

Criminal Procedure

Indictment Issues

[State v. Holanek](#), ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 18, 2015). (1) In a case involving charges of obtaining property by false pretenses arising out of alleged insurance fraud, the defendant waived the issue of fatal variance by failing to raise it at trial. (2) Counsel rendered ineffective assistance by failing to move to dismiss on grounds of fatal variance. The indictment alleged that the defendant submitted fraudulent invoices for pet boarding services by Meadowsweet Pet Boarding which caused the insurance company to issue payment to her in the amount of \$11,395.00. The evidence at trial, however, showed that the document at issue was a valid estimate for future services, not an invoice. Additionally, the document was sent to the insurance company three days after the company issued a check to the defendant. Therefore the insurance company's payment could not have been triggered by the defendant's submission of the document. Additionally, the State's evidence showed that it was not the written estimate that falsely led the insurance company to believe that the defendant's pets remained at Meadowsweet long after they had been removed from that facility, but rather the defendant's oral representations made later. (3) The court rejected the defendant's argument that false pretenses indictments pertaining to moving expenses were fatally defective because they did not allege the exact misrepresentation with sufficient precision. The indictments were legally sufficient: each alleged both the essential elements of the offense and the ultimate facts constituting those elements by stating that the defendant obtained money from the insurance company through a false representation made by submitting a fraudulent invoice which was intended to, and did, deceive the insurance company.

Sentencing

[State v. Edgar](#), ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 18, 2015). The trial court correctly calculated the defendant's PRL. The defendant argued that the trial court erred by basing its PRL calculation on an ineffective stipulation. The defendant's only prior conviction was one in Michigan for carrying a concealed weapon, which he contended is substantially similar to the NC Class 2 misdemeanor offense of carrying a concealed weapon. The court concluded that the defendant did not make any stipulation as to the similarity of the Michigan offense to NC offense. Instead, the prior conviction was classified as a Class I felony, the default classification for an out-of-state felony. Thus, defendant's stipulations in the PRL worksheet that he had been convicted of carrying a concealed weapon in Michigan and that the offense was classified as a felony in Michigan, were sufficient to support the default classification of the offense as a Class I felony.

Evidence

Relevance

[State v. Rorie](#), ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 18, 2015). In this sex case involving a six-year-old victim, the trial court committed prejudicial error by excluding evidence that the defendant found the victim watching a pornographic video. The evidence was relevant to explain an alternate source of the victim's sexual knowledge, from which she could have fabricated the allegations in question.

[State v. Holanek](#), ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 18, 2015). In a case involving charges of obtaining property by false pretenses arising out of alleged insurance fraud, the trial court did not err by admitting testimony that the defendant did not appear for two scheduled examinations under oath as required by her insurance policy and failed to respond to the insurance company's request to reschedule the examination. The court rejected the defendant's argument that this evidence was not relevant, noting that to prove its case the State had to show that the defendant's acts were done "knowingly and decidedly ... with intent to cheat or defraud." The evidence in question constituted circumstantial evidence that the defendant's acts were done with the required state of mind.

Rape Shield

[State v. Rorie](#), ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 18, 2015). (1) In this child sex case, evidence that the victim was discovered watching a pornographic video, offered by the defendant to show the victim's sexual knowledge, is not evidence of sexual activity barred by the Rape Shield Statute. (2) Evidence offered by the defendant of the child victim's prior allegations and inconsistent statements about sexual assaults committed by others who were living in the house were not barred by the Rape Shield Statute, and the trial court erred by excluding this evidence. False accusations do not fall within the scope of the Rape Shield Statute and may be admissible to attack the victim's credibility. The court was careful however not to "hold the statements necessarily should have been admitted into evidence at trial;" it indicated that whether the victim's "prior allegations and inconsistent statements come into the evidence at trial should be determined on retrial subject to a proper Rule 403 analysis."

Criminal Offenses

Frauds

[State v. Holanek](#), ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 18, 2015). (1) In a case arising out of insurance fraud, the trial court did not err by denying the defendant's motion to dismiss three counts of obtaining property by false pretenses. Two of the counts arose out of payments the defendant received based on false moving company invoices submitted to her insurance company. The defendant submitted the invoices, indicating that they were paid in full. The court rejected the defendant's argument that the State failed to prove that the invoices contained a false representation noting that the evidence showed that investigators were unable to discover any indication that either of the purported moving companies existing in North Carolina. (2) The trial court did not commit plain error by failing to instruct the jury that under G.S. 14-100(b) that "[e]vidence of nonfulfillment of a contract obligation standing alone shall not establish the essential element of intent to defraud." Because the jury was instructed that it was required to determine whether the defendant intended to defraud the insurance company through her submission of documents containing false representations in order to return a guilty verdict, no reasonable juror could have been left with the mistaken belief that she could be found guilty based solely on her failure to comply with contractual obligations under her insurance policy.