

Criminal Procedure

Indictment Issues

[State v. Morgan](#), __ N.C. App. __, __ S.E.2d __ (Mar. 5, 2013). (1) An indictment charging statutory rape of a 13, 14, or 15 year old was not defective because it alleged that the defendant did “carnally know” the victim. The court rejected the argument that the indictment was required to allege that “vaginal intercourse” occurred, concluding that the two terms were synonymous. (2) The court rejected the defendant’s argument that the same indictment was defective in that it failed to conform to the short form provided in G.S. 15-144.1. The court concluded that the short form did not apply to the crime charged and that the indictment alleged all material elements of the offense.

[State v. Warren](#), __ N.C. App. __, __ S.E.2d __ (Mar. 5, 2013). In an embezzlement case, no fatal variance occurred where the indictment alleged that Smokey Park Hospitality, Inc., d/b/a Comfort Inn had an interest in the property. Although the evidence showed that Smokey Park Hospitality never owned the hotel, it acted as a management company and ran the business. Smokey Park Hospitality thus had a special property interest in the embezzled money.

Motion to Suppress Procedure

[State v. Morgan](#), __ N.C. App. __, __ S.E.2d __ (Mar. 5, 2013). The trial court erred by failing to issue a written order denying the defendant’s motion to suppress. A written order is necessary unless the court announces its rationale from the bench and there are no material conflicts in the evidence. Here, although the trial court announced its ruling from the bench, there was a material conflict in the evidence. The court remanded for entry of the required written order. [Author’s note: For a discussion of motion to suppress procedure, see the chapter of the Superior Court Judges Bench Book [here](#)]

Jury Selection

[State v. Mills](#), __ N.C. App. __, __ S.E.2d __ (Mar. 5, 2013). The trial court did not err by failing to conduct a *Batson* hearing where the defendant failed to establish a prima facie case of discrimination. At the time the defendant objected, the State's acceptance rate, excluding jurors dismissed for cause, was 25% for African Americans, and 80% for whites. This was the only factor asserted by the defendant. The court noted that the defendant and both murder victims were African American and that the State questioned all the prospective jurors in the same manner, there were no racially motivated comments made or questions asked during jury selection, and the responses of the prospective jurors provided reasonable justification for exclusion.

Jury Review of Evidence

[State v. Hatfield](#), __ N.C. App. __, __ S.E.2d __ (Mar. 5, 2013). The court reversed and remanded for a new trial where the trial court failed to exercise its discretion regarding the jury’s request to review the victim’s testimony and the error was prejudicial. Responding to the jury’s request, the trial court stated,

in part, “We can’t do that.” This statement suggests that the trial court did not know its decision was discretionary. [Author’s note: For a discussion of the proper procedure for addressing a deliberating jury’s request to review evidence, see my chapter in the superior court judges’ bench book [here](#)].

Sentencing

[State v. Cook](#), __ N.C. App. __, __ S.E.2d __ (Mar. 5, 2013). The trial court did not violate G.S. 15A-1335 when on remand it sentenced the defendant to a term that was longer than he originally received. The trial court initially imposed an illegal term, sentencing the defendant to a presumptive range sentence of 120 to 153 months; the correct presumptive range sentence for the defendant’s class of offense and prior record level was 135 to 171 months. When the trial court imposed a presumptive range of 135 to 171 months on remand, it was imposing a statutorily mandated sentence that did not run afoul of G.S. 15A-1335. [Author’s note: For more information about G.S. 15A-1335, see my bulletin [here](#).]

Evidence

Personal Knowledge

[State v. Warren](#), __ N.C. App. __, __ S.E.2d __ (Mar. 5, 2013). A hotel owner had personal knowledge and could testify to the responsibilities of the defendant, the hotel’s general manger, with respect to removing deposits from the hotel safe and other related matters.

Hearsay

[State v. Mills](#), __ N.C. App. __, __ S.E.2d __ (Mar. 5, 2013). The trial court did not err by admitting a murder victim’s hearsay statement to her sister-in-law under the Rule 803(3) then existing mental, emotional or physical condition hearsay exception. The murder victim told her sister-in-law that the defendant was harassing her and had threatened her.

Opinions

[State v. Dew](#), __ N.C. App. __, __ S.E.2d __ (Mar. 5, 2013). (1) In a child sex case, the trial court did not err by qualifying as an expert a family therapist who provided counseling to both victims. The court first concluded that the witness possessed the necessary qualifications. Among other things, she had a master’s degree in Christian counseling and completed additional professional training relating to the trauma experienced by children who have been sexually abused; she engaged in private practice as a therapist and was a licensed family therapist and professional counselor; and over half of her clients had been subjected to some sort of trauma, with a significant number having suffered sexual abuse. Second, the court rejected the defendant’s challenge to the expert’s testimony on reliability grounds, concluding that he failed to demonstrate that her methods were unreliable. The court noted that our courts have consistently allowed the admission of similar expert testimony, relying upon personal observations and professional experience rather than upon quantitative analysis. (2) The expert did not impermissibly vouch for the credibility of the victims when she testified that “research says is 60% of cases like this do

not even get reported.” According to the defendant, the expert improperly vouched for the credibility of the children by describing child sexual abuse cases with which she was familiar as “cases like this.” Distinguishing prior cases, the court disagreed. It noted that the expert never directly stated that the victims were believable; instead she described the actions and reactions of sexual abuse victims in general. (3) A detective did not impermissibly vouch for the victim’s credibility when she testified that the child actually remembered specific events. The challenged testimony was nothing more than a permissible discussion of the manner in which the child communicated with the detective.

Offer of Proof

[State v. Dew](#), __ N.C. App. __, __ S.E.2d __ (Mar. 5, 2013). Where the defendant failed to make an offer of proof after the trial court sustained the State’s objection to his cross-examination of a detective, he did not properly preserve the issue for appellate review.

Criminal Offenses

Frauds

[State v. Braswell](#), __ N.C. App. __, __ S.E.2d __ (Mar. 5, 2013). The trial court erred by denying the defendant’s motion to dismiss false pretenses charges. The State failed to offer sufficient evidence to establish that the defendant made a false representation with the intent to deceive when he told the victims that he intended to invest the money that they loaned him in legitimate financial institutions and would repay it with interest at the specified time. The evidence, taken in the light most favorable to the State, simply tends to show that the defendant, after seriously overestimating his own investing skills, made a promise that he was unable to keep.