

Criminal Procedure

Indictment Issues

[State v. Galloway](#), __ N.C. App. __, __ S.E.2d __ (Mar. 19, 2013). The trial court erred by instructing the jury on the offense of discharging a firearm into a vehicle that is in operation under G.S. 14-34.1(b) where the indictment failed to allege that the vehicle was in operation. However, because the indictment properly charged discharging a firearm into an occupied vehicle under G.S. 14-34.1(a), the court vacated the conviction under G.S. 14-34.1(b) and remanded for entry of judgment under G.S. 14-34.1(a).

[State v. Seelig](#), __ N.C. App. __, __ S.E.2d __ (Mar. 19, 2013). (1) Indictments charging the defendant with obtaining property by false pretenses were not defective. The indictments alleged in part that “[t]he defendant sold bread products to the victim that were advertised and represented as Gluten Free when in fact the defendant knew at the time that the products contained Gluten.” The court rejected the argument that the indictments were defective because they failed to sufficiently allege that he himself made a false representation. (2) There was no fatal variance between an indictment alleging that the defendant obtained value from the victim and the evidence, which showed that he obtained value from the victim’s husband. Citing G.S. 14-100(a), the court concluded that because an indictment for obtaining property by false pretenses need not allege any person's ownership of the thing of value obtained, the allegation was surplusage.

Jury Instructions

[State v. Combs](#), __ N.C. App. __, __ S.E.2d __ (Mar. 19, 2013). The court rejected the defendant’s argument that the trial court erred by failing to give additional jury instructions in open court and make them a part of the record as required by G.S. 15A-1234. Where, as here, the trial judge simply repeats or clarifies instructions previously given and does not add substantively to those instructions, the court’s instructions are not “additional instructions” within the meaning of the statute.

[State v. Davis](#), __ N.C. App. __, __ S.E.2d __ (Mar. 19, 2013). In a homicide case, the trial court did not err by instructing on flight. The State’s evidence showed that officers were unable to locate the defendant for several months following the shooting. The defendant resided at his aunt’s house before the 2:30 am shooting and instead of returning there, he left the state and went to Florida. The court rejected the defendant’s argument that his presence in Florida, his home state, was not indicative of whether he avoided apprehension.

Jury Deliberations

[State v. Hinton](#), __ N.C. App. __, __ S.E.2d __ (Mar. 19, 2013). The trial court committed prejudicial error by failing to exercise discretion in responding to the deliberating jury’s request to review evidence. The trial court indicated that the requested information was “not in a form which can be presented to [the jury.]” The court found that this statement “demonstrated a belief that [the trial court] was not capable

of complying with the jury's transcript request" and that as a result the trial court failed to exercise discretion in responding to the jury's request. [Author's note: For the proper procedure for responding to such a request by the jury, see my Bench Book section [here](#).]

Sentencing & Sex Offenders

[State v. Davis](#), __ N.C. App. __, __ S.E.2d __ (Mar. 19, 2013). When determining prior record level, the trial court erroneously concluded that a Georgia conviction for theft was substantially similar to misdemeanor larceny without hearing any argument from the State. Additionally, the Georgia offense is not substantially similar to misdemeanor larceny; the Georgia offense covers both temporary and permanent takings but misdemeanor larceny covers only permanent takings.

[State v. James](#), __ N.C. App. __, __ S.E.2d __ (Mar. 19, 2013). Because the defendant was sentenced in the presumptive range, the trial court did not err in failing to make findings regarding a mitigating factor.

[Walters v. Cooper](#), __ N.C. App. __, __ S.E.2d __ (Mar. 19, 2013). Over a dissent, the court held that a PJC entered upon a conviction for sexual battery does not constitute a "final conviction" and therefore cannot be a "reportable conviction" for purposes of the sex offender registration statute.

Evidence

Relevancy and Rule 403 Balancing

[State v. Hinton](#), __ N.C. App. __, __ S.E.2d __ (Mar. 19, 2013). In an attempted murder and assault case, the trial court committed plain error by allowing an officer to testify about gangs and gang-related activity where the evidence was not relevant to guilt or to the aggravating factor that the crimes were gang-related. The State's theory was that the defendant attacked the victim because he was having a sexual relationship with the defendant's aunt, not because of gang activity. Thus, gang evidence "was neither relevant to the alleged criminal act nor to the aggravating factor of which the State had given notice of its intent to show." Additionally, the testimony carried the danger of unfair prejudice that substantially outweighed its non-existent probative value under Rule 403.

[State v. Rollins](#), __ N.C. App. __, __ S.E.2d __ (Mar. 19, 2013). In a murder case, the trial court did not err by admitting a knife found four years after the crime at issue. The defendant objected on relevancy grounds. The defendant's wife testified that he told her that he murdered the victim with a knife that matched the description of the one that was found, the defendant was seen on the day of the murder approximately 150 yards from where the knife was found, and the knife was consistent with the description of the likely murder weapon provided by the State's pathologist. The court went on to find no abuse of discretion in admitting the knife under Rule 403.

Hearsay

[State v. Rollins](#), __ N.C. App. __, __ S.E.2d __ (Mar. 19, 2013). The trial court properly admitted an unavailable witness's testimony at a proceeding in connection with the defendant's *Alford* plea under the Rule 804(b)(1) hearsay exception for former testimony. The court rejected the defendant's argument that the testimony was inadmissible because he had no motive to cross-examine the witness during the plea hearing.

[Joines v. Moffitt](#), __ N.C. App. __, __ S.E.2d __ (Mar. 19, 2013). In this civil case the court held that an officer's accident report, prepared near the time of the accident, using information from individuals who had personal knowledge of the accident was admissible under the Rule 803(6) hearsay exception.

Crawford Issues

[State v. Seelig](#), __ N.C. App. __, __ S.E.2d __ (Mar. 19, 2013). In a case in which the defendant was charged with obtaining property by false pretenses for selling products alleged to be gluten free but which in fact contained gluten, the trial court did not err by allowing an ill witness to testify by way of a two-way, live, closed-circuit web broadcast. The witness testified regarding the results of laboratory tests he performed on samples of the defendant's products. The trial court conducted a hearing and found that the witness had a history of panic attacks, had suffered a severe panic attack on the day he was scheduled to fly from Nebraska to North Carolina for trial, was hospitalized as a result, and was unable to travel to North Carolina because of his medical condition. Applying the test of *Maryland v. Craig*, the court found these findings sufficient to establish that allowing the witness to testify remotely was necessary to meet an important state interest of protecting the witness's ill health. Turning to *Craig's* second requirement, the court found that reliability of the witness's testimony was otherwise assured, noting, among other things that the witness testified under oath and was subjected to cross-examination. [Author's note: For an extensive discussion of the use of remote testimony at trial, see my paper [here](#).]

[State v. Rollins](#), __ N.C. App. __, __ S.E.2d __ (Mar. 19, 2013). (1) No violation of the defendant's confrontation rights occurred when the trial court admitted an unavailable witness's testimony at a proceeding in connection with the defendant's *Alford* plea under the Rule 804(b)(1) hearsay exception for former testimony. The witness was unavailable and the defendant had a prior opportunity to cross-examine her at the plea hearing. (2) No violation of the defendant's confrontation rights occurred when an officer testified to statements made to him by others where the statements were not introduced for their truth but rather to show the course of the investigation, specifically why officers searched a location for evidence.

Arrest Search and Investigation

Confessions

[State v. Rollins](#), __ N.C. App. __, __ S.E.2d __ (Mar. 19, 2013). The trial court did not err by finding the defendant's statements to his wife voluntary. The defendant's wife spoke with him five times while he was in prison and while wearing a recording device provided by the police. The wife did not threaten

defendant but did make up evidence which she claimed law enforcement had recovered and told him defendant that officers suspected that she was involved in the murder. In response, the defendant provided incriminating statements in which he corrected the wife's lies regarding the evidence and admitted details of the murder. The court rejected the defendant's argument that his statements was involuntary because of his wife's deception and her emotional appeals to him based on these deceptions.

Criminal Offenses

Participants

[*State v. James*](#), __ N.C. App. __, __ S.E.2d __ (Mar. 19, 2013). In a kidnapping and armed robbery case the evidence was sufficient that the defendant acted in concert with an accomplice. Although the defendant argued that the evidence established that he was merely present at the scene, the evidence showed that he aided his co-conspirator.

Sexual Assaults

[*State v. Combs*](#), __ N.C. App. __, __ S.E.2d __ (Mar. 19, 2013). In a case in which the defendant was convicted of rape of a child under G.S. 14-27.2A, there was substantial testimony to establish that the defendant engaged in vaginal intercourse with the victim. The victim testified that the defendant put his "manhood inside her middle hole." Although the victim used potentially ambiguous terms, she explained them, noting that a middle hole is where "where babies come from," a bottom hole is where things come out of that go in the toilet, and a third hole is for urination. She also described the defendant's manhood as "down at the bottom but on the front" and not a part a woman has.

Robbery

[*State v. James*](#), __ N.C. App. __, __ S.E.2d __ (Mar. 19, 2013). The evidence was sufficient to show that either the defendant or his accomplice used a firearm to induce the victim to part with her purse.

Frauds

[*State v. Seelig*](#), __ N.C. App. __, __ S.E.2d __ (Mar. 19, 2013). The evidence was sufficient to establish that the defendant obtained property by false pretenses where she sold products alleged to be gluten free but in fact contained gluten. The defendant argued that the evidence was insufficient as to one victim because he returned the check she gave him in exchange for his products after the victim became ill from consuming them. Noting that this offense covers attempts, the court found the evidence sufficient.