Criminal Procedure

Appeal Issues

State v. Gamez, __ N.C. App. __, __ S.E.2d __ (July 2, 2013). Where the State's witness testified regarding statements made to the victim by the victim's brother and the defendant failed to move to strike the testimony, the defendant failed to preserve the issue for appellate review.

State v. Storm, __ N.C. App. __, __ S.E.2d __ (July 2, 2013). By failing to object to the omission of diminished capacity and voluntary intoxication from the trial court's final mandate to the jury instructions on murder, the defendant failed to preserve this issue for appellate review. The trial court had instructed on those defenses per the pattern instructions. The defendant never requested that the final mandate for murder include voluntary intoxication and diminished capacity. The court went on to reject the defendant's argument that this constituted plain error.

Indictment Issues

State v. Sheppard, __ N.C. App. __, __ S.E.2d __ (July 2, 2013). The trial court lacked jurisdiction to sentence the defendant for larceny of goods worth more than $1,000 when the indictment charged that the stole more than $1,000 of "U.S. CURRENCY."

Jury Argument

State v. Storm, __ N.C. App. __, __ S.E.2d __ (July 2, 2013). In a murder case, the trial court was not required to intervene ex mero motu when the prosecutor argued to the jury that depression might make you suicidal but it "doesn't make you homicidal." The defendant's witness had testified that depression can make a person suicidal. In context, the prosecutor's argument attacked the relevance, weight, and credibility of that testimony.

Sentencing

Eighth Amendment

State v. Pemberton, __ N.C. App. __, __ S.E.2d __ (July 2, 2013). Under *Miller v. Alabama,* 132 S. Ct. 2455 (2012), the trial court violated the defendant's constitutional right to be free from cruel and unusual punishment by imposing a mandatory sentence of life imprisonment without the possibility of parole upon him despite the fact that he was under 18 years old at the time of the murder. Because the defendant was convicted of first-degree murder solely on the basis of the felony-murder rule, he must be resentenced to life imprisonment with parole in accordance with G.S. 15A-1340.19B(a).

Probation

State v. Nolen, __ N.C. App. __, __ S.E.2d __ (July 2, 2013). Applying the Justice Reinvestment Act (JRA), the court held that the trial court improperly revoked the defendant's probation. The defendant

violated the condition of probation under G.S. 15A-1343(b)(2) that she not leave the jurisdiction without permission and monetary conditions under G.S. 15A-1343(b). She did not commit a new crime, was not subject to the new absconding condition codified by the JRA in G.S. 15A-1343(b)(3a), and had served no prior CRVs under G.S. 15A 1344(d2). Thus, under the JRA, her probation could not be revoked.

Evidence

404(b)

State v. Hanif, __ N.C. App. __, __ S.E.2d __ (July 2, 2013). In a counterfeit controlled substance case in where the defendant was alleged to have sold tramadol hydrochloride, representing it to be Vicodin, evidence that he also possessed Epsom salt in a baggie was properly admitted under Rule 404(b). The salt bore a sufficient similarity to crack cocaine in appearance and packaging that it caused an officer to do a field test to determine if it was cocaine. Under these circumstances, evidence that the defendant possessed the salt was probative of intent, plan, scheme, and modus operandi.

Expert Opinions

State v. Gamez, __ N.C. App. __, __ S.E.2d __ (July 2, 2013). (1) In criminal cases, the amendment to N.C.Evid. R. 702, which is "effective October 1, 2011, and applies to actions commenced on or after that date" applies to cases where the indictment is filed on or after that date. The court noted that it had suggested in a footnote in a prior unpublished opinion that the trigger date for applying amended Rule is the start of the trial but held that the proper date is the date the indictment is filed. Here, the defendant was initially indicted on 17 May 2010, before the 1 October 2011 effective date. Although a second bill of indictment was filed on 12 December 2011 and subsequently joined for trial, the court held that the criminal proceeding commenced with the filing of the first indictment and that therefore amended Rule 702 did not apply. (2) In a child sex case, the trial court did not abuse its discretion by admitting expert opinion that the victim suffered from post-traumatic stress disorder when a licensed clinical social worker was tendered as an expert in social work and routinely made mental health diagnoses of sexual assault victims. The court went on to note that when an expert testifies the victim is suffering from PTSD, the testimony must be limited to corroboration and may not be admitted as substantive evidence.

State v. Hanif, __ N.C. App. __, __ S.E.2d __ (July 2, 2013). In a counterfeit controlled substance case, the trial court committed plain error by admitting evidence identifying a substance as tramadol hydrochloride based solely upon an expert's visual inspection. The State's witness Brian King, a forensic chemist with the State Crime Lab, testified that after a visual inspection, he identified the pills as tramadol hydrochloride. Specifically he compared the tablets' markings to a Micromedex online database. King performed no chemical analysis of the pills. Finding that *State v. Ward*, 364 N.C. 133 (2010), controlled, the court held that in the absence of a scientific, chemical analysis of the substance, King's visual inspection was insufficient to identify the composition of the pills.

Lay Opinions

State v. Storm, __ N.C. App. __, __ S.E.2d __ (July 2, 2013). In a murder case, the trial court did not err by excluding testimony of Susan Strain, a licensed social worker. Strain worked with the defendant's step-father for several years and testified that she occasionally saw the defendant in the lobby of the facility where she worked. The State objected to Strain's proffered testimony that on one occasion the defendant "appeared noticeably depressed with flat affect." The trial court allowed Strain to testify to her observation of the defendant, but did not permit her to make a diagnosis of depression based upon her brief observations of the defendant some time ago. The defendant tendered Strain as a lay witness and made no attempt to qualify her as an expert; her opinion thus was limited to the defendant's emotional state and she could not testify concerning a specific psychiatric diagnosis. The statement that the defendant "appeared noticeably depressed with flat affect" is more comparable to a specific psychiatric diagnosis than to a lay opinion of an emotional state. Furthermore Strain lacked personal knowledge because she only saw the defendant on occasion in the lobby, her observations occurred seven years before to the murder, she did not spend any appreciable amount of time with him, and the defendant did not present any evidence to indicate Strain had any personal knowledge of his mental state at that time

Criminal Offenses

Homicide

State v. Horskins, __ N.C. App. __, __ S.E.2d __ (July 2, 2013). In this first-degree murder case, the evidence was sufficient to show premeditation and deliberation. After some words in a night club parking lot the defendant shot the victim, who was unarmed, had not reached for a weapon, had not engaged the defendant in a fight and did nothing to provoke the defendant's violent response. After the victim fell from the defendant's first shot, the defendant shot the victim 6 more times. Instead of then trying to help the victim, the defendant left the scene and attempted to hide evidence.

Assaults

State v. Lowery, __ N.C. App. __, __ S.E.2d __ (July 2, 2013). The evidence was sufficient to establish assault by strangulation. The victim testified that the defendant strangled her twice; the State's medical expert testified that the victim's injuries were consistent with strangulation; and photographic evidence showed bruising, abrasions, and bite mark on and around the victim's neck. The court rejected the defendant's arguments that the statute required "proof of physical injury beyond what is inherently caused by every act of strangulation" or extensive physical injury.

Domestic Violence Protective Order Offenses

State v. Poole, __ N.C. App. __, __ S.E.2d __ (July 2, 2013). The trial court erred by dismissing an indictment charging the defendant with violating an ex parte domestic violence protective order (DVPO) that required him to surrender his firearms. The trial court entered an ex parte Chapter 50B DVPO prohibiting the defendant from contacting his wife and ordering him to surrender all firearms to the sheriff. The day after the sheriff served the defendant with the DVPO, officers returned to the

defendant's home and discovered a shotgun. He was arrested for violating the DVPO. The trial court granted the defendant's motion to dismiss, finding that under *State v. Byrd,* 363 N.C. 214 (2009), the DVPO was not a protective order entered within the meaning of G.S. 14-269.8 and that the prosecution would violate the defendant's constitutional right to due process. The State appealed. The court concluded that *Byrd* was not controlling because of subsequent statutory amendments and that the prosecution did not violate the defendant's procedural due process rights.

Larceny & Related Offenses

State v. Sheppard, __ N.C. App. __, __ S.E.2d __ (July 2, 2013). (1) A larceny was from the person when the defendant stole the victim's purse, which was in the child's seat of her grocery store shopping cart. At the time, the victim was looking at a store product and was within hand's reach of her cart; additionally she realized that the larceny was occurring as it happened, not some time later. (2) The trial court erred by sentencing the defendant for both larceny from the person and larceny of goods worth more than $1,000 based on a single larceny. Larceny from the person and larceny of goods worth more than $1,000 are not separate offenses, but alternative ways to establish that a larceny is a Class H felony. While it is proper to indict a defendant on alternative theories of felony larceny and allow the jury to determine guilt as to each theory, where there is only one larceny, judgment may only be entered for one larceny.

Ineffective Assistance of Counsel

State v. Pemberton, __ N.C. App. __, __ S.E.2d __ (July 2, 2013). (1) In a murder case, trial counsel did not impermissibly concede the defendant's guilt under *Harbison.* Although defense counsel never explicitly conceded the defendant's guilt during trial, she did make factual concessions, including admitting that the defendant was present at the shooting and that he believed that he was participating in a plan to commit a robbery. The court found that it did not need to decide whether the factual admissions constituted an admission of guilt of first degree felony-murder given that the defendant expressly consented to counsel's admissions. (2) The court dismissed the defendant's claim that counsel's trial strategy constituted ineffectiveness under *Strickland.* This claim was dismissed without prejudice to the defendant's right to assert the claim in a Motion for Appropriate Relief.