

Criminal Procedure Counsel Issues

[*State v. Wray*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 6, 2013). The trial court did not err by failing to appoint counsel for the defendant after his case was remanded from the appellate division and before ordering the defendant to submit to a capacity to proceed evaluation. The court held: “the trial court’s order committing defendant to a competency evaluation was not a critical stage and defendant was not denied his Sixth Amendment right to counsel.”

Pleas & Plea Procedure

[*State v. Harwood*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 6, 2013). By pleading guilty to multiple counts of felon in possession, the defendant waived the right to challenge his convictions on double jeopardy grounds.

Discovery & Related Issues

[*State v. McCoy*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 6, 2013). The trial court did not err by refusing to provide defense counsel with an internal investigation report prepared by the police department’s Office of Professional Standards and Inspections regarding a lead detective in the investigation. During the trial prosecutors learned of an ongoing internal investigation of the detective. The State informed the trial court and defense counsel of this and decided not to call the detective as a witness. The trial court examined the report in camera and issued an oral ruling noting that the report detailed a problem in the detective’s life that could have affected his job performance. However, it found that there was no evidence that the detective was experiencing the problem at the time of the investigation in question. The trial court noted that the report suggests that the detective may not have been honest in his internal investigation disclosures but again found no connection to the case at hand. The court of appeals held that the trial court did not violate the defendant’s constitutional rights by refusing to disclose the contents of the report to counsel. The court found that it was unable to conclude that the report was material “when the State was able to prove its case through the testimony of other law enforcement officers and without [the] Detective . . . ever taking the stand.”

Indictment Issues

[*State v. Pennell*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 6, 2013). A larceny indictment was fatally defective where it described the property taken as “various items of merchandise.”

Motion to Continue

[*State v. Blackwell*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 6, 2013). In this drug case, the trial court did not violate the defendant’s constitutional rights to due process and effective assistance of counsel by denying a motion to continue. The defendant argued that defense counsel had been appointed only 54 days before trial and had just become aware of material witnesses that might testify favorably for the defendant. Also, the defendant argued, on the Friday before trial week, the State turned over a confidential informant’s statements. The court noted that the trial was a retrial and that the underlying facts—two hand-to-hand sales to an undercover officer—were straightforward. Furthermore, the defendant failed to explain how a period of two months was insufficient to prepare for trial. With respect to the additional witnesses, the defendant failed to explain why he was unable to find them in

the more than three years since his indictment and why their testimony was material. Also, the defendant already had copies of the informant's statements.

Expression of Opinion By Judge

[State v. Summey](#), __ N.C. App. __, __ S.E.2d __ (Aug. 6, 2013). (1) In a statutory rape case, the trial court committed reversible error by expressing an opinion regarding the victim's age--an element of the offense--when responding to a note from the jury. During deliberations, the jury sent a note asking: "May we please have the date and age of [the victim] when she was raped the first time regarding the first-degree rape?" The trial court informed the jurors that the information they sought was in the victim's testimony and that it was their duty to recall that testimony from memory. Juror number 5 then immediately asked: "[W]ould it be an accurate statement that the Court would not be able to charge him with that particular charge if it were not in corroboration with the age reference?" The trial court answered: "You're correct." (2) The trial court did not commit plain error by referring to the prosecuting witnesses as "victims" in its jury instructions. The trial court's statements did not constitute an opinion.

Jury Instructions

[State v. Evans](#), __ N.C. App. __, __ S.E.2d __ (Aug. 6, 2013). (2) The trial court did not err by failing to include self-defense in its mandate on felony-murder charges that were based on the underlying offenses of attempted robbery. Self-defense is only relevant to felony-murder if it is a defense to the underlying felony. The court continued: "We fail to see how defendant could plead self-defense to a robbery the jury found he had attempted to commit himself." (2) The trial court did not err by failing to include self-defense in its mandate on felony-murder charges based on underlying assault offenses. The trial court gave the full self-defense instructions with respect to the assault charges. It then referenced these instructions, and specifically the self-defense instructions, in its instructions concerning felony-murder based upon the assault charges. Taken as a whole, this was not error.

[State v. Fisher](#), __ N.C. App. __, __ S.E.2d __ (Aug. 6, 2013). In this involuntary manslaughter case, the trial court did not commit plain error by failing to instruct the jury that foreseeability was an essential element of proximate cause. The court noted that foreseeability is an essential element of proximate cause. It further noted that a trial court should, as a general proposition, incorporate a foreseeability instruction into its discussion of proximate cause when the record reflects the existence of a genuine issue as to whether the injury which resulted from a defendant's allegedly unlawful conduct was foreseeable. But on the facts of this case, the court found that no plain error occurred.

[State v. Oliphant](#), __ N.C. App. __, __ S.E.2d __ (Aug. 6, 2013). In a case involving two defendants, no plain error occurred where the trial court's instructions referred to the defendant and his accomplice collectively as "defendants." The court noted that when two or more defendants are tried jointly for the same offense, a charge that is susceptible to the construction that the jury should convict all if it finds one guilty is reversible error. However, it noted, it is not necessary to give wholly separate instructions as to each defendant when the charges and the evidence as to each defendant are identical, provided that the trial court either gives a separate final mandate as to each defendant or otherwise clearly instructs the jury that the guilt or innocence of one defendant is not dependent upon the guilt or innocence of a codefendant. Noting that the trial court failed to give a separate mandate as to each defendant or a separate instruction clarifying that the guilt or innocence of one defendant is not dependent upon the guilt or innocence of a codefendant, the court held that even if error occurred, it did not rise to the level of plain error.

Jury Deliberations

[State v. Blackwell](#), __ N.C. App. __, __ S.E.2d __ (Aug. 6, 2013). (1) The trial court did not coerce a verdict by giving an *Allen* charge pursuant to G.S. 15A-1235. The jury sent the judge a note at 3:59 pm, after 70 minutes of deliberations, indicating that they were split 11-to-1 and that the one juror “will not change their mind.” The court rejected the defendant’s argument that a jury’s indication that it may be deadlocked requires the trial court to immediately declare a mistrial, finding it inconsistent with the statute and NC case law. (2) The trial court did not coerce a verdict when it told the deliberating jury, in response to the same note about deadlock, that if they did not reach a verdict by 5 pm, he would bring them back the next day to continue deliberations. Although threatening to hold a jury until they reach a verdict can under some circumstances coerce a verdict, that did not happen here. After receiving the note at approximately 4:00 pm, the trial judge told the jurors that although they were divided, they had been deliberating for only approximately 75 minutes. The judge explained that he was going to have them continue to deliberate for the rest of the afternoon and that if they needed more time they could resume deliberations the next day. The trial judge further emphasized that the jurors should not rush in their deliberations and reminded them that it was “important that every view of the jury be considered, and that you deliberate in good faith among yourselves.” The court found that these statements cannot be viewed as coercive.

[State v. Summey](#), __ N.C. App. __, __ S.E.2d __ (Aug. 6, 2013). The trial court did not coerce a verdict by instructing the jurors to continue deliberating after they three times indicated a deadlock. Although the trial court did not give an *Allen* instruction every time, G.S. 15A-1235 does not require the trial court to do so every time the jury indicates that it is deadlocked.

Sentencing

Aggravating & Mitigating Factors

[State v. Bacon](#), __ N.C. App. __, __ S.E.2d __ (Aug. 6, 2013). (1) Trial court erred by finding a statutory aggravating factor where the evidence used to support the G.S. 15A-1340.16(d)(8) aggravating factor (knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person) was the same evidence used to support an element of the involuntary manslaughter charge. That charge stemmed from a vehicle accident. The court reasoned: “[D]efendant was not impaired when the accident occurred, and defendant’s speed is the only evidence that would support the aggravating factor that he used a device in a manner normally hazardous to the lives of more than one person. Because the evidence of defendant’s speed was required to prove the charge of involuntary manslaughter and the finding of the aggravating factor, the trial court erred in sentencing defendant in the aggravated range[.]” (2) Trial court did not err by declining to find two statutory mitigating factors: G.S. 15A-1340.16(e)(12) (good character/reputation in the community) and 15A-1340.16(e)(19) (positive employment history). The court rejected the defendant’s argument that the evidence supporting each factor was uncontradicted and manifestly credible.

G.S. 15A-1335

[State v. Wray](#), __ N.C. App. __, __ S.E.2d __ (Aug. 6, 2013). G.S. 15A-1335 did not apply when on retrial the trial court sentenced the defendant for a different, more serious offense.

Probation Violations

[*State v. Pennell*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 6, 2013). Addressing contradicting case law, the court stated a general rule that a defendant may, on appeal from revocation of probation, attack the jurisdiction of the trial court, either directly or collaterally. Here, in his appeal from the probation revocation, the defendant argued that the indictment was defective; the court found his appeal to be proper.

Habeas Corpus

[*State v. Chapman*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 6, 2013). The trial court erred by granting the defendant habeas relief and dismissing two first-degree capital murder charges. The trial court concluded that the victims were preivable fetuses that did not meet the born alive rule for murder. It thus dismissed the murder charges. The court concluded that this was error, reasoning that whether the fetuses could be deemed living persons within the meaning of the homicide statute was a factual issue for the jury.

Motions for Appropriate Relief

[*State v. Harwood*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 6, 2013). Declining to address whether *State v. Garris*, 191 N.C. App. 276 (2008), applied retroactively, the court held that the defendant's MAR was subject to denial because the *Garris* does not constitute a significant change in the substantive or procedural law as required by G.S. 15A-1415(b)(7), the MAR ground asserted by the defendant. When *Garris* was decided, no reported NC appellate decisions had addressed whether the possession of multiple firearms by a convicted felon constituted a single violation or multiple violations of G.S. 14-415.1(a). For that reason, *Garris* resolved an issue of first impression. The court continued: "Instead of working a change in existing North Carolina law, *Garris* simply announced what North Carolina law had been since the enactment of the relevant version of [G.S.] 14-415.1(a)." As a result, it concluded, "a decision which merely resolves a previously undecided issue without either actually or implicitly overruling or modifying a prior decision cannot serve as the basis for an award of appropriate relief made pursuant to [G.S.] 15A-1415(b)(7)." It thus concluded that the trial court lacked jurisdiction to grant relief for the reason requested and properly denied the MAR.

Evidence

Rule 401—Relevancy

[*State v. McCoy*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 6, 2013). Trial court did not err by excluding defense evidence of guilt of another where the evidence was "sheer conjecture" and was not inconsistent with the defendant's guilt.

404(b) Evidence

[*State v. Barrett*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 6, 2013). In a child sexual assault case, even if an officer's testimony that the police department had a record of defendant's date of birth "[f]rom prior arrests" could be considered 404(b) evidence, it was admissible to show a fact other than the defendant's character: the defendant's age, an element of the charged offense. Furthermore, there was no reasonable possibility that any error with respect to this testimony could have affected the verdict.

Corroboration

[State v. Barrett](#), __ N.C. App. __, __ S.E.2d __ (Aug. 6, 2013). No plain error occurred when the trial court admitted the child victim's prior statements to corroborate her trial testimony. Any differences between the statements and the victim's trial testimony were "minor inconsistencies."

Opinions

[State v. Frady](#), __ N.C. App. __, __ S.E.2d __ (Aug. 6, 2013). In this child sex case, the trial court committed reversible error by allowing the State's medical expert to testify to the opinion that the victim's disclosure was consistent with sexual abuse where there was no physical evidence consistent with abuse. In order for an expert medical witness to give an opinion that a child has, in fact, been sexually abused, the State must establish a proper foundation, i.e. physical evidence consistent with sexual abuse. Without physical evidence, expert testimony that sexual abuse has occurred is an impermissible opinion regarding credibility. Although the expert in this case did not diagnose the victim as having been sexually abused, she "essentially expressed her opinion that [the victim] is credible."

Arrest Search and Investigation

Vehicle Stops

[State v. Derbyshire](#), __ N.C. App. __, __ S.E.2d __ (Aug. 6, 2013). In this DWI case, the trial court held that the officer lacked reasonable suspicion to stop the defendant's vehicle. At 10:05 pm on a Wednesday night an officer noticed that the defendant's high beams were on. The officer also observed the defendant weave once within his lane of travel. When pressed about whether he weaved out of his lane, the officer indicated that "just . . . the right side of his tires" crossed over into the right-hand lane of traffic going in the same direction. The State presented no evidence that the stop occurred in an area of high alcohol consumption or that the officer considered such a fact as a part of her decision to stop the defendant. The court characterized the case as follows: "[W]e find that the totality of the circumstances . . . present one instance of weaving, in which the right side of Defendant's tires crossed into the right-hand lane, as well as two conceivable "plus" factors — the fact that Defendant was driving at 10:05 on a Wednesday evening and the fact that [the officer] believed Defendant's bright lights were on before she initiated the stop." The court first noted that the weaving in this case was not constant and continuous. It went on to conclude that driving at 10:05 pm on a Wednesday evening and that the officer believed that the defendant's bright lights were on "are not sufficiently uncommon to constitute valid 'plus' factors" to justify the stop under a "weaving plus" analysis.

Interrogation & Confessions

[State v. Martin](#), __ N.C. App. __, __ S.E.2d __ (Aug. 6, 2013). The defendant's confession was involuntary. The defendant's first confession was made before *Miranda* warnings were given. The officer then gave the defendant *Miranda* warnings and had the defendant repeat his confession. The trial court suppressed the defendant's pre-*Miranda* confession but deemed the post-*Miranda* confession admissible. The court disagreed, concluding that the circumstances and tactics used by the officer to induce the first confession must be imputed to the post-*Miranda* confession. The court found the first confession involuntary, noting that the defendant was in custody, the officer made misrepresentations and/or deceptive statements, the officer made promises to induce the confession, and the defendant may have had an impaired mental condition.

Searches

[*State v. Miller*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 6, 2013). (1) Exigent circumstances—investigation of a possible burglary—supported officers’ warrantless entry into the defendant’s home. The police department received a burglar alarm report concerning a suspected breaking and entering at the defendant’s home. The first arriving officer noticed a broken back window and that all of the doors remained locked. Under these circumstances, the officer reasonably believed that the intruder could have still been in the home. (2) The officers’ discovery of marijuana in a closet was not fruit of the poisonous tree. The officers entered the home with a police dog and found marijuana in a bedroom dresser drawer. They then continued their search. The dog then alerted on a hall closet, large enough to be a hiding place for a person. Upon opening the closet door, the officers discovered 2 large trash bags of marijuana. The defendant argued that since the search of the dresser drawer was illegal, their discovery of the marijuana in the closet was fruit of the poisonous tree. The court disagreed, concluding that the discovery of marijuana in the closet resulted from constitutional conduct. It explained: “There is no support for defendant’s contention that [the] Officers . . . could not have resumed their lawful search after discovering the drugs in the bedroom.” (3) The court remanded for further factfinding on the issue of whether the marijuana in the closet was in plain view. On this issue of first impression, the court concluded that if the police dog “opened the bags and exposed the otherwise hidden marijuana, it would not be admissible under the plain view doctrine.”

Criminal Offenses

General Crimes

[*State v. Oliphant*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 6, 2013). There was sufficient evidence of a conspiracy to commit armed robbery. The victim was approached from behind by both defendants while walking alone. One defendant held the gun while the other reached for her cellphone. Although not showing an express agreement between defendants, these circumstances sufficiently establish an implied agreement to rob the victim with a firearm.

Homicide

[*State v. Fisher*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 6, 2013). The trial court properly denied the defendant’s motion to dismiss a charge of involuntary manslaughter. The primary issue raised in the defendant’s appeal was whether there was sufficient evidence that the defendant committed a culpably negligent act which proximately resulted in the victim’s death. The evidence showed that the defendant became angry at the victim during the defendant’s party and “kicked or stomped” his face, leaving the victim semiconscious; the defendant was irritated that he had to take the victim to meet the victim’s parents at a church; instead of taking the victim to the church, the defendant drove him to an isolated parking area and again beat him; the defendant abandoned the victim outside knowing that the temperature was in the 20s and that the victim had been beaten, was intoxicated, and was not wearing a shirt; the defendant realized his actions put the victim in jeopardy; and even after being directly informed by his father that the victim was missing and that officers were concerned about him, the defendant lied about where he had last seen the victim, hindering efforts to find and obtain medical assistance for the victim. On these facts, the court had “no difficulty” concluding that there was sufficient evidence that the defendant’s actions were culpably negligent and that he might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected.

Robbery

[State v. Evans](#), __ N.C. App. __, __ S.E.2d __ (Aug. 6, 2013). Rejecting the defendant's argument that the State failed to present evidence of an attempted taking, the court held that there was sufficient evidence of attempted robbery. The defendant's accomplice testified that the defendant planned the robbery with her; the defendant waited in a vehicle until the accomplice went into the residence and sent him a message with the location of each individual inside; the defendant entered the apartment and went directly to the victim's bedroom; and the defendant proceeded to wield his firearm in a threatening manner towards the victim. The court noted that while there was no testimony that the defendant made a specific demand for money, an actual demand for the victim's property is not required.