

RAPE AND SEX OFFENSES (CHILD)

Sufficient Evidence That Acts Constituting First-Degree Statutory Sexual Offense Occurred Within Dates Given in Indictment and Bill of Particulars

State v. Pettigrew, __ N.C. App. __, __ S.E.2d __ (1 June 2010)

The defendant was convicted of two counts of first-degree statutory sexual offense. The court ruled that there was sufficient evidence that the acts constituting the offenses occurred with the dates given in the indictment and bill of particulars, which proved that the defendant was sixteen years old when he committed the offenses and thus within the original jurisdiction of superior court. (See the court's detailed discussion of the evidence.)

Evidence Of Defendant's Prior Violence Towards Victims' Mother Was Relevant To Show Why Victims Were Afraid To Report Abuse And Refute Defendant's Assertion That Victims' Mother Was Pressuring Victims To Make Statements In A Child Sexual Abuse Case

State v. Espinoza-Valenzuela, __ N.C. App. __, __ S.E.2d __ (April 20, 2010).

In a child sexual abuse case, evidence of the defendant's prior violence towards the victims' mother, with whom he lived, was relevant to show why the victims were afraid to report the sexual abuse and to refute the defendant's assertion that the victims' mother was pressuring the victims to make allegations in order to get the defendant out of the house. Evidence that the victims' mother had been sexually abused as a child was relevant to explain why she delayed notifying authorities after the victims told her about the abuse and to rebut the defendant's assertion that the victims were lying because their mother did not immediately report their allegations.

Mistake of Age Is Not a Defense to Indecent Liberties Under G.S. 14-202.1

State v. Breathette, __ N.C. App. __, 690 S.E.2d 1 (2 March 2010).

The court ruled, relying on *People v. Olsen*, 685 P.2d 52 (Cal. 1984), and other cases, that mistake of age is not a defense to the offense of indecent liberties under G.S. 14-202.1. Thus, the trial court did not err in rejecting the defendant's proposed jury instruction that it was a defense to the charge if the jury found that the defendant had a reasonable but mistaken belief that the victim was older than 15 years old.

Evidence Insufficient to Establish Aggravating Factor In Sexual Assault Case Involving 13-Year-Old Victim

State v. Blakeman, __ N.C. App. __, __ S.E.2d __ (Feb. 2, 2010).

In a sexual assault case involving a 13-year-old victim, the evidence was insufficient to establish aggravating factor G.S. 15A-1340.16(d)(15) (took advantage of a position of trust or confidence, including a domestic relationship). The defendant was the stepfather of the victim's friend. The victim required parental permission to spend the night with her friend, and

had done so not more than ten times. There was no evidence that the victim's mother had arranged for the defendant to care for the victim on a regular basis, or that the defendant had any role in the victim's life other than being her friend's stepfather. There was no evidence suggesting that the victim, who lived nearby, would have relied on the defendant for help in an emergency, rather than going home. There was no evidence of a familial relationship between the victim and the defendant, that they had a close personal relationship, or that the victim relied on the defendant for any physical or emotional care. The evidence showed only that the victim "trusted" the defendant in the same way she might "trust" any adult parent of a friend.

In Child Sexual Assault Case, Prior Statements Of Victim To Expert Witness Regarding Defendant's "Grooming" Techniques Were Properly Admitted To Corroborate Victim's Testimony

State v. Horton, __ N.C. App. __, __ S.E.2d __ (Sept. 15, 2009).

In a child sexual assault case, prior statements of the victim made to an expert witness regarding "grooming" techniques employed by the defendant were properly admitted to corroborate the victim's trial testimony. Although the prior statements provided new or additional information, they tended to strengthen the child's testimony that she had been sexually abused by the defendant.

Determination of "More Than Four" Years Older in G.S. 14-27.7A (Statutory Rape or Sexual Offense) Is Based on Comparison of Birthdates of Victim and Defendant

State v. Faulk, __ N.C. App. __, 683 S.E.2d 265 (15 September 2009).

The court ruled, distinguishing *State v. Moore*, 167 N.C. App. 495 (2004), that the determination of "more than four" years older in G.S. 14-27.7A (statutory rape or sexual offense) is based on a comparison of birthdates of the victim and the defendant. The defendant's date of birth was June 9, 1987, and the victim's date of birth was November 6, 1991, making their respective ages on the date of the offense 19 years, 7 months, and 5 days old for the defendant and 15 years, 2 months, and 8 days old for the alleged victim. That is sufficient evidence that the defendant was more than four years older than the alleged victim. The court reversed the trial court's pretrial ruling that had considered the whole ages of the defendant (19 years old) and alleged victim (15 years old) in determining whether the defendant was more than four years older than the alleged victim.

Juvenile Petitions Alleging First-Degree Sexual Offense Were Fatally Defective and Deprived Court of Jurisdiction to Accept Juvenile's Admission of Delinquency Because They Failed to Name Victim

In re M.S., __ N.C. App. __, 681 S.E.2d 441 (18 August 2009).

Juvenile petitions alleging first-degree sexual offense did not name the victim or give the victim's initials. The petitions simply stated "a child under the age of 13 years." The court ruled, noting that *State v. McKoy*, __ N.C. App. __, 675 S.E.2d 406 (2009) (victim's initials were sufficient based on the facts in the

case), implicitly acknowledged that an indictment must name the victim in some way, ruled that the petitions were fatally defective and deprived the court of jurisdiction to accept the juvenile's admission of delinquency. Challenges to a court's subject matter jurisdiction may be raised at any time, including for the first time on appeal.

Sufficient Evidence to Support Indecent Liberties Conviction Based on Letter Defendant Gave to Child Victim

State v. McClary, ___ N.C. App. ___, 679 S.E.2d 414 (7 July 2009).

The defendant was convicted of indecent liberties with a child. The defendant was the next-door neighbor of the victim. While following the victim as she walked home alone from a park, the defendant handed her a letter written on notebook paper. He told her not to show the letter to anyone or tell anyone about it. After the victim arrived home, she read the letter to her brother. It contained sexually graphic language soliciting her for sexual intercourse and oral sex. It also offered to pay her ten dollars. The court ruled that this evidence was sufficient to support the defendant's conviction.

Sufficient Evidence of Sexual Act to Support Convictions of First-Degree Sexual Offense

State v. Crocker, ___ N.C. App. ___, ___ S.E.2d ___ (2 June 2009).

The defendant was convicted of three counts of first-degree sexual offense and other offenses. The victim was nine years old when the offenses occurred and eleven years old when she testified. She said that on three separate occasions the defendant reached beneath her shorts and touched between the "the skin type area" in "[t]he area that you pee out of." Also, the defendant rubbed against a pressure point causing her pain and made her feel as if she was about to pass out. The examining pediatrician testified that "with extreme pressure and friction on the outside [of the labia majora] or also on the inside coupled with the complaint of pain, it would be more suggestive of touching these structures on the inside." The court ruled that this evidence was sufficient to prove that the defendant committed a sexual act involving penetration.

(1) Trial Judge Did Not Err Under Rule 412 in Excluding Evidence of Child Sexual Assault Victim's Prior Sexual Activity With Others

State v. Cook, ___ N.C. App. ___, 672 S.E.2d 25 (3 February 2009).

The defendant was convicted of first-degree statutory rape and other sex offenses involving a child victim. There was medical evidence of two scars on the victim's hymen that appeared to be healed lacerations. (1) The court ruled, relying on *State v. Black*, 111 N.C. App. 284 (1993), that the trial judge did not err under Rule 412 in excluding evidence of the victim's prior sexual activity with others. The defendant sought to introduce testimony of a boy indicating that he had sex with the victim during the week the victim accused the defendant of committing the offenses. However, the defendant failed to offer the boy's testimony during the Rule 412 in camera hearing and also failed to call him as a witness at trial to show its relevance. Thus, the only evidence was the

victim's denial of having sex with the boy. Based on Black, the judge did not err in excluding this testimony (the court also ruled that the defendant failed to show the relevance of the testimony). Concerning another person, who allegedly inserted his finger into the victim's vagina, the court ruled that the defendant failed to present evidence during the in camera hearing that the digital penetration could have caused the victim's internal scarring.

Trial Judge in Child Sexual Assault Trial Properly Excluded Under Rule 412(b)(2) Defense-Proffered Evidence of Third Person's Sexual Abuse of Victim

State v. Adu, ___ N.C. App. ___, 672 S.E.2d 84 (3 February 2009).

The defendant was convicted of first-degree statutory rape and indecent liberties with a child. A doctor testified that a genital examination of the child victim revealed a notch or healed tear to her hymen, which was consistent with genital penetration. The defendant proffered evidence of a third person's sexual abuse of the victim as an alternative explanation for the physical trauma. The court ruled that the trial judge properly excluded this evidence under Rule 412(b)(2). The court reviewed the defendant's evidence and concluded that it did not show that the third person's abuse involved penetration and thus an alternative explanation for the trauma to the victim's vaginal area.

Variance Between Period of Time Alleged in Statutory Rape Indictments Within Which Rapes Occurred and Evidence Introduced at Trial Was Not Material and Did Not Deprive Defendant of Opportunity to Adequately Present Defense

State v. Hueto, ___ N.C. App. ___, 671 S.E.2d 62 (20 January 2009).

The defendant was indicted on six counts of statutory rape for having sex with the victim: two counts each for the months of June, August, and September 2004. The court ruled, assuming that the victim's testimony was insufficient to prove that the defendant had sex with her twice in August, the state nevertheless presented sufficient evidence that the defendant had sex with her at least six times between June 2004 and August 12, 2004, including at least four times in July. The variance between the period of time alleged in the indictment within which the offenses occurred and the state's evidence at trial was not material and did not deprive the defendant of the opportunity to adequately present his defense.

(3) Double Jeopardy Did Not Bar Convictions and Punishments for Both Second-Degree and Third-Degree Sexual Exploitation of Minor

State v. Anderson, ___ N.C. App. ___, 669 S.E.2d 793 (16 December

2008).

The defendant surreptitiously placed a camera in his stepdaughter's bedroom. The camera was connected by a cord to the defendant's computer located in another room. After the camera was discovered, the computer was taken to the sheriff's office. Investigation of the computer's hard drive discovered child pornography. The defendant was convicted of misdemeanor peeping and appealed for trial de novo. He was also indicted, based on the child pornography in the computer, for ten counts of third-degree sexual exploitation of a minor and ten counts of second-degree sexual exploitation of a minor. At a conference with the prosecutor and defense counsel before trial, the judge commented that if the two parties were engaged in plea discussions, he would be amenable to a probationary sentence. Defense counsel objected to the judge's comments, stating that it could be inferred that the judge would be less likely to give the defendant probation if he did not plead guilty. The judge stated that he had not meant to make any such implication, but rather to encourage the parties to enter plea negotiations. The defendant at a single trial was convicted of all 21 charges and sentenced to imprisonment. The court ruled: (3) relying on *State v. Davis*, 302 N.C. 370 (1981), double jeopardy did not bar convictions and punishments for both second-degree and third-degree sexual exploitation offenses. The third-degree charges were based on the defendant's possession of the images of minors, and the second-degree charges were based on the defendant's receipt of those images.

(1) Insufficient Evidence to Support Conviction of First-Degree Sexual Offense When State's Evidence Failed to Satisfy Corpus Delecti Rule—Ruling of Court of Appeals Is Affirmed

State v. Smith, 362 N.C. 583, 669 S.E.2d 299 (12 December 2008), affirming in part and reversing in part, ___ N.C. App. ___, 660 S.E.2d 82 (6 May 2008).

The defendant was convicted of first-degree sexual offense and indecent liberties. (1) The court ruled, distinguishing *State v. Parker*, 315 N.C. 222 (1985), that there was insufficient evidence to support the defendant's conviction of first-degree sexual offense when the state's evidence failed to satisfy the corpus delecti rule. There was not substantial evidence independent of the defendant's confession. (See the court's discussion of the evidence in its opinion.)

(1) Sufficient Evidence to Support Conviction of Third-Degree Sexual Exploitation of Minor

State v. Riffe, ___ N.C. App. ___, 661 S.E.2d 899 (17 June 2008).

The defendant was convicted of twelve counts of third-degree sexual

exploitation of a minor under G.S. 14-190.17A. (1) The court ruled that there was sufficient evidence that the defendant (i) knew the character or content of the material, and (ii) possessed the material. An officer testified that the defendant operated a business out of a warehouse where a computer was found with images of a minor engaging in sexual activity. The SBI agent who examined the computer's contents found twelve files saved to the computer with names indicating that they contained child pornography. The computer was registered to the defendant. A receipt signed by the defendant, a payment receipt that included the defendant's name and address, and two deposit slips (one bearing the defendant's signature, the other his name), were found in and around the desk where the computer was located. All the files that were saved on the hard drive had been opened on the day the computer was seized by the officers.

Court, Per Curiam and Without Opinion, Affirms Court of Appeals Ruling That Defendant's Double Jeopardy Challenge to Convictions of Two Sexual Offenses Arising From Single Transaction Was Not Preserved for Appellate Review, and Even If It Was Preserved, Double Jeopardy Was Not Violated Because Multiple Sex Acts Occurring During Single Transaction Are Separate Offenses

State v. Gopal, 362 N.C. 342, 661 S.E.2d 732 (12 June 2008), affirming, 186 N.C. App. 308, 651 S.E.2d 279 (16 October 2007).

The defendant was convicted of two counts of first-degree sexual offense (cunnilingus and fellatio) and other offenses. All offenses arose from a single transaction involving a child, the child's mother (the defendant), and a male. The court, per curiam and without an opinion, affirmed the ruling of the North Carolina Court of Appeals that the defendant's double jeopardy challenge to the convictions of two sexual offenses arising from a single transaction was not preserved for appellate review, and even if it was preserved, double jeopardy was not violated because multiple sex acts occurring during a single transaction are separate offenses, citing *State v. James*, 182 N.C. App. 698, 643 S.E.2d 34 (2007), and *State v. Dudley*, 319 N.C. 656 (1987).

(1) Probable Cause Existed to Issue Search Warrant to Search Computer in Defendant's Home Based on Instant Messages Between Defendant and Law Enforcement Officers Posing as Twelve-Year-Old Girl

(2) Impossibility Not Bar to Commission of Attempt Offenses Based on Conversations With Law Enforcement Officers Posing as Young Girl

State v. Ellis, 188 N.C. App. 820, 657 S.E.2d 51 (19 February 2008).

(1) The court ruled that probable cause existed to issue a search warrant to search a computer in the defendant's home based on instant messages

between the defendant and law enforcement officers posing as a twelve-year-old girl. The search warrant affidavit contained many sexually explicit instant message conversations in which the defendant asked to meet the “children” to engage in sexual conduct and stated that he transmitted a video of himself masturbating. Other conversations including his statements to a “mother” of young girls involving sexual contact with the girls. In other conversations the defendant admitted that he had penetrated children with his penis. (2) The court also stated that although it was not necessary to find in upholding the search warrant, the defendant’s conversations with officers posing as a young girl constituted attempted indecent liberties under G.S. 14-202.1 and attempted computer solicitation under the former version of G.S. 14-202.3. Impossibility of committing the completed offenses would not bar a person from attempting to commit these offenses; see *State v. Hageman*, 307 N.C. 1 (1982).

(1) Evidence of Prior Sexual Activity With Another Person Committed Eight Years Before Offenses Being Tried Was Properly Admitted Under Rule 404(b) and Rule 403

(2) Error to Admit Certified Copies of Defendant’s Sexual Battery Convictions Under Rule 404(b)

(3) Error to Admit Victim Impact Evidence During Guilt-Innocence Stage of Trial

State v. Bowman, 188 N.C. App. 635, 656 S.E.2d 638 (19 February 2008). The defendant was convicted of three counts of aiding and abetting statutory rape, three counts of indecent liberties, and two counts of second-degree kidnapping. The offenses occurred in 2005. (1) The court ruled that evidence of prior sexual activity with another person (not a victim in this trial) committed eight years before offenses being tried was properly admitted under Rule 404(b) and Rule 403. The evidence was admitted to show absence of mistake of age, specific intent in the kidnapping, and an intent for sexual gratification. Concerning temporal proximity, the defendant had been incarcerated for three years and had relocated to another state during the eight-year time period. (2) The court ruled that the trial judge erred in admitting certified copies of the defendant’s sexual battery convictions under Rule 404(b). The court stated that although North Carolina appellate courts are liberal in their inclusion of prior sexual offenses for Rule 404(b) purposes, it found in this case there was little probative value in the defendant’s prior convictions for any Rule 404(b) purpose because there was significant testimony concerning the facts underlying the defendant’s convictions. (3) The court ruled that the trial judge erred in admitting victim impact evidence during the guilt-innocence stage of the trial because it was irrelevant to any issue in the

trial.

Trial Judge Did Not Err in Allowing State to Amend Indictment to Correct Statutory Citation to Sexual Offenses Alleged in Indictments—Ruling of Court of Appeals Is Reversed

State v. Hill, 362 N.C. 169, 655 S.E.2d 831 (25 January 2008), reversing ruling for reasons given in dissenting opinion, 185 N.C. App. 216, 647 S.E.2d 475 (7 August 2007). The defendant was convicted of five counts of first-degree statutory sexual offense under G.S. 14-27.4(a)(1) (victim under 13 years old). The allegations in the indictments conformed with the short-form indictment language authorized in G.S. 15-144.2(b) to charge first-degree statutory sexual offense under G.S. 14-27.4(a)(1). However, the indictments stated that the offenses were committed in violation of G.S. 14-27.7A (statutory rape or sexual offense of person who is 13, 14, or 15 years old). The trial judge granted the state's motion at the close of the state's case to amend the indictments to allege a violation of G.S. 14-27.4. The majority opinion of the North Carolina Court of Appeals ruled that the trial judge erred in allowing the state to amend the indictments. The dissenting opinion stated that the trial judge did not err: the trial judge properly allowed the state to cure a mere clerical defect and the amendment did not fundamentally change the nature of the charges against the defendant. The North Carolina Supreme Court ruled, per curiam and without an opinion, that the judgment of the North Carolina Court of Appeals is reversed for the reasons given in the dissenting opinion.

No Fourth Amendment Violation Occurred When Officer Without Search Warrant Viewed Videotape Supplied by Private Person Who Had Viewed It and Decided to Give It to Law Enforcement, Even Though Officer's Viewing of Videotape Was More Thorough Than Private Person's Viewing

State v. Robinson, 187 N.C. App. 587, 653 S.E.2d 889 (18 December 2007).

The defendant was convicted of multiple counts of first-degree statutory rape and sex offense with young girls. A videotape of the defendant's engaging in the sexual activities was introduced at trial. The court ruled, relying on *United States v. Runyan*, 275 F.3d 449 (5th Cir. 2001), and *United States v. Simpson*, 904 F.2d 607 (11th Cir. 1990), that no Fourth Amendment violation occurred when an officer without a search warrant viewed the videotape supplied by a private person who had viewed it and decided to give it to law enforcement, even though the officer's viewing of the videotape was more thorough than the private person. The private person's viewing of the videotape did not violate the Fourth Amendment because he was not acting under the authority of the state. The viewing

effectively frustrated the defendant's expectation of privacy concerning the videotape's contents, and thus the officer's later viewing did not violate the defendant's Fourth Amendment rights. While the private person stated that he had only viewed portions of the videotape, his viewing "opened the container" of the videotape, and the later viewing of the entire videotape by the officer was not outside the scope of the private person's viewing.

Probable Cause Existed to Support Search Warrant of Defendant's Home and His Computer for Child Pornography

State v. Dexter, 186 N.C. App. 587, 651 S.E.2d 900 (6 November 2007). Officers received an email tip from a person they later verified as the defendant's housemate. The email reported the defendant's having child pornography on his home computer. The court noted that although the housemate later recanted her email tip, the officers confirmed the easily verified information from the tip which increased her credibility. The court reviewed the officers' additional corroboration of the tip (see the facts set out in its opinion) and ruled that probable cause supported the issuance of a search warrant for the defendant's home and his computer for child pornography.

Sufficient Evidence That Defendant Possessed Child Pornography on His Home Computer to Support Conviction of Third-Degree Sexual Exploitation of Child

State v. Dexter, 187 N.C. App. 587, 651 S.E.2d 900 (6 November 2007). The court ruled that there was sufficient evidence that the defendant possessed child pornography on his home computer to support his conviction of third-degree sexual exploitation of a child. The court stated that the evidence showed that the defendant knew exactly what temporary Internet files were, purposefully stored child pornography on his computer as temporary Internet files, revisited those files offline, and purposefully and habitually deleted those files so that he would avoid being caught with too many at once. The defendant clearly had the power and intent to control the disposition of the images. (See additional facts set out in the court's opinion.)

Convictions of Both First-Degree Statutory Rape and First-Degree Forcible Rape Based on Same Act Is Not Authorized, and Same Rule Applies to First-Degree Statutory Sexual Offense and First-Degree Forcible Sexual Offense

State v. Ridgeway, ___ N.C. App. ___, 648 S.E.2d 886 (21 August 2007). The defendant was convicted of multiple offenses involving the murder

and sexual assaults of a fourteen year old victim. The court ruled that convictions of both first-degree statutory rape and first-degree forcible rape based on the same act is not authorized, and the same rule applies to first-degree statutory sexual offense and first-degree forcible sexual offense.

No Violation of Right to Unanimous Verdict When There Were Greater Number of Acts of Sexual Misconduct Than Number of Charged Offenses and Convictions

State v. Massey, 361 N.C. 406, 646 S.E.2d 362 (28 June 2007), reversing, 174 N.C. App. 216, 621 S.E.2d 633 (2005).

The defendant was convicted of five counts of first-degree statutory sexual offense, ten counts of sexual acts with a minor when defendant assumed position of parent, and four counts of indecent liberties. The court ruled, relying on *State v. Markeith Lawrence*, 360 N.C. 368 (2006), and *State v. Gary Lawrence*, 360 N.C. 393 (2006), that there was no violation of the defendant's right to a unanimous verdict when there were a greater number of acts of sexual misconduct than the number of charged offenses and convictions

(1) Fourteen-Year-Old Juvenile Who Had Consensual Fellatio With Twelve-Year-Old Was Properly Adjudicated Delinquent of Crime Against Nature

(2) Crime Against Nature Offense Was Not Unconstitutionally Applied to Juvenile

In re R.L.C., 361 N.C. 287, 643 S.E.2d 920 (4 May 2007), affirming, 179 N.C. App. 311, 635 S.E.2d 1 (5 September 2006).

A fourteen-year-old juvenile was adjudicated delinquent of crime against nature for having consensual fellatio with a twelve-year-old. (1) The court ruled the fact that other offenses involving this sex act require certain age differentials as elements did not show a legislative intent that the juvenile could not be adjudicated delinquent of crime against nature with a person who was only two years younger than the juvenile. (2) The court ruled, distinguishing *Lawrence v. Texas*, that the crime against nature offense was not unconstitutionally applied to the juvenile. The court noted that, unlike *Lawrence v. Texas*, this case involved minors. The court also recognized that preventing sexual conduct between minors furthers a legitimate governmental interest and application of the crime against nature offense is a reasonable means of promoting that interest.

Sufficient Evidence of Overt Act to Support Conviction of Attempted First-Degree Statutory Sexual Offense

State v. Henderson, 182 N.C. App. 406, 642 S.E.2d 509 (3 April 2007). The defendant was convicted of attempted first-degree statutory sexual offense with his eight-year-old daughter. The court ruled that there was sufficient evidence of an overt act to support the defendant's conviction. The evidence showed that the defendant removed his pants, walked into a room where his daughter was seated, stood in front of her, and asked her to put his penis in her mouth. The defendant had threatened the victim many times in the past, and the victim stated that she was afraid of the defendant. The court noted that violence is not a necessary component of an overt act.

(2) Videotaped Interviews Between Child Sexual Abuse Victims and Pediatric Nurses Were Admissible Under Rule 803(4) (Statement Made for Medical Diagnosis or Treatment) and State v. Hinnant

(3) Child Sexual Assault Victim's Statement to Mother Within 24 Hours of Assault Was Admissible Under Rule 803(2) (Excited Utterance)

State v. Burgess, 181 N.C. App. 27, 639 S.E.2d 68 (2 January 2007). The defendant was convicted of six counts of first-degree sexual offense involving three children under thirteen years old. (2) The court ruled, relying on *State v. Lewis*, 172 N.C. App. 97, 616 S.E.2d 1 (2005), and *State v. Isenberg*, 148 N.C. App. 29, 557 S.E.2d 568 (2001), that videotaped interviews between child sexual abuse victims and pediatric nurses were admissible under Rule 803(4) (statement made for medical diagnosis or treatment) because they satisfied the standard set out in *State v. Hinnant*, 351 N.C. 277, 523 S.E.2d 663 (2000). The children made the statements with the understanding that they would lead to medical diagnosis or treatment. The pediatric nurses at the children's medical center had interviewed the children before they were examined by a doctor, and the children were told they were there for a check up with a doctor. (3) The court ruled, relying on *State v. Smith*, 315 N.C. 76, 337 S.E.2d 833 (1985), and *State v. Thomas*, 119 N.C. App. 708, 460 S.E.2d 349 (1995), that a child sexual assault victim's statement to her mother within 24 hours of assault was admissible under Rule 803(2) (excited utterance).

(2) Medical Expert's Opinion Testimony That, Based on Child's Statements to Her, She Would Believe Child and Diagnose Sexual Abuse Even in Absence of Physical Evidence Was Inadmissible, But Error Was Not Plain Error Requiring New Trial—Ruling of Court of Appeals Is Reversed

State v. Hammett, 361 N.C. 92, 637 S.E.2d 518 (15 December 2006), reversing, 175 N.C. App. 597, 625 S.E.2d 168 (7 February 2006).

The defendant was convicted of multiple charges concerning sexual abuse of his daughter. (2) The court ruled that the medical expert's opinion testimony that based on the child statements to her, she would believe the child and diagnose sexual abuse even in absence of physical evidence was inadmissible. This testimony improperly vouched for the child's credibility. The court, however, also ruled that this error was not plain error requiring a new trial.

(2) Trial Judge Did Not Err in Allowing State to Amend Dates Specified in Indictments Charging Statutory Rape and Sexual Offense

State v. Whitman, 179 N.C. App. 657, 635 S.E.2d 906 (17 October 2006). The defendant was convicted of statutory rape, statutory sexual offense, indecent liberties, and incest. (2) The court ruled that the trial judge did not err in allowing the state to amend the dates specified in the indictments charging statutory rape and sexual offense (from "January 1998 through June 1998" to "July 1998 through December 1998"). The amendment did not substantially alter the offense because the victim would have been 15 under both the original and amended dates. Also, the amendment did not impair the defendant's ability to prepare an alibi defense because an incest indictment tried with these charges covered the entire 1998 calendar year, and the defendant would have to address all of 1998. See also *State v. Wallace, 179 N.C. App. 710, 635 S.E.2d 455 (17 October 2006)* (no error in amending date of statutory sexual offense indictment from "November 2001" to "June through August 2001"; defendant did not present an alibi defense that was adversely affected by the change in dates).

Defendant's Right to Unanimous Verdict Was Not Violated Although There Was Evidence of More Sexual Acts Than Charges of Statutory Sexual Offense

State v. Wallace, 179 N.C. App. 710, 635 S.E.2d 455 (17 October 2006). The defendant was convicted of three counts of statutory sexual offense. There was evidence of more sexual acts than charged offenses. The court ruled, relying on *State v. Markeith Lawrence, 360 N.C. 368, 627 S.E.2d 609 (2006)*, that the defendant's right to a unanimous verdict was not violated.

1) Indecent Liberties; Sexual Offenses-Unanimous verdict-More incidents than charges

State v Smith 180 N.C. APP. 86 (2006)

Defendant's conviction for sexual misconduct was by a unanimous jury, even though he argued that there was testimony of more incidents than

there were individual charges, where the instructions and the verdict sheets were clear as to what incident corresponded to each charge.

2) Sexual Offenses-Indictment-Amendment-Dates-No error

State v Smith 180 N.C. APP. 86 (2006)

There was no error in allowing the State to amend the dates alleged on indictments for defendant's sexual misconduct with his daughter where defendant was neither misled nor surprised at the nature of the charges, and did not raise an alibi defense.

3) Sexual Offenses-Statutory sexual offense-Attempt included

State v Smith 180 N.C. APP. 86 (2006)

Upon the trial of any indictment, the prisoner may be convicted of an attempt to commit the crime charged; here an indictment for statutory sexual offense was sufficient to support a conviction for attempted statutory sexual offense. N.C.G.S. § 15-570.

Criminal Law-Closing courtroom during victim's testimony-No objection by defendant-No error

State v Smith 180 N.C. APP. 86 (2006)

The trial court did not err in the prosecution of defendant for sexual offenses against his daughter by closing the courtroom during her testimony. The trial judge spent quite some time questioning people about why they were present and clearing the courtroom; defense counsel had the opportunity to object but did not.

1) Evidence-Psychologist's testimony-Child's behavior-Consistent with abuse victims

State v Wallace 179 N.C. APP. 710 (2006)

There was no plain error in the admission of a psychologist's testimony that a child sexual abuse victim's behavior, sense of trust, and emotional problems were **consistent with sexually abused children**. The witness did not state that the offenses occurred, and did not proffer an opinion on credibility. Defendant did not show that a different outcome would have occurred without this testimony in light of the other evidence presented.

2) Evidence-Detective's testimony-Nature of testimony by child sexual abuse

victims-Permissible lay testimony

State v Wallace 179 N.C. APP. 710 (2006)

A detective's testimony that child sexual abuse victims do not tell exactly the same story every time constituted permissible lay testimony. His experience supports his testimony on the procedure he uses for questioning victims, and he offered no opinion on the credibility of the victim.

3) Sexual Offenses-Amendment of indictment-Child victim-Dates of offenses changed

State v Wallace 179 N.C. APP. 710 (2006)

There was no error in allowing amendment of an indictment for sexual offenses against a child to change the dates of the alleged offenses. Time was not an essential element of the offenses charged, the amendment did not substantially alter the charges, and defendant had sufficient notice.

4) Constitutional Law-Unanimous verdict-Sexual offenses against child-Agreement on specific acts to support each verdict

State v Wallace 179 N.C. APP. 710 (2006)

Defendant's constitutional right to a unanimous jury was not violated where he was charged with multiple sexual offenses against a child and argued that neither the instructions nor the verdict sheets required that the jury agree unanimously on the specific acts to support each verdict. The reasoning of *State v. Lawrence*, 360 N.C. 368, may be imputed to sexual offense charges.

1) Sexual Offenses--Motion for bill of particulars--Exact date and times of offenses

State v Whitman 179 N.C. APP. 657 (2006)

The trial court did not abuse its discretion in a statutory rape, statutory sex offense, indecent liberties with a child, and incest case by denying defendant's motion for a bill of particulars providing the exact dates and times of the alleged offenses, because: 1) defendant was provided with open-file discovery; 2) defendant has not pointed to any factual information introduced at trial that he was not provided in discovery and was necessary to prepare his defense; and 3) defendant failed to argue that the victim's testimony or any of the other evidence at trial was more specific regarding dates, times, and places than the

information made available in the course of discovery.

2. Indictment and Information--Amendment of dates--Time not of the essence--failure to show inability to prepare alibi defense--Failure to show prejudice for motion for continuance

State v Whitman 179 N.C. APP. 657 (2006)

The trial court did not err by allowing the State, on the first day of trial, to amend the offense dates reflected on the indictment for statutory rape and statutory sex offense from January 1998 through June 1998 to July 1998 through December 1998, and by denying defendant's subsequent motion for a continuance, because: 1) although both charges required the State to prove the victim was fifteen years of age or younger at the time of the offense, the victim did not turn sixteen until 16 February 1999 which was after both sets of dates; 2) under either version of the indictment, time was not of the essence to the State's case, and thus, the amendment did not substantially alter the charge set forth in the original indictment; 3) the amendment did not impair defendant's ability to prepare an alibi defense when he was already put on notice by the eighteen-month span covered by the incest indictment that he was going to have to address all of 1998; 4) defendant's argument that he had no reason to present an alibi defense to the incest charge based on the fact that he admitted to having incestuous sex with the victim in 2002 ignores the fact that the State's incest indictment, the jury instructions, and the verdict sheet all required the jury to decide whether incest had occurred during the period of January 1998 through June 1999; and 5) defendant failed to establish prejudice as a result of the denial of his motion for a continuance, and the transcript reveals defendant did in fact present alibi evidence tending to show that he had few opportunities to engage in sexual activity with the victim in 1998.

1) Criminal Law-Unanimous verdicts-Indecent liberties--More indictments than verdicts

State v Bates 179 N.C. App. 628 (2006)

The fact that the jury may have considered evidence of ten counts of indecent liberties to arrive at seven guilty verdicts does not violate defendant's right to a unanimous verdict under *State v. Lawrence*, 360 N.C. 368.

2) Criminal Law-Unanimous verdicts-First-degree sexual offenses-Verdicts matched to specific incidents

State v Bates 179 N.C. App. 628 (2006)

Defendant's right to unanimous verdicts as to convictions for first-degree sexual offense was not violated where it was possible to match the verdict of guilty with specific incidents presented in evidence and in the trial court's instructions. The factors considered included the evidence, the indictments, the jury charge, and the verdict sheets.

3) Constitutional Law--Right to unanimous jury--Indecent liberties--First-degree rape

State v Fuller, 179 N.C. APP. 61

Defendant was not denied his constitutional right to a unanimous jury in a double count of indecent liberties with a child and triple count of first-degree rape of a child case by the State's presentation of evidence of a greater number of sexual acts than there were charges, and the trial court's instructions and verdict sheet failing to require the jury to unanimously agree on which specific criminal acts defendant committed before finding him guilty, because: 1) a defendant may be convicted of indecent liberties even if the juror considered a higher number of incidents of immoral or indecent behavior than the number of counts charged and the indictments lacked specific details to identify the specific incidents since while one juror may have found some incidents of misconduct and another juror might have found different incidents of misconduct, the jury as a whole found that improper sexual conduct occurred; 2) regarding the three counts of first-degree rape, while the victim's testimony and statement to the police suggested that other incidents may have occurred, the evidence and argument focused in detail upon only three specific occasions of intercourse which was the same number of instances as verdict sheets; and 3) a general instruction on unanimity was given to the jury.

1) Rape-Instruction--Variation between allegation and proof as to time

State v Bullock, 178 N.C. APP. 460 (2006)

The trial court did not err in a multiple first-degree rape of a child under thirteen case by allegedly instructing the jury on theories of guilt not alleged in one of the indictments, because: 1) variance between allegation and proof as to time is not material where no statute of limitations is involved, and particularly when allegations of sexual abuse of a child are involved; and 2) even assuming *arguendo* that a variation exists between the indictment and the charge, it does not require a new trial on this count.

2) Evidence--Prior crimes or bad acts--Failure to intervene ex mero motu--

Remoteness in time--Common scheme or plan

State v Bullock, 178 N.C. APP. 460 (2006)

The trial court did not err in a multiple first-degree rape of a child under thirteen case by admitting evidence of other bad acts under N.C.G.S. § 8C-1, Rule 404(b) including sexual acts with defendant's older daughter (the victim's half sister) and by failing to intervene ex mero motu when the State argued this evidence, because: 1) when the facts surrounding a prior act are sufficiently similar to those in a case at bar, it may be proper to admit the prior act evidence even if over ten years have passed (although the elapsed time in this case was actually around nine years); and 2) in light of the similarity of the incidents and in light of the unnatural character of a father raping his own preteen daughters, the evidence was properly admitted to show a common scheme or plan.

3) Evidence--DNA evidence--Common plan scheme or plan to sexually abuse victim

State v Bullock, 178 N.C. APP. 460 (2006)

The trial court did not err in a multiple first-degree rape of a child under thirteen case by admitting DNA evidence establishing a 99.99 percent probability that defendant was in fact the father of the victim's child even though the victim conceived the child after she left Wake County and thus after each of the incidents for which defendant was convicted in the instant case, because: 1) evidence that defendant engaged in other sexual acts with the victim is admissible to show that he had a common scheme or plan to sexually abuse the victim; and 2) contrary to defendant's assertion, statements made in the closing argument cannot alter the propriety of admitting the evidence under N.C.G.S. § 8C-1, Rule 404(b) at trial.

Indecent Liberties--Two incidents of touching in one night--One act

State v. Laney, 178 N.C. APP. 337 (2006)

Two incidents of touching in one night should have resulted in one indecent liberties conviction, not two, and defendant's motion to dismiss one of the cases should have been granted. The sole act was the touching, there was no temporal gap between the two incidents, and the two incidents combined for the purpose of arousing defendant's sexual desire.

Search and Seizure--Warrant Information not stale--Items still useful to defendant--Dates of sexual offenses against children

State v. Pickard, 178 N.C. APP. 330 (2006)

An affidavit is sufficient to support a search warrant if it establishes reasonable cause to believe that the proposed search will probably reveal the presence upon the described premises of the items sought and that those items will aid in the apprehension or conviction of the offender. The affidavit here, supporting the warrant to search the house of a man eventually convicted of multiple sexual offenses against children, was not invalid as containing stale information.

1) Evidence--Other bad acts--Admissible to show preparation and planning

State v. Brown 178 N.C. APP. 189 (2006).

The trial court did not err in a trial for statutory sexual offense with a person thirteen years old by admitting nude photographs which defendant had shown to the victim. The photographs demonstrated defendant's preparation and planning, a permissible purpose other than showing defendant's character.

2) Sexual Offenses--Sexual act with thirteen-year-old-Variance between indictment and evidence--Time of offense

State v. Brown 178 N.C. APP. 189 (2006).

There was not a fatal variance between the indictment and the evidence in a trial for a sexual act with a thirteen-year-old where defendant contended that the evidence showed that the victim was twelve years old during some of the time specified in the indictment, but the victim testified that she was thirteen when one of the offenses occurred. The trial court properly instructed the jury about what it must find to convict and defendant did not contend that he was deprived of the opportunity to present an adequate defense due to the variation.

1) Evidence--Hearsay--Nontestimonial--Residual hearsay exception

State v. Brigman, 178 N.C. APP. 78 (2006).

The trial court did not abuse its discretion in a multiple first-degree sex offense and multiple taking indecent liberties with a minor case by admitting the children's hearsay statements to their foster parents and to medical personnel, because: 1) defendant concedes that the statements made to the children's foster parents were not testimonial, and therefore, did not violate the Confrontation Clause; 2) the children's

statements to their foster parents were admissible under the residual hearsay exception when the children testified they had told the foster parents about things defendant had done but did not remember what they told the foster parents, the statements were more probative on the points for which they were offered than any other evidence the State could produce through reasonable efforts at the time, the State gave proper notice of its intent to offer the statements, the children's statements possess equivalent circumstantial guarantees of trustworthiness, and it cannot be said the trial court's findings and conclusions were manifestly unsupported by reason or were so arbitrary that they could not have been the result of a reasoned decision; and 3) Child 3's statements to a doctor (that defendant put his hand in the child's bottom, that it hurt, and that defendant touched the two other children in the same way) were not testimonial and defendant's right to confrontation was not violated when it cannot be concluded that a reasonable child under three years of age would know or should know that his statements might later be used at trial.

2) Evidence--Expert testimony--Sexual abuse--Credibility--Posttraumatic stress disorder--Plain error analysis

Although the trial court erred in a multiple first-degree sex offense and multiple taking indecent liberties with a minor case by admitting certain statements made by two expert witnesses including that the children suffered sexual abuse by defendant, concerning Child 3's credibility, and regarding the children's symptoms of posttraumatic stress disorder, it did not amount to plain error because it cannot be concluded that there was a reasonable possibility that a different result would have been reached by the jury when the evidence against defendant was overwhelming.

Rape-Statutory--Mistake of age--Strict liability

State v. Browning, 177 N.C. APP. 487 (2006).

There was no error in a statutory rape prosecution in the denial of defendant's requested jury instruction on reasonable mistake of fact as to the victim's age. Statutory rape is a strict liability crime and defendant's requested instruction was not supported by the law of North Carolina. *Lawrence v. Texas, 539 U.S. 558*, by its own language does not involve minors, and policy arguments about the appropriateness of strict liability are more appropriately addressed to the General Assembly.

Evidence--Prior crimes or bad acts--Cunnilingus

State v Anderson, 177 N.C. APP. 54 (2006)

The trial court did not err in a multiple indecent liberties and multiple first-degree sexual offense with a child under the age of thirteen years case by denying defendant's motion to exclude evidence admitted under N.C.G.S. § 8C-1, Rule 404(b) that he performed a prior act of cunnilingus on the victim based on the fact that the incident did not occur within Cabarrus County, because: 1) the similarity of the 404(b) evidence to the offense and the temporal proximity to the other incidents to the offense may reveal defendant's opportunity, plan, and intent to take advantage of the minor victim; 2) following the first incident, defendant engaged in numerous other sexual acts with the victim in the seclusion of his bedroom while her mother was outside or away from the home; and 3) assuming arguendo that the evidence was improperly admitted, defendant failed to show a different result would have been reached absent this evidence in light of defendant's admissions and other evidence of defendant's guilt.

Rape- -Attempted second-degree rape plea--Not LIO of statutory rape

State v. Frink, 177 N.C. APP. 144 (2006).

A conviction for attempted second-degree rape was a nullity where the indictment was for statutory rape, did not charge essential elements of the offense of attempted second-degree rape, and did not provide subject matter jurisdiction.

Evidence--Expert testimony--Victim sexually abused--Plain error

State v. Hammett, 175 N.C. APP. 597 (2006)

The trial court committed plain error in a multiple statutory sexual offense and multiple taking indecent liberties case by admitting expert testimony that based on the victim's statements alone the expert would have diagnosed the victim as having been sexually abused, and defendant is entitled to a new trial, because: 1) the Court of Appeals has repeatedly held that the admission of expert testimony that a child victim has suffered sexual abuse absent physical findings is error; 2) the injuries could have been caused by someone other than defendant; 3) in this evidentiary context where the physical findings revealed a tenuous connection to defendant, and defendant and the victim gave conflicting accounts of factual matters central to the criminal charges, the credibility of the witnesses was particularly important; 4) although a victim's testimony standing alone is generally sufficient to survive a motion for directed verdict, in the instant case where plain error analysis is concerned, the concern is whether there was overwhelming evidence of defendant's guilt

independent of the improper testimony instead of whether there was substantial evidence in the record to allow the offenses to be submitted to the jury in the absence of the improper opinion testimony; 5) there is a likelihood that the outcome of the verdicts would have been different in the absence of the expert's impermissible expert opinion since the case rested largely on the credibility of witnesses; and 6) the expert's inadmissible testimony, considered in context and in full, could also have been associated by the jury with the conduct underlying the indecent liberties charges.

1) Indictment and Information--Variance between allegation and proof as to time--Child sex abuse--Statute of limitations not involved

State v. Massey, 174 N.C. APP. 216 (2005)

The trial court did not improperly instruct the jury on theories of guilt not alleged in indictments for sexual offenses against a child when the date and time periods in the instructions were not specified in the indictments because: 1) the fact that a crime was committed on a date other than that which is alleged in the indictment is not a fatal variance between allegation and proof where no statute of limitations is involved such as in child sex abuse cases; and 2) the trial court did not instruct on a different theory or under a different statute, and the indictments gave defendant sufficient notice of the charges against him.

2) Constitutional Law--right to unanimous verdict--multiple sexual offenses with child

State v. Massey, 174 N.C. APP. 216 (2005)

Defendant's right to a unanimous verdict was not violated with respect to convictions on five counts of first-degree sexual offense with a child under thirteen where the instructions and verdict sheets contained specific references to the date, act and location of each of the alleged acts, and it was possible from those references to determine which of defendant's five convictions correspond to the acts testified to at trial.

3) Constitutional Law--Right to unanimous verdict--Multiple sexual offenses in parental role

State v. Massey, 174 N.C. APP. 216 (2005)

Defendant's right to a unanimous verdict was not violated with respect to convictions on two of the ten counts of sexual offense by a person in a parental role where there was sufficient evidence to support convictions for acts occurring in two different locations, and the trial

court's disjunctive instruction allowed different sexual acts to be considered as alternate means by which the State proved a single offense. However, defendant's right to a unanimous verdict was denied with respect to convictions on eight counts of sexual offense by a person in a parental role where it is impossible to relate the charges in the verdict sheets

to specific instances because the verdict sheets did not associate an offense with a given incident. But see *State v. Markeith Lawrence*, 360 NC 368 (2006) & *State v. Gary Lawrence*, 360 NC 393 (2006).

4) Constitutional Law--Right to unanimous verdict--Multiple indecent liberties offenses

State v. Massey, 174 N.C. APP. 216 (2005)

Defendant's right to a unanimous verdict was denied with respect to convictions on four counts of indecent liberties, even though defendant was charged with only four counts of indecent liberties, where the State presented evidence of more than four incidents of indecent liberties; although the trial court instructed the jury to consider each count a separate and distinct act, the instructions made no further attempt to distinguish among the counts; and it is therefore impossible to determine whether each juror had in mind the same four incidents when voting to convict defendant. But see *State v. Markeith Lawrence*, 360 NC 368 (2006) & *State v. Gary Lawrence*, 360 NC 393 (2006).

State v. Gary Lawrence, 360 NC 393 (2006) *Rev'd in part Ct Appeals 165 N.C. APP. 548 (2004)*

For the reasons stated in *State v. Markeith R. Lawrence*, 360 N.C. 368 (2006), we reverse the decision of the Court of Appeals as to defendant's seven convictions for second-degree sexual offense. However, the portion of the Court of Appeals opinion finding no error in nine of defendant's convictions as specified in that opinion remains undisturbed. Pursuant to *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004) and *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005), defendant's case is remanded to the Court of Appeals for further remand to the trial court for resentencing consistent with *Blakely* and *Allen*.

Indecent Liberties--Rape--Statutory rape--Short-form indictment--Lack of specific details and identical wording

State v. Markeith Lawrence, 360 NC 368 (2006) *Rev'd Ct Appeals 170 NC 200 (2005)*

A jury unanimously convicted defendant of three counts of taking indecent

liberties with a minor and five counts of statutory rape even though the short-form indictments for each alleged crime are identically worded and lack specific details distinguishing one particular incident of a crime from another, and defendant's motion for appropriate relief is dismissed, because: 1) defendant may be unanimously convicted of indecent liberties even if the jurors considered a higher number of incidents of immoral or indecent behavior than the number of counts charged and the indictments lacked specific details to identify the specific incidents since the statute proscribing indecent liberties does not list as elements of the offense discrete criminal activities in the disjunctive; and 2) with regard to the statutory rape charges, defendant was indicted on five counts of statutory rape, the victim testified to five specific incidents of statutory rape, defendant never raised an objection at trial regarding unanimity, the jury was instructed on all issues including unanimity, separate verdict sheets were submitted to the jury for each charge, the jury deliberated and reached a decision on all counts submitted to it in less than one and one-half hours, the record reflected no confusion or questions as to jurors' duty in the trial, and when polled by the court all jurors individually affirmed that they had found defendant guilty in each individual case file number. See Farb p. 5

Indecent Liberties--Purpose arousing or gratifying sexual desire--Sufficiency of evidence

State v. Verrier, 173 N.C. APP. 123 (2005)

There was sufficient evidence that an indecent liberties defendant acted for the purpose of arousing or gratifying sexual desire where the victim testified about tickling sessions in which she was touched inappropriately.

1) Evidence--Direct examination--Leading questions--Child--Sexual matters

State v. Bates, 172 N.C. APP. 27 (2005)

The trial court did not abuse its discretion in a multiple first-degree statutory sexual offense, double attempted first-degree statutory sexual offense, and multiple taking indecent liberties with a minor case by allowing the State to ask the minor child victim leading questions on direct examination, because: 1) the minor child was eleven years old at the time of trial and her testimony dealt with sexual matters of a delicate nature; and 2) the State did not ask leading questions throughout its examination of the minor child, but only where she was hesitant to answer.

2) Constitutional Law--Denial of unanimous verdict--Sexual offenses

State v. Bates, 172 N.C. APP. 27 (2005)

Defendant was denied his right to a unanimous verdict with respect to convictions on six counts of first-degree sexual offense where defendant was charged with eleven counts of that offense; evidence of between four and ten possible instances of first-degree sexual offense was presented at trial; the State did not effectively associate each particular offense or incident with a particular indictment or verdict sheet; the trial court did not explain the need for unanimity on each specific sexual incident; and neither the indictments, jury instructions nor verdict sheets associated a given indictment or verdict sheet with any particular incident.

3) Constitutional Law--Denial of unanimous verdict--Indecent liberties

State v. Bates, 172 N.C. APP. 27 (2005)

Defendant was denied his right to a unanimous verdict with respect to convictions on seven counts of indecent liberties with a minor where defendant was charged with ten counts of taking indecent liberties with a minor; more incidents of indecent liberties were presented at trial than the number charged; evidence presented on charges of first-degree sexual offense could also support convictions for indecent liberties; the trial court gave the pattern jury instruction for indecent liberties with no explanation as to which acts by defendant could support a conviction for indecent liberties; and the jury received no guidance from the trial court and no indication from the State as to which offenses were to be considered for which verdict sheets.

4) Indecent Liberties--Multiplicitous indictments--Absence of prejudice

State v. Bates, 172 N.C. APP. 27 (2005)

Indictments charging defendant with indecent liberties and the alternate crime of lewd and lascivious conduct for each violation of N.C.G.S. § 14-202.1 were multiplicitous, but defendant was not prejudiced because judgment was arrested on each count of defendant's convictions for lewd and lascivious conduct.

1) Evidence--Expert opinion--Child sex abuse--Credibility

State v. Delsanto, 172 N.C. APP. 42 (2005)

The trial court committed plain error in a first-degree sexual offense case by admitting the testimony of a doctor that she had diagnosed the minor victim as having been sexually abused by defendant, and defendant is entitled to a new trial, because: 1) the only evidence that defendant sexually abused the victim is the victim's own statements to the testifying

witnesses; 2) there was no physical evidence, yet the doctor testified that this lack of physical evidence was absolutely consistent with the victim's account; 3) the doctor conclusively stated that defendant sexually assaulted the minor child when the doctor testified that she diagnosed the minor child as having been sexually abused by defendant; 4) the doctor's inadmissible opinion likely had an impact on the jury's finding of guilt; 5) admission of expert testimony on a victim's credibility prejudices defendant in the eyes of the jury when the minor child's credibility is the central issue in the case; 6) there was no other permissible expert testimony, there was no evidence that the victim exhibited behaviors that were consistent with having suffered from sexual assault, and the State did not present other overwhelming evidence of defendant's guilt; and 7) the only physical manifestation of injury suffered by the minor child in this case was pain, which is subjective and not independently verifiable.

2) Evidence--Prior crimes or bad acts--Child sex abuse

State v. Delsanto, 172 N.C. APP. 42 (2005)

The trial court erred in a first-degree sexual offense case by overruling defendant's objection and permitting a witness to testify that defendant had sexually abused her twenty-three years earlier, because: 1) evidence that a defendant engaged in previous sexual abuse is inadmissible when a significant lapse of time exists between the instances of alleged sexual abuse; 2) the lapse of time between the alleged instances of abuse merits against finding that defendant was engaged in an ongoing plan or scheme of sexual abuse; 3) unlike in *State v. Jacob*, 113 N.C. App. 605 (1994), the State offered no evidence that defendant did not have access to his preferred victim during the twenty-three year time span between the alleged instances of abuse, or that his plan was interrupted and then resumed twenty-three years later; and 4) although the State for the first time on appeal relies on Rule 404(b) to show identity and intent, this argument is not properly before the Court of Appeals.

3) Evidence--Prior crimes or bad acts--Possession of pornographic magazines and women's underwear--Impermissible character evidence

State v. Delsanto, 172 N.C. APP. 42 (2005)

Although the trial court did not commit plain error in a first-degree sexual offense case by allowing the State to elicit a witness's testimony that defendant possessed pornographic magazines and women's underwear, the admission of the testimony should not be presented at defendant's new trial (granted on other grounds) for the purpose of showing defendant's propensity to commit the crime, because: (1) the

State

presented no evidence that defendant's possession of pornographic magazines and women's underwear played any part in the alleged offenses; and (2) the evidence was not relevant to prove the charges against him and was merely impermissible character evidence.

1) Indecent Liberties--Two charges--Same act

State v Jones, 172 N.C. APP. 308 (2005)

Defendant was erroneously convicted of two charges of indecent liberties, one characterized as “indecent liberties” and the other as “lewd and lascivious act,” based on the same act. Although N.C.G.S. § 14-202.1(a) sets out alternative acts (indecent liberties and lewd and lascivious acts), a single act can support only one conviction.

2) Constitutional Law--rape and indecent liberties--not double jeopardy

State v Jones, 172 N.C. APP. 308 (2005)

Defendant was not subjected to double jeopardy by sentences for first-degree rape and indecent liberties.

Evidence--Hearsay--Medical diagnosis or treatment exception --Videotape interviews of minor children

State v Lewis, 172 N.C. APP. 97 (2005)

The trial court did not err in a double taking indecent liberties with a minor case by denying defendant father's motion to suppress and by overruling his objections to the introduction of the interviews of the minor children as substantive evidence on the basis that they were statements made for the purpose of medical diagnosis or treatment pursuant to N.C.G.S. § 8C-1, Rule 803, because: 1) both children testified at trial and were subject to cross-examination, and thus, there was no violation of defendant's right to confrontation; 2) both children were old enough to understand the interviews had a medical purpose and they indicated as such; 3) the circumstances surrounding the interviews created an atmosphere of medical significance; 4) the interviews took place at a medical center with a registered nurse immediately prior to a physical examination; 5) although the examinations took place in a child-friendly room instead of a medical examination room, our Supreme Court has stated that the trial court should consider all objective circumstances of record surrounding declarant's statements in determining whether he or she possessed the requisite intent under Rule 803(4); 6) the evidence taken in its entirety indicates the statements were made at the children's first

visit to a doctor after discovery of these particular allegations of sexual abuse; and 7) both children identified their father as the abuser in their interviews, and such identification was not made simply for trial preparation but also to diagnose psychological problems and prepare a course of treatment.

Sexual Offenses--First-degree--Motion to dismiss--Sufficiency of evidence--Penetration

State v Bellamy, 172 N.C. APP. 649 (2005)

The trial court did not err by denying defendant's motion to dismiss the charge of first- degree sexual offense even though defendant contends there was insufficient evidence of penetration, because: 1) N.C.G.S. § 14-27.1(4) provides that a sexual act can be defined as penetration, however slight, by any object into the genital or anal opening of another person's body; 2) in the context of rape, our Supreme Court has held that evidence that defendant entered the labia is sufficient to prove the element of penetration, and the Court of Appeals finds no reason to establish a different standard for sexual offense; and 3) the evidence in the instant case shows that defendant used the barrel of his gun to spread the labia of the victim.

Jury unanimity--First-degree sexual offense

State v. Brewer, 171 NC App 686 (2005)

Court ruled that the defendant's right to unanimous jury verdicts concerning his convictions of three counts of first-degree sexual offense and three counts of indecent liberties was not violated, considering the indictments, evidence, jury instructions, and verdict sheets. (See the court's discussion of the detailed facts in this case.)

Indecent liberties

State v. Brewer, 171 NC App 686 (2005)

Indecent liberties does not merge with and is not a lesser included offense of firstdegree sexual offense.

First-degree sexual offense--Indecent liberties--Double Jeopardy

State v. Brewer, 171 NC App 686 (2005)

Using the same underlying act to support convictions for both first-degree sexual offense and indecent liberties does not violate a defendant's

constitutional protection against double jeopardy.

1) Sexual Offenses--First-degree sexual offenses--Fatal variance between indictment and evidence

State v Markeith Lawrence, 170 N.C. APP. 200 (2005) Rev'd by State v Markeith Lawrence, 360 NC 368 (2006)

The judgments entered on each of defendant's six first-degree sexual offense convictions must be vacated due to a fatal variance between the offense alleged in each indictment and the evidence presented at trial, because: 1) none of the six indictments for first-degree sexual offense utilized the short-form indictment language authorized by N.C.G.S. § 15-144.2(b) to charge defendant with first-degree sexual offense pursuant to N.C.G.S. § 14-27.4(a)(1) on the theory that the alleged sexual offenses were committed against a victim under the age of thirteen years old; 2) the trial court instructed the jury regarding the first-degree sexual offense charges on the theory that the minor child was under the age of thirteen at the time of the alleged offenses, and not on the theory that the offenses were forcible as alleged in the indictments; 3) the State did not present any evidence that the alleged offenses were forcible as alleged in the indictments; and 4) defendant must be convicted, if convicted at all, of the particular offense charged in the warrant or bill of indictment.

2) Constitutional Law--Right to unanimous jury--Multiple sexual crimes

State v Markeith Lawrence, 170 N.C. APP. 200 (2005) Rev'd by State v Markeith Lawrence, 360 NC 368 (2006)

Defendant's judgments for three counts of indecent liberties and five counts of statutory rape are reversed and remanded for a new trial on those charges based on the risk of a nonunanimous jury verdict, because: 1) no jury instructions, indictment, or verdict sheet distinguished which incidents served as the bases of the jury's eight verdicts; and 2) there was evidence of more incidents presented than the respective charges.

Indecent Liberties--Motion to dismiss--Sufficiency of evidence

State v. Stanford, 169 N.C. APP. 214 (2005)

The trial court erred by denying defendant's motion to dismiss the charge of indecent liberties, because: 1) there was no substantial evidence during the pertinent time period that defendant brushed against the breast of his niece for the purpose of arousing sexual desire, and the evidence suggested nothing more than an accidental encounter; and 2) the

State's evidence supporting the other sexual offense charges occurred months after this incident, and there was no evidence suggesting that the later incidents were even similar to the first to allow a reasonable inference that defendant had the same purpose.

**Probation and Parole--Indecent liberties--Special condition of probation--
Defendant cannot reside in home with minor child**

State v. Strickland, 169 N.C. APP. 193 (2005)

N.C.G.S. § 15A-1343(b2)(4), which mandates a special condition of probation that defendant may not reside in a household with any minor child if the offense is one in which there is evidence of sexual abuse of a minor, was a valid condition for defendant's probation arising out of multiple convictions for taking indecent liberties with a child based upon his sexual contact with his thirteen-year-old sister-in-law and did not violate defendant's due process rights. Further, the trial court did not err by activating defendant's sentence based on a violation of this special condition of probation based on defendant residing in a home with his wife and minor son, because: 1) defendant was not losing custody of his child, but instead his right of association with his child was being restricted for a probationary period of 36 months; 2) defendant was not prohibited by the contested condition from seeing his child nor did it prevent defendant from visiting his child in the home where his wife and child were residing; 3) defendant had the potential, through good conduct, to shorten the term of his probation; 4) defendant took advantage of the fact that he was residing with the minor victim to facilitate the abuse and the thirteen-year-old victim in the instant case was related to defendant through marriage; 5) N.C.G.S. § 15A-1343(b2)(4) serves the purpose of the goals of sentencing and probation to protect the public, assist the offender toward rehabilitation, and providing a general deterrent; 6) a restriction prohibiting defendant from residing in a household with any child, regardless of the gender or relationship of defendant to the child, is not unreasonable or violative of defendant's constitutional rights; and 7) our legislature decided to err on the side of caution by making N.C.G.S. § 15A-1343(b2)(4) a mandatory condition, and one that does not permit exceptions for defendant's own children.

1) Sexual Offenses--Third-degree sexual exploitation of minor--Motion to dismiss--Multiplicity of convictions

State v. Howell, 169 N.C. APP. 58 (2005)

The trial court did not err in a multiple third-degree sexual exploitation of a minor case by denying defendant's motion to dismiss some or all of the charges on grounds of double jeopardy and by denying his motion to arrest

judgment on all but one count arising from 43 child pornography images on defendant's computer hard drive, because: 1) the plain language of N.C.G.S. § 14-190.17A(a) supports multiple convictions, and the intent of the child pornography statutes is to prevent the victimization of individual children and to protect minors from physiological and psychological injuries resulting from sexual exploitation and abuse; and 2) even if there were only five downloads, the State's evidence tended to show that each of the two hundred individual photographs on defendant's computer, found within the five zip directories, had been opened, and saved on defendant's hard drive.

2) Constitutional Law--Overbreadth--Child pornography statutes--Case-by-case analysis of fact situations

State v. Howell, 169 N.C. APP. 58 (2005)

N.C.G.S. §§ 14-190.17A(a) and 14-190.13 which protect against child pornography are not overbroad even though they extend to images of minors which do not require a live minor for their production and even though defendant contends they allegedly criminalize material that does not violate community standards, because: 1) both the Court of Appeals and our Supreme Court have addressed this very issue and concluded that the statutes are constitutional; and 2) whatever overbreadth may exist should be cured on a case-by-case analysis of fact situations to which their sanctions assertedly may not be applied.

Evidence--Expert medical testimony--Sexual abuse in absence of physical evidence--Plain Error

State v. Ewell, 168 N.C. APP. 98 (2005)

The trial court committed plain error in a first-degree sex offense, attempted statutory sex offense, statutory rape, and indecent liberties with a child case by admitting the opinion testimony of a doctor indicating it was probable that the minor child was a victim of sexual abuse in the absence of any physical evidence, because: 1) the improperly admitted opinion by a medical expert on the child's credibility prejudiced defendant in the eyes of the jury; and 2) the State presented no other evidence beyond what the child told other witnesses, and as such, the child's credibility was the strength of the State's case. ***Can ask if evidence consistent with sexual abuse ***

Evidence--Officer's testimony--Prior consistent statements--Corroboration

State v. Thaggard, 168 N.C. APP. 263 (2005)

The trial court did not err in a statutory rape, statutory sexual offense, and taking indecent liberties case by permitting an investigator to testify that the two minor victims' in-court testimony was consistent with their previous statements to the investigator, because: 1) a review of the investigator's testimony with the victims' in-court testimony shows his testimony to be corroborative; 2) the differences that defendant cites in the statements are not appreciable variances and instead appeared to be either where the investigator did not receive all the details during the initial meetings or the order of details in the victims' stories varied between their initial statements and their testimony at trial; and 3) any disparities affect the weight, not the admissibility, of the statements and the witnesses' credibility.

Rape–Statutory–Age of victim–Birthday rule

State v. Moore, 167 N.C. APP. 495 (2004)

There was sufficient evidence of statutory rape where the victim was 2 days older than 15. The plain language of N.C.G.S. § 14-27.7A(a) does not qualify the age of the victim and, under the “birthday rule” in North Carolina, people reach an age on their birthday and remain that age until their next birthday.

Sexual Offenses–Sexual activity by substitute parent–Parental relationship–Evidence sufficient

State v. Oakley, 167 N.C. APP. 318 (2004)

There was sufficient evidence of the parental relationship in a prosecution for sexual activity by a substitute parent where defendant, who initially had a sexual relationship with the 17-year-old boy's mother, obtained permission from the victim's parole officer for the victim to live with him and provided clothes, food, shelter, bail, and other support, and was more than a babysitter.

Sexual Offenses--Incest–Motion to dismiss–No requirement of one count of incest per victim

State v. Shelton, 167 N.C. APP. 225 (2004)

The trial court did not err by denying defendant's motion to dismiss all but one incest charge per victim, because: 1) N.C.G.S. § 14-178 does not reveal any legislative intent to prohibit prosecuting a defendant for more than one count of incest per victim; and 2) neither statutory provisions nor relevant case law suggest that incest is a continuing offense.

Rape--Statutory--Fifteen-year-old victim

State v. Roberts, 166 N.C. APP. 649 (2004)

There was sufficient evidence of the victim's age in a statutory rape prosecution where the victim was 15 years and eleven months old. The fair meaning of "15 years" in the statutory rape statute includes children in their 15th year until they reach their 16th birthday.

1) Indecent Liberties--Child's testimony--Sufficient

State v. Fuller 166 N.C. APP. 548 (2004)

The trial court did not err by denying a defendant's motion to dismiss an indecent liberties prosecution where the child's testimony was sufficient for the jury to infer that defendant acted to arouse or gratify sexual desire.

2) Witnesses--Expert--Sexual assault nurse examiner

State v. Fuller, 166 N.C. APP. 548 (2004)

The trial court did not abuse its discretion in a prosecution for statutory rape and other offenses by allowing a nurse to testify as an expert sexual assault nurse examiner where she had been employed by the hospital for nineteen years; had served as a nurse manager in the emergency department for two years; had a bachelor of science in nursing and had received special sexual assault nurse examiner training in 1999; that training involved forty hours in the classroom and fifty-six hours of clinical practice; the witness was specifically trained to examine the victim's demeanor and body language as well as to look for physical evidence and signs of trauma; and the witness had been a certified sexual assault nurse examiner for three years at the time of trial.

3) Evidence--sexual offenses--medical testimony--injuries consistent with assault

State v. Fuller, 166 N.C. APP. 548 (2004)

The trial court did not err in a prosecution for statutory rape and other offenses by permitting a doctor and a nurse who were qualified as experts to testify about whether their examinations and findings were consistent with a child who had suffered kissing on the breast and vaginal penetration.

Evidence--Sexually explicit images--Not admitted--Testimony about images admitted

State v. Quinn, 166 N.C. APP. 733 (2004)

Testimony that defendant viewed sexually explicit photographs on his home computer was admissible in a prosecution for kidnapping and statutory sexual offense to establish defendant's motive, preparation and plan. The probative value of this evidence was not substantially outweighed by the danger of unfair prejudice where the judge did not admit the images, the State was cautioned that the images were inflammatory, and the court took the precaution of placing them in an envelope to avoid their being shown to the jury.

Constitutional Law--Right to unanimous jury--Sexual assaults

State v. Lawrence 165 N.C. APP. 548 (2004) Rev'd in part 360 NC 393 (2006) & 360 NC 368 (2006)

The trial court in a multiple second-degree rape, multiple second-degree sex offense, and double indecent liberties case deprived defendant of his right to a unanimous verdict, because comparison of the evidence adduced at trial with the charges brought against defendant reveals that with regard to the charges of second-degree sex offense: 1) there was evidence of a greater number of separate criminal offenses than the number of charges for two of the victims; 2) there was general testimony with no accompanying instructions on limiting its consideration to one criminal offense in regard to one of the victims; 3) the jury was permitted to consider evidence of numerous criminal sexual acts with no guidance separating them into separate criminal offenses for all three victims; and 4) none of the verdict sheets associated the offense number with a given incident or separate criminal offense, nor did the trial court's instructions make any attempt to separate the individual criminal offenses or guide the jury to identify a given verdict sheet with a corresponding instance of alleged sexual abuse.

Rape--Sexual Offenses—Statutory--Specificity of evidence--Sufficient

State v. Bingham, 165 N.C. APP. 355 (2004)

The testimony of a 13-year-old statutory rape and sexual offense victim that certain sexual acts occurred with defendant 25-40 times at intervals during an 8 month period was sufficient to deny defendant's motion to dismiss, although the victim could not remember the details because it was "...basically the same thing over and over again."

Kidnapping--First-degree--Minor--Sex offender registration

State v. Sakobie, 165 N.C. APP. 447 (2004)

The trial court did not err in a first-degree kidnapping of a minor case by entering an amended judgment mandating that defendant be required upon release from the Department of Correction to register pursuant to the Sex Offender and Public Protection Registration Program under Article 27A, because: 1) registration pursuant to Article 27A is not a form of punishment unauthorized by Article XI, Section 1 of the North Carolina Constitution when Article 27A is a civil rather than a criminal remedy; 2) even though defendant contends the kidnapping was in furtherance of larceny of a vehicle, N.C.G.S. § 14-208.6(li) provides that an offense against a minor includes kidnapping pursuant to N.C.G.S. § 14-39; 3) defendant's separate asportation or movement of the child was unnecessary to complete the offense of larceny of the vehicle as defendant already had possession of the vehicle; and 4) based on the language of the indictment and the fact that defendant was found guilty of the crime for which she was indicted, it is unnecessary to remand the case for a specific finding concerning whether the kidnapping involved a minor.

Sexual Offenses--Statutory sex offense against person 13, 14, or 15 years old--short-form indictment

State v. Daniels 164 N.C. APP. 558 (2004)

The trial court did not err by concluding that the indictment for statutory sex offense against a person who is 13, 14, or 15 years old was sufficient to apprise defendant of the crime with which he was charged, because: 1) N.C.G.S. § 15-144.2 permits a short-form indictment for this crime; and 2) the statute does not require the State to provide the details of the alleged sexual offense in the indictment, but specifically states that it is sufficient in describing a sex offense to allege that the accused person unlawfully, willfully, and feloniously did engage in a sex offense with the victim.

Evidence--Expert testimony--Hypothetical questions

State v. McCall, 162 N.C. APP. 64 (2004)

The trial court did not err in an indecent liberties with a minor and attempted first-degree rape case by allowing a child psychologist to testify about hypothetical evidence, because: 1) the expert's testimony could help the jury understand the behavior patterns of sexually abused children and assist in assessing the credibility of the victim; 2) the fact that the expert's testimony took the form of hypothetical questions and was based on information related to her by a third party does not affect the admissibility of her opinion, but instead goes to the weight of the evidence; 3) although the expert testified at least twice that her opinion was not based upon

personal observation of the child, the source of her information about the child did not lessen her qualifications as a psychologist or her expertise in treating the victims of sexual abuse; and 4) the DSS report, the child's statement to police, and interviews with other medical or psychological evaluators provided sufficient information to form the basis for the witness's expert opinion. Rule 701 See Farb p.26

Sexual Offenses--Crime against nature—Instruction--Penetration by object

State v. Stiller, 162 N.C. APP. 138 (2004)

The trial court did not err in a multiple second-degree rape and crime against nature case by its instruction on crime against nature, because: 1) while no case in our State has specifically included penetration of the genital opening by an object in its definition of crime against nature, such an act is consistent with the language of *State v. Joyner, 295 N.C. 55 (1978)*; and 2) defendant failed to object to the instructions when given, and the instructions did not arise to the level of plain error.

Sexual Offenses--Taking or attempting to take indecent liberties with a child--Motion to dismiss--Sufficiency of evidence

State v. Brown 162 N.C. APP. 333 (2004)

The trial court erred by denying defendant's motion to dismiss the charges of taking or attempting to take indecent liberties with a child, because: 1) the conversations between defendant and the victim were neither sexually graphic and explicit nor were they accompanied by other actions tending to show defendant's purpose was sexually motivated; 2) nothing in the record indicated defendant's actions emanated from a desire or purpose to arouse or gratify sexual desire; and 3) the scope of taking indecent liberties has never encompassed innuendo and intimation unaccompanied by other indicia of defendant's motivation.

Sexual Offenses--First-degree--Indecent liberties--Motion to dismiss--Sufficiency of evidence--Fatal variance from indictment

State v. Custis, 162 N.C. APP. 715 (2004)

The trial court erred by denying defendant's motion to dismiss the charges of two counts of first-degree sexual offense and two counts of indecent liberties with a child, because: 1) the State failed to present evidence that the charged offenses occurred on or about 15 June 2001 as alleged in the indictment; 2) defendant relied on the language in the indictment to build his alibi defense for the 15 June 2001 weekend; and 3) all of the evidence presented at trial went to sexual encounters over a period of years

ending some time prior to the date listed in the indictment, and such a dramatic variance between the indictment date and the evidence adduced at trial prejudiced defendant by denying him the opportunity to present an adequate defense.

Indecent Liberties--Sufficiency of evidence--Intent

State v. Shue 163 N.C. APP. 58 (2004)

There was insufficient evidence of an intent to take indecent liberties, and the trial court erred by denying defendant's motion to dismiss, where there was an encounter in a restroom but the only evidence of intent was in the defendant's subsequent actions with another victim in the same stall.

Juveniles -- Delinquency --First -- Degree sexual offense -- Fatal variance between petition and evidence

In RE: Griffin, 162 N.C. App. 487 (2004)

The Court of Appeals exercised its discretionary authority under N.C. R.App.P. 2 and determined that a juvenile order adjudicating respondent a delinquent for commission of first-degree sexual offense and the subsequent dispositional order should be vacated because a fatal variance existed between the juvenile petition and the evidence upon which respondent was adjudicated delinquent, including that: 1) the petition alleged only sexual offense by force against the victim's will; 2) there was no evidence presented at the adjudicatory hearing which tended to show respondent committed forcible sexual offense; and 3) the hearing transcript indicates the trial court adjudicated respondent a juvenile first-degree sex offender based on the respective ages of respondent and the victim, despite the petition's failure to allege either the victim's age or the difference in age between respondent and the victim.

Sexual Offenses--First-degree--Failure to require unanimous verdict for specific sexual act

State v. Carrigan, 161 N.C. APP. 256 (2003)

The trial court did not commit plain error by failing to require a unanimous verdict regarding the specific sexual act it found as the predicate act for the verdict of guilty of first-degree sexual offense because N.C.G.S. § 14-27.4(a)(1) does not require all twelve jurors to agree as to which act defendant committed, but rather that he committed a sexual act.

Constitutional Law--Equal protection--Statutory rape--Marital status

State v. Clark, 161 N.C. APP. 316 (2003)

North Carolina's statutory rape law under N.C.G.S. § 14-27.7(a) does not violate equal protection even though it exempts married couples.

**1) Rape; Sexual Offenses--Statutory rape--Statutory sexual offense--
Amendment of indictment--
Age**

State v. Wiggins, 161 N.C. APP. 583 (2003)

The trial court did not err in a multiple statutory rape and statutory sexual offense case by amending the indictments over defendant father's objection to state that defendant was "more than six years older" than the victim instead of "more than four years older," because: 1) the amendment related to defendant's age and not the manner and means by which the crime was perpetrated; 2) defendant knew his age and was therefore aware that N.C.G.S. § 14-27.7A(b), which was neither referenced in the indictments by its statute number nor quoted, did not apply to him; and 3) it would be biologically impossible for defendant to father the victim and fall within the age requirements of subsection (b), and therefore defendant could not have been misled or surprised as to the nature of the charges and the respective punishment.

2) Rape--Statutory--Motion to dismiss--Sufficiency of evidence

State v. Wiggins, 161 N.C. APP. 583 (2003)

The trial court did not err by denying defendant's motion to dismiss the multiple statutory rape charges, because: 1) a child's uncertainty as to the time or particular day the offense charged was committed goes to the weight of the testimony rather than its admissibility; 2) the evidence established that the victim was between thirteen and fifteen years old, an essential element of statutory rape under N.C.G.S. § 14-27.7A(a), during the pertinent time she lived with defendant and that defendant engaged in almost daily sexual intercourse with her; and 3) the victim testified that defendant was her biological father, and it was biologically impossible for defendant to be less than six years older than the victim to be her father.

Constitutional Law—Rape--Right to unanimous verdict--Instruction--First-degree statutory rape of female under age of thirteen

State v. Holden 160 N.C. APP. 503 (2003)

The trial court erred in a first-degree statutory rape of a female under the age of thirteen case by depriving defendant of his constitutional right to a unanimous jury verdict before being found guilty of a crime when it failed to distinguish between each of the ten counts submitted to the jury, because the effect of the instruction was to permit the jury to return guilty verdicts without agreeing that defendant committed a particular offense, or without agreeing on which two particular incidents of statutory rape occurred. N.C. Const. art. I, § 24.

Rape—Penetration--Sufficiency of evidence

State v. Bell, 159 N.C. APP. 151 (2003)

There was sufficient evidence of penetration in a rape case. Complete penetration need not occur.

Sexual Offenses--First-degree sexual offense—Indictment--Confused with statutory sexual offense

State v. Miller, 159 N.C. APP. 608 (2003)

Indictments for first-degree sexual offense were fatally defective because they confused first-degree sexual offense with statutory sexual offense. The indictments alleged a combination of the elements of the two offenses without alleging each element of either offense, and they erroneously cite a different statute than the one under which defendant was tried, convicted, and sentenced. The “short-form” language of N.C.G.S. § 15-144.2(b) was not sufficient to cure the defects under these narrow circumstances.

N.C.G.S. § 14-27.7A; N.C.G.S. § 14-27.4(a)(1).

1) Criminal Law--Indictment for completed offense--Conviction for attempt

State v. Sines, 158 N.C. APP. 70 (2003)

An indictment for a completed statutory sexual offense will support a conviction for the lesser crime of attempted statutory sexual offense.

2) Sexual Offenses--Attempted statutory sexual offense--Nature of intent

State v. Sines, 158 N.C. APP. 70 (2003)

The crime of attempted statutory sexual offense is valid under North Carolina law. The intent required for attempted statutory sexual offense requires only that defendant intended to commit a sexual act with the victim, not that defendant intended to commit a sexual act with an

underage person.

Indecent Liberties -- Telephone conversations -- Sexually explicit -- Evidence sufficient -- Common sense of society

State v. Every, 157 N.C. App. 200 (2003)

Defendant's telephone conversations with the minor victim constituted an indecent liberty with a child, and the trial court correctly denied defendant's motion to dismiss, where defendant repeatedly engaged in extremely graphic and explicit sexual conversations while he groaned, breathed heavily, told the victim that he was masturbating, and invited her to do the same. Moreover, defendant exploited a position of trust as the victim's karate instructor to overcome her hesitation.

Evidence--Expert testimony--Sexual abuse

In re: Butts 157 N.C. APP. 609 (2003)

The trial court did not commit plain error in a case adjudicating respondent juvenile a delinquent for commission of first-degree sexual offense by allowing a pediatrician to testify under N.C.G.S. § 8C-1, Rule 702 that her physical examination of the victim was consistent with the interview in which the victim told the pediatrician about the incident involving respondent even though the exam failed to show any physical injury because the pediatrician did not testify that the allegations in the juvenile petition were accurate, but only that her examination of the alleged victim was consistent with her interview of him.

1) Rape--Attempted first-degree--Motion to dismiss--Sufficiency of evidence

State v. Rogers, 153 N.C. APP. 203 (2002)

The trial court did not err by denying defendant's motion to dismiss the charge of attempted first-degree rape even though the State relied on the serious injuries suffered by the victim mother's daughter to elevate the offense when the daughter was not present during the attempted rape and the indictment did not allege which element the State relied on to elevate the crime to a first-degree offense, because: 1) when the State is proceeding under the theory that the serious personal injury was inflicted on a person other than the victim of the rape or attempted rape, there is no requirement under N.C.G.S. § 14-27.2(a)(2)(b) that the other person actually be present during the rape or attempted rape; 2) viewing the evidence in the light most favorable to the State reveals that a jury could have reasonably inferred that defendant attacked the daughter for the purpose of concealing the attempted rape of the mother or aiding in his escape from apprehension and that the attempted rape of the mother and

the attack on the daughter were part of one continuous transaction; 3) the evidence supports the serious personal injury element of attempted first-degree rape based on the injuries suffered by either of the two victims; and (4) N.C.G.S. § 15-144.1 does not require that an indictment for rape contain an allegation of which element the State was relying on to elevate the crime to a first-degree offense.

2) Rape--Attempted first-degree--Jury instructions--Serious personal injury on victim or another

State v. Rogers, 153 N.C. APP. 203 (2002)

The trial court did not err in its instructions on attempted first-degree rape by instructing the jury that it could find defendant guilty if it found that he inflicted serious personal injury on the victim or any other person, because the State presented sufficient evidence to show that the attempted rape of the victim and the assault of another victim were part of a continuous transaction.

Sexual Offenses--First-degree--Deliberate touching of child--Prurient intent not required

State v. Bartlett 153 N.C. APP. 680 (2002)

The trial court properly declined to instruct the jury on accidental or inadvertent touching as requested by a first-degree sexual offense defendant where there was no evidence that the physical contact between defendant and his children was not deliberate. The offense of first-degree sexual offense does not require prurient intent as proposed in the instruction.

Evidence--Sexual assault--Emergency room physician's testimony--Credibility of victim

State v. O'Hanlan, 153 N.C. APP. 546 (2002)

An emergency room physician's opinion testimony that the victim's emotional state was consistent with someone who had been sexually assaulted and that a sexual assault had occurred did not improperly bolster the credibility of the victim so as to constitute plain error in a rape and sexual offense prosecution. The treating physician is permitted to give the background reasons for his diagnosis and he was never asked whether he believed the victim was sincere.

Sexual Offenses--Constructive force--Parental relationship

State v. Corbett, 154 N.C. APP. 713 (2002)

There was sufficient evidence of constructive force in a second-degree sexual offense conviction where the victim was defendant's step-daughter; the abuse in question began when she was twelve and continued until she was sixteen; and the victim testified that defendant acted like her father, disciplined her, and that she treated him as her father. Constructive force may be inferred from the circumstances surrounding the parental relationship.

Evidence--Other offenses--Identity, pattern, common plan

State v. Brothers, 151 N.C. APP. 71 (2002)

The trial court did not err in a prosecution for first-degree statutory rape and other sexual offenses against a six-year-old girl by admitting testimony from her sister as to other sexual acts committed by defendant. The prior acts showed identity, pattern, and a common plan or scheme.

1) Evidence--Indecent liberties prosecution--Possession of pornography--Nonprejudicial error

State v. Smith 152 N.C. APP. 514 (2002)

The trial court in a prosecution for indecent liberties and first-degree sexual offense erred in the admission of defendant's possession of pornographic magazines and videos where there was no evidence that defendant had viewed the materials with the victim, nothing more than speculation that defendant asked the victim to view the materials, the testimony which the materials were supposed to corroborate was never presented to the jury, and defendant did not waive his objection by testifying about the material on cross-examination because he had timely objected when the State began the line of questioning. However, this error was not prejudicial because there was no reasonable possibility of a different result without the evidence.

2) Evidence--Indecent liberties--Sexual offenses--Child victim--Prior sexual misconduct with babysitter

State v. Smith 152 N.C. APP. 514 (2002)

Evidence that defendant had previously engaged in sexual misconduct with a 15-year-old babysitter was admissible under Rule 404(b) in a prosecution for taking indecent liberties and sexual offense with his 12-year-old stepdaughter to show the absence of mistake and defendant's

plan, scheme or design. N.C.G.S. § 8C-1, Rule 404(b).

Evidence—Psychologist--Testimony that abuse occurred

State v. Dixon, 150 N.C. APP. 46 (2002)

The trial court erred in a prosecution for first-degree statutory sexual offense by permitting a clinical psychologist to testify to his opinion that the victim had been sexually abused. Although the witness's testimony about the various psychological tests, interviews, and reports upon which he relied may have been a sufficient foundation to support an opinion that the victim did or did not exhibit symptoms or characteristics of victims of child sexual abuse, it was not a sufficient foundation for the admission of his opinion that she had in fact been sexually abused. There is a reasonable possibility that a different result would have been reached without the testimony because there was no evidence of sexual abuse other than the victim's testimony and her credibility was critical.

Rape--Attempted--Sufficiency of evidence

State v. Oxendine 150 N.C. APP. 670 (2002)

The trial court did not err by denying defendant's motion to dismiss the two charges of attempted rape, because: 1) a reasonable jury could infer from defendant's actions with the two victims that he intended to rape them; 2) the fact that defendant ended his assault before he actually raped either victim or the reasons for the change in his stated intent to rape the women is irrelevant for purposes of attempted rape; and 3) the fact that the women apparently managed to dissuade defendant from his stated purpose does not alter defendant's initial actions towards them.

Evidence--Expert opinion testimony--Credibility of sexual abuse victim

State v. O'Connor, 150 N.C. APP. 710 (2002)

The trial court committed plain error in a first-degree statutory sexual offense case by distributing an exhibit to the jury which had an expert's opinion that a sexual abuse victim's disclosure to her that defendant "sodomized and performed oral sex on him was credible," because: 1) the admission constitutes impermissible expert testimony on the credibility of the minor victim's testimony; and 2) there was no physical evidence of abuse and the State's case was almost entirely dependent on the minor victim's credibility with the jury.

Evidence -- Sexual offense against child -- Expert testimony

State v. Stancil, 355 N.C. 266 (2002)

In a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has in fact occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility. However, an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith.

Evidence--Expert opinion testimony--Child abuse--Delayed and incomplete disclosures--Continued association with abuser

State v. Carpenter, 147 NC App 386 (2001)

The trial court did not abuse its discretion in an indecent liberties and first-degree sexual offense case by admitting expert opinion testimony stating that delayed and incomplete disclosures are not unusual in cases of child abuse and that children sometimes continue to associate with the alleged abuser, because: 1) the expert was adequately qualified in the area of child abuse evaluations and interviews based on her extensive experience, training, and education; 2) the expert's testimony was instructive and helpful to the jury in understanding the evidence; and 3) a proper foundation was established for the expert's opinion testimony.

Evidence--Child sexual assault victim--Prior agency record--Cross-examination of psychologist limited

State v. Yearwood, 147 NC App 662 (2001)

The trial court did not abuse its discretion in a prosecution for first-degree statutory sexual offense with a child under 13, indecent liberties, and first-degree statutory rape in limiting defendant's cross-examination of the victim's psychologist by precluding any reference to evidence contained in agency records regarding allegations that the victim was exposed to sexual situations as a young child by her father. The psychologist testified on voir dire that she was aware of social services records involving the victim, but that she did not base her opinion that the victim's behavior was consistent with having been assaulted on events occurring before the date of the alleged assault. Additionally, there was abundant evidence that the victim had been sexually assaulted and there was no evidence of another rapist; defendant merely claimed that exposure to her father's nudity years earlier could have caused the behavior referred to by the psychologist. Finally, there was no indication in the record that

this evidence was relevant to the victim's credibility.

Sexual Offenses--Indecent liberties between children--Motion to dismiss--Sufficiency of evidence—Purpose of arousing or gratifying sexual desire

In re: T.C.S.148 N.C. APP. 297 (2002)

The juvenile court did not err by failing to dismiss the charge of taking indecent liberties between children under N.C.G.S. § 14-202.2 based on the sufficiency of the evidence showing that defendant juvenile acted for the purpose of arousing or gratifying sexual desire, because: 1) the juvenile was almost twelve years of age when he was seen holding hands with the five-year-old victim in the presence of her three-year-old sister; 2) a witness testified that the victim's actions appeared to be done at the insistence and direction of the boy, and the boy appeared to put his hands on his private parts while the victim was taking off her clothes; and 3) the age disparity, the control by the juvenile, the location and secretive nature of their actions, and the attitude of the juvenile is evidence of the maturity and intent of the juvenile.

Evidence--Expert testimony--Child sexual abuse

State v. Grover, 142 N.C. App. 411, 2001

The trial court erred in a prosecution for statutory rape and related offenses by admitting testimony from a clinical social worker and a pediatric nurse practitioner concluding that the victims had been sexually abused based solely on the children's statements to them or to someone else. It is permissible for an expert to testify that a child exhibits characteristics consistent with abused children, but impermissible for an expert to testify that a child has been sexually abused in the absence of physical evidence. Affirmed by Sup Ct. 354 NC 354 (2001)

Sexual Offenses--Sexual activity by custodian--Job Corps employee

State v. Jones, 43 N.C. App. 514, 2001

The trial court did not err in a prosecution against a Job Corps employee for voluntary sexual activity with a sixteen-year-old Job Corps participant by refusing to grant motions to dismiss the charge of sexual activity by a custodian. *State v. Raines, 319 N.C. 258*, does not require that a victim be involuntarily or physically confined or that an institution obtain legal custody for the victim to be considered in "custody" under N.C.G.S. § 14-27.7(a). In accordance with *Raines*, the victim here was in the Job Corps' care, preservation, and protection and was therefore within its "custody."

1) Evidence--Expert testimony--Sexual assault--Credibility

State v. Stancil, 146 N.C. App. 234, 2001

The trial court did not commit plain error in a first-degree sexual offense case by allowing the State's expert witnesses to state opinions about whether the seven-year-old child victim had been sexually assaulted and about the child's credibility, because: 1) a physical exam was given within hours after the incident and interview, and the nature of the sex act was not likely to leave forensic evidence particularly after the child used the bathroom; 2) the child was consistent in relating facts during each interview and exhibited physical symptoms of trauma; 3) the expert testimony was based on the overall examination of the child during the course of treatment rather than solely on the child's statements; and 4) each opinion was given by an expert in the field of child abuse or child investigation and interviews who had observed the child, noted her symptoms and manifestations, conducted at least one interview with her, and was aware of her account of the incidents to others.

2) Evidence--Testimony--Sexual assault--Child's allegations did not vary--Prior consistent statements--Corroboration

State v. Stancil, 146 N.C. App. 234, 2001

The trial court did not err in a first-degree sexual offense case by allowing the State's witnesses to testify that the seven-year-old child victim's allegations did not vary, because: 1) the witnesses first related to the jury what the victim had told them and then testified that she had not changed her story; and 2) the child's prior consistent statements are admissible to corroborate the testimony of the witnesses.

3) Evidence--Hearsay--Medical diagnosis or treatment exception

State v. Stancil, 146 N.C. App. 234, 2001

The trial court did not err in a first-degree sexual offense case by allegedly allowing hearsay statements of the seven-year-old child victim because the interviews occurred in the hospital almost immediately after the incident, showing that the victim made the statements for purposes of medical diagnosis and treatment.

Sexual Offenses--Date of offense--Variance between indictment and evidence--Prejudicial

State v. Stewart, 353 N.C. 516 2001

The trial court erred in a prosecution for a first-degree sexual offense against a juvenile under the age of thirteen by not granting defendant's motion to dismiss where the indictment listed only the month of July 1991 as the time of the assaults, defendant presented evidence of his whereabouts for each day of that month, the prosecutor introduced evidence concerning sexual encounters between the victim and defendant over a two- and one-half-year period, and the prosecutor presented no evidence of a specific act occurring during July of 1991. Generally, the time listed in the indictment is not an essential element of the crime charged, but here the dramatic variance between the date set forth in the indictment and the evidence presented by the State prejudiced defendant by depriving him of an opportunity to adequately present his defense.

Indecent Liberties -- Sentencing -- Aggravating factors --Victim's age

State v. Rudisill, 137 N.C. App. 379 (2000)

An indecent liberties defendant received a new sentencing hearing where the sentencing judge found the statutory aggravating factor that the victim was very young, but the record showed only that the victim was seven years old. There was no finding that this child was more vulnerable simply because of his age; merely checking the AOC form is not sufficient to establish this aggravating factor except in cases where the child is of such tender age that the vulnerability is established by the nature of the crime.

Evidence--Rape shield statute--Medical DSS records--Sexual act involved in offense--Accusations

State v. Thompson, 139 N.C. App. 299, 2000

There was no prejudicial error in a prosecution for first-degree statutory rape, indecent liberties, and other offenses where the trial court erroneously invoked the rape shield statute to prevent defendant from introducing the victim's medical records, which indicated that defendant's "partner" had been treated for gonorrhea, and to prevent defendant from questioning whether the victim's DSS records included any accusations of people other than defendant or false accusations. The medical records concerned the direct sexual act for which defendant was on trial, not some other act in defendant's history, and the line of questioning about the DSS records dealt with accusations, not sexual activity, so that Rule 412 did not operate as a shield; however, the questions were irrelevant because the medical records did not identify the "partner" and it was obvious that the victim had a sexual connection, and

no evidence at trial suggested that she had ever made false accusations.

Rape--Continuous act--Multiple penetrations

State v. Lancaster, 137 N.C. App. 37 (2000)

The trial court did not err by denying a motion to dismiss one of two rape charges on the theory that there was only one continuous act. Each act of intercourse constitutes a distinct and separate offense and the victim testified that she was penetrated from behind by defendant, that he forced her onto a closet shelf so that she was facing him, and that he again forcibly penetrated her.

Sexual Offenses--Sexual activity by a custodian--Motion to dismiss--Sufficiency of evidence

State v. Crockett, 138 N.C. App. 109 2000

The trial court did not err in denying defendant's motion to dismiss the charge of sexual activity by a custodian in 97 CRS 20050 because: 1) the victim's testimony revealed that she believed she was in a custodial relationship with defendant on the date of their sexual encounter; 2) employees from the Youth Opportunity Home testified that the victim was still a participant in their program on the date of the victim's sexual encounter with defendant; and 3) the State demonstrated sufficient evidence that defendant was an employee of the Youth Opportunity Home at that time.

Rape -- Statutory -- Consent not a defense

State v. Anthony, 351 N.C. 611 (2000)

Statutory construction of N.C.G.S. § 14-27.7A(b) reveals that consent is not a defense to a charge of vaginal intercourse or a sexual act with a person who is thirteen, fourteen, or fifteen years old by a defendant who is more than four but less than six years older than the victim because: 1) the designation of marriage in this statute as the single defense is an implicit rejection of all other defenses under the doctrine of *inclusio unius est exclusio alterius*; 2) the purpose of the statute, when viewed in the context of the historical development of this area of law, is to protect children aged thirteen, fourteen, and fifteen years old from sexual acts; 3) the legislature identified the difference in age between the defendant and the victim as an essential element of the crime, reflecting a legitimate legislative decision that sexual intercourse or sexual acts with children deserve more severe punishment if the victim is younger or based on a greater difference in age between the victim and the older defendant;

4) the fact the legislature did not chose to amend an existing statute does not mean that it intended to depart from well-established precedent and allow consent as a defense to a charge of violating the new statutory rape statute; and 5) the use of the term "statutory rape" in the title of the legislative act presumes the legislature intended to impart that term's well-understood meaning of an offense committed against a victim legally incapable of giving consent to sexual intercourse because of age or other incapacity.

**Criminal Law 904 (NCI4th)--Rape and Allied Sexual Offenses 132 (NCI4th) -
- Indecent liberties --Disjunctive instruction**

State v. McCarroll, 336 N.C. 559 (1994)

The trial court did not deny defendant the right to a unanimous verdict by instructing the jury that it could find her guilty of indecent liberties based on any "immoral, improper or indecent touching or act by the defendant upon the child or an inducement by the defendant of an immoral or indecent touching by the child." Even though there may have been evidence of touching or other acts by defendant which would not be considered "immoral, improper or indecent," there was plenary evidence of illegal touching by defendant to support her conviction; the trial court properly instructed the jury as to how to consider the evidence; and it will be assumed that the jury followed the court's instructions.

**Evidence and Witnesses 2330 (NCI4th) -- Indecent liberties -- Evidence of
penetration -- Admissible**

State v. Baker, 333 N.C. 325 (1993)

The trial court did not err in a prosecution for taking indecent liberties by admitting medical opinion evidence that the victim had been penetrated even though the child's testimony did not mention penetration.

**1) Evidence and Witnesses 2332 (NCI4th) --Child sexual abuse -- Expert
testimony -- Coaching of child --Redirect examination - No error**

State v. Baymon, 336 N.C. 748 (1994)

The trial court did not err in a prosecution for rape and sexual offenses against a nine-year-old child by allowing Dr. Everett, an expert in pediatric medicine and child sexual abuse, to testify on redirect examination that she had not picked up on anything to suggest that someone had told the victim what to say or that the victim had been coached. Although an expert witness may not testify that the prosecuting

child-witness in a sexual abuse trial is believable or that the child is not lying about the alleged sexual assault, defense counsel on cross-examination attempted to leave the impression that the victim had been coached by her relatives or social workers involved in the case and opened the door for the State on redirect to proffer Dr. Everett's testimony that she did not perceive that the victim had been told what to say or had been coached.

2) Evidence and Witnesses 2972, 3158 (NCI4th) -- Child sexual abuse -- Specific acts of truthfulness -- Testimony of victim's teacher

State v. Baymon, 336 N.C. 748 (1994)

There was prejudicial error in a prosecution for rape and sexual offenses against a child where the child's teacher testified to specific acts of the child which were indicative of truthfulness. The testimony was improperly offered to show the victim's truthfulness in the past in order to suggest that she was being truthful concerning the subject matter of the charges against defendant and was prejudicial in light of the conflicting medical testimony.

Rape and Allied Offenses 19 (NCI3d) -- Taking indecent liberties with minor -- Secretly filming a child who undresses -- What "with" a minor means

State v. McCless, 108 N.C. App. 648 (1993)

Defendant was "with" a minor within the context of N.C.G.S. 14-202.1(a)(1), and there was no merit to his contention that the statute and subsequent case law required that the victim and defendant have physical contact or be in one another's physical presence and that the victim must be aware of the perpetrator's presence before an indecent liberty could be taken "with" a child, where defendant, the headmaster of a school, took advantage of an authoritative position of trust by asking the victim to try on basketball uniforms; he strategically placed a camera such that she was unaware of its presence, thereby secretly filming the child as she changed clothes several times;

Evidence and Witness 373 (NCI4th) -- Second degree rape of stepdaughter -- Rape of other stepdaughter ten years earlier -- Relevancy -- Remoteness -- Admissibility to show common plan or scheme

State v. Matheson, 110 N.C. App. 577 (1993)

Rape and Allied Offenses 19 (NCI3d) -- Indecent liberties -- Evidence sufficient

State v. Rogers, 109 N.C. App. 491 (1993) 428 S.E.2d 220

Evidence that defendant touched the victim's chest and vaginal area while alone in the bathroom with her was sufficient to permit the jury to infer that defendant's purpose in doing so was to arouse himself or to gratify his sexual desire.

Evidence and Witnesses 125 (NCI4th)--Rape and sexual offenses -- Thirteen-year-old victim -- Previous false accusations -- Not excluded by Rape Shield Statute

State v. McCarroll, 109 N.C. App. 574 (1993)

Rape and Allied Offenses 4.3 (NCI3d) - Rape Shield Statute - Letter not excluded

State v. Guthrie, 110 N.C. App. 91 (1993)

Cross-examination of an alleged sexual offense and indecent liberties victim about a letter she wrote asking a school friend to have sex with her was not prohibited by the Rape Shield Statute, N.C.G.S. 8C-1, Rule 412, because evidence of language does not constitute evidence of sexual behavior excluded by this statute.

1) Indictment, Information, and Criminal Proceedings 52 (NCI4th) -- First-degree rape and indecent liberties -- Time of offense -- Variance between indictment and evidence -- Not fatal

State v. McKinney, 110 N.C. App. 365 (1993)

2) Indictment, Information, and Criminal Proceedings 29 (NCI4th) -- Rape -- Allegations as to dates not specific -- Not grounds for dismissal

State v. McKinney, 110 N.C. App. 365 (1993)

1) Evidence and Witnesses 120 (NCI4th) -- Rape Shield Statute -- Prior sexual conduct -- Exclusion of cross-examination

State v. Black, 111 N.C. App. 284 (1993)

In a prosecution of defendant for an alleged series of sexual assaults involving his two stepdaughters, the trial court properly applied the Rape Shield Statute in refusing to permit defendant to cross-examine one stepdaughter concerning whether she had previously engaged in sexual intercourse with two specific persons where the stepdaughter testified at the in camera hearing that she had not had sex with either person, no evidence was offered to contradict her testimony, and there was

thus no evidence of sexual activity the relevance of which the trial court was obligated to determine.

2) Rape and Allied Offenses 6 (NCI3d) -- Second-degree rape -- Instructions on force proper

State v. Black, 111 N.C. App. 284 (1993)

In a prosecution of defendant for sexual assaults on his stepdaughters, the trial court's instruction to the jury on the element of force needed to support the charges of second-degree rape was proper where the instruction indicated that the jury "may find" the existence of constructive force in intrafamilial situations.

Evidence and Witnesses 2333 (NCI4th) -- Rape and incest case -- Doctor qualified as expert in detection of child abuse and trauma -- No error

State v. Parker, 111 N.C. App. 359 (1993)

The trial court did not err in qualifying a doctor as an expert "in the field of pediatrics and in the area of the detection of child abuse and trauma," where the witness was a board certified pediatrician who had served as a child medical examiner for the State for a dozen years, had examined over 400 abused and neglected children, and had testified in the North Carolina courts on the subject of child abuse and neglect on numerous occasions.

1) Evidence and Witnesses 373 (NCI4th) - Other offense committed by defendant - Admissibility to show victim's state of mind

State v. Bynum, 111 N.C. App. 845 (1993)

In a prosecution of defendant for taking indecent liberties with a minor and statutory sexual offense, the trial court did not err in admitting testimony by the victim that defendant, her stepfather, put her on the kitchen counter, took out a knife and sharpened it, and was going to kill her except that her mother walked into the room, since the evidence was not offered to show defendant's character but was instead offered to show the victim's state of mind; the evidence was probative on the issue of the victim's hesitancy in telling her mother

2) Evidence and Witnesses 962 (NCI4th) - Taking indecent liberties with minor - Victims' interviews with mental health professional - Admissibility under medical treatment or diagnosis exception to hearsay rule

State v. Richardson, 112 N.C. App. 58 (1993)

3) Evidence and Witnesses 2332 (NCI4th) - Taking indecent liberties with minor - General characteristics of sexually abused children - Expert testimony admissible

State v. Richardson, 112 N.C. App. 58 (1993)

4) Evidence and Witnesses 2335 (NCI4th) - Taking indecent liberties with minor - Expert pediatrician - testimony as to molestation - Admission not error

State v. Richardson, 112 N.C. App. 58 (1993)

In a prosecution of defendant for taking indecent liberties with a minor and crime against nature, the trial court did not err in admitting the testimony of a pediatrician who was qualified without objection as an expert in the area of pediatrics and diagnosis of child sexual abuse that the victims had been sexually molested.

Rape and Allied Sexual Offenses 206 (NCI4th) - First-degree sexual offense - Indecent liberties - Not a lesser included offense

State v. Ramseur, 112 N.C. App. 429 (1993)

1) Evidence and Witnesses 2332 (NCI4th) - Characteristics of sexually abused children - Victim exhibiting characteristics - No expression of opinion on child's truthfulness - Expert opinion admissible

State v. Hammond, 112 N.C. App. 454 (1993)

The trial court did not err in allowing an expert witness to discuss the symptoms and characteristics of sexually abused children and to express, in her expert opinion, whether the minor child exhibited such characteristics, and this testimony was not an improper opinion as to the child's truthfulness.

2) Evidence and Witnesses 962 (NCI4th) - Sexual abuse victim - Picture drawn by child - Counselor's testimony - Admission under medical diagnosis and treatment exception to hearsay rule

State v. Hammond, 112 N.C. App. 454 (1993)

Evidence and Witnesses 84 (NCI4th) - Defendant's military service record - Inadmissibility in rape case

State v. Mustafa, 113 N.C. App. 240 (1994)

1) Evidence and Witnesses 372 (NCI4th) - Rape of daughter - Earlier rape of another daughter - Admissibility to show plan or scheme

State v. Jacob, 113 N.C. App. 605 (1994)

2) Evidence and Witnesses 2342 (NCI4th) - Victim suffering from PTSD - Relevancy - Failure to give limiting instruction

State v. Hughes, 114 N.C. App. 742 (1994)

A sexual abuse therapist's testimony that a rape, sexual offense and indecent liberties victim suffered from post traumatic stress disorder was relevant to explain the victim's delay in reporting the offenses. However, the trial court erred by failing to limit the jury's consideration of this testimony to corroborative purposes, but this error was not prejudicial

3) Evidence and Witnesses 2332 (NCI4th) - Expert testimony - Characteristics of sexually abused children - Victim's similar characteristics

State v. Hughes, 114 N.C. App. 742 (1994)

A pediatrician was properly permitted to testify about the characteristics of sexually abused children and to state that her findings with regard to the alleged victim "were strongly suggestive of possible sexual abuse."

4) Evidence and Witnesses 961 (NCI4th) - Victim's statement to pediatrician - Hearsay - Medical diagnosis and treatment exception

State v. Hughes, 114 N.C. App. 742 (1994)

Rape and Allied Offenses 200 (NCI4th) - First-degree rape - Defendant's denial of penetration instruction on attempted rape required

State v. Nelson, 114 N.C. App. 341 (1994)

Evidence and Witnesses 2337 (NCI4th) - Attempted statutory rape and first-degree sexual offense expert testimony - Suggestibility of child witnesses - Not admissible

State v. Robertson, 115 N.C. App. 249 (1994)

Criminal Law 362 (NCI4th) - Rape case - Judge's clearing of courtroom - Failure to make required findings

State v. Jenkins, 115 N.C. App. 520 (1994)

Evidence and Witnesses 2334 (NCI4th) - First-degree sex offense - Opinion that children abused admissible - Opinion that defendant was abuser inadmissible - Admission harmless error

State v. Figured, 116 N.C. App. 1 (1994)

Rape and Allied Offenses 28, 164 (NCI4th) first-degree sexual offense - Diminished capacity no defense

State v. Daughtry, 340 N.C. 488 (1995)

The trial court did not err by failing to instruct on diminished capacity as that defense related to a charge of first-degree sexual offense since first-degree sexual offense is not a specific intent crime, and diminished capacity is thus not a defense to such crime.

Evidence and Witnesses 3130 (NCI4th) child sexual abuse medical examinations of children other than victims offered to support defendant not admissible

State v. Parker, 119 N.C. App. 328 (1995)

The trial court did not err in a prosecution for multiple counts of first-degree sexual offense and taking indecent liberties with a child by refusing to allow defendant to introduce the results of medical examinations of other minor children who did not testify at trial but who had allegedly participated in and witnessed the abuse of the victims who did testify and defendant testified that he did not abuse any of his children. N.C.G.S. 8C-1, Rule 608(b).

1) Evidence and Witnesses 2327 (NCI4th) alleged sexual abuse expert's testimony as to cause of posttraumatic stress syndrome admissibility as substantive evidence prejudicial error

State v. Hensley, 120 N.C. App. 313 (1995)

2) Rape and Allied Offenses 73 (NCI4th) alleged sexual assault date of offense no fatal variance between indictment and proof

State v. Hensley, 120 N.C. App. 313 (1995)

No fatal variance existed between the indictment and proof with regard to the date of the offense in a prosecution of defendant for sexual assault on a child where the indictment alleged that the offenses occurred on or about

November 23, 1990; both the victim and the investigating officer testified the offense took place at or around the date indicated; and though defendant brought out some inconsistencies regarding the date of the offense on cross-examination of the victim, a child's uncertainty as to time or date the offense was committed goes to the weight rather than the admissibility of the evidence.

Indictment, Information, and Criminal Pleadings 53 (NCI4th) alleged variance between indictment and proof no error

State v. Frazier, 121 N.C. App. 1 (1995)

In a prosecution of defendant for taking indecent liberties with a minor and rape, there was no merit to defendant's contention that there was a fatal variance between the indictments and the evidence presented at trial, since specificity regarding dates diminishes in child abuse cases, the indictments alleged that defendant's sexual misconduct occurred "on or about" certain dates, and the State took adequate measures to put defendant on notice that the dates alleged should not be relied upon for any degree of certainty.

Evidence and Witnesses 123 (NCI4th) sexual abuse of child previous abuse by another person not admissible

State v. Bass, 121 N.C. App. 306 (1-2-1996)

The trial court did not err in a prosecution for taking indecent liberties with a child and first-degree sexual offense by denying defendant's motion to present evidence concerning prior similar abuse of the victim by another person. Defendant introduced no evidence that the victim's prior accusations were false, alleges no prior inconsistent statements, and makes no allegation that the proffered evidence would be relevant to show that someone other than defendant committed the assault. Although defendant contended that the information was relevant to the witness's credibility merely because it would show that she had some of the requisite information she would need to lie, that contention would substantially restrict the effect of N.C.G.S. 8C-1, Rule 412. Absent some opening of the door, evidence of prior abuse such as in this case is inadmissible.

Evidence and Witnesses 125 (NCI4th) rape and murder of child prior third-party sexual behavior with child not admissible

State v. Kandies, 342 N.C. 419 (1996)

The trial court did not err in a prosecution for the first-degree rape and first-degree murder of a four year-old child by her mother's fiancee by not

admitting evidence of prior sexual activity with her father where all of the evidence indicated that the injuries to the child's vagina were recent in relation to the time of her death.

Evidence and Witnesses § 373 (NCI4th) indecent liberties and rape adolescent family members sexual abuse of other family members remoteness admissibility to show common plan

State v. Frazier, 344 N.C. 611 (1996)

In a prosecution of defendant for taking indecent liberties with and first degree rape of his two adolescent stepgranddaughters, testimony by three other female members of defendant's family recounting how defendant had sexually abused them when they were young did not pertain to acts too remote in time to be admissible under Rule 404(b) to show defendant's common plan or scheme to sexually abuse female family members where the testimony tended to prove that defendant's prior acts of sexual abuse occurred continuously over a period of approximately twenty-six years and in a strikingly similar pattern in that all the victims were adolescents at the time defendant began his sexual assaults; in each instance, defendant slowly began touching the victim and gradually reached more serious abuse culminating in intercourse; defendant bought the victims gifts and gave them money during the period of abuse; defendant threatened each of them that if she revealed to anyone what he was doing, she would be sent away or suffer some other severe sanction; all of the victims were related to defendant either through his own marriage or the marriage of his children; and all the victims lived with or near defendant during the course of the abuse. N.C.G.S. § 8C-1 Rule 404(b).

1) Evidence and Witnesses § 2330 (NCI4th) - Medical expert - Opinion testimony - Sexual mistreatment of child

State v. Dick, 126 N.C. App. 312 (1997)

A medical expert was properly permitted to state her opinion that it was very likely that a child had been sexually mistreated where the expert's testimony about abnormalities in the child's hymen showed that she based her opinion on her examination of the child and her expert knowledge concerning the abuse of children in general and not on her personal belief that the child was telling the truth. N.C.G.S. § 8C-1, Rule 702.

Evidence and Witnesses § 516 (NCI4th) - Second-degree rape - Evidence of victim's age - Coercion or force

State v. Martin, 126 N.C. App. 426 (1997)

In a prosecution for second-degree rape, it was not error for the trial court to deny defendant's motion to suppress evidence that the victim was thirteen years old at the time she was raped because the victim's age was relevant to the element of coercion or fear. Further, the jury could have inferred the victim's age from her physical appearance and demeanor, and even without evidence of the victim's age, the jury could have found from the victim's testimony that defendant acted forcefully and against the victim's will.

State v. Anthony, (15 June 1999).

The court ruled that neither consent nor mistake of age is a defense to statutory rape under G.S. 14- 27.7A (statutory rape or sexual offense of person who is 13, 14, or 15 years old).

State v. Owen, (15 June 1999).

1) The court ruled that the female defendant was properly convicted of first-degree statutory rape and two counts of attempted first-degree statutory rape when she aided and abetted a male who had vaginal intercourse or attempted vaginal intercourse with the female victim. 2) The court ruled, relying on *State v. Midyette*, 87 N.C. App. 199, 360 S.E.2d 507 (1984), that the defendant was properly convicted of three counts of rape or attempted rape because there were three distinct occasions of penetration or attempted penetration of the victim's vagina by the defendant's accomplice. 3) The defendant in this case was the wife of her accomplice who committed the sexual assault offenses. The court criticized the common law affirmative defense of spousal coercion (wife who commits crime in husband's presence is presumed, in absence of contrary evidence, to have committed crime under his coercion recognized in *State v. Seahorn*, 166 N.C. 373, 81 S.E. 687 (1914), but noted that it lacks authority to overrule this supreme court ruling; see *Cannon v. Miller*, 313 N.C. 324, 327 S.E.2d 888 (1985). Thus the defense remains valid.

1) Crime Against Nature § 4 (NCI4th) - Indecent liberties - Defendant allegedly asleep - Intent inferred from act

State v. Connell, 127 N.C. App. 685 (1997)

The trial court did not err by denying defendant's motions to dismiss a charge of taking indecent liberties with a child and defendant's motion to set aside the guilty verdict where the evidence, in the light most favorable to the State, was that defendant got into a bed which he shared with the victim's mother and went to sleep; the eight-year-old victim came to their bed at about midnight; defendant touched her inside her panties, "rubbed

on her," and put his finger in her vagina; there was no testimony that defendant gave any indication other than the touching that he was awake; the victim admitted that she did not know whether he was awake; and the only testimony regarding intent was a social worker's testimony that the victim had told her that, when confronted by the victim's mother, defendant had said that he thought he was touching the mother. The State can infer from the touching and defendant's comment to the mother that he was awake and that his purpose was to gratify his sexual desires.

2) Crime Against Nature § 13 (NCI4th) - Indecent liberties - Sleeping defendant - Instruction on mistake - Improperly denied

State v. Connell, 127 N.C. App. 685 (1997)

The trial court erred in an indecent liberties prosecution by not giving the requested mistake of fact instruction where the eight-year-old victim was touched by defendant after she joined defendant and her mother in her mother's bed after defendant and her mother were asleep. The only evidence is that defendant went to bed and went to sleep before the victim entered his room, and the only testimony regarding intent is the victim's statement to a social worker that, when confronted by the mother, defendant said that he thought he was touching the mother. Because the State presented only circumstantial evidence that defendant was awake and intended to touch the child instead of the mother, the court should have given the instruction.

3) Crime Against Nature § 4 (NCI4th) - Indecent liberties with child - Assault on female not lesser offense

State v. Love, 127 N.C. App. 437 (1997)

Assault on a female is not a lesser included offense of taking indecent liberties with a child because assault on a female contains elements not present in the offense of taking indecent liberties; therefore, the trial court did not err by refusing to instruct on assault on a female as a lesser included offense in a prosecution for taking indecent liberties with a child.

4) Crime Against Nature § 10 (NCI4th) - Indecent liberties - Sexual element - Evidence sufficient

State v. Creech, 128 N.C. App. 592 (1998)

The trial court did not err in a prosecution for taking indecent liberties by denying defendant's motion to dismiss for lack of evidence of the sexual element of the crime. The test of the sufficiency of the evidence is whether

a reasonable inference of guilt can be drawn from the evidence presented; here, defendant and the child wore only underwear during massages and testimony concerning defendant's similar pattern of behavior during massages with other young males was evidence from which the jury could reasonably conclude that these acts with this child were committed to arouse defendant's sexual desire.

Evidence - Opinion - Characterization of child abuse victim's testimony

State v. Waddell, 130 N.C. App. 488 (1998)

The trial court did not err in a prosecution arising from the sexual abuse of a child by admitting a licensed Psychological Associate's descriptions of the child's actions with anatomically correct dolls as illustrating fellatio and anal intercourse. Assuming that the testimony was tendered in the witness's capacity as a child sex abuse expert, such testimony simply related her opinion, based upon her specialized knowledge, as to what the child had demonstrated and was without question helpful to the jury. Moreover, a contextual reading of the testimony indicates that it represented her non-expert instantaneous conclusion, based upon her perception of the child's appearance, condition and actions, and thus constituted a "shorthand statement of fact" admissible under N.C.G.S. § 8C-1, Rule 701.

1) Evidence - Credibility of child - Admissible as to formation of professional opinion

State v. Bright, 131 N.C. App. 57 (1998)

The trial court did not err in a prosecution for burglary, kidnapping, sexual offense, and rape involving a ten-year-old child by admitting testimony from the Child Medical Evaluation Physician that the child was a reliable informant. The statement was not a comment on her credibility as a testifying witness, but the doctor's professional observation that at the time of the interview he believed he could rely on the information she gave him in forming an opinion as to the source of her injuries.

2) Evidence - Sexual offenses - Expert testimony - Defendant not a high risk sexual offender – Excluded

State v. Wagoner, 131 N.C. App. 285 (1998)

The trial court did not err in a prosecution for taking indecent liberties with a child and first-degree sexual offense by excluding expert testimony that defendant has no mental illness, no substance abuse problems, and is not a high risk sexual offender. N.C.G.S. § 8C-1, Rule

404(a) prohibits character evidence offered to prove conduct in conformity therewith, with an exception for a pertinent character trait. While evidence of a sexual pathology would have been relevant to motive, the lack of mental problems does not qualify as a pertinent character trait. Even expert testimony on the lack of sexual attraction to children would have been inadmissible because any relevancy would be substantially outweighed by the prejudicial effect.

Sexual Offenses - Instructions - Nonunanimous

State v. Petty, 132 N.C. App. 453 (1999)

There was no error in a prosecution for indecent liberties and sexual offenses against a child where the court instructed the jury that it could find defendant guilty of a first-degree sexual offense if it found that defendant had engaged in either of two acts. The single wrong of engaging in a sexual act with a minor may be established by a finding of various alternatives, which are merely alternative ways of showing the commission of a sexual act. Even if some jurors found that one act occurred and others found that the other act transpired, the jury as a whole would unanimously find that there occurred sexual conduct constituting the single crime of engaging in a sexual act with a child. However, it was noted that charging a defendant with a separate count of first-degree sexual offense for each alternative sexual act performed in a single transaction would result in a multiplicitous indictment.

Indecent Liberties - Presence of children - Sufficiency of evidence

State v. Nesbitt, 133 N.C. App. 420 (1999)

The trial court correctly denied defendant's motion to dismiss a charge of indecent liberties under N.C.G.S. § 14-202.1(a)(1) where defendant let his dogs into his yard to encourage children to stop and play; defendant, while inside his house 35 feet away and in clear view of the children, exposed himself and masturbated while the children were playing with the dogs; and defendant acknowledged the children's presence by waving to them in one instance and changing his position in another instance. The fact that the children were outside defendant's home while he was inside is not material, and neither is the fact that the children were 35 feet away. It is material that defendant involved the children in his scheme to engage in an indecent liberty for the purpose of arousing his own sexual desire.

1) Rape - Accessory - Multiple attempts - Double jeopardy

State v. Owen, 133 N.C. App. 543 (1999)

The trial court did not err by denying defendant's motion to dismiss on double jeopardy grounds two of three counts of statutory rape. Although defendant argued that the two instances in which defendant's husband attempted to penetrate the eleven-year-old victim and the one incident where he was successful constituted one single continuous incident merging into one criminal act, the victim testified that defendant's husband penetrated her to some degree on three distinct occasions. The slightest penetration constitutes intercourse and the evidence as to each separate act was thus complete and sufficient to sustain three indictments for first-degree rape.

2) Rape - Sufficiency of evidence - Woman as aider and abettor

State v. Owen, 133 N.C. App. 543 (1999)

The trial court did not err by denying defendant's motion to dismiss charges of first-degree statutory rape against a woman who acted as an aider and abettor to her husband. Even though a woman is physically incapable of committing rape upon another woman, she may still be convicted of rape if she aids and abets a male assailant and, viewing the evidence in the light most favorable to be State, defendant was an active participant in the rape by her husband of this victim.

3) Rape--Statutory--Consent not a defense

State v. Anthony, 133 NC App 573

4) Rape----statutory---mistake of age---not a defense

State v. Anthony, 133 NC App 573

Evidence - Prior sexual behavior of victim - Child's sexual acts

State v. Trogden, 135 N.C. App. 85 (1999)

The trial court did not err in a prosecution for indecent liberties, first-degree statutory sexual offense, and sexual activity by a custodian by excluding testimony relating an instance of sexual behavior by the victim. Rule 412 prohibits introduction of evidence of a complainant's sexual behavior during prosecution of a rape or sexual offense unless such evidence is relevant; moreover, any error was harmless because other children testified to sexual abuse by defendant and there was other evidence establishing that the victim had prior knowledge of sexual matters and the ability to fabricate allegations.