

Criminal Procedure Appeal

State v. Lawrence, ___ N.C. ___, ___ S.E.2d ___ (April 13, 2012)

(<http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMi8xMDBQQTExLTEucGRm>). Reaffirming its decision in *State v. Odom*, 307 N.C. 655, 660 (1983), the court clarified “how the plain error standard of review applies on appeal to unpreserved instructional or evidentiary error.” It stated:

For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error “had a probable impact on the jury’s finding that the defendant was guilty.” Moreover, because plain error is to be “applied cautiously and only in the exceptional case,” the error will often be one that “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.”

(citations omitted). Applying that rule to the case at hand, the court held that the court of appeals applied the incorrect formulation of the plain error standard in *State v. Lawrence*, ___ N.C. App. ___, 706 S.E.2d 822 (Mar. 1, 2011) (holding that the trial judge committed plain error by failing to instruct the jury on all elements of conspiracy to commit armed robbery). Although the trial judge erred (the judge instructed the jury that armed robbery involved a taking from the person or presence of another while using or in the possession of a firearm but failed to instruct on the element of use of the weapon to threaten or endanger the life of the victim), the error did not rise to the level of plain error.

Dismissal

State v. Joe, ___ N.C. ___, ___ S.E.2d ___ (April 13, 2012)

(<http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMi8zMzNQQTExLTEucGRm>). Disagreeing with the court of appeals’ holding in *State v. Joe*, ___ N.C. App. ___, ___, 711 S.E.2d 842, 848 (2011), that the prosecutor’s statements amounted to a dismissal in open court, the court also held that the trial court had no authority to enter an order dismissing the case on its own motion. The defendant was charged with resisting a public officer, felony possession of cocaine with intent to sell or deliver, and attaining habitual felon status. The defendant filed a motion to dismiss the resisting charge and a motion to suppress all evidence seized during the search incident to arrest. The trial court granted both motions. The State then announced that it “would be unable to proceed with the case in chief” on the remaining charges and the other charges were dismissed. The State appealed and the court of appeals affirmed, reasoning that the prosecutor’s statements constituted a dismissal in open court under G.S. 15A-931. The court disagreed with this conclusion and further held that the trial court had no authority to enter an order dismissing the case on its own motion. It remanded to the court of appeals for consideration of the State’s argument regarding the motion to suppress.

Preservation of Evidence

State v. Lewis, ___ N.C. ___, ___ S.E.2d ___ (April 13, 2012)

(<http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMi8zODZQQTExLTEucGRm>). Reversing the court of appeals, the court held that the trial court did not violate the defendant’s due process rights by allowing the State to present evidence of a knife allegedly used during the crime at the defendant’s retrial. The knife had been seized from the defendant’s residence and was admitted into evidence during the defendant’s first trial. However, the knife was not available at the retrial because it had been destroyed after the defendant’s first conviction was affirmed. Before the retrial the defense

unsuccessfully moved to limit evidence regarding the knife. The court noted that under *California v. Trombetta*, 467 U.S. 479 (1984), “[t]he duty imposed by the Constitution on the State to preserve evidence is limited to evidence that might be expected to play a significant role in the suspect’s defense.” It continued: “[t]o meet this standard of constitutional materiality, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.” (quotation omitted). Applying this test, the court concluded that the evidence did not meet the constitutional materiality threshold required by *Trombetta*. According to the defendant, the knife was the only physical evidence linking him to the crime and if it had been available at the retrial, he would have been able to compare the recovered knife with the victim’s description to show that the victim’s identification of the knife as the one used by the attacker was not credible. The court concluded however that although the knife was unavailable, defense counsel was able to challenge the victim’s identification of the knife by using cross-examination to point out that its handle had been inside the assailant’s hand. While cross-examining the lead detective defense counsel also established that the victim’s nightgown had been left bloody by the assault but that the recovered knife was tested for blood and DNA and found to be “clean.” Thus, the court concluded, despite the knife’s unavailability, defense counsel was able to elicit impeaching testimony from the State’s witnesses concerning the knife. It held: “In the absence of an allegation that the evidence was destroyed in bad faith, we conclude that the State’s failure to preserve the knife for defendant’s retrial did not violate defendant’s right to due process.”

Motion to Suppress

State v. Lewis, __ N.C. __, __ S.E.2d __ (April 13, 2012) (<http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMi8zODZQQTEwLTEucGRm>). Affirming the court of appeals, the court held that on a retrial the trial court erred by applying the law of the case and denying the defendant’s motion to suppress. At the defendant’s first trial, he unsuccessfully moved to suppress the victim’s identification as unduly suggestive. That issue was affirmed on appeal. At the retrial, the defense filed new motions to suppress on the same grounds. However, at the pretrial hearings on these motions, the defense introduced new evidence relevant to the reliability of the identification. The State successfully argued that the law of the case governed and that the defendant’s motions must be denied. After the defendant was again convicted, he appealed and the court of appeals reversed on this issue. Affirming that ruling the court noted that “the law of the case doctrine does not apply when the evidence presented at a subsequent proceeding is different from that presented on a former appeal.” It then went on to affirm the court of appeals’ holding that the retrial court erred in applying the doctrine of the law of the case to defendant’s motion to suppress at the retrial.

Evidence

State v. Lewis, __ N.C. __, __ S.E.2d __ (April 13, 2012) (<http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMi8zODZQQTEwLTEucGRm>). (1) The court of appeals properly found that the trial court abused its discretion by excluding, at a retrial, evidence of remarks that the lead investigator, Detective Roberts, made to a juror at the defendant’s first trial. After the defendant’s conviction, he filed a motion for appropriate relief (MAR) alleging that his trial had been tainted because of improper communication between Roberts and a juror, Deputy Hughes. At a hearing on the MAR, the defendant presented evidence that when his case was called for trial Hughes was in the pool of prospective jurors. While in custody awaiting trial, Hughes had twice transported the defendant to Central Prison in Raleigh. On one of those trips, the defendant told Hughes that he had failed a

polygraph examination. Also, Hughes had assisted Roberts in preparing a photographic lineup for the investigation. While undergoing voir dire, Hughes acknowledged that he knew the defendant and had discussed the case with him. While he had misgivings about being a juror, Hughes said that he believed he could be impartial. Because the defendant insisted that Hughes remain on the jury, his lawyer did not exercise a peremptory challenge to remove Hughes from the panel. The evidence at the MAR hearing further showed that during a break in the trial proceedings, Roberts made the following statement to Hughes: "if we have . . . a deputy sheriff for a juror, he would do the right thing. You know he flunked a polygraph test, right?" Hughes did not report this communication to the trial court. Although the trial court denied the MAR, the court of appeals reversed, ordering a new trial. Prior to the retrial, the State filed a motion in limine seeking to suppress all evidence raised in the MAR hearing. Defense counsel opposed the motion, arguing that Roberts' earlier misconduct was directly relevant to his credibility. The trial court allowed the State's motion. The defendant was again convicted and appealed. The court of appeals held that the trial court abused its discretion by granting the State's motion. The supreme court affirmed, holding that the trial court should have allowed defense counsel to cross-examine Roberts regarding his statements to Hughes to show Roberts' bias against the defendant and pursuant to Rule 608(b) to probe Roberts' character for untruthfulness. The court went on to reject the State's argument that the evidence was properly excluded under Rule 403, noting that defense counsel understood that the line of questioning would inform the jurors that the defendant had been convicted in a prior trial but believed the risk was worth taking. Finally, the court held that the trial court's error prejudiced the defense given Roberts' significant role in the case. (2) The court held that on retrial the defendant may cross-examine relevant witnesses about the procedures used to identify another party as a co-defendant and about whether that person later established an alibi.