compartment. After the defendant was charged with possession of cocaine and other offenses, he moved to suppress the evidence found in the car. The court concluded that although a search of the car was not proper under *Gant,* it was proper under the automobile exception. Specifically, the fact that the officers smelled a strong odor of marijuana inside the vehicle provided probable cause to search.

(1) Search warrant for defendant and her home lawful where defendant's home was connected to an IP address used to unlawfully access an email account of a NC A&T employee; (2) NC A&T campus police had territorial jurisdiction to execute warrant; (3) Officer's seizure of privileged documents did not render entire search unlawful

State v. Bernard, __ N.C. App. __, __ S.E.2d. __ (Sept. 2, 2014). (1) In a case involving unlawful access to computers and identity theft, a search warrant authorizing a search of the defendant and her home and vehicle was supported by probable cause. The court rejected the defendant's argument that hearsay evidence was improperly considered in the probable cause determination. It went on to conclude that the warrant was supported by probable cause where the defendant's home was connected to an IP address used to unlawfully access an email account of a NC A&T employee. (2) NC A&T campus police had territorial jurisdiction to execute a search warrant at the defendant's off-campus private residence where A&T had entered into a mutual aid agreement with local police. The Agreement gave campus police authority to act off-campus with respect to offenses committed on campus. Here, the statutes governing unauthorized access to a computer—the crime in question—provide that any offense "committed by the use of electronic communication may be deemed to have been committed where the electronic communication was originally sent or where it was originally received." Here, the defendant "sent" an "electronic communication" when she accessed the email account of an A&T employee and sent a false email. The court continued, concluding that the offenses were "committed on Campus" because she sent the email through the A&T campus computer servers. (3) Although an officer "inappropriately" took documents related to the defendant's civil action against A&T and covered by the attorney-client privilege during his search of her residence, the trial court properly suppressed this material and the officer's actions did not otherwise invalidate the search warrant or its execution.

Seizure and analysis of DNA from cigarette butt that the defendant, while under arrest and handcuffed in his driveway, placed in an officer's hand after the officer offered to throw it away was lawful

State v. Borders, __ N.C. App. __, __ S.E.2d. __ (Sept. 2, 2014). In this rape and murder case, no Fourth Amendment violation occurred when an officer seized a cigarette butt containing the defendant's DNA. The defendant, a suspect in a murder case, refused four requests by the police to provide a DNA sample.

Acting with the primary purpose of obtaining a sample of the defendant's DNA to compare to DNA from the victim's rape kit, officers went to his residence to execute an unrelated arrest warrant. After the defendant was handcuffed and taken outside to the driveway, an officer asked him if he wanted to smoke a cigarette. The defendant said yes and after he took several drags from the cigarette the officer asked if he could take the cigarette to throw it away for the defendant. The defendant said yes. Instead of throwing away the cigarette, the officer extinguished it and placed it in an evidence bag. The DNA on the cigarette butt came back as a match to the rape kit DNA. The court acknowledged that if the defendant had discarded the cigarette himself within the curtilage of the premises, the officers could not have seized it. However, the defendant voluntarily accepted the officer's offer to throw away the cigarette butt. The court continued, rejecting the defendant's argument that he had a reasonable expectation of privacy in the cigarette butt. When the defendant, while under arrest and handcuffed, placed the cigarette butt in the officer's gloved hand—instead of on the ground or in some other object within the curtilage--the defendant relinquished possession of the butt and any reasonable expectation of privacy in it. Finally, although indicating that it was "troubled" by the officers' trickery, the court concluded that the officers' actions did not require suppression of the DNA evidence. The court reasoned that because "the police did not commit an illegal act in effectuating the valid arrest warrant and because the subjective motives of police do not affect the validity of serving the underlying arrest warrant," suppression was not required.

Identification

Trial court did not err by admitting in-court identification of the defendant by two officers who saw defendant at scene and identified him shortly thereafter based on pictures in their computer database

State v. Macon, __ N.C. App. __, 762 S.E.2d 378 (Sept. 2, 2014). The defendant argued that the trial court erred in denying his motion to suppress the officers' in-court identifications because the procedure they used to identify him violated the Eyewitness Identification Reform Act (EIRA) and his constitutional due process rights. After the officers observed the defendant at the scene, they returned to the police station and put the suspect's name into their computer database. When a picture appeared, both officers identified the defendant as the perpetrator. The officers then pulled up another photograph of the defendant and confirmed that he was the perpetrator. This occurred within 10-15 minutes of the incident in question. The court concluded that the identification based on two photographs was not a "lineup" and therefore was not subject to the EIRA. Next, the court held that even assuming the procedure was impermissibly suggestive, the officers' in-court identification was admissible because it was based on an independent source and their clear, close, and unobstructed view of the suspect at the scene.

Trial court did not commit plain error by denying the defendant's motion to suppress the victim's show-up identification, which occurred within 20 minutes of the victim finding the defendant in his home

State v. Harvell, __ N.C. App. __, __ S.E.2d __ (Sept. 5, 2014). In this felony breaking and entering and larceny case, the trial court did not commit plain error by denying the defendant's motion to suppress the victim's show-up identification of the defendant as the person he found in his home on the date in question. Among other things, the court noted that the victim viewed the defendant's face three separate times during the encounter and that during two of those observations was only 20 feet from the defendant. Additionally, the identification occurred within 15-20 minutes of the victim finding the suspect in his home. Although the show-up identification was suggestive, it was not so impermissibly suggestive as to cause irreparable mistaken identification and violate defendant's constitutional right to due process.

Interrogation

Miranda

Defendant's statements, made while a police officer who responded to a domestic violence scene questioned the defendant's girlfriend, were spontaneous and in not response to interrogation

State v. Hogan, __ N.C. App. __, 758 S.E.2d 465 (June 3, 2014). The State conceded that the defendant was in custody at the time he made the statements at issue. The court rejected the defendant's argument that asking his girlfriend what happened in front of him was a coercive technique designed to elicit an incriminating statement. Conceding that the "case is a close one," the court concluded that the officer's question to the girlfriend did not constitute the functional equivalent of questioning because the officer's question did not call for a response from the defendant and therefore was not reasonably likely to elicit an incriminating response from him.

Defendant's statements to police investigating sexual assault of child in Goodwill store were voluntary

State v. McCanless, __ N.C. App. __, 758 S.E.2d 474 (June 3, 2014). Rejecting the defendant's argument that that "[t]he detectives' lies, deceptions, and implantation of fear and hope established a coercive atmosphere", the court relied on the trial court's findings of fact and found that the defendant's statement was voluntary. The trial court found that officers told the defendant that a Child Medical Examination had been performed, hoping that the defendant would believe that the results implicated him, even though the officers did not yet have the results. The officers also told the defendant that there was a video recording of the incident, but did not reveal the contents of the recording. One officer used profanity, but it was not continuous or ongoing and did not appear to have a significant effect on the defendant. Significantly, the trial court found that the defendant arrived at the police station on his own, was not restrained during questioning, was offered water and use of the restroom, was not subject to unduly long interrogation, and left the police department on his own at the end of the interview.

Pretrial and Trial Procedure

Pretrial Release

(1) Defendant, who had several opportunities to call counsel and friends, failed to establish basis for dismissal under *State v. Knoll*; (2) Defendant failed to show he was prejudiced by "option bond"

State v. Townsend, __ N.C. App. __, __ S.E.2d __ (Sept. 16, 2014). (1) The trial court properly denied the defendant's *Knoll* motion, in which the defendant argued that he was denied his right to communicate with counsel and friends. The defendant had several opportunities to call counsel and friends to observe him and help him obtain an independent chemical analysis, but the defendant failed to do so. In fact, the defendant asked that his wife be called, but only to tell her that he had been arrested. Thus, the defendant was not denied his rights under *Knoll*. (2) Even if the magistrate erred by ordering an "option bond" that gave the defendant a choice between paying a $1,000 secured bond or a $1,000 "unsecured bond and being released to a sober, responsible adult" without making written findings of fact to support the secured bond, the defendant failed to show how he was prejudiced where he was released on an unsecured bond to his wife.

Right to Counsel

No error occurred when trial court denied defense counsel's request for an overnight recess following the court's denial of the State's request that defense counsel be held in criminal contempt

State v. King, __ N.C. App. __, 760 S.E.2d 377 (July 15, 2014). The State moved during defendant's trial on charges that he raped a child to hold defendant's counsel in criminal contempt, alleging that he violated the court's order regarding the rape shield rule in cross-examining the victim. After the trial court denied the State's motion, defense counsel requested an overnight recess to "calm down" about the contempt motion. The trial court denied this request but at 11:38 am called a recess until 2 pm that day. The court rejected the defendant's arguments that there was a conflict of interest between the defendant and defense counsel and that the trial court's denial of the overnight recess resulted in ineffective assistance of counsel.

Defense counsel did not commit a *Harbison* error by admitting to assault by pointing gun in an attempted murder case

State v. Wilson, __ N.C. App. __, __ S.E.2d __ (Sept. 16, 2014). In an attempted murder case, counsel did not commit a *Harbison* error when he stated during closing argument: "You have heard my client basically admit that while pointing the gun at someone, he basically committed a crime: Assault by pointing a gun." Because assault by pointing a gun is not a lesser-included of the charged offense, counsel's statement fell outside of *Harbison.*

Pleadings

Defendant entitled to dismissal of drug paraphernalia charges where paraphernalia proved at trial was not that alleged in the indictment

State v. Satterthwaite, __ N.C. App. __, 759 S.E.2d 369 (June 17, 2014). Where a drug paraphernalia indictment charged the defendant with possession of plastic baggies used to package and repackage pills but the State introduced no evidence of plastic baggies at trial, the trial court erred by denying the defendant's motion to dismiss. At trial, the State's evidence showed that the defendant used a bottle to deliver the pills. The court stated: "We hold that the specific items alleged to be drug paraphernalia must be enumerated in the indictment, and that evidence of such items must be presented at trial."

Larceny indictment fatally defective where it failed to allege that church was an entity capable of owning property

State v. Campbell, __ N.C. App. __, 759 S.E.2d 380 (July 1, 2014), *temp. stay allowed*, __ N.C. __, 761 S.E.2d 905 (July 21, 2014). In a case involving a larceny from a church, the indictment was defective where it failed to allege the victim, Manna Baptist Church, was an entity capable of owning property. The fact that the indictment alleged a named natural person as a co-owner did not save the indictment: "If one of the owners were incapable of owning property, the State necessarily would be unable to prove that both alleged owners had a property interest."

Superior court lacked jurisdiction to try defendant on a misdemeanor statement of charges filed in superior court

State v. Wall, __ N.C. App. __, 760 S.E.2d 386 (July 15, 2014). The superior court lacked jurisdiction to try the defendant for resisting arrest where the defendant was tried on a misdemeanor statement of charges filed in superior court. The State filed the statement of charges on its own, without an objection to the magistrate's order having been made by the defendant. Under G.S. 15A-922, "the State has a limited window in which it may file a statement of charges on its own accord, and that is prior to arraignment" in district court. After arraignment, the State may only file a statement of charges when the defendant objects to the sufficiency of the pleading and the trial court rules that the pleading is insufficient.

The State was properly allowed to prove acts of abuse or neglect that were not alleged in the warrant at defendant's trial on charges that he contributed to the abuse or neglect of a juvenile

State v. Harris, __ N.C. App. __, __ S.E.2d __ (Sept. 16, 2014). Where the warrant charging contributing to the abuse or neglect of a juvenile alleged, in part, that the defendant knowingly caused, encouraged, and aided the child "to commit an act, consume alcoholic beverage," the State was not prohibited from showing that the defendant also contributed to the abuse or neglect of the juvenile by engaging her in sexual acts. The court noted that an indictment that fails to allege the exact manner in which the defendant contributed to the delinquency, abuse, or neglect of a minor is not fatally defective.

Other Procedural Issues

The trial court did not err by joining for trial offenses committed on two different child victims

State v. McCanless, __ N.C. App. __, 758 S.E.2d 474 (June 3, 2014). The State alleged that on 3 September 2010, the defendant committed indecent exposure by showing his privates to a child victim, M.S., and committed indecent liberties with M.S. It also alleged that on 1 July 2011 he engaged in a sexual act with a child victim, K.C., committed first-degree kidnapping, and committed indecent liberties on K.C. The evidence in the cases was similar with respect to victim, location, motive, and modus operandi. Both victims were prepubescent girls, the acts occurred within months of one another in a donation store while the girls were momentarily alone, and in both cases the defendant immediately fled the scene and engaged in sexual misconduct.

Closing the courtroom for testimony by a child sexual abuse victim was proper

State v. Godley, __ N.C. App. __, 760 S.E.2d 285 (July 1, 2014). On appeal after a remand for the trial court to conduct a hearing and make appropriate findings of fact and conclusions of law regarding a closure of the courtroom during testimony by a child sexual abuse victim, the court held that the closure of the courtroom was proper and that the defendant's constitutional right to a public trial was not violated.

Trial court did not abuse its discretion in quashing defendant's subpoena of prosecutor who represented State at plea hearing

State v. Hurt, __ N.C. App. __, 760 S.E.2d 341 (July 15, 2014). The trial court did not abuse its discretion by granting the State's motion to quash the subpoena of a prosecutor involved in an earlier hearing on the defendant's guilty plea. The court rejected the defendant's argument that the prosecutor's recitation of the factual basis for the plea was a judicial admission. Thus, the court rejected the defendant's argument that the trial court's decision to quash the subpoena deprived him of the opportunity to elicit binding admissions on the State. Additionally, the defendant could have proffered the prosecutor's statements through a transcript of the plea proceeding, which he introduced with respect to other matters.

Evidence

Authentication

State adequately authenticated photographs of text messages sent between accomplices to an attempted robbery

State v. Gray, __ N.C. App. __, 758 S.E.2d 699 (June 3, 2014). The State adequately authenticated

photographs of text messages sent between accomplices to an attempted robbery. A detective testified that he took pictures of text messages on an accomplice's cell phone while searching the phone incident to arrest. The detective identified the photographs in the exhibit as screen shots of the cell phone and testified that they were in substantially the same condition as when he obtained them. Another accomplice, with whom the first accomplice was communicating in the text messages, also testified to the authenticity of the exhibit. The court rejected the defendant's argument that to authenticate the text messages, the State had to call employees of the cell phone company.

Affidavit of indigency was self-authenticating and trial court properly allowed jury to compare signature on affidavit with signature on pawn shop buy ticket introduced at trial

State v. McCoy, __ N.C. App. __, 759 S.E.2d 330 (June 3, 2014). (1) An affidavit of indigency sworn to by the defendant before a court clerk was a self-authenticating document under Evidence Rule 902 and thus need not be authenticated under Rule 901. (2) The trial court properly allowed the jury to consider whether a signature on a pawn shop buy ticket matched the defendant's signature of his affidavit of indigency. The court compared the signatures and found that there was enough similarity between them for the documents to have been submitted to the jury for comparison.

Opinion Testimony

Trial court did not err by permitting pediatrician to testify about common characteristics she observed in sexually abused children and a possible basis for those characteristics

State v. King, __ N.C. App. __, 760 S.E.2d 377 (July 15, 2014). In this child sex abuse case, the trial court did not err by allowing the State's expert in pediatric medicine and the evaluation and treatment of sexual abuse to testify that children who have been abused frequently do not immediately disclose the abuse or only partially disclose the abuse. The expert explained that children often do not disclose abuse because the alleged perpetrator is a parent, parental figure, or someone they love and trust, and the child does not want to get them in trouble. The court rejected the defendant's argument that the expert's testimony constituted opinion testimony on the victim's credibility.

Trial court did not commit plain error in admitting testimony from victim's grandmother in sexual abuse trial

State v. Harris, __ N.C. App. __, __ S.E.2d __ (Sept. 16, 2014). In a case where the defendant was convicted of sexual battery and contributing to the abuse or neglect of a juvenile, the trial court did not commit plain error by allowing the victim's grandmother to testify about what happened when her granddaughter told her she had been assaulted by the defendant shortly after it occurred. The court of appeals deemed the evidence relevant because it established that the victim immediately reported the incident and that she gave a consistent account of what occurred. It also helped complete the story of the assault for the jury.

The appellate court rejected the defendant's argument that the grandmother vouched for the victim's credibility, noting that she never expressly stated that she believed her granddaughter. The court further concluded that it could not construe the grandmother's testimony, which included her recounting of how she threw the defendant out of her home and told him she would kill him if he came back, to imply that she believed her granddaughter. Finally, the court stated that even if the grandmother's testimony was impermissible vouching, the admission of her statements did not rise to the level of plain error as any vouching was incidental and most jurors are likely to assume that a grandmother would believe an accusation of sexual abuse by one of her grandchildren.

Other Evidence Issues

Improper admission of results from portable breath test did not warrant new trial

State v. Townsend, __ N.C. App. __, __ S.E.2d __ (Sept. 16, 2014). Although the trial court erred by admitting evidence of the numerical result of an alco-sensor test during a pretrial hearing on the defendant's motion to suppress, a new trial was not warranted. The numerical results were admitted only in the pre-trial hearing, not at trial and even without the numerical result, the State presented sufficient evidence to defeat the suppression motion.

(1) The trial court did not abuse its discretion by allowing the prosecution to use leading questions when examining a child sexual assault victim; (2) The trial court did not err by allowing the prosecutor to ask a 14-year-old child sexual assault victim to write down what the defendant did to her and then allowing the prosecutor to read the note to the jury

State v. Earls, __ N.C. App. __, 758 S.E.2d 654 (June 3, 2014). (1) The trial court did not abuse its discretion by allowing the prosecution to use leading questions when examining a child sexual assault victim. The prosecutor was attempting to ask a 14-year-old victim questions about her father's sexual conduct toward her. She was very reluctant to testify. The prosecutor repeatedly urged the victim to tell the truth, regardless of what her answer would be. The prosecutor attempted to refresh her recollection with her prior statements, but she still refused to specify what the defendant did. The court concluded: "Leading questions were clearly necessary here to develop the witness's testimony." (2) The trial court did not err by allowing the prosecutor to ask a 14-year-old child sexual assault victim to write down what the defendant did to her and then allowing the prosecutor to read the note to the jury. Although the child answered some questions, she was reluctant to verbally answer the prosecutor's question about what the defendant did to her. The prosecutor then asked the victim to write down the answer to the question. The victim wrote that the defendant penetrated her vaginally.

Where the State failed to produce substantial, independent corroborative evidence to support the facts underlying the defendant's extrajudicial statement in violation of the corpus delicti rule, the trial court erred by denying the defendant's motion to dismiss charges of participating in the prostitution of a minor

State v. Parks, __ N.C. App. __, 759 S.E.2d 355 (June 17, 2014). The defendant told a police officer that he agreed to supply two 17-year-old girls (A.J. and D.T.) with marijuana if they came to his house. He told police that he had the following exchange with one of the girls:

> "[A.J.] asked if I had any money. I said, 'Yeah, I got some money.' She said she was waiting on her friend. She called me back about three times and asked which house to come to. . . . [A.J.] asked, and said, "You are supposed to have something waiting on me." I said, "Why, did you bring something?" We went back to my room and I asked what they were working with. They both took their clothes off. [A.J.] asked about the money, again, and I played it off, because I didn't have much money for them."

Both A.J. and D.T. testified at trial that defendant performed a sexual act on both of them, but that he did not solicit sex from them in exchange for money or marijuana.

The court rejected the State's argument that an agreement to exchange sex for marijuana could be inferred even without the defendant's statements and that other independent evidence corroborated the defendant's extrajudicial confession. The court found the record insufficient to strongly corroborate the essential element that defendant patronized a minor prostitute.

Trial court did not err by barring testimony that defendant possessed the character trait of working well with children and not having an unnatural lust or desire to have sexual relations with children

State v. Clapp, __ N.C. App. __, 761 S.E.2d 710 (Aug. 5, 2014). In a child sexual assault case, in which the defendant was charged with having sexual contact with student athletes who came to him for help with sports injuries, the trial court did not err by refusing to allow a defense witness to testify that the defendant possessed the character trait of working well with children and not having an unnatural lust or desire to have sexual relations with children. The defendant argued that the evidence should have been admitted since it related to a pertinent character trait that had a special relationship to the charged crimes. Citing *State v. Wagoner*, 131 N.C. App. 285, 293 (1998) (the trial court properly excluded evidence showing the defendant's "psychological make-up," including testimony that he was not a high-risk sexual offender, on the theory that such evidence, which amounted to proof of the defendant's normality, did not tend to show the existence or non-existence of a pertinent character trait), the court concluded that the evidence in question "constituted nothing more than an attestation to Defendant's normalcy" and was properly excluded.

Trial court committed reversible error by prohibiting the defendant from introducing a voice mail message by a key witness for the State to show her bias and attack her credibility

State v. Triplett, __ N.C. App. __, __ S.E.2d __ (Sept. 2, 2014), *temp. stay allowed*, __ N.C. __, __ S.E.2d

__ (Sept. 19, 2014). In this murder case the trial court committed reversible error by prohibiting—under Rules 402 and 403—the defendant from introducing a tape-recorded voice mail message by the defendant's sister, a key witness for the State, to show her bias and attack her credibility.

Crimes

Abuse and Neglect

(1) A defendant who places a child in a position where she may be abused or neglected may be convicted of contributing to a juvenile's being abused or neglected; (2) Evidence was sufficient to show that defendant placed child in a position in which she could be abused or neglected; (3) Erroneous jury instructions did not rise to the level of plain error

State v. Harris, __ N.C. App. __, __ S.E.2d __ (Sept. 16, 2014). (1) Following *State v. Stevens*, ___ N.C. App. ___, 745 S.E.2d 64, 67 (2013), the court held that the offense of contributing to a juvenile's being delinquent, undisciplined, abused, or neglected (G.S. 14-316.1) does not require the defendant to be the juvenile's parent, guardian, custodian, or caretaker; the defendant need only be a person who causes a juvenile to be in a place or condition where the juvenile does not receive proper care from a caretaker or is not provided necessary medical care. (2) The evidence was sufficient to show that the defendant placed the child in a position in which she could be found to be abused or neglected. The defendant entered the child's bedroom when she was trying to sleep, tried to get her to drink alcohol, squeezed her buttocks, asked her to suck his thumb and asked to suck her chest. (3) Although the trial court's instruction to the jury that "[a]n abused and neglected juvenile is a person who has not reached her 18th birthday, and is not married, emancipated, or a member of the armed forces of the United States" misstated the law, the error did not rise to the level of plain error.

Assaults

(1) Evidence was sufficient to establish that the defendant inflicted serious bodily injury; (2) Defendant could not be convicted and sentenced for both assault inflicting serious bodily injury and assault on a female based on the same conduct

State v. Jamison, __ N.C. App. __, 758 S.E.2d 666 (June 3, 2014). (1) The evidence was sufficient to establish that the defendant inflicted serious bodily injury on the victim. The beating left the victim with broken bones in her face, a broken hand, a cracked knee, and an eye so beat up and swollen that she could not see properly out of it at the time of trial. The victim testified that her hand and eye "hurt all of the time." (2) The defendant could not be convicted and sentenced for both assault inflicting serious bodily injury and assault on a female when the convictions were based on the same conduct. The court concluded that language in the assault on a female statute ("[u]nless the conduct is covered under some other provision of law providing greater punishment . . . .") reflects a legislative intent to limit a trial

court's authority to impose punishment for assault on a female when punishment is also imposed for higher class offenses that apply to the same conduct (here, assault inflicting serious bodily injury).

Burglary and related offenses

(1) Evidence that defendants broke back window but did not enter home was insufficient to prove burglary; (2) Evidence that defendants were casing the neighborhood at night and the absence of any innocent explanation for their behavior was sufficient to establish that defendants intended to commit a felony or larceny in the home; (3) Trial court did not err by failing to instruct on trespass; (4) Trial court did not err by failing to define larceny for jury

State v. Lucas, __ N.C. App. __, 758 S.E.2d 672 (June 3, 2014). (1) In this burglary case, the evidence was insufficient to establish that the defendants entered the premises where it showed that the defendants used landscaping bricks and a fire pit bowl to break a back window of the home but no evidence showed that any part of their bodies entered the home (no items inside the home were missing or had been tampered with) or that the instruments of breaking were used to commit an offense inside. (2) The evidence was sufficient to establish that the defendants intended to commit a felony or larceny in the home. Among other things, an eyewitness testified that the defendants were "casing" the neighborhood at night. Additionally, absent evidence of other intent or explanation for a breaking and entering at night, the jury may infer that the defendant intended to steal. (3) Although first-degree trespass is a lesser-included offense of felonious breaking or entering, the trial court did not err by failing to instruct the jury on the trespass offense when the evidence did not permit a reasonable inference that would dispute the State's contention that the defendants intended to commit a felony. (4) The trial court did not commit plain error by failing to define larceny in instructions it provided to the jury on burglary. Because evidence was presented permitting the inference that the defendants intended to steal property and there was no evidence suggesting that they intended to merely borrow it, the jury did not need a formal definition of the term "larceny" to understand its meaning and to apply that meaning to the evidence.

(1) Trial court did not err by instructing jury that it could find the defendant guilty if he broke or entered the vehicle, notwithstanding indictment's charge that he broke and entered the vehicle; (2) Evidence was sufficient to establish that defendant or his accomplice entered the vehicle; (3) Evidence was sufficient to show that the defendant broke into the vehicle with intent to commit a felony or larceny therein

State v. Mitchell, __ N.C. App. __, 759 S.E.2d 335 (June 17, 2014). (1) When an indictment charging breaking or entering into a motor vehicle alleged that the defendant broke *and* entered the vehicle, the trial court did not err by instructing the jury that it could find the defendant guilty if he broke *or* entered the vehicle. The statute required only a breaking or entering, not both. (2) There was sufficient evidence to establish that either the defendant or his accomplice entered the vehicle where among other things, the defendant was caught standing near the vehicle with its door open, there was no pollen inside the vehicle although the outside of the car was covered in pollen, the owner testified that the door was not

opened the previous day, and the defendant and his accomplice each testified that the other opened the door. (3) There was sufficient evidence that the defendant broke into the vehicle "with intent to commit any felony or larceny therein." Citing prior case law, the court held that the intent to steal the motor vehicle itself may satisfy the intent element.

Evidence was insufficient to establish that defendant intended to steal from the church he entered, requiring dismissal of charges of felony breaking or entering a place of worship

State v. Campbell, __ N.C. App. __, 759 S.E.2d 380 (July 1, 2014), *temp. stay allowed*, __ N.C. __, 761 S.E.2d 905 (July 21, 2014). The trial court erred by denying the defendant's motion to dismiss a charge of felony breaking or entering a place of worship where there was insufficient evidence of the defendant's intent to commit a larceny therein. The defendant admitted entering the church in question, but he explained that he entered to seek sanctuary, drink water, and pray and without the intent to steal. None of the State's evidence contradicted this testimony and no evidence showed that the defendant ever possessed the missing items. Although the law holds that an intent to commit larceny may be reasonably inferred from an unlawful entry, here the evidence showed an innocent reason for the defendant's entering of the church and the inference did not apply.

DVPO Violations

Knife used by defendant was not a deadly weapon per se and trial court was required to instruct jury on lesser included offense of misdemeanor violation of a DVPO

State v. Edgerton, __ N.C. App. __, 759 S.E.2d 669 (June 17, 2014), *temp. stay allo*wed, __ N.C. __, 759 S.E.2d 103 (June 20, 2014), *writ of supersedeas allowed*, __ N.C. __, 761 S.E.2d 906 (July 22, 2014). In a felony violation of a DVPO case, the trial court properly determined that a knife used by the defendant was not a deadly weapon per se. There was conflicting evidence as to whether or not the knife was capable of producing death or great bodily harm, including testimony that the knife was so dull that even though the defendant "saw[ed]" the victim's neck with the knife, it left only "knicks" on her neck. The defendant was found guilty of violation of a DVPO with a deadly weapon. The appellate court held, over a dissent, that the trial court committed plain error by failing to instruct the jury on the lesser included offense, misdemeanor violation of a DVPO, where the court had determined that the weapon at issue was not a deadly weapon per se.

Generally

Bail bondsmen cannot violate motor vehicle laws in order to make an arrest

State v. McGee, __ N.C. App. __, 758 S.E.2d 661 (June 3, 2014). (1) In an involuntary manslaughter case where a death occurred during a high speed chase by a bail bondsman in his efforts to arrest a principal,

the trial court did not err by instructing the jury that bail bondsmen cannot violate motor vehicle laws in order to make an arrest. While the statute contains specific exemptions to the motor vehicle laws pertaining to speed for police, fire, and emergency service vehicles, no provision exempts a bail bondsman from complying with speed limits when pursuing a principal. (2) The trial court did not err by failing to submit to the jury the question whether the defendant's means in apprehending his principal were reasonable. Under the law the defendant bail bondsman was not authorized to operate his motor vehicle at a speed greater than was reasonable and prudent under the existing conditions because of his status as a bail bondsman. It concluded:

> Just as the bail bondsmen cannot enter the homes of third parties without their consent, a bail bondsmen pursuing a principal upon the highways of this State cannot engage in conduct that endangers the lives or property of third parties. Third parties have a right to expect that others using the public roads, including bail bondsmen, will follow the laws set forth in Chapter 20 of our General Statutes.

Evidence sufficient to establish misdemeanor assault when student body-checked a parent in the school gymnasium and disorderly conduct where juvenile's conduct disrupted operation of school

In re M.J.G., __ N.C. App. __, 759 S.E.2d 361 (June 17, 2014). The evidence established that the juvenile began arguing with a teacher during a school gathering in the gymnasium before a volleyball game. He then "stormed off" the bleachers toward the teacher and a parent, ramming his shoulder into the parent. The teacher described the student as "very defiant," and other evidence about the juvenile's actions supported the trial court's determination that the juvenile's actions were intentional. Thus, the trial court did not err in denying the juvenile's motion to dismiss the petition for misdemeanor assault. The evidence was sufficient to establish that the juvenile engaged in disorderly conduct by disrupting students (G.S. 14-288.4(a)(6)), where the juvenile's conduct caused a substantial interference with, disruption of, and confusion of the operation of the school. The juvenile's conduct "merited intervention by several teachers, the assistant principal, as well as the school resource officer" and "caused such disruption and disorder . . . that a group of special needs students missed their buses."

Impaired Driving

In felony death by vehicle case, evidence that defendant drank a large quantity of beer, wrecked her car, and appeared intoxicated after the collision was sufficient to establish that defendant was impaired by alcohol

State v. Hawk, __ N.C. App. __, __ S.E.2d. __ (Sept. 2, 2014). In this felony death by vehicle case, even without evidence of the defendant's blood-alcohol, the evidence was sufficient to establish that the defendant was impaired. After drinking beer, the defendant ran off a rural road, over-corrected, and flipped her vehicle. When an officer interviewed the defendant at the hospital, she admitted drinking "at least a 12-pack" before driving. The defendant admitted at trial that she drank at least seven or eight

beers, though she denied being impaired. The first responding officer testified that when he arrived on the scene, he noticed the strong odor of alcohol and when he spoke with defendant, she kept asking for a cigarette, slurring her words. He opined that she seemed intoxicated. Finally, the doctor who treated the defendant at the hospital diagnosed her with alcohol intoxication, largely based on her behavior.

Larceny

Larceny of laptop was from person of victim who was three feet away

State v. Hull, __ N.C. App. __, __ S.E.2d __ (Sept. 16, 2014). The evidence was sufficient to show that a larceny of a laptop was from the victim's person. At the time the laptop was taken, the victim took a momentary break from doing her homework on the laptop and she was about three feet away from it. Thus, the court found that the laptop was within her protection and presence at the time it was taken.

Unauthorized use of a stolen vehicle is not a lesser-included offense of possession of a stolen vehicle, by virtue of binding precedent from another panel, but supreme court could clarify law in this area

State v. Robinson, __ N.C. App. __, __ S.E.2d __ (Sept. 16, 2014). Following *State v. Oliver*, __ N.C. App. __, 718 S.E.2d 731 (2011), the court determined that unauthorized use of a stolen vehicle is not a lesser-included offense of possession of a stolen vehicle. However, the court found that *Oliver* had mistakenly relied on *State v. Nick*erson, 365 N.C. 279 (2011), "for a proposition not addressed, nor a holding reached, in that case." Concluding that it was bound by *Oliver,* the court expressed the hope that "the Supreme Court may take this opportunity to clarify our case law" and decide whether unauthorized use of a motor vehicle is a lesser-included offense of possession of a stolen motor vehicle.

Sexual Offenses

(1) Statute criminalizing a sex offender's failure to report a change of address not void for vagueness as applied to homeless defendant; (2) Evidence was sufficient to convict defendant of failure to notify of change in address

State v. McFarland, __ N.C. App. __, 758 S.E.2d 457 (June 3, 2014). (1) The court rejected the defendant's argument that G.S. 14-208.11 (2011) (failure to notify of a change in address) is void for vagueness as applied to him. He argued that because he is homeless, a person of ordinary intelligence could not know what "address" means in his case. The court noted that in *State v. Abshire*, 363 N.C. 322 (2009), the N.C. Supreme Court clearly and unambiguously defined the term "address" as used in the statute well before the defendant was released from prison. It further noted that in *State v. Worley*, 198 N.C. App. 329 (2009), it rejected the defendant's argument that homeless sex offenders have no address for purposes of the registration statutes. It concluded:

> Even assuming that the language of the statute is ambiguous, defendant had full notice of what was required of him, given the judicial gloss that the appellate courts have put on it. Certainly after *Abshire* and *Worley*, if not before, a person of reasonable intelligence would understand that a sex offender is required to inform the local sheriff's office of the physical location where he resides within three business days of a change, even if that location changes from one bridge to another, or one couch to another. Although this obligation undoubtedly places a large burden on homeless sex offenders, it is clear that they bear such a burden under [G.S.] 14-208.9 and that under [G.S.] 14-208.11(a)(2) they may be punished for willfully failing to meet the obligation. Moreover, the fact that it may sometimes be difficult to discern when a homeless sex offender changes addresses does not make the statute unconstitutionally vague or relieve him of the obligation to inform the relevant sheriff's office when he changes addresses.

(Citations omitted).

(2) The evidence was sufficient to convict the defendant for failing to notify of a change in address. Conceding that the State presented evidence that he was not residing at his registered address, the defendant argued that the State failed to presented evidence of where he was actually residing. The court rejected this argument, reasoning that the State is not required to prove the defendant's new address, only that he failed to register a change of address. It stated: "proof that [the] defendant was not living at his registered address is proof that his address had changed."

(1) In indecent liberties with student case, trial court did not err by failing to instruct on specific acts alleged in bill of particulars; (2) Trial court did not err by denying motion to dismiss for insufficient evidence that victim was student

State v. Stephens, __ N.C. App. __, 758 S.E.2d 695 (June 3, 2014). (1) In a multi-count indecent liberties with a student case, the trial court did not err by failing to instruct the jury using the specific acts alleged in the amended bill of particulars. The trial court properly instructed the jury that it could find the defendant guilty if it concluded that he willfully took "any immoral, improper, or indecent liberties" with the victim. The actual act by the defendant committed for the purpose of arousing himself or gratifying his sexual desire was immaterial. The victim's testimony included numerous acts, any one of which could have served as the basis for the offenses. (2)The court rejected the defendant's argument that the trial court erred by denying his motion to dismiss because there was insufficient evidence that the victim was a "student." The trial court instructed the jury that a "student," for purposes of G.S. 14-202.4(A), means "a person enrolled in kindergarten, or in grade one through 12 in any school." The court rejected the defendant's argument that a person is only "enrolled" during the academic year and that since the offenses occurred during the summer, the victim was not a student at the time.

Sexual Assaults

The term "sexual act" in G.S. 14-318.4(a2) includes vaginal intercourse

State v. McClamb, __ N.C. App. __, 760 S.E.2d 337 (July 1, 2014). A defendant may be convicted of child abuse by sexual act under G.S. 14-318.4(a2) when the underlying sexual act is vaginal intercourse.

State presented sufficient evidence in indecent liberties prosecution that defendant committed the act for the specified statutory purpose

State v. Godley, __ N.C. App. __, 760 S.E.2d 285(July 1, 2014). With respect to an indecent liberties charge, the State presented sufficient evidence that the defendant committed the relevant act for the purpose of arousing or gratifying sexual desire. The court noted the defendant's purpose "may be inferred from the evidence of the defendant's actions." Here, the victim stated that the defendant kissed her on the mouth, told her not to tell anyone about what happened, and continued to kiss her even after she asked him to stop. The victim told the police that the defendant made sexual advances while he was drunk, kissed her, fondled her under her clothing, and touched her breasts and vagina. This evidence, along with other instances of the defendant's alleged sexual misconduct giving rise to first-degree rape charges, is sufficient evidence to infer the defendant's purpose.

Sex Offender Crimes

(1) Indictment charging defendant with violating G.S. 14-208.18(a) not defective; (2) State failed to present sufficient evidence to establish that the defendant's presence at a public park violated statute

State v. Simpson, __ N.C. App. __, __ S.E.2d __ (Aug. 5, 2014). (1) An indictment charging the defendant with violating G.S. 14-208.18(a) (prohibiting registered sex offenders from being "[w]ithin 300 feet of any location intended primarily for the use, care, or supervision of minors when the place is located on premises that are not intended primarily for the use, care, or supervision of minors") was not defective. The charges arose out of the defendant's presence at a Wilkesboro public park, specifically, sitting on a bench within the premises of the park and in close proximity to the park's batting cage and ball field. The indictment alleged, in relevant part, that the defendant was "within 300 feet of a location intended primarily for the use, care, or supervision of minors, to wit: a batting cage and ball field of Cub Creek Park located in Wilkesboro, North Carolina." The court rejected the defendant's argument that the indictment was defective because it failed to allege that the batting cages and ball field were located on a premise not intended primarily for the use, care, or supervision of minors. (2) The trial court erred by denying the defendant's motion to dismiss a charge that the defendant was a registered sex offender unlawfully on premises used by minors in violation of G.S. 14-208.18(a). The court agreed with the defendant that the State failed to present substantial evidence that the batting cages and ball fields constituted locations that were primarily intended for use by minors. At most, the State's evidence established that these places were sometimes used by minors.

Defenses

Trial court erred by refusing to instruct jury on defense of entrapment where defendant presented sufficient evidence of the essential elements of the defense

State v. Foster, __ N.C. App. __, 761 S.E.2d 208 (Aug. 5, 2014). (1) In a delivery of cocaine case where the defendant presented sufficient evidence of the essential elements of entrapment, the trial court erred by refusing to instruct the jury on that defense. The defendant's evidence showed that an undercover officer tricked the defendant into believing that the officer was romantically interested in the defendant in order to persuade the defendant to obtain cocaine for him, that the defendant had no predisposition to commit a drug offense such as delivering cocaine, and that the criminal design originated solely with the officer. The court rejected the State's argument that the evidence showed that the officer merely afforded the defendant the opportunity to commit the offense. (2) The trial court abused its discretion by denying the defendant's request for an entrapment instruction as a sanction under G.S. 15A-910(a) for failure to provide "specific information as to the nature and extent of the defense" as required by G.S. 15A-905(c)(1)(b). The trial court made no findings of fact to justify the sanction and the State did not show prejudice from the lack of detail in the notice filed eight months prior to trial. The court held:

> [I]n considering the totality of the circumstances prior to imposing sanctions on a defendant, relevant factors for the trial court to consider include without limitation: (1) the defendant's explanation for the discovery violation including whether the discovery violation constituted willful misconduct on the part of the defendant or whether the defendant sought to gain a tactical advantage by committing the discovery violation, (2) the State's role, if any, in bringing about the violation, (3) the prejudice to the State resulting from the defendant's discovery violation, (4) the prejudice to the defendant resulting from the sanction, including whether the sanction could interfere with any fundamental rights of the defendant, and (5) the possibility of imposing a less severe sanction on the defendant.

Slip op. at pp. 29-30. The court held that assuming that the defendant's notice constituted a discovery violation, the trial court abused its discretion by refusing to instruct on entrapment as a sanction.

Sex Offender Registration and Satellite-Based Monitoring

(1) Requirement that SBM hearing be held in county where defendant resides relates to venue and may be waived; (2) Trial court's findings supporting its order of lifetime SBM were not supported by evidence

State v. Jones, __ N.C. App. __, 758 S.E.2d 444 (June 3, 2014). (1) The court rejected the defendant's argument that the trial court lacked subject matter jurisdiction to hold the SBM hearing in Craven

County. The requirement that the SBM hearing be held in the county in which the defendant resides relates to venue and the defendant's failure to raise the issue before the trial court waives his ability to raise it for the first time on appeal. (2) The trial court erred by requiring the defendant to enroll in lifetime SBM. Two of the trial court's additional findings supporting its order that the defendant—who tested at moderate-low risk on the Static 99—enroll in lifetime SBM were not supported by the evidence. Also, the additional finding that there was a short period of time between the end of probation for the defendant's 1994 nonsexual offense and committing the sexual offense at issue does not support the conclusion that he requires the highest possible level of supervision and monitoring. Although the 1994 offense was originally charged as a sexual offense, it was pleaded down to a non-sexual offense. The trial court may only consider the offense of conviction for purposes of the SBM determination.

Trial court did not err by ordering the defendant to enroll in lifetime SBM

State v. Williams (No. COA13-1280), __ N.C. App. __, 761 S.E.2d 662 (July 15, 2014). The court rejected the defendant's argument that the SBM statute violates substantive due process by impermissibly infringing upon his right to be free from government monitoring of his location. The court also rejected the defendant's argument that as applied to him the statute violates substantive due process because it authorizes mandatory lifetime participation without consideration of his risk of reoffending.

Falsely stating an address on any verification form required by the sex offender registration program supports a conviction for failing to register as a sex offender

State v. Pressley, __ N.C. App. __, 762 S.E.2d 374 (Aug. 19, 2014). The court rejected the defendant's argument that the only verification forms that count are the initial verification form and those required to be filed every 6 months thereafter, noting that under G.S. 14-208.9A(b) additional verification may be required. The court also rejected the defendant's argument that his false reporting of his address on two separate verification forms constituted a continuing offense and could support only one conviction. The court concluded that the submission of each form was a distinct violation of the statute.

Sentencing and Probation

Although the trial court erred by referencing the Bible or divine judgment in sentencing, the defendant failed to show prejudice or that his sentence was based on the trial court's religious invocation

State v. Earls, __ N.C. App. __, 758 S.E.2d 654 (June 3, 2014). Before pronouncing its sentence on the defendant, who was found guilty of sexually abusing his children, the trial court addressed the defendant as follows:

> Well, let me say this: I think children are a gift of God and I think God expects when he gives us these gifts that we will treat them as more precious than gold, that we

> will keep them safe from harm the best as we're able and nurture them and the child holds a special place in this world. In the 19th chapter of Matthew Jesus tells his disciples, suffer the little children, to come unto me, forbid them not: for such is the kingdom of heaven. And the law in North Carolina, and as it is in most states, treats sexual abuse of children as one of the most serious crimes a person can commit, and rightfully so, because the damage that's inflicted in these cases is incalculable. It's murder of the human spirit in a lot of ways. I'm going to enter a judgment in just a moment. But some day you're going to stand before another judge far greater than me and you're going to have to answer to him why you violated his law and I hope you're ready when that day comes.

Although finding no basis for a new sentencing hearing, the court "remind[ed] trial courts that judges must take care to avoid using language that could give rise to an appearance that improper factors have played a role in the judge's decision-making process even when they have not." Slip Op. at 18 (quotation omitted).

The trial court did not err in calculating the defendant's prior record level when it counted a New Jersey third-degree theft conviction as a Class I felony

State v. Hogan, __ N.C. App. __, 758 S.E.2d 465 (June 3, 2014). The court rejected the defendant's argument that because New Jersey does not use the term "felony" to classify its offenses, the trial court could not determine that third-degree theft is a felony for sentencing purposes, noting that the State presented a certification that third-degree theft is considered a felony in New Jersey. The court also rejected the defendant's argument that the offense was substantially similar to misdemeanor larceny.

Verdicts finding the defendant guilty of felony child abuse in violation of G.S. 14-318.4(a3) and felony child abuse resulting in violation of G.S. 14-318.4(a4) were not mutually exclusive

State v. Mosher, __ N.C. App. __, 761 S.E.2d 204 (Aug. 5, 2014). The jury did not return mutually exclusive verdicts when it found the defendant guilty of felony child abuse in violation of G.S. 14-318.4(a3) (the intentional injury version of this offense) and felony child abuse resulting in violation of G.S. 14-318.4(a4) (the willful act or grossly negligent omission version of this offense). The charges arose out of an incident where the victim was severely burned in a bathtub while under the defendant's care. Citing *State v. Mumford*, 364 N.C. 394, 400 (2010), the court noted that criminal offenses are mutually exclusive if "guilt of one necessarily excludes guilt of the other." The defendant argued that the mens rea component of the two offenses makes them mutually exclusive. The court concluded, however, that substantial evidence permitted the jury to find that two separate offenses occurred in succession such that the two charges were not mutually exclusive. Specifically, that the defendant acted in reckless disregard for human life by initially leaving the victim and her brother unattended in a tub of scalding hot water and that after a period of time, the defendant returned to the tub and intentionally held the victim in that water.

Probation

Trial court did not abuse its discretion by revoking defendant's probation based on hearsay evidence

State v. Murchison, __ N.C. __, 758 S.E.2d 356 (June 12, 2014). The defendant's probation officer filed a violation report alleging that he had been charged with first-degree burglary, first-degree kidnapping, and assault with a deadly weapon. The officer testified during the violation hearing that the defendant's mother had called her and reported that the defendant had "'broken into her house and held her and his girlfriend in a closet, and he had knives.'" The officer testified that she believed the defendant would kill someone if allowed to remain on probation. The State also introduced a printout from the Administrative Office of the Courts showing that the defendant had been indicted for first-degree burglary in another county. The trial court found that the defendant had violated his probation by committing one or more subsequent offenses as alleged in the violation report. Reversing an unpublished decision of the court of appeals, the court held that the trial court did not abuse its discretion by basing its decision to revoke the defendant's probation on the hearsay evidence presented by the State. The court noted that probation is an act of grace and a probation revocation proceeding is not a formal criminal trial. Moreover, the court held that under Rule 1101, the formal rules of evidence do not apply in probation revocation hearings. The court concluded that "[g]iven the statements of defendant's mother, the document indicating defendant had been indicted for first-degree burglary, defendant's demonstrated propensity for violence, and Officer Tyree's concern that defendant would kill somebody if allowed to remain on probation," the trial court did not abuse its discretion in revoking defendant's probation.

A defendant may not challenge the jurisdictional validity of the indictment that led to his original conviction in an appeal from an order revoking probation

State v. Pennell, __ N.C. __, 758 S.E.2d 383 (June 12, 2014). Reversing the court of appeals, the court held that on direct appeal from the activation of a suspended sentence, a defendant may not challenge the jurisdictional validity of the indictment underlying his original conviction. The court reasoned that a challenge to the validity of the original judgment constitutes an impermissible collateral attack. It explained:

> [D]efendant failed to appeal from his original judgment. He may not now appeal the matter collaterally via a proceeding contesting the activation of the sentence imposed in the original judgment. As such, defendant's present challenge to the validity of his original conviction is improper. Because a jurisdictional challenge may only be raised when an appeal is otherwise proper, we hold that a defendant may not challenge the jurisdiction over the original conviction in an appeal from the order revoking his probation and activating his sentence. The proper procedure through which defendant may challenge the facial validity of the original indictment is by filing a motion for appropriate relief under [G.S.] 15A-1415(b) or petitioning for

> a writ of habeas corpus. Our holding here does not prejudice defendant from pursuing these avenues.

Slip Op. at 9-10 (footnote and citation omitted).

Restitution

Court of appeals vacated trial court's restitution order in light of State's concession that no evidence supported award

State v. Lucas, __ N.C. App. __, 758 S.E.2d 672 (June 3, 2014). In the face of the State's concession that there was no evidence supporting a restitution award, the court vacated the trial court's restitution order and remanded for a rehearing on the issue.

State v. Talbot, __ N.C. App. __, 758 S.E.2d 441 (June 3, 2014). In the face of the State's concession that there was no evidence supporting a restitution award, the court vacated the trial court's restitution order and remanded for a rehearing on the issue. The court noted: "In the interest of judicial economy, we urge prosecutors and trial judges to ensure that this minimal evidentiary threshold is met before entering restitution awards."