

Criminal Procedure

Indictment Issues

[*State v. James*](#), ___ N.C. App. ___, ___ S.E.2d ___ (July 7, 2015). The indictment in a sex offender failure to notify of change of address case was not fatally defective. The indictment alleged that the defendant failed to notify the sheriff of a change of address “within three (3) days of the address change.” The statute, however, requires that the notice be made within three *business* days. The defendant argued that omission of the “business” rendered the indictment fatally defective. The court disagreed:

While we agree that the better practice would have been for the indictment to have alleged ... that Defendant failed to report his change of address within “three business days,” ... the superseding indictment nevertheless gave Defendant sufficient notice of the charge against him and, therefore, was not fatally defective.

Among other things, the court noted that the defendant did not argue that the omission in the indictment prejudiced his ability to prepare for trial.

[*State v. Sullivan*](#), ___ N.C. App. ___, ___ S.E.2d ___ (July 7, 2015). (1) Indictments charging the defendant with drug crimes were fatally defective where they did not name controlled substances listed in Schedule III. The possession with intent and sale and delivery indictments alleged the substances at issue to be “UNI-OXIDROL,” “UNIOXIDROL 50” and “SUSTANON” and alleged that those substances are “included in Schedule III of the North Carolina Controlled Substances Act.” Neither Uni-Oxidrol, Oxidrol 50, nor Sustanon are included in Schedule III and none of these substances are considered trade names for other substances so included. (2) The court rejected the defendant’s argument that there was a fatal variance between a sale and delivery indictment which alleged that the defendant sold the controlled substance to “A. Simpson” and the evidence. Although Mr. Simpson testified at trial that his name was “Cedrick Simpson,” not “A. Simpson,” the court rejected the defendant’s argument, stating:

[N]either during trial nor on appeal did defendant argue that he was confused as to Mr. Simpson’s identity or prejudiced by the fact that the indictment identified “A. Simpson” as the purchaser instead of “Cedric Simpson” or “C. Simpson.” In fact, defendant testified that he had seen Cedric Simpson daily for fifteen years at the gym. The evidence suggests that defendant had no question as to Mr. Simpson’s identity. The mere fact that the indictment named “A. Simpson” as the purchaser of the controlled substances is insufficient to require that defendant’s convictions be vacated when there is no evidence of prejudice, fraud, or misrepresentation.

Suppression Motions

[*State v. Ingram*](#), ___ N.C. App. ___, ___ S.E.2d ___ (July 7, 2015). On the State’s appeal from a trial court order granting the defendant’s motion to suppress, the court vacated and remanded for new findings of fact and if necessary, a new suppression hearing. After being shot by police, the defendant was taken to the hospital and given pain medication. He then waived his *Miranda* rights and made a statement to the police. He sought to suppress that statement, arguing that his *Miranda* waiver and statements were involuntarily. The court began by rejecting the State’s claim that the trial court erred by considering

hearsay evidence in connection with the suppression motion and by relying on such evidence in making its findings of fact. The court noted that the trial court had “great discretion” to any relevant evidence at the suppression hearing. However, the court agreed with the State’s argument that the trial court erred by failing to resolve evidentiary issues before making its findings of fact. It explained:

[T]he trial court suppressed Defendant’s statements on the grounds Defendant was “in custody, in severe pain, and under the influence of a sufficiently large dosage of a strong narcotic medication[;]” however, the trial court failed to make any specific findings as to Defendant’s mental condition, understanding, or coherence—relevant considerations in a voluntariness analysis—at the time his *Miranda* rights were waived and his statements were made. The trial court found only that Defendant was in severe pain and under the influence of several narcotic pain medications. These factors are not all the trial court should consider in determining whether his waiver of rights and statements were made voluntarily.

Furthermore, although the defendant moved to suppress on grounds that police officers allegedly coerced his *Miranda* waiver and statements by withholding pain medication, the trial court failed to resolve the material conflict in evidence regarding whether police coercion occurred.

Jury Instructions

Not Guilty Mandate

[*State v. Calderon*](#), ___ N.C. App. ___, ___ S.E.2d ___ (July 7, 2015). In this robbery case, no plain error occurred with respect to the trial court’s not guilty mandate. The jury instructions for the offenses of armed and common law robbery conformed to the pattern jury instructions with one exception: the court did not expressly instruct the jury that it had a “duty to return a verdict of not guilty” if it had a reasonable doubt as to one or more of the enumerated elements of the offenses. Instead, for the offense of armed robbery, the court ended its charge to the jury with the following instruction: “If you do not so find or have a reasonable doubt as to one or more of these things, then you will not return a verdict of guilty of robbery with a firearm as to that defendant.” For the offense of common law robbery, the court ended its charge similarly, substituting the words “common law robbery” for robbery with a firearm. Citing *State v. McHone*, 174 N.C. App. 289 (2005) (trial court erred by failing to instruct the jury that “it would be your duty to return a verdict of not guilty” if the State failed to meet one or more of the elements of the offense), the court held that the trial court’s instructions were erroneous. However, it went on to hold that no plain error occurred, reasoning in part that the verdict sheet provided both guilty and not guilty options, thus clearly informing the jury of its option of returning a not guilty verdict.

Acting in Concert

[*State v. Calderon*](#), ___ N.C. App. ___, ___ S.E.2d ___ (July 7, 2015). In this case involving three accomplices and charges of armed robbery, common law robbery and attempted armed robbery, the court rejected the defendant’s argument that he could not have been convicted of attempted armed robbery under the theory of acting in concert because the trial court did not specifically instruct the jury

on that theory in its charge on that count. The trial court gave the acting in concert instruction with respect to the counts of armed and common law robbery; it did not however repeat the acting in concert instruction after it gave the instruction for attempted robbery with a firearm. Considering the jury instructions as a whole and the evidence, the court declined to hold that the trial court's failure to repeat the instruction was likely to have misled the jury.

Sentencing

[*State v. Purcell*](#), ___ N.C. App. ___, ___ S.E.2d ___ (July 7, 2015). As conceded by the State, the trial court erred when it sentenced the defendant under a statute enacted after his offenses were committed. The court remanded for resentencing.

[*State v. Harris*](#), ___ N.C. App. ___, ___ S.E.2d ___ (July 7, 2015). (1) No violation of due process occurred when the defendant was sentenced in the aggravated range where proper notice was given and the jury found that an aggravated factor (that the defendant committed the offense while on pretrial release on another charge). (2) Because G.S. 15A-1340.16 (aggravated and mitigated sentences) applies to all defendants, imposition of an aggravated sentence did not violate equal protection.

[*State v. Hardy*](#), ___ N.C. App. ___, ___ S.E.2d ___ (July 7, 2015). In this injury to real property case, the trial court did not err by ordering the defendant to pay \$7,408.91 in restitution. A repair invoice provided sufficient evidence to support the award of restitution and the restitution award properly accounted for all damage directly and proximately caused by the defendant's injury to the property.

Probation

[*State v. Hoskins*](#), ___ N.C. App. ___, ___ S.E.2d ___ (July 7, 2015). (1) In this case which came to the court on a certiorari petition to review the trial court's 2013 probation revocation, the court concluded that it had jurisdiction to consider the defendant's claim that the trial court lacked jurisdiction to extend her probation in 2009. (2) The trial court lacked jurisdiction to extend the defendant's probation in 2009. The defendant's original period of probation expired on 27 June 2010. On 18 February 2009, 16 months before the date probation was set to end, the trial court extended the defendant's probation. Under G.S. 15A-1343.2(d), the trial court lacked statutory authority to order a three-year extension more than six months before the expiration of the original period of probation. Also the trial court lacked statutory authority under G.S. 15A-1344(d), because the defendant's extended period of probation exceeded five years. Because the trial court lacked jurisdiction to extend probation in 2009, the trial court lacked jurisdiction to revoke the defendant's probation in 2013.

Evidence

Confrontation Issues

[*State v. Clark*](#), ___ N.C. App. ___, ___ S.E.2d ___ (July 7, 2015). In this driving while license revoked case, the court held that DMV records were non-testimonial. The documents at issue included a copy of the

defendant's driving record certified by the DMV Commissioner; two orders indefinitely suspending his drivers' license; and a document attached to the suspension orders and signed by a DMV employee and the DMV Commissioner. In this last document, the DMV employee certified that the suspension orders were mailed to the defendant on the dates as stated in the orders, and the DMV Commissioner certified that the orders were accurate copies of the records on file with DMV. The court held that the records, which were created by the DMV during the routine administration of its affairs and in compliance with its statutory obligations to maintain records of drivers' license revocations and to provide notice to motorists whose driving privileges have been revoked, were non-testimonial.

Opinions

[*State v. Purcell*](#), ___ N.C. App. ___, ___ S.E.2d ___ (July 7, 2015). In this child sexual assault case, no error occurred when the State's expert medical witness testified that the victim's delay in reporting anal penetration was a characteristic consistent with the general behavior of children who have been sexually abused in that manner. The court rejected the defendant's argument that the expert impermissibly opined on the victim's credibility.

404(b) Evidence

[*State v. Manquum*](#), ___ N.C. App. ___, ___ S.E.2d ___ (July 7, 2015). In this case where the defendant was convicted of second-degree murder for killing her boyfriend, the trial court did not err by introducing 404(b) evidence pertaining to an incident between the defendant and another boyfriend, Walker, which occurred 14 months before the events in question. The court found strong similarities between the incidents, noting that both involved the defendant and her current boyfriend; the escalation of an argument that led to the use of force; the defendant's further escalation of the argument; and the defendant's deliberate decision to obtain a knife from the kitchen. Given these similarities, the court found that the Walker evidence was probative of the defendant's motive, intent, and plan. Next, the court found that the prior incident was not too remote.

Criminal Offenses

Robbery

[*State v. Calderon*](#), ___ N.C. App. ___, ___ S.E.2d ___ (July 7, 2015). (1) The evidence was sufficient to support charges of attempted armed robbery against both defendants. The defendants and a third person, Moore, planned to rob Bobbie Yates of marijuana. However, once they learned there was a poker game going on in the apartment, they retrieved another weapon and returned to apartment to rob those present. Upon entering the apartment, Moore took the money off the kitchen table where several of the people were playing poker, and proceeded to search their pockets for more money. The robbery lasted between two and four minutes, during which time the defendants continuously pointed their weapons at the people in the apartment. After Moore took money from the people seated around the kitchen table, he—with shotgun in hand—approached Mr. Allen, who was "passed out" or asleep in the living room. One witness saw Moore search Allen's pockets, but no one saw Moore take money

from Allen. When the three prepared to leave the apartment, they told the people to remain there for ten minutes or they would kill them. This evidence was sufficient to show that the defendants, acting in concert with Moore, had the specific intent to deprive Allen of his personal property by endangering or threatening his life with a dangerous weapon and took overt acts to bring about this result. (2) The court rejected the defendants argument that the trial court erred by failing to instruct the jury on attempted larceny and attempted common law robbery as lesser-included offenses for the charge of attempted armed robbery of Allen. The defendant argued that because Allen was “passed out” or asleep, his life was not endangered or threatened. The court found that where, as here, the defendants were convicted of attempted robbery, their argument failed.

Larceny & Possession Offenses

[State v. Hardy](#), ___ N.C. App. ___, ___ S.E.2d ___ (July 7, 2015). The trial court erred by sentencing the defendant for both felony larceny and felony possession of stolen goods when both convictions were based on the same items.

[In re K.M.M.](#), ___ N.C. App. ___, ___ S.E.2d ___ (July 7, 2015). In this case where the juvenile was adjudicated delinquent based on a misdemeanor larceny of a cell phone, the evidence was sufficient to establish that the juvenile was the perpetrator. Among other things, the victim identified the juvenile as the thief.

Injury to Real Property

[State v. Hardy](#), ___ N.C. App. ___, ___ S.E.2d ___ (July 7, 2015). In this injury to real property case, the court held that an air conditioning unit that was attached to the exterior of a mobile home is real property. The defendant dismantled and destroyed the unit, causing extensive water damage to the home. The trial court instructed the jury that “[a]n air conditioner affixed to a house is real property” and the jury found the defendant guilty of this offense. On appeal the defendant argued that the air conditioning unit was properly classified as personal property. The court rejected the argument that *State v. Primus*, 742 S.E.2d 310 (2013), controlled, finding that case did not resolve the precise issue at hand. After reviewing other case law the court determined that the air-conditioner would be real property if it was affixed to the mobile home such that it “became an irremovable part of the [mobile home].” Applying this test, the court concluded:

The air-conditioner at issue ... comprised two separate units: an inside unit, referred to as the A-coil, which sat on top of the home’s heater, and an outside condensing unit, which had a compressor inside of it. The two units were connected by copper piping that ran from the condenser underneath the mobile home into the home. [A witness] testified that the compressor, which was located inside the condensing unit, had been totally “destroyed,” and that although the condensing unit itself remained in place, it was rendered inoperable. Thus, . . . the entire air-conditioner could not be removed but had to be “gutted” and removed in pieces. Moreover, when defendant cut the copper piping underneath the home, he caused significant damage to the water pipes that were

also located in the crawlspace. Thus, here, not only could the air-conditioner not be easily removed from the mobile home but it also could not be easily removed from other systems of the home given the level of enmeshment and entanglement with the home's water pipes and heater.

The court went on to note that while the mobile home could serve its "contemplated purpose" of providing a basic dwelling without the air-conditioner, the purpose for which the air-conditioner was annexed to the home supports a conclusion that it had become part of the real property: the use and enjoyment of the tenant.

Hunting Without a License

[*State v. Oxendine*](#), ___ N.C. App. ___, ___ S.E.2d ___ (July 7, 2015). (1) In this hunting without a license case, the trial court did not err by denying defendant Oxendine's request to instruct the jury on legal justification. The defendant argued that he was exempt under G.S. 113-276 from the requirement of a hunting license because he had been engaged in a Native American religious hunting ceremony. That statute applies to "member[s] of an Indian tribe recognized under Chapter 71A of the General Statutes." Although the defendant argued that he is "an enrolled member of the Haudenosaunee Confederacy of the Tuscarora Nation," he is not a member of a Native American tribe recognized under Chapter 71A. Additionally the defendant did not show that he was hunting on tribal land, as required by the statute. (2) The evidence was sufficient to convict defendant Pedro of hunting without a license. Based on the facts presented, the court rejected the defendant's argument that the State's evidence was insufficient to show that he "was preparing to immediately kill a dove."