Criminal Procedure

Indictment Issues

State v. Campbell, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 20, 2015). The trial court erred by failing to dismiss a larceny charge due to a fatal variance with respect to ownership of the stolen property. The indictment alleged that the property was owned by Pastor Stevens and Manna Baptist Church. The court held that when an indictment alleges multiple owners, the State must prove multiple owners. Here, there was no evidence that the property was owned by Pastor Stevens; it showed only that it was owned by the church. The fact that Stevens was an employee of the church, the true owner of the property, did not cure the fatal variance. The State was required to demonstrate that both alleged owners had at least some sort of property interest in the stolen items; here it failed to do that.

Counsel Issues

State v. Campbell, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 20, 2015). In a case involving a breaking or entering of a church, counsel was not ineffective by failing to challenge the admissibility of evidence that the defendant broke into a home on the night in question. The court noted that because the issue pertains to the admission of evidence no further factual development was required and it could be addressed on appeal. It went on to hold that the evidence was admissible under Rule 404(b) to show that the defendant's intent in entering the church was to commit a larceny therein and to contradict his testimony that he entered the church for sanctuary. The evidence also was admissible under Rule 403. As to the defendant's argument that counsel should have requested a limiting instruction that the jury could not consider the evidence to show his character and propensity, the court agreed that a limiting instruction would have mitigated any potential unfair prejudice. But it held: "any resulting unfair prejudice did not substantially outweigh the evidence's probative value, given the temporal proximity of the breaking or entering offenses and the evidence's tendency to show that defendant's intent in entering the church was to commit a larceny therein." Because the defendant failed to show that admission of the evidence was error he could not prevail on his ineffective assistance claim.

Discovery & Related Issues

State v. Hicks, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 20, 2015). In this methamphetamine case, the trial court did not abuse its discretion by denying the defendant's motion for discovery sanctions after the State destroyed evidence seized from the defendant's home, without an order authorizing destruction, and despite a court order that the evidence be preserved. In its order denying the motion, the trial court found that the SBI destroyed the evidence under the belief that a destruction order was in place, that the defendant's preservation motion was filed some 30 days after the evidence had been destroyed, and that the item in question—an HCL generator used to manufacture meth—is not regularly preserved. The court concluded that the record contained "ample evidence" to support the trial court's conclusion that law enforcement had a good faith belief that the items were to be destroyed and did not act in bad faith when they initiated destruction.

Pleas

State v. Miller, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 20, 2015). Where the defendant pleaded guilty in this DWI case "and preserved his right to appeal" the denial of his motion to dismiss, the court found that the defendant had no statutory right to appeal the issue or ground to request review by way of certiorari. The defendant's motion alleged that he was denied his constitutional right to communicate with counsel and friends and gather evidence on his behalf by allowing friends or family to observe him and form opinions as to his condition. The court thus dismissed the appeal without prejudice to the defendant's right to pursue relief by way of a MAR.

Jury Venire

State v. Gettys, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 20, 2015). The trial court did not err by denying the defendant's motion to strike the jury venire. The defendant alleged that his venire was racially disproportionate to the demographics of Mecklenburg County, where he was tried, and therefore deprived him of his constitutional right to a jury of his peers. The court began by noting that the fact that a single venire that fails to proportionately represent a cross-section of the community does not constitute systematic exclusion. Rather, systematic exclusion occurs when a procedure in the venire selection process consistently yields non-representative venires. Here, the defendant argued that Mecklenburg County's computer program, Jury Manager, generated a racially disproportionate venire and thus deprived him of a jury of his peers. Although the defendant asserted that there was a disparity in the venire, he conceded the absence of systematic exclusion and thus his claim must fail.

Continuance

State v. Hicks, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 20, 2015). The trial court did not err by denying the defendant's motion to continue after rejecting his *Alford* plea, where the defendant did not move for a continuance until the second week of trial. The defendant argued that he had an absolute right to a continuance under G.S. 15A-1023(b) (providing in part that "[u]pon rejection of the plea arrangement by the judge the defendant is entitled to a continuance until the next session of court"). Here, where the defendant failed to move for a continuance until the second week of trial, his statutory right to a continuance was waived.

Jury Instructions

State v. Gettys, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 20, 2015). The trial court did not err by denying the defendant's request for a special instruction on sequestration. In closing argument, the prosecutor argued, in part: "[Defendant is] cherry-picking the best parts of everybody's story after … he's had the entire trial to listen to what everybody else would say. You'll notice that our witnesses didn't sit in here while everybody else was testifying." After the jury was instructed and left the courtroom to begin deliberations, the defendant asked the trial court to instruct the jury as follows: "In this case, all witnesses allowed by law were sequestered at the request of the State. These witnesses could not be

present in court except to testify until they were released from their subpoenas, or to discuss the matter with other witnesses or observers in court. By law, the defendant and lead investigator for the State cannot be sequestered." Given the trial court's conclusion that the requested instruction did not relate to a dispositive issue in the case, it did not abuse its discretion in denying the defendant's request.

Sentencing

State v. Hammonds, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 20, 2015). The court held, with the State's concession, that the trial court erred by ordering $50 in restitution where the victim did not testify regarding the value of the items stolen. Because there was some evidence to support an award of restitution but the evidence was not specific enough to support the award, the court vacated the restitution order and remanded for a new hearing to determine the appropriate amount of restitution.

Arrest, Search & Investigation

Stops & Arrests

State v. Miller, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 20, 2015). (1) Because the officer saw the defendant drive through a red light, the officer had reasonable suspicion to stop the defendant's vehicle. (2) Where upon stopping the defendant's vehicle the officer smelled a strong odor of alcohol and saw that the defendant had red glassy eyes, the defendant failed field sobriety tests, and admitted to drinking before driving, the officer had probable cause to arrest the defendant for DWI.

Miranda

State v. Hammonds, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 20, 2015). (1) In this armed robbery case, and over a dissent, the court rejected the defendant's argument that when police interrogated him in the hospital for approximately 1 ½ hours and procured a confession, he was in custody, triggering his right to *Miranda* warnings. The defendant argued that because he had been involuntarily committed, he was automatically "in custody" for purposes of *Miranda*. Agreeing that involuntary commitment is different from a voluntary hospitalization, the court found instructive cases holding that the fact that a person is incarcerated does not automatically mean that he or she is in custody for purposes of *Miranda*. In continued: "Since involuntary commitment is arguably less restrictive than incarceration, and certainly not more restrictive, we do not adopt a more restrictive rule for involuntary commitment than for incarceration." It went on to consider the circumstances of the interrogation as it would for an incarcerated defendant, specifically: whether the person was free to refuse to go to the place of the interrogation; whether the person was told that participation in the interrogation was voluntary and that he was free to leave at any time; whether the person was physically restrained from leaving the place of interrogation; and whether the person was free to refuse to answer questions. Here, the court noted, the officers told the defendant he was not under arrest, they never told him that he could not stop the conversation or could not request that they leave, the officers never raised their voices, and the defendant was not isolated from others such as nurses. The court went on to "hold that a reasonable person in defendant's position would understand that the restriction on his movement was due to his

involuntary commitment to receive medical treatment, not police interrogation." (2) Based on the trial court's findings, the court concluded, over a dissent, that the defendant's confession was not involuntary. Among other things, the trial court found that the officers never threatened the defendant and that their exhortations that he tell the truth did not make his confession involuntary.

Evidence

Hearsay

State v. Hicks, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 20, 2015). In this methamphetamine case, a report about the defendant's pseudoephedrine purchases was properly admitted as a business record. The report was generated from the NPLEx database. The defendant argued that the State failed to lay a proper foundation, asserting that the State was required to present testimony from someone associated with the database, or the company responsible for maintaining it, regarding the methods used to collect, maintain and review the data in the database to ensure its accuracy. The court disagreed. Among other things, an officer testified about his knowledge and familiarity with the database and how it is used by pharmacy employees. This testimony provided a sufficient foundation for the admission of the report as a business record.

Rule 609

State v. Joyner, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 20, 2015). In this larceny trial, the trial court did err by allowing the State to cross-examine the defendant on his previous convictions for uttering a forged instrument, forgery, and obtaining property by false pretenses, all of which occurred more than 10 years ago. The court noted that it has held that under Rule 609 trial court must make findings as to the specific facts and circumstances demonstrating that the probative value of an older conviction outweighs its prejudicial effect and that a conclusory finding that the evidence would attack the defendant's credibility without prejudicial effect does not satisfy this requirement. It continued, however, stating that a trial court's failure to follow this requirement "does not [necessarily constitute] reversible error." (quotation omitted). It explained: "Where there is no material conflict in the evidence, findings and conclusions are not necessary." (quotation omitted). Here, other than making a general objection, the defendant offered no evidence and made no attempt to rebut the State's argument for admitting the prior convictions. Furthermore, a trial court's failure to make the necessary findings is not error when the record demonstrates the probative value of prior conviction evidence to be obvious, and that principle applied in the case at hand. The court held: "although the trial court's findings were conclusory and would normally be inadequate under Rule 609(b), the record contains facts and circumstances showing the probative value of the evidence." Among other things, it noted that the defendant's credibility was central to the case and that all of the prior crimes involved dishonesty.

Corroboration, Impeachment & Reading a Transcript

State v. Gettys, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 20, 2015). (1) The trial court did not abuse its discretion by admitting a recording of a witness's interview with the police for corroboration and

impeachment. The witness in question testified for the State. Although much of her testimony was consistent with her earlier interview, it diverged in some respects. The court rejected the defendant's argument that the State had called the witness in pretext so as to be able to introduce her prior inconsistent statements as impeachment. In this respect it noted the trial court's finding that her testimony was "90 percent consistent with what she said before." Additionally the trial court gave appropriate limiting instructions. The court went on to reject the defendant's argument that admitting the recording for both corroboration and impeachment is "logically contradictory and counterintuitive," noting that the State did not introduce a single pretrial statement for both corroboration and impeachment; rather, it introduced a recording of the witness's interview, which included many pretrial statements, some of which tended to corroborate her testimony and some of which tended to impeach her testimony. (2) The trial court did not abuse its discretion by allowing a detective to read portions of the transcript of the recording. The defendant argued that the trial court's decision to allow the detective to read portions of the transcript that the State believed were not clearly audible from the recording intruded upon the province of the jury. The court concluded, however, that because the detective interviewed the witness, she had personal knowledge of the interview and could testify about it at trial. Additionally, the trial court gave a proper limiting instruction.

Privileges

State v. Matsoake, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 20, 2015). In this rape case, the marital privilege did not bar the defendant's then-wife from testifying that the defendant wept upon seeing a composite sketch of the victim's assailant in the newspaper. The wife did not observe the defendant looking at the composite sketch and weeping until she heard a teardrop hit the newspaper. No testimony indicated that the defendant intended to communicate anything to his wife by crying at the sight of the composite sketch and thus the privilege did not apply.

State v. Crisco, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 20, 2015). In this murder case, the court rejected the defendant's argument that the clergy-communicated privilege prohibited admission of evidence regarding the defendant's confession to his pastor. The court noted that there are two requirements for this privilege to apply: the defendant must be seeking the counsel and advice of his or her minister; and the information must be entrusted to the minister as a confidential communication. Here, the evidence in question was not the defendant's confession to the pastor; it was evidence that the defendant told a third-party who was not a member of the clergy that he had confessed to the pastor about the murder. Because no recognized privilege existed between the defendant and that third-party, the defendant's statement to the third-party that he had confessed to a preacher was not privileged. The court continued, concluding that even if error had occurred the defendant failed to show prejudice.

Criminal Offenses

Sexual Assaults

State v. Matsoake, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 20, 2015). In this rape case, because the evidence was clear and positive and not conflicting with respect to penetration, the trial court did not

err by failing to instruct on attempted rape. Here, among other things, a sexual assault nurse testified that the victim told her she was penetrated, the victim told the examining doctor at the hospital immediately after the attack that the defendant had penetrated her, the defendant's semen was recovered from inside the victim's vagina.