

Criminal Procedure

Discovery and Related Issues

[State v. Barnes](#), __ N.C. App. __, __ S.E.2d __ (April 2, 2013). In a murder case, the trial court did not violate the defendant's constitutional right to reasonable notice of evidence or his statutory right to discovery by allowing the State to present an expert toxicologist's testimony. As part of his investigation, Dr. Jordan, a local medical examiner, sent a specimen of the victim's blood to the Office of the Chief Medical Examiner for analysis. During trial, Jordan testified to the opinion that the cause of death was methadone toxicity and that this opinion was based upon the Chief Medical Examiner's Office's report. When defense counsel raised questions about the report, the trial court allowed the State to call as a witness Jarod Brown, the toxicologist at the State Medical Examiner's Office who analyzed the victim's blood. The defendant objected to Brown's testimony on grounds that he had not been notified that Brown would be a witness. With respect to the alleged statutory discovery violation, the trial court did not abuse its discretion by allowing Brown to testify. The court noted that the defendant had the toxicology report for four years, had it reviewed by two experts, was afforded the opportunity to meet privately with Brown for over an hour prior to a voir dire hearing, and was afforded cross-examination on voir dire. As to the constitutional issues, the court noted that although the defendant argued that he was not afforded adequate time to prepare, he failed to show how his case would have been better prepared if he had more time or that he was materially prejudiced by Brown's testimony. Because the defendant had the report for four years, had two experts review it, was afforded an opportunity to confer with Brown prior to his testimony, and cross-examined Brown, the defendant failed to demonstrate that a constitutional error occurred.

[State v. Ramseur](#), __ N.C. App. __, __ S.E.2d __ (April 2, 2013). The trial court did not err by failing to grant the defendant a new trial on his MAR where the State failed to disclose in discovery more than 1,800 pages of material to which the defendant was entitled. The court was unable to conclude that but for the nondisclosure a different result would have occurred at trial.

Indictment Issues

[State v. Hunnicutt](#), __ N.C. App. __, __ S.E.2d __ (April 2, 2013). A defendant may not challenge the validity of an indictment in an appeal challenging revocation of probation. In such circumstances, challenging the validity of the original judgment is an impermissible collateral attack.

Conduct of the Trial Judge

[State v. Sessoms](#), __ N.C. App. __, __ S.E.2d __ (April 2, 2013). No plain error occurred when the trial court referred to the prosecuting witness as "the victim." The court rejected the defendant's argument that a different result should obtain because he asserted self-defense.

Comment on the Defendant's Silence

[State v. Richardson](#), __ N.C. App. __, __ S.E.2d __ (April 2, 2013). The trial court committed plain error by allowing the State to cross-examine the defendant about his failure to make a post-arrest statement to officers and to comment in closing argument on the defendant's decision to refrain from giving such a statement. The following factors, none of which is determinative, must be considered in ascertaining whether a prosecutorial comment concerning a defendant's post-arrest silence constitutes plain error: whether the prosecutor directly elicited the improper testimony or explicitly made an improper comment; whether there was substantial evidence of the defendant's guilt; whether the defendant's credibility was successfully attacked in other ways; and the extent to which the prosecutor emphasized or capitalized on the improper testimony. After concluding that the State improperly cross-examined the defendant about his post-arrest silence and commented on that silence in closing argument, the court applied the factors noted above and concluded that the trial court's failure to preclude these comments constituted plain error.

Jury Instructions

[State v. Ramseur](#), __ N.C. App. __, __ S.E.2d __ (April 2, 2013). The trial court did not commit plain error by failing to instruct on perfect or imperfect self-defense or perfect or imperfect defense of others where no evidence supported those instructions.

[State v. Sessoms](#), __ N.C. App. __, __ S.E.2d __ (April 2, 2013). The trial court did not commit plain error by failing to instruct on defense of others. The defendant's statement that he was defending himself, his vehicle and his wife was not evidence from which the jury could find that the defendant reasonably believed a third person was in immediate peril of death or serious bodily harm at the hands of another.

Sentencing and Probation

[State v. Hunnicutt](#), __ N.C. App. __, __ S.E.2d __ (April 2, 2013). (1) A defendant may not challenge the validity of an indictment in an appeal challenging revocation of probation. In such circumstances, challenging the validity of the original judgment is an impermissible collateral attack. (2) The trial court did not err by activating the defendant's sentence on the basis that the defendant absconded by willfully avoiding supervision. The defendant's probation required that he remain in the jurisdiction and report as directed to the probation officer. The violation report alleged violations of both of these conditions. Despite the trial court's use of the term "abscond," it was clear that the trial court revoked the defendant's probation because he violated the two listed conditions. (3) The court remanded for correction of a clerical error on the judgment that incorrectly indicated that the defendant absconded pursuant to G.S. 15A-1343(b)(3e). (4) The trial court did not abuse its discretion in finding a violation and revoking his probation where the evidence supported its determination.

Sex Offenders

[State v. Arrington](#), __ N.C. App. __, __ S.E.2d __ (April 2, 2013). (1) The trial court properly required the defendant to enroll in lifetime SBM. When deciding whether a conviction counts as a reportable

conviction as an “offense against a minor”, the trial court is not restricted to considering the elements of the offense; the trial court may make a determination as to whether or not the defendant was a parent of the abducted child. The defendant had a 2009 conviction for abduction of a child. Although the State did not present any independent evidence at the SBM hearing that the defendant was not the child’s parent, the trial court previously made this determination at the 2009 sentencing hearing when it found the conviction to be a reportable offense. This prior finding supported the trial court’s determination at the SBM hearing that the defendant’s conviction for abduction of a child was a reportable conviction as an offense against a minor. (2) There was sufficient evidence that the defendant was a recidivist for purposes of lifetime SBM. The prior record worksheet and defense counsel’s stipulation to the prior convictions support a finding that the defendant had been convicted of indecent liberties in 2005, even though it appears that the State did not introduce the judgment or record of conviction from that case, or a copy of defendant’s criminal history.

[State v. Hadden](#), __ N.C. App. __, __ S.E.2d __ (April 2, 2013). The trial court erred by requiring the defendant to enroll in SBM. After finding that the defendant did not fall into any of the categories requiring SBM under G.S. 14-208.40, the trial court nonetheless ordered SBM enrollment for 30 years, on grounds that his probation was revoked and he failed to complete sex offender treatment. The court remanded for reconsideration.

Entry of an Order

[State v. Hadden](#), __ N.C. App. __, __ S.E.2d __ (April 2, 2013). The trial court’s order requiring the defendant to enroll in SBM, although signed and dated by the trial court, was never filed with the clerk of court and therefore was a nullity.

Evidence

Crawford Issues

[State v. Barnes](#), __ N.C. App. __, __ S.E.2d __ (April 2, 2013). In a murder case, the defendant’s right of confrontation was not violated when Dr. Jordan, an expert medical examiner, testified that in his opinion the cause of death was methadone toxicity. As part of his investigation, Jordan sent a specimen of the victim’s blood to the Office of the Chief Medical Examiner for analysis. During trial, Jordan testified that in his opinion the cause of death was methadone toxicity and that his opinion was based upon the blood toxicology report from the Chief Medical Examiner’s Office. When defense counsel raised questions about the test showing methadone toxicity, the trial court allowed the State to call as a witness Jarod Brown, the toxicologist at the State Medical Examiner’s Office who analyzed the victim’s blood. Noting the evolving nature of the confrontation question presented, the court concluded that even assuming arguendo that Jordan’s testimony was erroneous, any error was cured by the subsequent testimony and cross-examination of Brown, who performed the analysis. [Author’s note: For an extensive discussion of this confrontation clause issue, see my paper [here](#)]

[State v. Ward](#), __ N.C. App. __, __ S.E.2d __ (April 2, 2013). (1) In a drug case, the trial court did not err by allowing one analyst to testify to the results of an analysis done by another non-testifying analyst. The analysis at issue identified the pills as oxycodone. The defendant did not object to the analyst's testimony at trial or to admission of the underlying report into evidence. Because the defendant and defense counsel stipulated that the pills were oxycodone, no plain error occurred. (2) The court rejected the defendant's argument that the State's failure to comply with the requirements of the G.S. 90-95 notice and demand statute with respect to the analyst's report created error. In addition to failing to object to admission of the report, both the defendant and defense counsel stipulated that the pills were oxycodone. The court also rejected the defendant's argument that his stipulation was not a knowing, voluntary and intelligent waiver of his right to confront the non-testifying analyst, noting that such a stipulation does not require the formality of a guilty plea.

Arrest Search and Investigation

[State v. Heien](#), __ N.C. App. __, __ S.E.2d __ (April 2, 2013). (1) Over a dissent the court held that a valid traffic stop was not unduly prolonged and as a result the defendant's consent to search his vehicle was valid. The stop was initiated at 7:55 am and the defendant, a passenger who owned the vehicle, gave consent to search at 8:08 am. During this time, the two officers discussed a malfunctioning vehicle brake light with the driver, discovered that the driver and the defendant claimed to be going to different destinations, and observed the defendant behaving unusually (he was lying down on the backseat under a blanket and remained in that position even when approached by an officer requesting his driver's license). After each person's name was checked for warrants, their licenses were returned. The officer then requested consent to search the vehicle. The officer's tone and manner were conversational and non-confrontational. No one was restrained, no guns were drawn and neither person was searched before the request to search the vehicle was made. The trial judge properly concluded that the defendant was aware that the purpose of the initial stop had been concluded and that further conversation was consensual. (2) Over a dissent, the court held that the defendant's consent to search the vehicle was valid even though the officer did not inform the defendant that he was searching for narcotics.

[State v. Phifer](#), __ N.C. App. __, __ S.E.2d __ (April 2, 2013). The trial court improperly denied the defendant's motion to suppress. An officer saw the defendant walking in the middle of the street. The officer stopped the defendant to warn him about impeding the flow of street traffic. After issuing this warning, the officer frisked the defendant because of his "suspicious behavior," specifically that the "appeared to be nervous and kept moving back and forth." The court found that "the nervous pacing of a suspect, temporarily detained by an officer to warn him not to walk in the street, is insufficient to warrant further detention and search."

Criminal Offenses

Homicide

[*State v. Barnes*](#), __ N.C. App. __, __ S.E.2d __ (April 2, 2013). (1) In a case in which the victim died after consuming drugs provided by the defendant and the defendant was convicted of involuntary manslaughter, the trial court did not err by instructing the jury on second-degree murder and the lesser offense of involuntary manslaughter. The defendant objected to submission of the lesser offense. The evidence showed that the defendant sold the victim methadone and that the defendant had nearly died the month before from a methadone overdose. There was no evidence that the defendant intended to kill the victim by selling him the methadone. This evidence would support a finding by the jury of reckless conduct under either second-degree murder or involuntary manslaughter. (2) The court also rejected the defendant's argument that under G.S. 14-17, he only could have been convicted of second-degree murder for his conduct.

Stalking and Related Offenses

[*State v. Williams*](#), __ N.C. App. __, __ S.E.2d __ (April 2, 2013). (1) The trial court committed plain error by instructing the jury on the crime of stalking under the new stalking statute, G.S. 14-277.3A, when the charged course of conduct occurred both before and after enactment of the new statute. The new version of the stalking statute lessened the burden on the State. The court noted that where, as here, a defendant is indicted for a continuing conduct offense that began prior to a statutory modification that disadvantages the defendant and the indictment tracks the new statute's disadvantageous language, the question of whether the violation extended beyond the effective date of the statute is one that must be resolved by the jury through a special verdict. Here, the trial court's failure to give such a special verdict was plain error. (2) The evidence was insufficient to establish that the defendant knowingly violated a DVPO. The DVPO required the defendant to "stay away from" victim Smith's place of work, without identifying her workplace. The victim worked at various salons, including one at North Hills. The defendant was charged with violating the DVPO when he was seen in the North Hills Mall parking lot on a day that the victim was working at the North Hills salon. The court concluded that it need not determine the precise contours of what it means to "stay away" because it is clear that there was insufficient evidence that the defendant failed to "stay away" from the victim's place of work, and no evidence that defendant knowingly did so. It reasoned:

The indictment alleges defendant was "outside" Ms. Smith's workplace, and although technically the area "outside" of Ms. Smith's workplace could include any place in the world outside the walls of the salon, obviously such an interpretation is absurd. Certainly the order must mean that defendant could not be so close to Ms. Smith's workplace that he would be able to observe her, speak to her, or intimidate her in any way, but we cannot define the exact parameters of the term "stay away." It is clear only that defendant was not seen in an area that could reasonably be described as "outside" of Ms. Smith's salon, nor was there evidence that he was in a location that would permit him to harass, communicate with, follow, or even observe Ms. Smith at her salon, which might reasonably constitute a failure to "stay away" from her place of work. There was also no evidence that he was in proximity to Ms. Smith's vehicle or that he was in a location which might be along the path she would take from the salon to her vehicle.

Additionally, there was no evidence that defendant was aware that Ms. Smith worked at the North Hills salon, or that he otherwise knew that he was supposed to stay away from North Hills. The order did not identify North Hills as one of the locations that defendant was supposed to stay away from. The order specified no distance that defendant was supposed to keep between himself and Ms. Smith or her workplace. Defendant was seen walking in the parking structure of a public mall at some unknown distance from the salon where Ms. Smith was working on the night in question.

Drug Offenses

[State v. Hazel](#), __ N.C. App. __, __ S.E.2d __ (April 2, 2013). (1) There was sufficient evidence that the defendant had constructive possession of heroin found in an apartment that was not owned or rented by him. Evidence that the defendant was using the apartment included that he had a key to the apartment on his key ring, his clothing was found in the bedroom, he was seen entering and exiting the apartment shortly before the drug transaction, and he characterize the apartment as "where he was staying." Also, the defendant told the officer he had more heroin in the apartment and once inside lead them directly to it. The defendant also told the officers that his roommate was not involved with heroin and knew nothing of the defendant's involvement with drugs. (2) The trial court did not err by allowing heroin recovered from the defendant's person outside the apartment to be combined with the heroin recovered from the apartment for the purposes of arriving at a trafficking amount for trafficking by possession. The defendant was observed entering the apartment immediately before his sale of 3.97 grams of heroin to an undercover officer. Upon arrest, the defendant said that he had more heroin in the apartment, and provided the key and consent for the officers to enter the apartment where 0.97 grams of additional heroin were recovered. This additional heroin was packaged for sale in the same manner as the heroin sold to the officer. The defendant admitted to being a drug dealer. There was no evidence any of the heroin was for the defendant's personal use. Under these circumstances, the defendant possessed the heroin in the apartment simultaneously with the heroin sold to the officer.

Frauds

[State v. Renkosiak](#), __ N.C. App. __, __ S.E.2d __ (April 2, 2013). There was sufficient evidence of embezzlement where the defendant, a bookkeeper controller for the victim company, was instructed to close the company's credit cards but failed to do so, instead incurring personal charges on the cards and paying the card bills from company funds. The court rejected the defendant's argument that the evidence was insufficient because it did not show that she had been physically entrusted with the credit cards. The evidence also showed that the defendant embezzlement funds by paying for her personal insurance with company funds without making a required corresponding deduction from her personal paycheck.