

## Criminal Case Law Update for Magistrates



Jeff Welty  
UNC School of Government  
[welty@sog.unc.edu](mailto:welty@sog.unc.edu)  
(919) 843-8474

*Cases decided April 1, 2016 through September 12, 2016*

### Crimes, Elements, and Charging Documents

#### Armed Robbery

State v. Whisenant, \_\_\_ S.E.2d \_\_\_, \_\_\_ N.C. App. \_\_\_ (Sept. 6, 2016). In this armed robbery case, the evidence was sufficient to establish that the defendant used a dangerous weapon in a way that endangered the victim. A store loss prevention officer questioned the defendant about having taken some store jewelry in the store foyer. During the exchange, the victim saw a knife in the defendant's pocket. The defendant attempted to force his way out of the store foyer and pulled the unopened knife out of his pocket. The victim grabbed the defendant's hand and wrestled the closed knife away from the defendant while the defendant repeatedly said, "I will kill you." Deciding an issue of first impression, the court cited cases from other jurisdictions and held that a closed knife can constitute a dangerous weapon for purposes of armed robbery. It stated: "Defendant's brandishing and use of the knife satisfied the element of a dangerous weapon. The manner and circumstances in which Defendant displayed the knife alludes to its purpose: Defendant yelled 'I will kill you,' attempted to push past [the victim], removed the knife from his pocket and brandished it when [the victim] mentioned police involvement." The court went on to hold that the State presented sufficient evidence tending to show that the victim's life was endangered or threatened by the defendant's actions and threats.

#### Kidnapping

State v. King, \_\_\_ S.E.2d \_\_\_, \_\_\_ N.C. App. \_\_\_ (Sept. 6, 2016). In this kidnapping and sexual assault case, the evidence was sufficient to establish confinement or restraint for purposes of kidnapping that was separate and apart from the force necessary to facilitate the sexual offense. Here, the defendant forced the victim into his car after he had sexually assaulted her.

State v. James, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Aug. 2, 2016). The trial court properly denied the defendant's motion to dismiss a first-degree kidnapping charge. (1) The restraint of the victim was not inherent in the also charged offense of assault by strangulation. The evidence showed two separate, distinct restraints sufficient to support the two offenses. After the initial restraint when the defendant choked the victim into unconsciousness, leaving her unresponsive on the ground, he continued to restrain her by holding her hair, wrapping his arm around her neck, and dragging her to a new location 100 to 120 feet away. (2) There was sufficient evidence that the defendant removed the victim for the purpose of terrorizing her where multiple witnesses heard the defendant threaten to kill her in broad daylight. The defendant assaulted the victim, placed her in headlock, and choked her. Evidence showed that the victim was in a state of intense fright and apprehension; several witnesses heard her yelling for help. (3) The defendant did not leave the victim in a safe place where he dragged her to the middle of a

gravel driveway and left her, unconscious and injured. The defendant did not consign her to the care of the witnesses who happened to be nearby; he was running away because they saw him. Additionally, the defendant took one of her cell phones, perhaps not realizing that she had a second phone. Additionally, the statute requires finding either that the victim was not left in a safe place or that the victim suffered serious injury (or sexual assault, not at issue here). Here, the State's evidence established that the victim suffered serious injury requiring emergency room treatment, as well as serious emotional trauma which required therapy for many months continuing through the time of trial. (3) The trial court did not err by failing to instruct the jury on the lesser-included offense of false imprisonment where substantial evidence showed that the defendant threatened and terrorized the victim.

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

### Drug Offenses

State v. Dulin, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (June 7, 2016). (1) Because there was sufficient evidence that the defendant possessed drug paraphernalia, the trial court did not err by denying his motion to dismiss. The paraphernalia was found in plain view in a common living area of a home over which the defendant exercised nonexclusive control. The court found that following constituted "other incriminating circumstances" necessary to prove constructive possession: the defendant spent hours at the house on the day of the search; the defendant admitted that he had a "blunt" in the black truck parked in front of the house and the police found marijuana in the truck's console; the police found marijuana in the house behind a photograph of the defendant; and several people visited the house while the defendant was there, including a man who shook hands with defendant "as if they were passing an item back and forth." Of these facts, the most significant was that marijuana was found in a picture frame behind a photograph of the defendant. (2) Because there was insufficient evidence that the defendant constructively possessed marijuana found in an uncovered fishing boat located in the yard of a home occupied by multiple people, including the defendant, the trial court erred by denying his motion to dismiss the drug possession charge. The boat was located roughly 70 feet from the side of the house, in a non-fenced area of the yard. There was no evidence that the defendant had any ownership interest in or possession of the boat and the defendant was never seen near the boat.

State v. Oxendine, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (April 5, 2016). (1) Over a dissent, the court held that an indictment charging possession of methamphetamine precursors was defective because it failed to allege either the defendant's intent to use the precursors to manufacture methamphetamine or his knowledge that they would be used to do so. The indictment alleged only that the defendant processed the precursors in question; as such it failed to allege the necessary specific intent or knowledge. (2) An indictment charging manufacturing of methamphetamine was sufficient. The indictment alleged that the defendant "did knowingly manufacture methamphetamine." It went on to state that the manufacturing

consisted of possessing certain precursor items. The latter language was surplusage; an indictment need not allege how the manufacturing occurred.

### Assaults and Child Abuse

State v. Bohannon, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (June 7, 2016). Because subarachnoid hemorrhaging constitutes “serious bodily injury,” the evidence was sufficient to convict the defendant of felonious child-abuse inflicting serious bodily injury under G.S. 14-318.4(a3). The court rejected the defendant’s argument that since the child did not actually suffer acute consequences from the hemorrhages, his brain injury never presented a substantial risk of death. Among other things, a medical expert testified that bleeding on the brain could lead to a number of issues including developmental delays and even “acute illness and death.” Citing this and other evidence, the court concluded that there was sufficient evidence that the child’s brain injury created a substantial risk of death.

State v. Watkins, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (May 3, 2016). The evidence was sufficient to survive the defendant’s motion to dismiss a misdemeanor child abuse charge under G.S. 14-318.2(a). The case arose from an incident in which the defendant left her young child unattended in a vehicle on a cold day. The State proceeded on the theory that she had created or allowed to be created a substantial risk of physical injury to the child. The court found the evidence sufficient, noting that she left the child, who was under 2 years old, alone and helpless and outside of her line of sight for over 6 minutes inside a vehicle with one of its windows rolled more than halfway down in 18° weather with accompanying sleet, snow and wind. It concluded: “Given the harsh weather conditions, [the child’s] young age, and the danger of him will being abducted (or of physical harm being inflicted upon him) due to the window being open more than halfway, we believe a reasonable juror could have found that Defendant ‘created a substantial risk of physical injury’ to him by other than accidental means.”

State v. Frazier, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (July 5, 2016). Child-abuse under G.S. 14-318.4(a) requires that the defendant intentionally inflict serious physical injury on a child or intentionally commit an assault on the child which results in serious physical injury. These are two separate prongs and the State is not required to prove that the defendant specifically intended that the injury be serious; proof that the defendant intentionally committed an assault on the child which results in serious physical injury is sufficient.

### Property Offenses

State v. Hill, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (May 3, 2016). (1) Fatal variance issues not raised at trial are waived on appeal. (2) Exercising discretion to consider one such argument with respect to a theft of money and an iPod from a frozen yogurt shop, the court held that a fatal variance existed. The State alleged that the property belonged to Tutti Frutti, LLC, but it actually belonged to Jason Wei, the son of the sole member of that company, and the State failed to show that Tutti Frutti was in lawful custody and possession of Wei’s property when it was stolen. It clarified: “there is no fatal variance between an indictment and the proof at trial if the State establishes that the alleged owner of stolen property had lawful possession and custody of the property, even if it did not actually own the property.” (3) The court rejected the defendant’s fatal variance argument regarding injury to real property charges, noting that the North Carolina Supreme Court recently held that an indictment charging this crime need only identify the real property, not its owner.

State v. Brice, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (June 7, 2016). The indictment charging the defendant with habitual misdemeanor larceny failed to comply with G.S. 15A-928 with respect to alleging the required prior convictions and thus was defective. A single indictment charged the defendant with habitual misdemeanor larceny and listed the defendant's prior convictions; the prior convictions were not alleged in a separate count. The court rejected the State's argument that the error did not warrant reversal unless the defendant was prejudiced.

State v. Jester, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Aug. 16, 2016). The evidence was sufficient to support a conviction for possession of stolen property. The defendant challenged only the sufficiency of the evidence that he knew or had reasonable grounds to believe that the items were stolen. Here, the defendant had possession of stolen property valued at more than \$1,000, which he sold for only \$114; although the defendant told a detective that he obtained the stolen property from a "white man," he could not provide the man's name; and the defendant did not specifically tell the detective that he bought the items from this unidentified man and he did not produce a receipt.

State v. Lineberger, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (June 21, 2016). An indictment charging breaking or entering a vehicle was not defective where it listed ownership of the vehicle in the names of two victims in the disjunctive: George E. Jones or Elizabeth T. Jones. The court characterized the defendant's argument as "a needlessly hyper-technical reading of indictments" and noted that the use of the disjunctive with respect to the alleged victims had no impact on defendant's ability to defend his case.

### Miscellaneous Offenses

State v. Williams, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (April 19, 2016). The evidence was sufficient to support the defendant's conviction of unlawfully entering property operated as a domestic violence safe house by one subject to a protective order in violation of G.S. 50B-4.1(g1). The evidence showed that the defendant drove his vehicle to shelter, parked his car in the lot and walked to the front door of the building. He attempted to open the door by pulling on the door handle, only to discover that it was locked. The court rejected the defendant's argument that the State was required to prove that he actually entered the shelter building. The statute in question uses the term "property," an undefined statutory term. However by its plain meaning, this term is not limited to buildings or other structures but also encompasses the land itself.

State v. Bishop, \_\_\_ N.C. \_\_\_, \_\_\_ S.E.2d \_\_\_ (June 10, 2016). Reversing the Court of Appeals, the court held that the cyberbullying statute, G.S. 14-458.1, was unconstitutional under the First Amendment. It concluded that the statute "restricts speech, not merely nonexpressive conduct; that this restriction is content based, not content neutral; and that the cyberbullying statute is not narrowly tailored to the State's asserted interest in protecting children from the harms of online bullying."

State v. Hayes, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E. 2d. \_\_\_ (July 19, 2016). Where in the course of one instance the defendant exposed himself to multiple people, one of which was a minor and one of which was an adult, the defendant could not be found guilty of both misdemeanor indecent exposure under G.S. 14-190.9(a) and felonious indecent exposure under G.S. 14-190.9(a1). The misdemeanor indecent exposure statute provides in part: "Unless the conduct is punishable under subsection (a1) of this section" a person who exposes him or herself "in the presence of any other person or persons" shall be guilty of a class 2 misdemeanor. Subsection (a1) makes it a felony to expose oneself, in certain circumstances, to a person less than 16 years of age. The defendant was convicted of a felony under subsection (a1)

because one of the victims was under 16. However, subsection (a), by its terms, forbids conduct from being the basis of a misdemeanor conviction if it is also punishable as felony indecent exposure. The court framed the issue as one of statutory construction, not double jeopardy.

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

## DWI Procedure

Birchfield v. North Dakota, 579 U.S. \_\_\_ (June 23, 2016). In three consolidated cases the Court held that while a warrantless breath test of a motorist lawfully arrested for drunk driving is permissible as a search incident to arrest, a warrantless blood draw is not. It concluded: "Because breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests, we conclude that a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving. As in all cases involving reasonable searches incident to arrest, a warrant is not needed in this situation." Having found that the search incident to arrest doctrine does not justify the warrantless taking of a blood sample, the Court turned to the argument that blood tests are justified based on the driver's legally implied consent to submit to them. In this respect it concluded: "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense."

State v. Sawyers, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (June 7, 2016). The trial court did not err by denying the defendant's motion to suppress the results of his breath test. The defendant argued that he was deprived of a reasonable opportunity to arrange to have a witness observe his breath test. Specifically, he asserted that officers deprived him of access to his cell phone address book, which in turn impeded his ability to contact a witness in a timely manner. However, the defendant did not challenge the trial court's finding of fact that he was in fact allowed to retrieve phone numbers from his phone and make phone calls.

## Search Warrants

State v. Brown, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (June 21, 2016). Because an affidavit failed to specify when an informant witnessed the defendant's allegedly criminal activities, there was insufficient evidence establishing probable cause to support issuance of the search warrant. In the affidavit, the officer stated that he received a counterfeit \$100 bill from an informant who claimed it had been obtained from the defendant's home. At the suppression hearing, the officer testified that what he meant to state in the affidavit was that the informant had obtained the bill within the last 48 hours. It was error for the trial court to consider this additional testimony from the officer that was outside of the facts recited in the affidavit. Considering the content of the affidavit, the court held that without any indication of when the informant received the bill, the affidavit failed on grounds of staleness.

State v. Downey, \_\_\_ S.E.2d \_\_\_, \_\_\_ N.C. App. \_\_\_ (Sept. 6, 2016). In this drug case, the court rejected the defendant's argument that the trial court erred by denying his motion to suppress evidence

collected from his residence on the grounds that the inventory list prepared by the detective was unlawfully vague and inaccurate in describing the items seized. The defendant argued that the evidence gathered from his residence was obtained in substantial violation of G.S. 15A-254, which requires an officer executing a search warrant to write and sign a receipt itemizing the items taken. Specifically, he asserted that the inventory receipt was vague and inaccurate and thus failed to satisfy the statute's requirements. In order for suppression to be warranted for a substantial violation of the statute, G.S. 15A-974 requires that the evidence be obtained as a result of officer's unlawful conduct and that it would not have been obtained but for the unlawful conduct. Here, citing prior case law, the court held, in part, that because the evidence was seized before the inventory required by the statute had to be prepared, the defendant failed to show that the evidence would not have been obtained but for the alleged violations of G.S. 15A-254. The court held that G.S. 15A-254 "applies only after evidence has been obtained and does not implicate the right to be free from unreasonable search and seizure. In turn, because evidence cannot be obtained 'as a result of' a violation of [G.S.] 15A-254, [G.S.] 15A-974(a)(2) is inapplicable to either alleged or actual [G.S.] 15A-254 violations."

## Contempt

State v. Burrow, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Aug. 2, 2016). The trial court did not err by imposing consecutive sentences for multiple findings of contempt. The trial court had sentenced the defendant to six consecutive 30-day terms of imprisonment based on six findings of direct criminal contempt.