

Criminal Procedure

Indictment Issues

[*State v. Pender*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 1, 2015). (1) Because it is a jurisdictional issue, a defendant's argument that a criminal indictment is defective may be raised for the first time on appeal notwithstanding the defendant's failure to contest the validity of the indictment at trial. (2) Indictments charging kidnapping with respect to victims under 16 were not defective. The indictments alleged that the defendant unlawfully confined and restrained each victim "without the victim's consent." The court rejected the defendant's argument that because the indictments failed to allege a lack of parental or custodial consent, they were fatally defective. The court explained:

"[T]he victim's age is not an essential element of the crime of kidnapping itself, but it is, instead, a factor which relates to the state's burden of proof in regard to consent. If the victim is shown to be under sixteen, the state has the burden of showing that he or she was unlawfully confined, restrained, or removed from one place to another without the consent of a parent or legal guardian. Otherwise, the state must prove that the action was taken without his or her own consent." (quoting *State v. Hunter*, 299 N.C. 29, 40 (1980)).

The court concluded: "Because age is not an essential element of the crime of kidnapping, and whether the State must prove a lack of consent from the victim or from the parent or custodian is contingent upon the victim's age, ... the indictments ... are adequate even though they allege that the victim — and not the parent — did not consent." (3) The issue of fatal variance is not preserved for purposes of appeal if not asserted at trial. (4) The court rejected the defendant's argument that there was a fatal variance between a kidnapping indictment with respect to victim D.M. and the evidence at trial. The defendant argued that the indictment alleged that D.M. was at least 16 years old but the evidence showed that D.M. was 16 at the time. The court concluded: "because D.M.'s age does not involve an essential element of the crime of kidnapping, any alleged variance in this regard could not have been fatal." (5) There was no fatal variance between a kidnapping indictment that named "Vera Alston" as a victim and the evidence at trial that showed the victim's last name was "Pierson." The court concluded:

[T]he evidence is undisputed that one of defendant's victims for kidnapping and assault on the date alleged in the indictment naming "Vera Alston" as the victim was defendant's mother-in-law, Vera Pierson. Given this, there was no uncertainty that the identity of the alleged victim "Vera Alston" was actually "Vera Pierson." Further, [a]t no time ... did Defendant indicate any confusion or surprise as to whom Defendant was charged with having kidnapped and assaulted. (quotation omitted).

Evidence

Opinions

[*State v. Turbyfill*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 1, 2015). (1) In this DWI case, the trial court did not abuse its discretion by allowing the State's witness, a field technician in the Forensic Test of Alcohol Branch of the NC DHHS, who demonstrated specialized knowledge, experience, and training in blood alcohol physiology, pharmacology, and related research on retrograde extrapolation to be

qualified and testify as an expert under amended Rule 702. (2) The trial court erred by allowing a law enforcement officer to testify as to the defendant's blood alcohol level testimony; however, based on the other evidence in the case the error did not rise to the level of plain error. The court noted that Rule 702(a1) provides:

A witness, qualified under subsection (a) ... and with proper foundation, may give expert testimony solely on the issue of impairment and not on the issue of specific alcohol concentration level relating to the following:

(1) The results of a Horizontal Gaze Nystagmus (HGN) Test when the test is administered by a person who has successfully completed training in HGN.

At trial, the officer's testimony violated Rule 702(a1) on the issue of the defendant's specific alcohol concentration level as it related to the results of the HGN Test.

Criminal Offenses

Assault by pointing a gun

[*State v. Pender*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 1, 2015). In a case with multiple victims, the court rejected the defendant's argument that the State's evidence was too vague for the jury to infer that he pointed the gun at any particular individual. One witness testified that upon defendant's orders, "everybody ran in the room with us ... and he was waiving [sic] the gun at us[.]" Another testified that "[w]hen [defendant] came down the hall, when he told everyone to get into one room, all of them came in there ... [e]ven the two little ones" She further testified, "I was nervous for the kids was down there hollering and carrying on, and he hollered – he point [sic] the gun toward everybody in one room. One room. And told them come on in here with me." A third testified that once everybody was in the same bedroom, defendant pointed the shotgun outward from his shoulder.

Kidnapping

[*State v. Pender*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 1, 2015). (1) The court rejected the defendant's argument that kidnapping charges should have been dismissed because there was insufficient evidence that his purpose in confining the victims was to terrorize them. "A defendant intends to terrorize another when the defendant intends to place that person in some high degree of fear, a state of intense fright or apprehension." (quotation omitted). The court rejected the defendant's argument that the State had to prove that the kidnapping victims were terrorized; State only needs to prove that the defendant's intent was to terrorize the victims. The evidence was sufficient for the jury to infer such an intent. That defendant shot victim Nancy's truck parked outside the house so that everyone could hear it, cut the telephone line to the house at night, shot through the windows multiple times to break into the house, yelled multiple times upon entering the house that he was going to kill Nancy, corralled the occupants of the house into a single bedroom, demanded of those in the bedroom to know where Nancy was, exclaimed that he was going to kill her, and pointed his shotgun at them. (2) Vacating two of the defendant's second-degree kidnapping convictions on grounds that the plain language of G.S. 14-39(a) does not permit prosecution of a parent for kidnapping, at least when that parent has custodial rights with respect to the children. The court explained:

“[T]here is no kidnapping when a parent or legal custodian consents to the unlawful confinement of his minor child, regardless whether the child himself consents to the confinement. The plain language requires that only one parent -- “a parent” -- consent to the confinement.

The court was careful to note “We do not address the question whether a parent without custodial rights may be held criminally liable for kidnapping.” (footnote 2).