

Criminal Procedure

Pleas

[State v. Tinney](#), __ N.C. App. __, __ S.E.2d __ (Sept. 17, 2013). The defendant's plea was valid even though the plea agreement contained an unenforceable provision preserving his right to appeal the transfer of his juvenile case to superior court. Distinguishing cases holding that the inclusion of an invalid provision reserving the right to obtain appellate review of a particular issue rendered a plea agreement unenforceable, the court noted that in this case the defendant had ample notice that the provision was, in all probability, unenforceable and he elected to proceed with his guilty plea in spite of this. Specifically, he was so informed by the trial court.

Jury Selection

[State v. Carr](#), __ N.C. App. __, __ S.E.2d __ (Sept. 17, 2013). The trial court did not abuse its discretion by denying the defendant's challenge for cause. Although the juror initially voiced sentiments that would normally make her vulnerable to a challenge for cause, she later confirmed that she would put aside prior knowledge and impressions, consider the evidence presented with an open mind, and follow the applicable law.

Motion to Dismiss

[State v. Kirkwood](#), __ N.C. App. __, __ S.E.2d __ (Sept. 17, 2013). There was sufficient evidence that the defendant perpetrated the crime of discharging a weapon into occupied property. Evidence tied a burgundy SUV to the shooting and suggested the defendant was the vehicle's driver, the defendant fled from police and made statements to them showing "inside" knowledge, and gunshot residue was found on the defendant shortly after the shooting.

Jury Argument

[State v. Barbour](#), __ N.C. App. __, __ S.E.2d __ (Sept. 17, 2013). The trial court did not err by failing to intervene ex mero motu during that State's closing argument. Even if the prosecutor misstated the evidence, the trial court's jury instruction cured any defect. The trial court instructed the jury that if their "recollection of the evidence differs from that of the attorneys, you are to rely solely upon your recollection of the evidence."

Verdict

[State v. Barbour](#), __ N.C. App. __, __ S.E.2d __ (Sept. 17, 2013). The trial court did not err by examining the verdict sheet returned by the jury, rejecting the verdict, and instructing the jury to answer each question. The trial court acted before consulting with counsel but did consult with counsel after the jury was removed from the courtroom. The court noted that "While it would have been preferable for the trial court to have excused the jury from the courtroom, and allowed counsel to view the verdict sheet

and to be heard prior to the court's instructions to the jury, we can discern no prejudice to defendant based upon what [actually] happened." The court noted that because the trial court instructed the jury to re-mark the verdict sheet next to their original markings, the original markings were preserved.

[*State v. Marsh*](#), __ N.C. App. __, __ S.E.2d __ (Sept. 17, 2013). The defendant's MAR claim was without merit where it alleged ineffective assistance because of counsel's failure to assert that extraneous information had been presented to the jury. The court found that evidence proffered from a juror was not "extraneous prejudicial information" and thus was inadmissible under N.C.R. Evid. 606(b).

Sentencing

[*State Watkins*](#), __ N.C. App. __, __ S.E.2d __ (Sept. 17, 2013). The court remanded for a determination of whether the trial court had jurisdiction to sentence the defendant more than a year after the date set for the PJC.

[*State v. Marlow*](#), __ N.C. App. __, __ S.E.2d __ (Sept. 17, 2013). The trial court did not err by accepting a stipulation to a PRL point under G.S. 15A-1340.14(b)(7) without engaging in the mandated colloquy where the context clearly indicated that it was not required.

Sex Offenders

[*State v. Marlow*](#), __ N.C. App. __, __ S.E.2d __ (Sept. 17, 2013). Where the defendant was convicted of first-degree statutory rape the trial court did not err by ordering the defendant to enroll in lifetime SBM upon release from imprisonment. The offense of conviction involved vaginal penetration and force and thus was an aggravated offense.

Evidence

Hearsay

[*State v. Jackson*](#), __ N.C. App. __, __ S.E.2d __ (Sept. 17, 2013). The trial court properly admitted data obtained from an electronic surveillance device worn by the defendant and placing him at the scene. The specific evidence included an exhibit showing an event log compiled from data retrieved from the defendant's device and a video file plotting the defendant's tracking data. The court began by holding that the tracking data was a data compilation and that the video file was merely an extraction of that data produced for trial. Thus, it concluded, the video file was properly admitted as a business record if the tracking data was recorded in the regular course of business near the time of the incident and a proper foundation was laid. The defendant did not dispute that the device's data was recorded in the regular course of business near the time of the incident. Rather, he asserted that the State failed to establish a proper foundation to verify the authenticity and trustworthiness of the data. The court disagreed noting that the officer-witness established his familiarity with the GPS tracking system by testifying about his experience and training in electronic monitoring, concerning how the device transmits data to a secured server where the data was stored and routinely accessed in the normal

course of business, and how, in this case, he accessed the tracking data for the defendant's device and produced evidence introduced at trial.

Opinions

[State v. Jackson](#), __ N.C. App. __, __ S.E.2d __ (Sept. 17, 2013). An officer properly gave lay witness testimony. In a case where data from the defendant's electronic monitoring device was used to place him at the crime scene, the officer-witness testified regarding the operation of the device and tracking data retrieved from the secured server. When questioned about specific tracking points in the sequence of mapped points, he identified the date, time, accuracy reading, and relative location of the tracking points.

Reference to Defendant's Silence

[State v. Barbour](#), __ N.C. App. __, __ S.E.2d __ (Sept. 17, 2013). The State did not impermissibly present evidence of the defendant's post-*Miranda* silence. After being advised of his *Miranda* rights, the defendant did not remain silent but rather made statements to the police. Thus, no error occurred when an officer indicated that after his arrest the defendant never asked to speak with the officer or anyone else in the officer's office.

Arrest Search and Investigation Identification

[State v. Jackson](#), __ N.C. App. __, __ S.E.2d __ (Sept. 17, 2013). An out-of-court show-up identification was not impermissibly suggestive. Police told a victim that they "believed they had found the suspect." The victim was then taken to where the defendant was standing in a front yard with officers. With a light shone on the defendant, the victim identified the defendant as the perpetrator from the patrol car. For reasons discussed in the opinion, the court held that the show-up possessed sufficient aspects of reliability to outweigh its suggestiveness.

Criminal Offenses General Crimes

[State v. Fish](#), __ N.C. App. __, __ S.E.2d __ (Sept. 17, 2013). In a case in which the defendant was charged with conspiracy to commit felony larceny, the trial court did not err by denying the defendant's motion to submit a jury instruction on conspiracy to commit misdemeanor larceny. The court determined that evidence of the cumulative value of the goods taken is evidence of a conspiracy to steal goods of that value, even if the conspirators' agreement is silent as to exact quantity. Here, the evidence showed that the value of the items taken was well in excess of \$1,000.

Larceny

[State v. Fish](#), __ N.C. App. __, __ S.E.2d __ (Sept. 17, 2013). The State presented sufficient evidence that the fair market value of the stolen boat batteries was more than \$1,000 and thus supported a conviction of felony larceny.

Burglary & Related Offenses

[State v. Fish](#), __ N.C. App. __, __ S.E.2d __ (Sept. 17, 2013). The trial court erred by denying the defendant's motion to dismiss charges of breaking or entering a boat where the State failed to present evidence that the boats contained items of value. Although even trivial items can satisfy this element, here the record was devoid of any evidence of items of value. The batteries did not count because they were part of the boats.

Sex Crimes

[State v. Marlow](#), __ N.C. App. __, __ S.E.2d __ (Sept. 17, 2013). The trial court did not err by sentencing the defendant for two crimes—statutory rape and incest—arising out of the same transaction. The two offenses are not the same under the *Blockburger* test; each has an element not included in the other.

[State v. Boyett](#), __ N.C. App. __, __ S.E.2d __ (Sept. 17, 2013). On remand by the NC Supreme Court for reconsideration in light of *State v. Carter*, __ N.C. __, 739 S.E.2d 548 (2013) (no plain error occurred in a child sexual offense case when the trial court failed to instruct on attempted sexual offense even though the evidence of penetration was conflicting), the court held that no plain error occurred when the trial court failed to instruct the jury on attempted second-degree rape and attempted incest when the evidence of penetration was conflicting. As in *Carter*, the defendant failed to show that the jury would have disregarded any portions of the victim's testimony stating that penetration occurred in favor of instances in which she said it did not occur. Thus, the defendant failed to show a "probable impact" on the verdict.

Weapons Offenses

[State v. Kirkwood](#), __ N.C. App. __, __ S.E.2d __ (Sept. 17, 2013). No violation of double jeopardy occurred when the trial court sentenced the defendant for three counts of discharging a firearm into occupied property. Although the three gunshots were fired in quick succession, the bullet holes were in different locations around the house's front door area. The evidence also showed that at least one shot was fired from a revolver, which, in single action mode, must be manually cocked between firings and, in double action mode, can still only fire a single bullet at a time. The other gun that may have been used was semiautomatic but it did not always function properly and many times, when the trigger was pulled, would not fire. Neither gun was a fully automatic weapon such as a machine gun. There was sufficient evidence to show that each shot was "distinct in time, and each bullet hit the [house] in a different place." In reaching this holding, the court declined to apply assault cases that require a distinct interruption in the original assault for the evidence to support a second conviction.

Drug Offenses

[State v. Barnes](#), __ N.C. App. __, __ S.E.2d __ (Sept. 17, 2013). (1) Over a dissent, the court held that the trial court did not err by denying the defendant's motion to dismiss a charge of possession of a controlled substance on the premises of a local confinement facility. The defendant first argued that the State failed to show that he intentionally brought the substance on the premises. The court held that the offense was a general intent crime. As such, there is no requirement that a defendant has to specifically intend to possess a controlled substance on the premises of a local confinement facility. It stated: "[W]e are simply unable to agree with Defendant's contention that a conviction . . . requires proof of any sort of specific intent and believe that the relevant offense has been sufficiently shown to exist in the event that the record contains evidence tending to show that the defendant knowingly possessed a controlled substance while in a penal institution or local confinement facility." The court also rejected the defendant's argument that his motion should have been granted because he did not voluntarily enter the relevant premises but was brought to the facility by officers against his wishes. The court rejected this argument concluding, "a defendant may be found guilty of possession of a controlled substance in a local confinement facility even though he was not voluntarily present in the facility in question." Following decisions from other jurisdictions, the court reasoned that while a voluntary act is required, "the necessary voluntary act occurs when the defendant knowingly possesses the controlled substance." The court also concluded that the fact that officers may have failed to warn the defendant that taking a controlled substance into the jail would constitute a separate offense, was of no consequence. (2) The trial court erred by entering judgment for both simple possession of a controlled substance and possession of a controlled substance on the premises of a local confinement facility when both charges stemmed from the same act of possession. Simple possession is a lesser-included offense of the second charge.