

Criminal Procedure

Charging Instruments

[*State v. Carlton*](#), __ N.C. App. __, __ S.E.2d __ (Jan. 21, 2014). The superior court lacked jurisdiction to try the defendant for possession of lottery tickets in violation of G.S. 14-290. An officer issued the defendant a citation for violating G.S. 14-291 (acting as an agent for or on behalf of a lottery). The district court allowed the charging document to be amended to charge a violation of G.S. 14-290. The defendant was convicted in district court, appealed, and was again convicted in superior court. The court held that the district court improperly allowed the charging document to be amended to charge a different crime.

Pretrial DNA Testing

[*State v. McLean*](#), __ N.C. App. __, __ S.E.2d __ (Jan. 21, 2014). In a case involving attempted murder and other charges related to a discharge of a firearm, the court held that the trial court did not err by denying the defendant's pre-trial motion for DNA testing, pursuant to G.S. 15A-267(c), of shell casings recovered from the crime scene. The defendant's motion indicated that he wanted "to test the shell casings to see if there is any DNA material on the shell casings that may be compared to the Defendant." The defendant also moved for fingerprint testing on the shell casings. The trial court denied the motion for DNA testing but ordered that the shell casings be subjected to fingerprint testing. The casings were tested and no fingerprints were found. The court determined that the absence of the defendant's DNA on the shell casings, even if established, would not have a logical connection or be significant to the defendant's alibi defense. Additionally, the court noted that the purpose of the defendant's request was to demonstrate the absence of his DNA on the shell casings but the plain language of G.S. 15A-267(c) contemplates DNA testing for ascertained biological material—it is not intended to establish the absence of DNA evidence.

Jury Instructions

[*State v. Stepp*](#), __ N.C. App. __, __ S.E.2d __ (Jan. 21, 2014). Over a dissent, the court held that the trial court committed reversible error by failing to instruct the jury on an affirmative defense to a felony that was the basis of a felony-murder conviction. The jury convicted the defendant of first-degree felony-murder of a 10-month old child based on an underlying sexual offense felony. The jury's verdict indicated that it found the defendant guilty of sexual offense based on penetration of the victim's genital opening with an object. At trial, the defendant admitted that he penetrated the victim's genital opening with his finger; however, he requested an instruction on the affirmative defense provided by G.S. 14-27.1(4), that the penetration was for "accepted medical purposes," specifically, to clean feces and urine while changing her diapers. The trial court denied the request. The court found this to be error, noting that the defendant offered evidence supporting his defense. Specifically, the defendant testified at trial to the relevant facts and his medical expert stated that the victim's genital opening injuries were consistent with the defendant's stated purpose. The court stated:

We believe that when the Legislature defined “sexual act” as the penetration of a genital opening with an object, it provided the “accepted medical purposes” defense, in part, to shield a parent – or another charged with the caretaking of an infant – from prosecution for engaging in sexual conduct with a child when caring for the cleanliness and health needs of an infant, including the act of cleaning feces and urine from the genital opening with a wipe during a diaper change. To hold otherwise would create the absurd result that a parent could not penetrate the labia of his infant daughter to clean away feces and urine or to apply cream to treat a diaper rash without committing a Class B1 felony, a consequence that we do not believe the Legislature intended.

(Footnote omitted). The court added that in this case, expert testimony was not required to establish that the defendant’s conduct constituted an “accepted medical purpose.”

Evidence

Opinions

[State v. McGrady](#), __ N.C. App. __, __ S.E.2d __ (Jan. 21, 2014). In murder case involving a claim of self-defense, the court applied amended NC Evidence Rule 702 and held that the trial court did not abuse its discretion by excluding defense expert testimony regarding the doctrine of “use of force.” The trial court concluded, among other things, that the expert’s testimony was not based on sufficient facts or data or the product of reliable principles and methods. The court also rejected the defendant’s argument that the trial court’s ruling deprived him of a right to present a defense, noting that right is not absolute and defendants do not have a right to present evidence that the trial court, in its discretion, deems inadmissible under the evidence rules.

Character Evidence

[State v. McGrady](#), __ N.C. App. __, __ S.E.2d __ (Jan. 21, 2014). In murder case involving a claim of self-defense, the trial court did not err by excluding the defense expert testimony, characterized by the defendant as pertaining to the victim’s proclivity toward violence. The court noted that where self-defense is at issue, evidence of a victim’s violent or dangerous character may be admitted under Rule 404(a)(2) when such character was known to the accused or the State’s evidence is entirely circumstantial and the nature of the transaction is in doubt. The court concluded that the witness’s testimony did not constitute evidence of the victim’s character for violence. On voir dire, the witness testified only that that the victim was an angry person who had thoughts of violence; the witness admitted having no information that the victim actually had committed acts of violence. Additionally, the court noted, there was no indication that the defendant knew of the victim’s alleged violent nature and the State’s case was not entirely circumstantial. The court also rejected the defendant’s argument that the trial court’s ruling deprived him of a right to present a defense, noting that right is not absolute and defendants do not have a right to present evidence that the trial court, in its discretion, deems inadmissible under the evidence rules.

404(b) Evidence

[*State v. Williams*](#), __ N.C. App. __, __ S.E.2d __ (Jan. 21, 2014). In a sexual exploitation of a minor case, the trial court did not commit plain error by admitting evidence that the defendant set up a webcam in a teenager's room; videotaped her dancing in her pajamas; and inappropriately touched her while they rode four-wheelers. Although the court had an issue with the third piece of evidence, it concluded that any error did not rise to the level of plain error.

Cross-Examination and Impeachment

[*State v. Council*](#), __ N.C. App. __, __ S.E.2d __ (Jan. 21, 2014). In a felony assault and robbery case, no plain error occurred when the trial court ruled that the defendant could not question the victim about an unrelated first-degree murder charge pending against him in another county at the time of trial. Normally it is error for a trial court to bar a defendant from cross-examining a State's witness regarding pending criminal charges, even if those charges are unrelated to those at issue. In such a situation, cross-examination can impeach the witness by showing a possible source of bias in his or her testimony, to wit, that the State may have some undue power over the witness by virtue of its ability to control future decisions related to the pending charges. However, in this case the plain error standard applied. Given that the victim's "credibility was impeached on several fronts at trial" the court found that no plain error occurred. Moreover the court noted, the victim's most important evidence—his identification of the defendant as the perpetrator—occurred before the murder allegedly committed by the victim took place. As such, the court reasoned, his identification could not have been influenced by the pending charge. For similar reasons the court rejected the defendant's claim that counsel rendered ineffective assistance by failing to object to the State's motion in limine to bar cross-examination of the victim about the charge.

Arrest Search and Investigation

Traffic Stops

[*State v. Smathers*](#), __ N.C. App. __, __ S.E.2d __ (Jan. 21, 2014). In a case where the State conceded that the officer had neither probable cause nor reasonable suspicion to seize the defendant, the court decided an issue of first impression and held that the officer's seizure of the defendant was justified by the "community caretaking" doctrine. The officer stopped the defendant to see if she and her vehicle were "okay" after he saw her hit an animal on a roadway. Her driving did not give rise to any suspicion of impairment. During the stop the officer determined the defendant was impaired and she was arrested for DWI. The court noted that in adopting the community caretaking exception, "we must apply a test that strikes a proper balance between the public's interest in having officers help citizens when needed and the individual's interest in being free from unreasonable governmental intrusion." It went on to adopt the following test for application of the doctrine:

[T]he State has the burden of proving that: (1) a search or seizure within the meaning of the Fourth Amendment has occurred; (2) if so, that under the totality of the circumstances an objectively reasonable basis for a community caretaking function is

shown; and (3) if so, that the public need or interest outweighs the intrusion upon the privacy of the individual.

After further fleshing out the test, the court applied it and found that the stop at issue fell within the community caretaking exception.

Searches

[State v. Elder](#), __ N.C. App. __, __ S.E.2d __ (Jan. 21, 2014). (1) The district court exceeded its statutory authority by ordering a general search of the defendant's person, vehicle, and residence for unspecified "weapons" as a provision of the ex parte DVPO under G.S. 50B-3(a)(13). Thus, the resulting search of the defendant's home was unconstitutional. (2) The court rejected the State's argument the ex parte DVPO served as a valid search warrant. (3) The court rejected the State's argument that exigent circumstances (the need to perform a "protective sweep" of the defendant's home) supported the warrantless search. The trial court made no findings as to any exigent circumstances or the need for a protective sweep and the State did not contend, nor did the trial court conclude, that the officers had probable cause to suspect any particular criminal activity when they approached the defendant's home. (4) Finally, the court rejected the State's argument that the good faith exception applied. The court noted that the good faith exception might have applied if the defendant challenged the search only under the US constitution; here, however the defendant also challenged the search under the NC Constitution, and there is a no good faith exception to the exclusionary rule applied as to violations of the state Constitution.

Interrogation

[State v. Council](#), __ N.C. App. __, __ S.E.2d __ (Jan. 21, 2014). No prejudicial error occurred when the trial court denied the defendant's motion to suppress statements made by him while being transported in a camera-equipped police vehicle. After being read his *Miranda* rights, the defendant invoked his right to counsel. He made the statements at issue while later being transported in the vehicle. The court explained that to determine whether a defendant's invoked right to counsel has been waived, courts must consider whether the post-invocation interrogation was police-initiated and whether the defendant knowingly and intelligently waived the right. Although the trial court did not apply the correct legal standard and failed to make the necessary factual findings, any error was harmless beyond a reasonable doubt, given that the defendant's statements contained little relevant evidence, they were not "particularly prejudicial," and the other evidence in the case is strong.

Criminal Offenses

Sexual Exploitation of a Child

[State v. Williams](#), __ N.C. App. __, __ S.E.2d __ (Jan. 21, 2014). (1) Deciding an issue of first impression the court held that the act of downloading an image from the Internet constitutes a duplication for purposes of second-degree sexual exploitation of a minor under G.S. 14-190.17. (2) The court rejected the defendant's argument that in third-degree sexual exploitation of a minor cases, the General

Assembly did not intend to punish criminal defendants for both receiving and possessing the same images.

Drug Offenses

[*State v. Beam*](#), __ N.C. App. __, __ S.E.2d __ (Jan. 21, 2014). In a case in which the defendant was convicted of possession of heroin and trafficking in opium or heroin by transportation, the trial court did not err by denying the defendant's request for an instruction about knowing possession or transportation. The court concluded that the requested instruction was not required because the defendant did not present any evidence that he was confused or mistaken about the nature of the illegal drug his accomplice was carrying.

Judicial Administration

Closing the Courtroom

[*State v. Williams*](#), __ N.C. App. __, __ S.E.2d __ (Jan. 21, 2014). In a sexual exploitation of a minor case, the trial court did not violate the defendant's constitutional right to a public trial by closing the courtroom during the presentation of the sexual images at issue.