

Criminal Procedure

Appeal Issues

[State v. Biddix](#), ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 6, 2015). (1) Where the defendant entered a guilty plea and did not assert an issue identified in G.S. 15A-1444(a2), he did not have a statutory right to appeal. (2) Because the provisions of Rule 21 of the Rules of Appellate Procedure prevail over G.S. 15A-1444(e), that rule provides the only circumstances where the court can issue a writ of certiorari: when the defendant lost the right to appeal by failing to take timely action; when the appeal is interlocutory; or when the trial court denied the defendant's motion for appropriate relief. Here, none of those circumstances applied. One judge on the panel concurred only in the result.

Indictment Issues

[State v. Hooks](#), ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 6, 2015). In a trafficking in methamphetamine case where the defendant did not object on grounds of fatal variance at trial, the issue was waived for purposes of appeal.

[State v. Jeffries](#), ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 6, 2015). (1) In this burning of personal property case where the indictment charged that the defendant set fire to the victim's bed, jewelry, and clothing and the evidence showed only that he set fire to her bedding, no fatal variance occurred. The State was not required to show that the defendant also set fire to her jewelry and clothing. The court rejected the defendant's argument that there was a fatal variance between the indictment's allegation that he set fire to her bed and the evidence, which showed he set fire to her bedding. Any variance in this regard was not material, given that there was no evidence that the "bedding" was found anywhere other than on the bed. It concluded: "we are unable to discern how Defendant was unfairly surprised, misled, or otherwise prejudiced in the preparation of his defense by the indictment's failure to identify the 'bedding' rather than the 'bed.'" (2) The trial court erred by instructing the jury that it could find that the defendant attained habitual felon status based on a prior conviction for selling cocaine where the indictment did not allege this conviction. The indictment alleged three predicate felonies to establish habitual felon status. However, the trial court instructed the jury on four felonies, the three identified in the indictment as well as sale of cocaine, which was not alleged in the indictment. Because it was impossible for the court to determine whether the jurors relied on the fourth felony not alleged in the indictment, a new hearing on habitual felon was required.

[State v. McLamb](#), ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 6, 2015). In a failure to register as a sex offender case, the indictment was not defective on grounds that did not allege that the defendant failed to provide "written notice" of his address change "within three business days." Citing prior case law, the court noted that has already rejected arguments. The court followed this case law, refusing "to subject the indictment to hyper technical scrutiny." It further noted that the defendant did not establish that this pleading issue prejudiced his trial preparation. Finally, it noted that the better practice would be for the prosecution to allege that the defendant failed to report his change in address "in writing" and "within three business days."

Speedy Trial

[State v. Carvalho](#), ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 6, 2015). Applying the four-factor speedy trial balancing test of *Barker v. Wingo*, the court concluded that no speedy trial violation occurred. The nine year gap between the time of indictment and the hearing on the speedy trial motion is presumptively prejudicial. However while extraordinary, this delay is not per se determinative and an examination of the remaining *Barker* factors is required. As to the second factor, reason for delay, the defendant failed to show that that the delay stemmed from the State's negligence or willfulness. The "more significant elements" that contributed to delay included: changing the proceedings from capital to noncapital; plea discussions; forensic issues regarding an audiotape; securing the testimony of the state's key witness; and the interconnectedness of the two murders. Regarding the third factor, assertion of the speedy trial right, the court noted that the defendant first asserted his right some eight years after he was indicted. Regarding the final factor, prejudice from delay, the court found that the defendant failed to show any affirmative proof of prejudice.

Jury Argument

[State v. Huey](#), ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 6, 2015). In this homicide case, a new trial was required where the trial court failed to intervene on its own motion to the State's improper statements made during closing argument. The State argued to the jury not only that the defendant was a liar but that he had lied on the stand in cooperation with defense counsel and the defendant's mental health expert. The prosecutor's argument suggested that the defendant's expert would say whatever the defense wanted him to say because he was being paid to do so. Further, the State implied that the expert was committing perjury because "he [was] just a \$6,000 excuse man[,] and would do "exactly what he was paid to do." The State also indicated that the jury should not trust defense counsel because he was "paid to defend the defendant."

[State v. Jeffries](#), ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 6, 2015). The court held, in this burning of personal property case, that although some of the prosecutor's comments regarding the credibility of certain witness testimony during closing arguments may have been objectionable, they did not rise to the level of requiring the trial court to intervene ex mero motu. The court noted as objectionable the prosecutor's statement that the victim's testimony was "extraordinarily credible."

[State v. Carvalho](#), ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 6, 2015). The State's closing arguments did not require the trial court to intervene ex mero motu. With respect to comments regarding 404(b) evidence, the State did not ask the jury to use the evidence for an improper purpose. To the extent that the State referred to any improper evidence the references were not so grossly improper that the trial court should have intervened on its own motion.

Jury Instructions

[State v. Juarez](#), ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 6, 2015). (1) Where the defendant was charged with first-degree murder, the trial court erred by denying his request to instruct the jury on the lesser offenses of second-degree murder and voluntary manslaughter. The trial court denied the defendant's request and instructed the jury only on first-degree murder pursuant to the felony murder theory, with discharging a barreled weapon serving as the underlying felony. This was however error where the defendant presented evidence that he committed the offense of discharging a barreled weapon in self-defense. (2) The trial court committed plain error by instructing the jury that the defendant could not benefit from self-defense if he was found to be the aggressor. The court noted that cases consistently hold that it is reversible error to instruct the jury on the aggressor doctrine where there is no evidence that the defendant was the initial aggressor. Reviewing the relevant law, the court noted that the initial aggressor doctrine provides that the right of self-defense is only available to a person who is without fault, and if a person voluntarily enters into a fight, he or she cannot invoke the doctrine of self-defense unless the defendant first abandons the fight, withdraws from it and gives notice to his adversary that he has done so. It continued: "Although our courts have not explicitly defined an 'initial aggressor,' we have held that withdrawing from conflict is a means by which a person can avoid that status." Considering the evidence in the case, the court concluded that the defendant's withdrawal "remove[d] him from the realm of the initial aggressor."

[State v. Huey](#), ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 6, 2015). In this homicide case, the trial court properly instructed the jury on flight where evidence showed that the defendant shot the victim, got into his vehicle, drove off for a short period of time, and returned; the firearm used to shoot the victim was never recovered. Noting that mere evidence that the defendant left a crime scene is not enough to support an instruction on flight, the court noted that here there was evidence that the defendant took steps to avoid apprehension. Specifically the evidence supported the theory that the defendant drove away briefly to dispose of the firearm used in the homicide.

[State v. Jeffries](#), ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 6, 2015). In this burning of personal property case, the trial court did not err by failing to instruct the jury regarding the defendant's presence at the crime scene. Contrary to the defendant's argument, his presence at the scene is not an element of the offense.

Probation

[State v. Harwood](#), ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 6, 2015). Because the probation officer filed violation reports after the defendant's probation had expired, the trial court lacked jurisdiction to revoke the defendant's probation. The court rejected the State's argument that the defendant's period of probation did not begin until he was released from incarceration and thus that the violation reports were timely. The State acknowledged that the trial court failed to check the box on the judgment form indicating that the period of probation would begin upon release from incarceration, but argued that this was a clerical error. The court noted that under G.S. 15A-1346, the default rule is that probation runs concurrently with imprisonment. The court rejected the notion that the trial court's failure to check the box on the form was a clerical, in part because the trial court failed to do so five times with respect

to five separate judgments. Additionally, the court held that if a mistake was made it was substantive not clerical, reasoning: “[c]hanging this provision would retroactively extend the defendant’s period of probation by more than one year and would grant the trial court subject matter jurisdiction to activate [the sentences].”

Arrest, Search & Investigation

Identification Procedures

[*State v. Gamble*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 6, 2015). The court rejected the defendant’s argument that the identification procedure used violated the Eyewitness Identification Reform Act (EIRA). Although a non-independent administrator was used, the administrator satisfied the requirements of G.S. 15A-284.52(c) for such administrators (he used the folder method specified in the statute). Additionally, the administrator met the other requirements of the EIRA. The court rejected the defendant’s argument that plain error occurred because the administrator could not identify the specific five filler photographs that were used out of the seven total selected for the lineup. The court concluded that the administrator’s failure to recall which of the five filler photographs were used went to the weight of his testimony, not its admissibility. The court went on to hold that the trial court did not err by admitting the filler photographs into evidence.

Self-Incrimination

[*Herndon v. Herndon*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 6, 2015). Over a dissent, the court held that the district court violated Ms. Herndon’s Fifth Amendment rights in a civil domestic violence protective order proceeding. Mr. Herndon sought the protective order against his wife, Ms. Herndon. When Ms. Herndon’s counsel called her to testify, the trial court stated, “She ain’t going to get up there and plead no Fifth Amendment?”, “I’m not doing no Fifth Amendment” and that if Ms. Herndon attempted to invoke her Fifth Amendment rights “somebody might be going to jail.” The trial court’s threat to imprison Ms. Herndon if she invoked her right to remain silent violated her Fifth Amendment rights. It explained: “Ms. Herndon was left with the choice of forgoing her right to testify at a hearing where her liberty was threatened or forgoing her constitutional right against self-incrimination. It was error for the trial court to place her in that impossible situation.” The court clarified:

Under long-standing U.S. Supreme Court precedent, a witness does not automatically waive her Fifth Amendment rights by voluntarily taking the stand to testify in a civil case. Instead, the trial court must listen to the witness’s testimony and determine whether the questions for which the witness invokes the right to remain silent concern “matters raised by her own testimony on direct examination.” *Brown v. United States*, 356 U.S. 148, 156 (1958). If so, then the witness has waived her Fifth Amendment rights as to those questions.

Evidence

Rule 611

[*State v. Henry*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 6, 2015). The trial court did not err with respect to the defendant's request to cross-examine the State's witness, Collins, regarding the victim's reputation for violence. Although the State objected to the defendant's attempt to so cross-examine the witness, it acknowledged that it would be appropriate to allow such testimony during the defendant's case; the trial court agreed and noted that defense counsel could recall the witness during the defense case. Although the defendant presented other evidence of the victim's reputation for violence, he did not recall Collins. The court noted that under Rule 611 trial courts have discretion to exercise reasonable control over the mode and order of interrogating witnesses. Here, the trial court did not abuse its discretion by requiring the defendant to wait until the defense case to examine Collins about the victim's reputation for violence.

404(b) Evidence

[*State v. Carvalho*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 6, 2015). In this murder case, the court held, over a dissent, that the trial court did not err by admitting under Rule 404(b) portions of an audiotape and a corresponding transcript, which included a conversation between the defendant and an individual, Anderson, with whom the defendant was incarcerated. Anderson was a key witness for the State and his credibility was crucial. The 404(b) evidence was not admitted for propensity but rather to show: that the defendant trusted and confided in Anderson; the nature of their relationship, in that the defendant was willing to discuss commission of the crimes at issue with Anderson; and relevant factual information to the murder charge for which the defendant was on trial. These were proper purposes. Additionally, the trial court did not abuse its discretion in admitting this evidence under the Rule 403 balancing test.

Opinions

[*State v. Jeffries*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 6, 2015). In this burning of personal property case, the trial court did not err by allowing the State's expert in fire investigation, a fire marshal, to testify that the fire had been intentionally set. The expert testified that the fire was caused by "the application of open flame to ... combustible material," and that it had been intentionally set. The court noted that in *State v. Hales*, 344 N.C. 419, 424-25 (1996), the North Carolina Supreme Court held that with the proper foundation, a fire marshal may offer an expert opinion regarding whether a fire was intentionally set.

Judicial Notice

[*State v. Harwood*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 6, 2015). In this probation revocation case, the Court of Appeals took judicial notice of the date of the defendant's release from incarceration. This fact was obtained from an offender search on the Department of Public Safety website.

Criminal Offenses

Homicide

[State v. Juarez](#), ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 6, 2015). Felony discharging of a firearm into an occupied vehicle can serve as an underlying felony supporting a charge of felony murder.

Drug Offenses

[State v. Hooks](#), ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 6, 2015). The evidence was sufficient with respect to 35 counts of possession of the precursor chemicals pseudoephedrine with intent to manufacture methamphetamine. As to possession, the State introduced evidence that the defendant purchased pseudoephedrine, was seen “cooking meth,” and that others had purchased pseudoephedrine for him. The court rejected the defendant’s argument that the evidence was insufficient because the substance was not chemically identified as pseudoephedrine. The court concluded that the holding of *State v. Ward* regarding the need to identify substances through chemical analysis was limited to identifying controlled substances, and pseudoephedrine is not listed as a controlled substance in the North Carolina General Statutes.

Contempt

[State v. Mastor](#), ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 6, 2015). Trial court did not err by holding the defendant in criminal contempt for willfully violating the Consent Order provision which forbade her from allowing the children to be in the presence of a convicted sex offender.