

Criminal Procedure

Counsel Issues

[*State v. Gillespie*](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 7, 2015). Without addressing the deficient performance prong of the *Strickland* test, the court held that the defendant did not receive ineffective assistance of counsel where he was not prejudiced by counsel's conduct. The defendant had complained of counsel's failure to object to a law enforcement officer's testimony about the victim's demeanor and counsel's failure to object to the striking of a defense witness's testimony.

Error Correction

[*State v. Gillespie*](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 7, 2015). Where the judgment form mistakenly contained a reference to "Assault with a Deadly Weapon," a charge on which the defendant was acquitted, but where the error did not affect the sentence imposed, the court remanded for correction of this clerical error. The court rejected the defendant's argument that the error entitled him to a resentencing.

Indictment Issues

[*State v. Barker*](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 7, 2015). Indictments charging obtaining property by false pretenses were not defective. The charges arose out of the defendant's acts of approaching two individuals (Ms. Hoenig and Ms. Harward), falsely telling them their roofs needed repair, taking payment for the work and then performing shoddy work or not completing the job. At trial, three other witnesses testified to similar incidents. On appeal, the defendant argued that the indictments failed to "intelligibly articulate" his misrepresentations. The court disagreed:

The indictments clearly state that defendant, on separate occasions, obtained property (money) from Ms. Hoenig and Ms. Harward by convincing each victim to believe that their roofs needed extensive repairs when in fact their roofs were not in need of repair at all. In each indictment, the State gave the name of the victim, the monetary sum defendant took from each victim, and the false representation used by defendant to obtain the money: by defendant "approaching [Ms. Hoenig] and claiming that her roof needed repair, and then overcharging [Ms. Hoenig] for either work that did not need to be done, or damage that was caused by the defendant[.]" As to Ms. Harward, the false representation used by defendant to obtain the money was "by . . . claiming that her shed roof needed repair, [with defendant knowing] at the time [that he] intended to use substandard materials and construction to overcharge [Ms. Harward]." Each indictment charging defendant with obtaining property by false pretenses was facially valid, as each properly gave notice to defendant of all of the elements comprising the charge, including the element defendant primarily challenges: the alleged misrepresentation (i.e., that defendant sought to defraud his victims of money by claiming their roofs needed repair when in fact no repairs were needed, and that defendant initiated these

repairs but either failed to complete them or used substandard materials in performing whatever work was done).

[State v. Spivey](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 7, 2015). (1) An indictment charging injury to real property was fatally defective where it alleged the property owner as “Katy’s Great Eats” but failed to allege that this entity was one capable of owning property. The court explained that for this offense, “where the victim is not a natural person, the indictment must allege that the victim is a legal entity capable of owning property, and must separately allege that the victim is such a legal entity unless the name of the entity itself, as alleged in the indictment, imports that the victim is such a legal entity.” (2) The trial court did not err by allowing the State to amend the victim’s name as stated in an indictment for assault with a deadly weapon from “Christina Gibbs” to “Christian Gibbs.”

Double Jeopardy & Related Issues

[State v. Baldwin](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 7, 2015). (1) Under *State v. Tirado*, 358 N.C. 551, 579 (2004) (trial court did not subject the defendants to double jeopardy by convicting them of attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury (AWDWIKISI) arising from the same conduct), no violation of double jeopardy occurred when the trial court denied the defendant’s motion to require the State to elect between charges of attempted first-degree murder and AWDWIKISI. (2) Because the assault inflicting serious bodily injury statute begins with the language “Unless the conduct is covered under some other provision of law providing greater punishment,” the trial court erred by sentencing the defendant to this Class F felony when it also sentenced the defendant for AWDWIKISI, a Class C felony. [Author’s note: Although the court characterized this as a double jeopardy issue, it is best understood as one of legislative intent. Because each of the offenses requires proof of an element not required for the other the offenses are not the “same” for purposes of double jeopardy. Thus, double jeopardy is not implicated. However, even if offenses are not the “same offense,” legislative intent expressed in statutory provisions may bar multiple convictions, as it does here with the “unless covered” language. For a more complete discussion of double jeopardy, see the chapter in my judges’ Benchbook [here](#)]

Jury Instructions

[State v. Baldwin](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 7, 2015). (1) The trial court did not commit plain error when it instructed the jury on attempted first-degree murder but failed to instruct on imperfect self-defense and on attempted voluntary manslaughter. In light of the fact that “the State introduced abundant testimony supporting a finding of defendant’s murderous intent,” the court held that the defendant failed to demonstrate that if the trial court had instructed on imperfect self-defense, the jury probably would have acquitted defendant of attempted first-degree murder. (2) The trial court did not err by instructing the jury that it could consider wounds inflicted after the victim was felled in determining whether the defendant acted with premeditation and deliberation. The trial court instructed the jury:

Neither premeditation nor deliberation are usually susceptible of direct proof. They may be proved by circumstances by which they may be inferred such as lack of provocation by the victim; conduct of the defendant before, during, and after the attempted killing; threats and declarations of the defendant; use of grossly excessive force; or inflictions of wounds after the victim is fallen.

The defendant argued this instruction was improper because there was no evidence that he inflicted wounds on the victim after the victim was felled. Following *State v. Leach*, 340 N.C. 236, 242 (1995) (trial court did not err by giving the instruction, “even in the absence of evidence to support each of the circumstances listed” because the instruction “informs a jury that the circumstances given are only illustrative”), the court found no error.

[*State v. Barker*](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 7, 2015). In an obtaining property by false pretenses case, the trial did not err by failing to specify in the jury instructions the misrepresentation made by defendant or the property the defendant received. Noting that the trial court used the standard pattern jury instruction, N.C.P.I.–Crim. 219.10, the court found no error.

Sentencing

[*State v. Antone*](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 7, 2015). Where the defendant was convicted of first-degree murder on the theories of felony murder and premeditation and deliberation, the trial court violated G.S. 15A-1340.19C(a) by imposing a sentence of life imprisonment without the possibility of parole without assessing mitigating factors, requiring a remand for a new sentencing hearing. The trial court’s findings of fact and order failed to comply with the statutory mandate requiring it to “include findings on the absence or presence of any mitigating factors[.]” The trial court’s order made “cursory, but adequate findings as to some mitigating circumstances but failed to address other factors at all. The court added:

We also note that portions of the findings of fact are more recitations of testimony, rather than evidentiary or ultimate findings of fact. The better practice is for the trial court to make evidentiary findings of fact that resolve any conflicts in the evidence, and then to make ultimate findings of fact that apply the evidentiary findings to the relevant mitigating factors If there is no evidence presented as to a particular mitigating factor, then the order should so state, and note that as a result, that factor was not considered. (citations omitted).

[*State v. Sturdivant*](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 7, 2015). The trial court correctly determined the defendant’s prior record level (PRL) points. At sentencing, the State submitted a print-out of the defendant’s Administrative Office of the Courts (AOC) record. The defendant offered no evidence. On appeal, the defendant argued that the State failed to meet its burden of proving that one of the convictions was the defendant’s, arguing that the birthdate in the report was incorrect and that he did not live at the listed address at the time of sentencing. The court held that the fact that the defendant was living at a different address at the time of sentencing was of no consequence, in part because people move residences. As to the birthdate, under G.S. 15A-1340.14(f), a copy of a AOC record

“bearing the same name as that by which the offender is charged, is prima facie evidence that the offender named is the same person as the offender before the court.”

Probation

[*State v. Moore*](#) (No. 14-665), ___ N.C. App. ___, ___ S.E.2d ___ (April 7, 2015). The trial court lacked subject matter jurisdiction to revoke the defendant’s probation when it did so after his probationary period had expired and he was not subject to a tolling period.

[*State v. Sanders*](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 7, 2015). The trial court lacked subject matter jurisdiction to revoke the defendant’s probation when it did so after his probationary period had expired and he was not subject to a tolling period.

Post-Conviction Proceedings

[*State v. Doisey*](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 7, 2015). (1) The court dismissed the defendant’s argument that the trial court erred by failing to order an inventory of biological evidence under G.S. 15A-269(f). Under the statute, a request for post-conviction DNA testing triggers an obligation for the custodial agency to inventory relevant biological evidence. Thus, a defendant who requests DNA testing under G.S. 15A-269 need not make any additional written request for an inventory of biological evidence. However, the required inventory under section 15A-269 is merely an ancillary procedure to an underlying request for DNA testing. Where, as here, the defendant has abandoned his right to appellate review of the denial of his request for DNA testing, there is no need for the inventory required by G.S. 15A-269(f). (2) The court rejected the defendant’s argument that the trial court erred by failing to order preparation of an inventory of biological evidence under G.S. 15A-268 where the defendant failed to make a written request as required by G.S. 15A-268(a7). The defendant’s motion asked only that certain “physical evidence obtained during the investigation of his criminal case be located and preserved.”

Evidence

Relevancy

[*State v. Mitchell*](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 7, 2015). In this murder case, the defendant’s statements about his intent to shoot someone in order to retrieve the keys to his grandmother’s car, made immediately prior to the shooting of the victim, were relevant. The statements showed the defendant’s state of mind near the time of the shooting and were relevant to the State’s theory of premeditation and deliberation, even though both witnesses to the statements testified that they did not believe that the defendant was referring to shooting the victim.

Rule 403

[*State v. Baldwin*](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 7, 2015). The trial court did not abuse its discretion under Rule 403 by admitting the defendant’s recorded interview with a police detective. Noting that the fact that evidence is prejudicial to the defendant does not make it unfairly so, the court concluded that the evidence’s probative value was not substantially outweighed by the danger of unfair prejudice.

[*State v. Mitchell*](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 7, 2015). In this murder case, the court rejected the defendant’s argument that the probative value of a recorded telephone call made by the defendant to his father was substantially outweighed by the danger of unfair prejudice. During the call, the defendant’s father asked: “Now who you done shot now?” and “That same gun, right?”

Rule 404(b)

[*State v. Barker*](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 7, 2015). In this obtaining property by false pretenses case, the trial court did not err by admitting Rule 404(b) evidence. The charges arose out of the defendant’s acts of approaching two individuals (Ms. Hoenig and Ms. Harward), falsely telling them their roofs needed repair, taking payment for the work and then performing shoddy work or not completing the job. At trial, three other witnesses testified to similar incidents. This evidence was “properly admitted under Rule 404(b) because it demonstrated that defendant specifically targeted his victims pursuant to his plan and intent to deceive, and with knowledge and absence of mistake as to his actions.”

Experts

[*State v. James*](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 7, 2015). (2) In this opium trafficking case where the State’s witness was accepted by the trial court as an expert witness without objection from defendant and the defendant did not cross-examine the expert regarding the sufficiency of the sample size and did not make the sufficiency of the sample size a basis for his motion to dismiss, the issue of whether the two chemically analyzed pills established a sufficient basis to show that there were 28 grams or more of opium was not properly before this Court. (2) Assuming arguendo that the issue had been properly preserved, it would fail. The court noted: “[a] chemical analysis is required . . . , but its scope may be dictated by whatever sample is sufficient to make a reliable determination of the chemical composition of the batch of evidence under consideration.” (quotation omitted). It noted further that “[e]very pill need not be chemically analyzed, however” and in *State v. Meyers*, 61 N.C. App. 554, 556 (1983), the court held that a chemical analysis of 20 tablets selected at random, “coupled with a visual inspection of the remaining pills for consistency, was sufficient to support a conviction for trafficking in 10,000 or more tablets of methaqualone.” Here, 1 pill, physically consistent with the other pills, was chosen at random from each exhibit and tested positive for oxycodone. The expert testified that she visually inspected the remaining, untested pills and concluded that with regard to color, shape, and imprint, they were “consistent with” those pills that tested positive for oxycodone. The total weight of the pills was 31.79 grams, exceeding the 28 gram requirement for trafficking. As a result, the State

presented sufficient evidence to conclude that the defendant possessed and transported 28 grams or more of a Schedule II controlled substance.

Judicial Notice

[State v. James](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 7, 2015). In this drug trafficking case where an SBI agent testified as an expert for the State and identified the substance in question as oxycodone, the court declined the defendant's request to take judicial notice of Version 4 and 7 of SBI Laboratory testing protocols. Among other things, the defendant did not present the protocols at trial, the State had no opportunity to test their veracity, and the defendant presented no information indicating that the protocols applied at the time of testing.

Arrest, Search and Investigation **Searches**

[State v. Clyburn](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 7, 2015). The court reversed and remanded for further findings of fact regarding the defendant's motion to suppress evidence obtained as a result of a search of the digital contents of a GPS device found on the defendant's person which, as a result of the search, was determined to have been stolen. The court held that under *Riley v. California*, 134 S. Ct. 2473 (2014), the search was not justified as a search incident to arrest. As to whether the defendant had a reasonable expectation of privacy in the GPS device, the court held that a defendant may have a legitimate expectation of privacy in a stolen item if he acquired it innocently and does not know that the item was stolen. Here, evidence at the suppression hearing would allow the trial court to conclude that defendant had a legitimate possessory interest in the GPS. However, because the trial court failed to make a factual determination regarding whether the defendant innocently purchased the GPS device, the court reversed and remanded for further findings of fact, providing additional guidance for the trial court in its decision.

[State v. Fizovic](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 7, 2015). A search of the defendant's vehicle was properly done incident to the defendant's arrest for an open container offense, where the officer had probable cause to arrest before the search even though the formal arrest did not occur until after the search was completed. The court noted that under *Gant* "[a]n officer may conduct a warrantless search of a suspect's vehicle incident to his arrest if he has a reasonable belief that evidence related to the offense of arrest may be found inside the vehicle." Here, the trial court's unchallenged findings of fact that it is common to find alcohol in vehicles of individuals stopped for alcohol violations; and that the center console in defendant's car was large enough to hold beer cans support the conclusion that the arresting officer had a reasonable belief that evidence related to the open container violation might be found in the defendant's vehicle. The court rejected the defendant's argument that the search was an unconstitutional "search incident to citation," noting that the defendant was arrested, not issued a citation.

Criminal Offenses

Homicide

[*State v. Mitchell*](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 7, 2015). (1) In this first-degree murder case there was sufficient evidence of premeditation and deliberation. Among other things, the evidence showed a lack of provocation by the victim, that just prior to the shooting the defendant told others that he was going to shoot a man over a trivial matter, that the defendant shot the victim 3 times and that the victim may have been turning away from or trying to escape at the time. (2) With regard to a felony-murder charge, the evidence was sufficient to show the underlying felony of discharging a firearm into occupied property (here, a vehicle). The court rejected the defendant's argument that the evidence failed to establish that he was outside of the vehicle when he shot the victim.

Robbery & Related Offenses

[*State v. Wright*](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 7, 2015). Applying a definitional rather than a factual test, the court held that extortion is not a lesser included offense of armed robbery.

Sex Offender Crimes

[*State v. Moore*](#) (No. 14-1033), ___ N.C. App. ___, ___ S.E.2d ___ (April 7, 2015). In this failure to register case based on willful failure to return a verification form as required by G.S. 14-208.9A, the trial court erred by denying the defendant's motion to dismiss. To prove its case, the State must prove that the defendant actually received the letter containing the verification form. It noted: "actual receipt could have been easily shown by the State if it simply checked the box marked "Restricted Delivery?" and paid the extra fee to restrict delivery of the ... letter to the addressee, the sex offender." The court also found that there was insufficient evidence that the sheriff's office made a reasonable attempt to verify the defendant's address, another element of the offense. The evidence indicated that the only attempt the Deputy made to verify that the defendant still resided at his last registered address was to confirm with the local jail that the defendant was not incarcerated. Finally, the court found that State failed to show any evidence that the defendant willfully failed to return the verification form.

Frauds

[*State v. Barker*](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 7, 2015). In an obtaining property by false pretenses case, the evidence was sufficient to support a conviction. The charges arose out of the defendant's acts of approaching two individuals (Ms. Hoenig and Ms. Harward), falsely telling them their roofs needed repair, taking payment for the work and then performing shoddy work or not completing the job. The court rejected the defendant's argument that the evidence showed only that he "charged a lot for poor quality work" and not that he "obtained the property alleged by means of a misrepresentation," finding that "[the] evidence demonstrates that defendant deliberately targeted Ms. Harward and Ms. Hoenig, two elderly women, for the purpose of defrauding each of them by claiming their roofs needed significant repairs when, as the State's evidence showed, neither woman's roof needed repair at all."