

## **Criminal Procedure**

### **Counsel Issues**

[\*State v. Smith\*](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (June 16, 2015). (1) Where appointed counsel moved, on the sixth day of a bribery trial, for mandatory withdrawal pursuant to Rule 1.16(a) of the N.C. Rules of Professional Conduct, the trial court did not abuse its discretion by allowing withdrawal upon counsel's citation of Comment 3 to Rule 1.16 as grounds for withdrawal. Comment 3 states in relevant part:

Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.

In light of the Comment, the trial court did not abuse its discretion by accepting counsel's assertion that his withdrawal was mandatory in light of his professional considerations. (2) After allowing the withdrawal, the trial court was not required to appoint substitute counsel. Under G.S. 7A-450(b), appointment of substitute counsel at the request of either an indigent defendant or original counsel is constitutionally required only when it appears that representation by original counsel could deprive the defendant of his or her right to effective assistance. The also provides that substitute counsel is required and must be appointed when the defendant shows good cause, such as a conflict of interest or a complete breakdown in communications. Here, counsel's representation did not fail to afford the defendant his constitutional right to counsel nor did the defendant show good cause for the appointment of substitute counsel. Nothing in the record suggests a complete breakdown in communications or a conflict of interest. Indeed, the court noted, "there was no indication that [counsel]'s work was in any way deficient. Rather, [his] withdrawal was caused by [defendant] himself demanding that [counsel] engage in unprofessional conduct. (3) The court rejected the defendant's argument that private counsel retained after this incident was presumptively ineffective given the limited time he had to review the case. The defendant noted that his new counsel entered the case on the seventh day of trial and requested only a four-hour recess to meet to prepare. Given the status of the trial and the limited work to be done, the court rejected the defendant's argument. The court also rejected the defendant's argument that new counsel rendered deficient performance by failing to request a longer or an additional continuance.

### **Jury Note**

[\*State v. Mackey\*](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (June 16, 2015). (1) In this murder and discharging a barreled weapon case in which the jury heard some evidence that the defendant was affiliated with a gang, the trial court did not deprive the defendant of his constitutional right to a fair and impartial jury by failing to question jurors about a note they sent to the trial court. The note read as follows:

(1) Do we have any concern for our safety following the verdict? Based on previous witness gang [information] and large [number] of people in court during the trial[.] Please do not bring this up in court[.]

(2) We need 12 letters—1 for each juror showing we have been here throughout this trial[.]

According to the defendant, the note required the trial court to conduct a voir dire of the jurors. The court disagreed, noting that the cases cited by the defendant dealt with the jurors being exposed to material not admitted at trial that constituted “improper and prejudicial matter.” Here, the information about gang affiliation was received into evidence and the number of people in the courtroom cannot be deemed “improper and prejudicial matter.” (2) The trial court violated the defendant’s constitutional right to presence at every stage of the trial by failing to disclose the note to the defendant. However, the error was harmless beyond a reasonable doubt. (3) Although the court agreed that the trial court should disclose every jury note to the defendant and that failing to do so violates the defendant’s right to presence, it rejected the defendant’s argument that such disclosure is required by G.S. 15A-1234. That statute, the court explained addresses when a trial judge may give additional instructions to the jury after it has retired for deliberations, including in response to an inquiry by the jury. It continued: “nothing in this statute *requires* a trial judge to respond to a jury note in a particular way.”

## **Evidence**

### **Relevancy**

[\*State v. Bishop\*](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (June 16, 2015). In this cyberbullying case that was based on electronic messages, the court rejected the defendant’s argument that the trial court erred by admitting into evidence the defendant’s Facebook posts that, among other things, stated that “there’s no empirical evidence that your Jesus ever existed.” The comments were relevant to show the defendant’s intent to intimidate or torment the victim, as well as the chain of events causing the victim’s mother to contact the police.

### **Rape Shield**

[\*State v. Martin\*](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (June 16, 2015). In this sexual offense with a student case, the trial court committed reversible error by concluding that the defendant’s evidence was per se inadmissible under the Rape Shield Rule. The case involved charges that the defendant, a substitute teacher, had the victim perform oral sex on him after he caught her in the boys’ locker room. At trial the defendant sought to introduce evidence that when he found the victim in the locker room, she was performing oral sex on football players to show that the victim had a motive to falsely accuse him of sexual assault. After an in camera hearing the trial court concluded that the evidence was per se inadmissible because it did not fit under the Rape Shield Rule’s four exceptions. Citing case law, the court determined that “that there may be circumstances where evidence which touches on the sexual behavior of the complainant may be admissible even though it does not fall within one of the categories in the Rape Shield Statute.” Here, the defendant’s defense was that he did not engage in any sexual behavior with the victim but that she fabricated the story to hide the fact that he caught her performing oral sex on the football players in the locker room. The court continued:

Where the State’s case in any criminal trial is based largely on the credibility of a prosecuting witness, evidence tending to show that the witness had a motive to falsely

accuse the defendant is certainly relevant. The motive or bias of the prosecuting witness is an issue that is common to criminal prosecutions in general and is not specific to only those crimes involving a type of sexual assault.

The trial court erred by concluding that the evidence was inadmissible per se because it did not fall within one of the four categories in the Rape Shield Statute. Here, the trial court should have looked beyond the four categories to determine whether the evidence was, in fact, relevant to show [the victim]’s motive to falsely accuse Defendant and, if so, conducted a balancing test of the probative and prejudicial value of the evidence under Rule 403 or was otherwise inadmissible on some other basis (e.g., hearsay). (footnote omitted).

## **Opinions**

### **Expert Opinions**

[\*State v. Chavez\*](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (June 16, 2015). In this child sexual abuse case, no error occurred when the medical doctor who examined the victim explained the victim’s normal examination, stating that 95% of children examined for sexual abuse have normal exams and explaining that “it’s more of a surprise when we do find something.” The doctor further testified that a normal exam with little to no signs of penetrating injury could be explained by the “stretchy” nature of the hymen tissue and its ability to heal quickly. For example, she explained, deep tears to the hymen can often heal within three to four months, while superficial tears can heal within a few days to a few weeks. Nor was it error for the doctor to testify that she was made aware of the victim’s “cutting behavior” through the victim’s medical history and that cutting behavior was significant to the doctor because “cutting, unfortunately, is a very common behavior seen in children who have been abused and frequently sexually abused.” The doctor never testified that the victim in fact had been abused.

### **Lay Opinions**

[\*State v. Bishop\*](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (June 16, 2015). In this cyberbullying case that was based on electronic messages, the trial court did not abuse its discretion by allowing the investigating detective to testify that while investigating the case, he took screen shots of anything that appeared to be evidence of cyberbullying. The defendant argued that the detective’s testimony was inadmissible opinion testimony regarding the defendant’s guilt. The detective testified at trial as a lay witness about what he found on Facebook and about the course of his investigation. When asked how he searched for electronic comments concerning the victim, he explained that he examined the suspects’ online pages and “[w]henver I found anything that appeared to have been to me cyber-bullying I took a screen shot of it.” He added that “[i]f it appeared evidentiary, I took a screen shot of it.” This testimony was not proffered as an opinion of the defendant’s guilt; it was rationally based on the detective’s perception and was helpful in presenting to the jury a clear understanding of his investigative process and thus admissible under Rule 701.

## **Criminal Offenses**

## Robbery

[\*State v. Holt\*](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (June 16, 2015). The trial court did not err by denying the defendant's motion to dismiss a charge of armed robbery. One of the victims testified that all three perpetrators had handguns. A BB pistol and a pellet gun were found near the scene of the robbery. The defendant argued that the State failed to produce any evidence that these items were dangerous weapons capable of inflicting serious injury or death. Distinguishing *State v. Fleming*, 148 N.C. App. 16 (2001) (trial court erred in denying the defendant's motion to dismiss charge of armed robbery when the evidence showed that he committed two robberies using a BB gun and the State failed to introduce any evidence that the BB gun was capable of inflicting death or great bodily injury), the court held:

[U]nlike in *Fleming*, where the weapon used to perpetrate the robbery was recovered from the defendant's direct physical possession, here there is no evidence that conclusively links either the BB pistol or the pellet gun to the robbery. Neither Defendant nor his co-conspirators were carrying any weapons when they were apprehended by police. Further, no evidence was offered regarding any fingerprints on, or ownership of, either gun, and neither the victims nor Defendant identified either of the guns as having been used during the robbery. Moreover, even assuming arguendo that both the BB pistol and the pellet gun could be conclusively linked to the robbery, [one of the victims] testified that all three of the men who robbed his home were armed with handguns. Although Defendant's counsel attempted to impeach [the victim] on this point, the trial court properly left the credibility of [his] testimony as a matter for the jury to resolve, and as such, it would have been permissible for a reasonable juror to infer that not all, if any, of the weapons used during the robbery had been recovered or accounted for. Indeed, if taken as true, Defendant's second post-arrest statement to Detective Snipes suggests that Defendant had the motivation and opportunity to "dump" the third weapon just like he claimed to have dumped the ounce of marijuana he purported to have stolen from the residence that investigators never recovered.

Thus, although the mandatory presumption that the weapons were dangerous did not apply, there was sufficient evidence for the case to go to the jury on the armed robbery charge.

## Burglary & Related Offenses

[\*State v. Mims\*](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (June 16, 2015). (1) The evidence was sufficient to support a conviction for attempted first-degree burglary. In this case, which involved an attempted entry into a home in the wee hours of the morning, the defendant argued that the State presented insufficient evidence of his intent to commit a larceny in the premises. The court concluded that the case was controlled by *State v. McBryde*, 97 N.C. 393 (1887), and that because there was no evidence that the defendant's attempt to break into the home was for a purpose other than to commit larceny, it could be inferred that the defendant intended to enter to commit a larceny inside. The court rejected the defendant's argument that the evidence suggested that he was trying to enter the residence to seek assistance or was searching for someone. (2) Applying the *McBryde* inference to an attempted breaking

or entering that occurred during daylight hours, the court held that the evidence was sufficient to support a conviction for that offense.

### **Cyberbullying**

[State v. Bishop](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (June 16, 2015). (1) The court upheld a provision of the cyberbullying statute, G.S. 14-458.1(a)(1)(d), rejecting the defendant's argument that the provision is an overbroad criminalization of protected speech. G.S. 14-458.1(a)(1)(d) makes it unlawful for any person to use a computer or computer network to, with the intent to intimidate or torment a minor, post or encourage others to post on the Internet private, personal, or sexual information pertaining to a minor. (2) Because the defendant failed to preserve the issue, the court declined to address the defendant's argument that the statute was unconstitutionally vague. (3) Because the defendant's motion to dismiss for insufficient evidence was made on other grounds, the court declined to consider the defendant's argument on appeal that insufficient evidence was presented to show he posted private, personal, or sexual information pertaining to the victim.