

Criminal Procedure Indictment Issues

[*State v. Hicks*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 17, 2015). The trial court committed plain error by instructing the jury on sexual offense with a child by an adult offender under G.S. 14-27.4A when the indictment charged the defendant with first-degree sexual offense in violation of G.S. 14-27.4(a)(1), a lesser-included of the G.S. 14-27.4A crime. The court vacated defendant's conviction under G.S. 14-27.4A and remanded for resentencing and entry of judgment on the lesser-included offense. Additionally, the court appealed to the General Assembly to clarify the relevant law:

This case illustrates a significant ongoing problem with the sexual offense statutes of this State: the various sexual offenses are often confused with one another, leading to defective indictments.

Given the frequency with which these errors arise, we strongly urge the General Assembly to consider reorganizing, renaming, and renumbering the various sexual offenses to make them more easily distinguishable from one another. Currently, there is no uniformity in how the various offenses are referenced, and efforts to distinguish the offenses only lead to more confusion. For example, because "first degree sexual offense" encompasses two different offenses, a violation of N.C. Gen. Stat. § 14-27.4(a)(1) is often referred to as "first degree sexual offense with a child" or "first degree statutory sexual offense" to distinguish the offense from "first degree sexual offense by force" under N.C. Gen. Stat. § 14-27.4(a)(2). "First degree sexual offense with a child," in turn, is easily confused with "statutory sexual offense" which could be a reference to a violation of either N.C. Gen. Stat. § 14-27.4A (officially titled "[s]exual offense with a child; adult offender") or N.C. Gen. Stat. § 14-27.7A (2013) (officially titled "[s]tatutory rape or sexual offense of person who is 13, 14, or 15 years old"). Further adding to the confusion is the similarity in the statute numbers of N.C. Gen. Stat. § 14-27.4(a)(1) and N.C. Gen. Stat. § 14-27.4A. We do not foresee an end to this confusion until the General Assembly amends the statutory scheme for sexual offenses. (citations omitted).

Speedy Trial & Related Issues

[*State v. Broussard*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 17, 2015). Although the issue does not appear to have been raised by the defendant on appeal in this second-degree murder case, the court noted: "[O]ur review of the record shows defendant was arrested on 1 September 2009 and was tried in August and September of 2013, almost four years later. . . . The record on appeal does not show any motions for speedy trial or arguments of prejudice from defendant." The court continued, in what may be viewed as a warning about trial delays:

While we are unaware of the circumstances surrounding the delay in bringing defendant to trial, it is difficult to conceive of circumstances where such delays are in the interest of justice for defendant, his family, or the victim's family, or in the best interests of our citizens in timely and just proceedings.

Charge Conference

[*State v. Houser*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 17, 2015). Although the trial court erred by failing to fully comply with the statutory requirements regarding a charge conference at the sentencing phase of this felony child abuse case, no material prejudice resulted. The court noted that G.S. 15A-

1231(b) requires the trial court to hold a charge conference, regardless of whether a party requests one, before instructing the jury on aggravating factors during the sentencing phase of a non-capital case. Here, the trial court informed the parties of the aggravating factors that it would charge, gave counsel a general opportunity to be heard at the charge conference, and gave counsel an opportunity to object at the close of the instructions. However, because the trial court failed to inform counsel of the instructions that it would provide the jury, it deprived the parties of the opportunity to know what instructions would be given, and thus did not comply fully with the statute.

Jury Instructions

Self-Defense

[*State v. Broussard*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 17, 2015). In this homicide case in which defendant was found guilty of second-degree murder, the trial court did not err by denying defendant's request to instruct the jury on voluntary manslaughter based on imperfect self-defense. The trial court instructed the jury on first-degree murder, second-degree murder and voluntary manslaughter based on heat of passion. During the charge conference, defendant requested an instruction on voluntary manslaughter based on imperfect self-defense. The trial court denied this request. On appeal, defendant argued that evidence of his stature and weight compared with that of the victim and testimony that the victim held him in a headlock when the stabbing occurred was sufficient to allow the jury to infer that he reasonably believed it was necessary to kill the victim to protect himself from death or great bodily harm. The court disagreed, concluding:

Here, the uncontroverted evidence shows that defendant fully and aggressively participated in the altercation with [the victim] in the yard of [the victim's] home. No evidence was presented that defendant tried to get away from [the victim] or attempted to end the altercation. Where the evidence does not show that defendant reasonably believed it was necessary to stab [the victim], who was unarmed, in the chest to escape death or great bodily harm, the trial court properly denied defendant's request for a jury instruction on voluntary manslaughter based upon imperfect self-defense.

Necessity or Duress

[*State v. Edwards*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 17, 2015). The trial court did not err by denying defendant's request for an instruction on duress or necessity as a defense to possession of a firearm by a felon. On appeal, defendant urged the court to adopt the reasoning of *United States v. Deleveaux*, 205 F.3d 1292 (11th Cir. 2000), an opinion recognizing justification as an affirmative defense to possession of a firearm by a felon. The court declined this invitation, instead holding that assuming without deciding that the *Deleveaux* rule applies, defendant did not satisfy its prerequisites. Specifically, even when viewed in the light most favorable to defendant, the evidence does not support a conclusion that defendant, upon possessing the firearm, was under unlawful and present, imminent, and impending threat of death or serious bodily injury.

Sentencing

Aggravated Sentences

[*State v. Houser*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 17, 2015). In this felony child abuse case the trial court erred by failing to provide an adequate instruction on the especially heinous, atrocious, or cruel (EHAC) aggravating factor. Rather than adapting the EHAC pattern instruction used in capital cases or

providing any “narrowing definitions” that are required for this aggravating factor, the trial court simply instructed the jury: “If you find from the evidence beyond a reasonable doubt that . . . the offense was especially heinous, atrocious, or cruel . . . then you will write yes in the space after the aggravating factor[] on the verdict sheet.” The court concluded: “The trial court failed to deliver the substance of the pattern jury instruction on EHAC approved by our Supreme Court, and in doing so, instructed the jury in a way that the United States Supreme Court has previously found to be unconstitutionally vague.” Having found that the trial court erred, the court went on to conclude that the error did not rise to the level of plain error.

[State v. Saunders](#), ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 17, 2015). In this rape case involving an 82-year-old victim, the court rejected defendant’s argument that the trial court erred by failing to instruct the jury that it could not use the same evidence to find both the element of mental injury for first-degree rape and the aggravating factor that the victim was very old. The defendant argued that the jury may have relied on evidence about ongoing emotional suffering and behavioral changes experienced by the victim after the rape to find both an element of the offense and the aggravating factor. Rejecting this argument the court noted that evidence established that after the rape the victim suffered mental and emotional consequences that extended for a time well beyond the attack itself. The court further explained, in part: “These after-effects of the crime were the evidence that the jury considered in finding that the victim suffered a serious personal injury, an element of first-degree rape. None of the evidence regarding the lingering negative impact of the rape on the victim’s emotional well-being was specifically related to her age.” (citation omitted).

Sentencing Enhancements

[State v. Jacobs](#), ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 17, 2015). The trial court erred by enhancing under G.S. 50B-4.1(d) defendant’s conviction for assault with a deadly weapon with intent to kill inflicting serious injury (AWDWIKISI) and attempted second-degree kidnapping. G.S. 50B-4.1(d) provides that a person who commits another felony knowing that the behavior is also in violation of a domestic violence protective order (DVPO) shall be guilty of a felony one class higher than the principal felony. However, subsection (d) provides that the enhancement “shall not apply to a person who is charged with or convicted of a Class A or B1 felony or to a person charged under subsection (f) or subsection (g) of this section.” Subsection (g) enhances a misdemeanor violation of a DVPO to a Class H felony where the violation occurs while the defendant possesses a deadly weapon. Here, defendant was indicted for attempted first-degree murder; first-degree kidnapping, enhanced under G.S. 50B-4.1(d); AWDWIKISI, enhanced; and violation of a DVPO with the use of a deadly weapon. He was found guilty of three crimes: attempted second-degree kidnapping, enhanced; AWDWIKISI, enhanced; and violation of a DVPO with a deadly weapon pursuant to G.S. 50B-4.1(g). The court held:

We believe the limiting language in G.S. 50B-4.1(d) - that the subsection “shall not apply to a person charged with or convicted of” certain felonies - is unambiguous and means that the subsection is not to be applied to “the person,” as advocated by Defendant, rather than to certain felony convictions of the person, as advocated by the State. Accordingly, we hold that it was error for Defendant’s convictions for AWDWIKISI and for attempted second-degree kidnapping to be enhanced pursuant to G.S. 50B- 4.1(d) since he was “a person charged” under subsection (g) of that statute.

Probation

[State v. Knox](#), ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 17, 2015). (1) Where counsel stated at the revocation hearing that defendant acknowledged that he had received a probation violation report and admitted the allegations in the report and defendant appeared and participated in the hearing voluntarily, the defendant waived the notice requirement of G.S. 15A-1345(e). (2) Because the trial court revoked defendant's probation before the period of probation expired, the court rejected defendant's argument that under G.S. 15A-1344(f) the trial court lacked jurisdiction to revoke.

Post-Conviction DNA Testing

[State v. Turner](#), ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 17, 2015). (1) The trial court did not err by denying defendant's motion for post-conviction DNA testing under G.S. 15A-269. Defendant's motion contained only the following conclusory statement regarding materiality: "The ability to conduct the requested DNA testing is material to defendant[']s defense[.]" That conclusory statement was insufficient to satisfy his burden under the statute. (2) The court rejected defendant's argument that the trial court erred in failing to consider defendant's request for the appointment of counsel pursuant to G.S. 15A-269(c), concluding that an indigent defendant must make a sufficient showing of materiality before he or she is entitled to appointment of counsel.

Evidence

Relevancy

[State v. Broussard](#), ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 17, 2015). In this homicide case, the trial court did not err by admitting evidence of four firearms found in the car when the defendant was arrested following a traffic stop. The State offered the evidence to show the circumstances surrounding defendant's flight. Defendant argued that the evidence was irrelevant and inadmissible because nothing connected the firearms to the crime. The court disagreed:

Defendant ran away from the scene immediately after he stabbed [the victim]. Three days later, he was apprehended following a traffic stop in South Carolina. Defendant, who was riding as a passenger in another person's car, possessed a passport bearing a fictitious name. Also found in the car was a piece of paper with directions to a mosque located in Laredo, Texas. Four firearms were found inside the passenger compartment of the car: a loaded assault rifle, two sawed-off shotguns, and a loaded pistol. The circumstances surrounding defendant's apprehension in South Carolina, the passport, the paper containing directions to a specific place in Texas, and the firearms are relevant evidence of flight.

Authentication

[State v. Snead](#), ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 17, 2015). In this store larceny case, the trial court committed prejudicial error by admitting as substantive evidence store surveillance video that was not properly authenticated. At trial Mr. Steckler, the store's loss prevention manager, explained how the store's video surveillance system worked and testified that he had reviewed the video images after the incident. Steckler also testified that the video equipment was "working properly" on the day of the incident. However, Steckler admitted he was not at the store on the date of the incident, nor was he in charge of maintaining the video recording equipment and ensuring its proper operation. The court also found that Steckler's testimony was insufficient to establish chain of custody of the CD, which was created from the store videotape.

Opinions

Child Victim Cases

[State v. Hicks](#), ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 17, 2015). (1) In this child sexual abuse case, testimony from a psychologist, Ms. Bellis, who treated the victim did not constitute expert testimony that impermissibly vouched for the victim's credibility. Bellis testified, in part, that the victim "came in because she had been molested by her older cousin." The court noted that in the cases offered by defendant, "the experts clearly and unambiguously either testified as to their opinion regarding the victim's credibility or identified the defendant as the perpetrator of the sexual abuse." It continued:

Here, in contrast, Ms. Bellis was never specifically asked to give her opinion as to the truth of [the victim's] allegations of molestation or whether she believed that [the victim] was credible. When reading Ms. Bellis' testimony as a whole, it is evident that when Ms. Bellis stated that "[t]hey specifically came in because [the victim] had been molested by her older cousin[,]" Ms. Bellis was simply stating the reason why [the victim] initially sought treatment from Ms. Bellis. Indeed, Ms. Bellis' affirmative response to the State's follow-up question whether there was "an allegation of molestation" clarifies that Ms. Bellis' statement referred to [the victim]'s allegations, and not Ms. Bellis' personal opinion as to their veracity. Because Ms. Bellis' testimony, when viewed in context, does not express an opinion as to [the victim]'s credibility or defendant's guilt, we hold that the trial court did not err in admitting it.

(2) The court rejected defendant's argument that the trial court committed plain error by admitting Bellis' testimony that she diagnosed the victim with PTSD. The court concluded that the State's introduction of evidence of PTSD on re-direct was not admitted as substantive evidence that the sexual assault happened, but rather to rebut an inference raised by defense counsel during cross-examination. The court further noted that although defendant could have requested a limiting instruction, he did not do so.

Lay Opinions

[State v. Houser](#), ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 17, 2015). In this felony child abuse case, the trial court did not commit plain error by admitting testimony from an investigating detective that the existence of the victim's hairs in a hole in the wall of the home where the incident occurred was inconsistent with defendant's account of the incident, that he punched the wall when he had difficulty communicating with a 911 operator. The detective's testimony did not invade the province of the jury by commenting on the truthfulness of defendant's statements and subsequent testimony. Rather, the court reasoned, the detective was explaining the investigative process that led officers to return to the home and collect the hair sample (later determined to match the victim). Contrary to defendant's arguments, testimony that the hair embedded in the wall was inconsistent with defendant's version of the incident was not an impermissible statement that defendant was not telling the truth. The detective's testimony served to provide the jury a clear understanding of why the officers returned to the home after their initial investigation and how officers came to discover the hair and request forensic testing of that evidence. It concluded: "these statements were rationally based on [the officer's] experience as a detective and were helpful to the jury in understanding the investigative process in this case."

[State v. Snead](#), ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 17, 2015). In this store larceny case, the trial court committed prejudicial error by admitting into evidence testimony by Mr. Steckler, the store's loss

prevention manager, regarding the total number of shirts stolen and the cumulative value of the stolen merchandise where his opinion was based on store surveillance video and not first-hand knowledge.