

Criminal Procedure

Appeal

[State v. Davis](#), __ N.C. App. __, __ S.E.2d __ (June 4, 2013). Relying on language in G.S. 15A-979, the court held that a defendant may appeal an order denying a motion to suppress made pursuant to G.S. 15A-980 (right to suppress use of certain prior convictions obtained in violation of right to counsel) where the defendant reserved the right to appeal in his guilty plea.

[State v. Hernandez](#), __ N.C. App. __, __ S.E.2d __ (June 4, 2013). The court determined that it need not address the substance of the defendants' challenge to the trial court's order denying their suppression motions where the argument asserted was not advanced at the suppression hearing in the trial court.

Jurisdiction

[State v. Tucker](#), __ N.C. App. __, __ S.E.2d __ (June 4, 2013). (1) North Carolina had territorial jurisdiction to prosecute the defendant for embezzlement. The defendant was a long distance driver employed by a North Carolina moving company. The defendant was charged with having received funds from a customer out-of-state and having converted them to his own use instead of transmitting the funds to his employer. The court adopted a "duty to account" theory under which territorial jurisdiction for embezzlement may be exercised by the state in which the accused was under a duty to account for the property. In this case, the court found that the duty to account was to the victim in North Carolina. (2) Because the defendant's argument about territorial jurisdiction was a legal and not a factual one, the trial court did not err by declining to submit the issue to the jury.

Counsel Issues

[State v. Gentry](#), __ N.C. App. __, __ S.E.2d __ (June 4, 2013). (1) The trial court did not err by denying defense counsel's motions to withdraw and for the appointment of substitute counsel. The court rejected the defendant's argument that he and his trial counsel experienced "a complete breakdown in their communications" resulting in ineffective assistance of counsel. The court noted that in the absence of a constitutional violation, the decision about whether to replace appointed counsel is a discretionary one. Although the defendant expressed dissatisfaction with counsel's performance on several occasions, he did not establish the requisite "good cause" for appointment of substitute counsel or that assigned counsel could not provide him with constitutionally adequate representation. The court concluded that any breakdown in communication "stemmed largely from Defendant's own behavior" and that the defendant failed to show that the alleged communication problems resulted in a deprivation of his right to the effective assistance of counsel. (2) Although the trial court misstated the maximum sentence during the waiver colloquy, it adequately complied with G.S. 15A-1242. The trial court twice informed the defendant that if he was convicted of all offenses and to be a habitual felon, he could be sentenced to 740 months imprisonment, or about 60 years. However, this information failed to account for the possibility that the defendant would be sentenced in the aggravated range and thus understated the maximum term by 172 months. The court held:

[W]e do not believe that a mistake in the number of months which a trial judge employs during a colloquy with a defendant contemplating the assertion of his right to proceed pro se constitutes a per se violation of N.C. Gen. Stat. § 15A-1242. Instead, such a calculation error would only contravene N.C. Gen. Stat. § 15A-1242 if there was a reasonable likelihood that the defendant might have made a different decision with respect to the issue of self-representation had he or she been more accurately informed about “the range of permissible punishments.

The court found that although the trial court’s information “was technically erroneous” the error did not invalidate the defendant’s “otherwise knowing and voluntary waiver of counsel.” It explained:

Our conclusion to this effect hinges upon the fact that Defendant was thirty-five years old at the time of this trial, that a sentence of 740 months imprisonment would have resulted in Defendant’s incarceration until he reached age 97, and that a sentence of 912 months would have resulted in Defendant’s incarceration until he reached age 111. Although such a fourteen year difference would be sufficient, in many instances, to preclude a finding that Defendant waived his right to counsel knowingly and voluntarily as the result of a trial court’s failure to comply with N.C. Gen. Stat. § 15A-1242, it does not have such an effect in this instance given that either term of imprisonment mentioned in the trial court’s discussions with Defendant was, given Defendant’s age, tantamount to a life sentence. Simply put, the practical effect of either sentence on Defendant would have been identical in any realistic sense. In light of this fact, we cannot conclude that there was a reasonable likelihood that Defendant’s decision concerning the extent, if any, to which he wished to waive his right to the assistance of counsel and represent himself would have been materially influenced by the possibility that he would be incarcerated until age 97 rather than age 111. As a result, we conclude that Defendant’s waiver of the right to counsel was, in fact, knowing and voluntary and that the trial court did not err by allowing him to represent himself.

Indictment Issues

[State v. Rogers](#), __ N.C. App. __, __ S.E.2d __ (June 4, 2013). Although the trial court erred when instructing the jury on first-degree burglary, no plain error occurred. The first-degree burglary indictment alleged that the defendant entered the dwelling with intent to commit larceny. The trial court instructed the jury that it could find the defendant guilty if at the time of the breaking and entering he intended to commit robbery with a dangerous weapon. Citing *State v. Farrar*, 361 N.C. 675 (2007) (burglary indictment alleged larceny as underlying felony but jury instructions stated that underlying felony was armed robbery; reviewing for plain error, the court held that the defendant had not been prejudiced by the instruction; because larceny is a lesser-included of armed robbery, the jury instructions benefitted defendant by adding an additional element for the State to prove), the court found that the defendant was not prejudiced by the error.

[*State v. Tucker*](#), __ N.C. App. __, __ S.E.2d __ (June 4, 2013). The trial court did not err by allowing the State to amend an embezzlement indictment. The indictment originally alleged that “the defendant . . . was the employee of MBM Moving Systems, LLC . . .” The amendment added the words “or agent” after the word “employee.” The court rejected the defendant’s argument that the nature of his relationship to the victim was critical to the charge and thus that the amendment substantially altered the charge. The court held that the terms “employee” and “agent” “are essentially interchangeable” for purposes of this offense. The court noted that the defendant was not misled or surprised as to the charges against him.

Motion to Continue

[*State v. Gentry*](#), __ N.C. App. __, __ S.E.2d __ (June 4, 2013). The trial court did not abuse its discretion by denying defense counsel’s motion to withdraw or in the alternative for a continuance. In the four months prior to trial, the defendant failed to provide counsel with the names of potential defense witnesses. However, no justification was provided for the defendant’s failure and counsel did not express any certainty that information about potential witnesses would be forthcoming. Nor did counsel’s conclusory assertion that he could not prepare for trial because of communication problems with the defendant support the motion, particularly where the record indicated that the defendant was responsible for those difficulties.

Motion to Dismiss

[*State v. Marley*](#), __ N.C. App. __, __ S.E.2d __ (June 4, 2013). In an impaired driving case, evidence that the defendant’s BAC was .09 was sufficient to survive a motion to dismiss, notwithstanding evidence that the machine may have had a margin of error of .02. The court concluded: “Defendant’s argument goes to the credibility of the State’s evidence, not its sufficiency to withstand defendant’s motion to dismiss. Such an argument is more appropriately made to the jury at trial, and not to an appellate court.”

Jury Instructions

[*State v. Rogers*](#), __ N.C. App. __, __ S.E.2d __ (June 4, 2013). Where no evidence negated the State’s proof of first-degree murder, the trial court did not err by denying the defendant’s request for an instruction on second-degree murder.

Sentencing

[*State v. Facyson*](#), __ N.C. App. __, __ S.E.2d __ (June 4, 2013). In a murder case, the trial court erred by sentencing the defendant in the aggravated range where the evidence supporting the aggravating factor was the same evidence necessary to support an element of the underlying offense. The trial court submitted to the jury the G.S. 15A-1340.16(d)(2) aggravating factor that “[t]he defendant joined with more than one other person in committing the offense and was not charged with committing a

conspiracy.” The trial court instructed the jury that it could find the defendant guilty of second-degree murder if he murdered the victim acting himself or “together with other persons.” The verdict sheet did not require the jury to indicate the theory on which it found the defendant guilty. The court concluded: “We cannot speculate as to the basis of the jury’s verdict, and we must resolve the ambiguity in favor of defendant by assuming that the aggravated sentence imposed was based on the same evidence necessary to establish an element of the underlying offense.”

Evidence

***Crawford* Issues**

[*State v. Burrow*](#), __ N.C. App. __, __ S.E.2d __ (June 4, 2013). In this drug trafficking case, notice was properly given under the G.S. 90-95(g) notice and demand statute even though it did not contain proof of service or a file stamp. The argued-for service and filing requirements were not required by *Melendez-Diaz* or the statute. The notice was stamped “a true copy”; it had a handwritten notation that saying “ORIGINAL FILED,” “COPY FAXED,” and “COPY PLACED IN ATTY’S BOX.” The defendant did not argue that he did not in fact receive the notice.

Arrest Search and Investigation

Police Power

[*King v. Town of Chapel Hill*](#), __ N.C. App. __, __ S.E.2d __ (June 4, 2013) (1) Reversing the trial court, the court held that the Town of Chapel Hill’s Towing Ordinance is a valid exercise of police power under G.S. 160A-174(a). (2) The trial court improperly enjoined enforcement of the Town’s Mobile Phone Ordinance. The ordinance prohibits the use of mobile phones while driving. The court found that the trial court erred in determining that the Plaintiff was subject to a manifest threat of irreparable harm through enforcement of the Mobile Phone Ordinance. The court noted that “[i]f Plaintiff wishes to challenge the validity of the Mobile Phone Ordinance, he must do so in the context of his own case.”

Vehicle Stops

[*State v. Hernandez*](#), __ N.C. App. __, __ S.E.2d __ (June 4, 2013). An investigative stop of the defendant’s vehicle was lawful. Officers stopped the defendant’s vehicle because it was registered in her name, her license was suspended, and they were unable to determine the identity of the driver.

Criminal Offenses

Participants

[*State v. Facyson*](#), __ N.C. App. __, __ S.E.2d __ (June 4, 2013). The evidence was sufficient to show that the defendant committed second-degree murder either alone or in concert with others. The defendant was present with two men who borrowed a red Ford from David Andrews. The three men did not return the car to Andrews and the defendant was later seen driving the car. Two witnesses said that the men who fired the shots at the victim were in a sedan, and one said that the car was red. Two other witnesses established that the red Ford was parked in an apartment complex parking lot shortly after

the shooting. The defendant and the others who borrowed the car went to the lot and one of the men was seen wiping the car. The keys to the car were found in the grass near the parking lot after one of the men fled and was seen throwing an object. A bullet casing consistent with bullets found at the murder scene was found in the car, and particles consistent with gunshot residue were found on all of the men, including one particle on the defendant's pants.

General Crimes

[*State v. Rogers*](#), __ N.C. App. __, __ S.E.2d __ (June 4, 2013). The evidence was sufficient to show a conspiracy to commit a robbery with a dangerous weapon. The defendant argued that there was no express agreement to use a dangerous weapon. The court held, in part, that there was an implied understanding to use such a weapon.

Homicide

[*State v. Rogers*](#), __ N.C. App. __, __ S.E.2d __ (June 4, 2013). In a first-degree murder case there was sufficient evidence of premeditation and deliberation. There was evidence that the victim begged for his life, that the victim's body had eight gunshot wounds, primarily in the head and chest, and there was a lack of provocation.

Robbery

[*State v. Rogers*](#), __ N.C. App. __, __ S.E.2d __ (June 4, 2013). There was sufficient evidence that a theft and use of force were part of a continuous transaction. A witness testified that the defendant went to the victim's mobile home with the intent to rob him, shot and killed the victim, and left with money and drugs.

Weapons Offenses

[*Booth v. North Carolina*](#), __ N.C. App. __, __ S.E.2d __ (June 4, 2013). G.S. 14-415.1(a), proscribing the offense of felon in possession of a firearm, does not apply to the plaintiff, who had received a Pardon of Forgiveness from the NC Governor for his prior NC felony. The court relied on G.S. 14-415.1(d), which provides in part that the section does not apply to a person who "pursuant to the law of the jurisdiction in which the conviction occurred, has been pardoned."