

## Criminal Procedure

### Indictment Issues

[\*State v. Harris\*](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Nov. 3, 2015). Where the indictment charged the defendant with sexual offense in violation of G.S. 14-27.4(a)(1) (first-degree statutory sex offense with a child under the age of 13), the trial court erred by instructing the jury on sexual offense with a child in violation of G.S. 14-27.4A(a) (statutory sexual offense by an adult). The court noted that the charged offense was a lesser included of the offense of conviction, and that while the charged offense requires the State to prove that the defendant was at least 12 years old and at least 4 years older than the victim, the offense of conviction requires proof that the defendant is at least 18 years old. The court found itself bound by *State v. Hicks*, \_\_\_, N.C. App. \_\_\_, 768 S.E.2d 373 (Feb. 17, 2015), vacated the conviction and remanded for resentencing on the lesser included offense. [Author's note: As discussed in my blog post [here](#), in response to *Hicks* the General Assembly recently recodified the State's sexual assault crimes to eliminate the type of error that occurred here.]

### Counsel Issues

[\*State v. Nkiam\*](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Nov. 3, 2015). In this appeal from a motion for appropriate relief (MAR), the court held that advice provided by the defendant's counsel in connection with his plea and did not comply with *Padilla v. Kentucky*, 559 U.S. 356 (2010) (incorrect advice regarding the immigration consequences of a guilty plea may constitute ineffective assistance). The defendant was a permanent resident of the United States. After he pled guilty to aiding and abetting robbery and conspiracy to commit robbery, the federal government initiated deportation proceedings against him. The defendant then filed a MAR asserting ineffective assistance of counsel. At issue was counsel's advice regarding the immigration consequences of the defendant's guilty plea. It was undisputed that defense counsel informed the defendant that his plea carried a "risk" of deportation. The court noted that "[t]his case is the first in which our appellate courts have been called upon to interpret and apply *Padilla's* holding." The court interpreted *Padilla* as holding: "when the consequence of deportation is unclear or uncertain, counsel need only advise the client of the risk of deportation, but when the consequence of deportation is truly clear, counsel must advise the client in more certain terms." In this case, "there was no need for counsel to do anything but read the statute," to understand that the deportation consequences for the defendant were truly clear. Thus, counsel was required, under *Padilla*, "'to give correct advice' and not just advise defendant that his 'pending criminal charges may carry a risk of adverse immigration consequences.'" The court remanded for determination of whether the defendant was prejudiced by counsel's deficient performance.

### Guilty Pleas

[\*State v. Ledbetter\*](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Nov. 3, 2015). (1) In this case where the defendant pleaded guilty to driving while impaired, the court concluded that the defendant did not have a statutory right to appeal the issue raised. Following the trial court's denial of the defendant's motion to dismiss, the defendant entered a guilty plea. The plea arrangement stated: "[Defendant] expressly

retains the right to appeal the Court's denial of her motion to dismiss/suppress her Driving While Impaired charge in this case and her plea of guilty is conditioned based on her right to appeal that decision[.]” The defendant then appealed, arguing that the trial court erred in denying her motion to dismiss, which had asserted that the State violated G.S. 20-38.4 and *Knoll*. The issue that the defendant attempted to appeal is not listed as one of the grounds for appeal of right as set forth in G.S. 15A-1444. The court rejected the defendant's argument that she had an appeal of right pursuant to G.S. 15A-979(b), noting that provision applies to preservation of the right to challenge a denial of a suppression motion, not a motion to dismiss. While the trial court's order denying the defendant's motion was styled as an “order on motion to suppress Defendant's DWI Charge” and the defendant's transcript of plea purported to reserve the right to appeal the denial of the “motion to dismiss/suppress,” the record reveals that the only motion filed by the defendant was a motion to dismiss. In fact, her motion specifically cited G.S. 15A-954, the motion to dismiss statute. Thus, because the defendant did not file a motion to suppress, she had no right of appeal under G.S. 15A-979(b). The court rejected the defendant's argument that because the court had reviewed denials of motions to dismiss based on *Knoll* in *State v. Chavez*, \_\_\_ N.C. App. \_\_\_, 767 S.E.2d 581 (2014), and *State v. Labinski*, 188 N.C. App. 120 (2008), it should do the same in her case. The court noted that in both of those cases it had failed to consider G.S. 15A-1444 or G.S. 15A-979(b) and that it was bound to follow decisions of the Supreme Court and its own prior case law on this issue. (2) The court lacked authority to consider the issue by way of a writ of certiorari. In this respect, Appellate Rule 21 limits the court's ability to grant petitions for writ of certiorari to three specified situations, none of which were at issue in this case. (3) The court declined to exercise its authority under Appellate Rule 2 to suspend the rules of appellate procedure.

### **Extending the Session**

[\*State v. Lewis\*](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Nov. 3, 2015). The trial court properly extended the session. After the State rested on Friday, the trial court announced that it would be in recess until the following Tuesday. The defendant did not object to the announcement. Prior to dismissing the jurors on Friday, the trial court again informed them in open court that court would be in recess until Tuesday. Again, the defendant offered no objection. Court resumed on Tuesday, without objection from the defendant, and the defendant was convicted. The court found that the trial court sufficiently complied with G.S. 15-167 and properly extended the session.

### **Jury Argument**

[\*State v. McNeill\*](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Nov. 3, 2015). The trial court did not err by failing to intervene sua sponte during the prosecutor's closing argument. Here, the prosecutor argued facts in evidence regarding a prior assault by the defendant and the trial court gave an appropriate limiting instruction regarding the defendant's prior conviction. Thus, the prosecutor's reference to this incident and his comment suggesting that the defendant was a “cold person” were not so grossly improper that the trial court was required to intervene on its own motion.

### **Jury Deliberations**

[\*State v. Hazel\*](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Nov. 3, 2015). In this felony murder case, the trial court acted within its discretion by declining to answer a question from the deliberating jury. Robbery was the underlying felony for the felony murder charge. During deliberations, the jury sent a note with the following question: “Can this defendant be found guilty of the robbery charge and then found not guilty of the murder charge?” After hearing from the parties, the trial court declined to answer the question yes or no, instead telling the jury to read the written jury instructions that it had previously provided. The court noted that whether to give additional instructions to the jury is within the trial court’s discretion. Here, it was undisputed that the trial court correctly instructed the jury on all offenses and heard from the parties when the question was raised.

## **Evidence**

### **Opinions**

[\*State v. Lewis\*](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Nov. 3, 2015). In this conspiracy to traffic in opiates case, the evidence was sufficient to support the conviction where the State’s expert analyzed only one of the pills in question and then confirmed that the remainder were visually consistent with the one that was tested. The police seized 20 pills weighing 17.63 grams. The State’s expert analyzed one of the pills and determined that it contained oxycodone, an opium derivative with a net weight of 0.88 grams. The expert visually examined the remaining 19 pills and found them to have “the same similar size, shape and form as well as the same imprint on each of them.” The defendant argued that the visual examination was insufficient to precisely establish how much opium derivative was present in the seized pills. The court rejected this argument, citing prior precedent establishing that a chemical analysis of each individual pill is not necessary; the scope of the analysis may be dictated by whatever sample is sufficient to make a reliable determination of the chemical composition of the entire quantity of pills under consideration.

[\*State v. Harris\*](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Nov. 3, 2015). (1) In this child sexual assault case the trial court did not err by admitting testimony from the victim’s therapist. The court rejected the defendant’s argument that the therapist’s testimony constituted impermissible vouching for the victim’s credibility. The therapist specialized in working with children who have been sexually abused; she performed an assessment and used trauma-focused cognitive behavioral therapy (TFCBT) to help treat the victim. During treatment the victim talked about the sexual misconduct, how she felt, and wrote a “trauma narrative” describing what had happened. The court noted that the defendant was unable to point to any portion of the therapist’s testimony where she opined that the victim was in fact sexually abused by the defendant or stated that sexual abuse did in fact occur. Rather, the therapist explained how TFCBT is used to help treat sexual abuse victims and described therapeutic techniques that she employs in her treatment. She testified that the victim had symptoms consistent with trauma, and explained the process and purpose of writing a trauma narrative. The court found that her explanation laid the foundation for the State to introduce the victim’s trauma narrative, which included her written statement about what happened to her. It noted that the narrative was introduced solely for the purpose of corroborating the victim’s testimony. It added, “[t]he mere fact that [the therapist’s]

testimony supports [the victim's] credibility does not render it inadmissible." (2) The trial court did not err by allowing a nurse practitioner to testify that she recommended the victim for therapy despite finding no physical evidence of abuse, and that she referred to the victim's mother as the "non-offending" caregiver. The defendant argued that this testimony impermissibly bolstered the victim's credibility and constituted opinion evidence as to guilt. The court noted that the nurse never asserted that the victim had been sexually abused or explicitly commented on her credibility. Rather, her testimony simply recounted what she did at the conclusion of her examination of the victim and was within the permissible range of expert testimony in child sexual abuse cases. As to her use of the term non-offending caregiver, the witness explained that her organization uses that term to refer to the person with whom the child will be going home and that any parent or caregiver suspected of being an offender is not allowed in the center. The court noted that the witness never testified that the defendant was an offending caregiver.

## **Criminal Offenses**

### **Participants**

[State v. Hardison](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Nov. 3, 2015). Reversing the defendant's convictions for contaminating a public water system, the court held that because the defendant was not constructively present, the evidence was insufficient to support criminal liability under the doctrine of acting in concert. The evidence showed that the defendant offered to pay another person to intentionally break county water lines so that the defendant's company, which was under contract with the county to repair the lines, would be paid by the county for the necessary repairs. The defendant was never present when the accomplice broke the water lines. The court held that the defendant "was not physically close enough to aid or encourage the commission of the crimes and therefore was not actually or constructively present—a necessary element of acting-in-concert liability." The court rejected the State's argument that the defendant was constructively present because she planned the crimes, was accessible if needed by telephone, and later was at the crime scene to repair the broken water lines. In this respect, the court held, in part, that "one cannot be actually or constructively present for purposes of proving acting in concert simply by being available by telephone." The court noted that the evidence would have supported a conviction based on a theory of accessory before the fact, but the jury was not instructed on that theory of criminal liability, nor was the defendant charged with other offenses, such as conspiracy, that apply to those who help plan a criminal act.

### **Homicide**

[State v. McNeill](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Nov. 3, 2015). (1) The evidence was sufficient to submit felony murder to the jury on the basis of felony larceny with a deadly weapon being the underlying felony. The court rejected the defendant's argument that the State failed to show that a beer bottle found at the crime scene was used as a "deadly weapon" within the meaning of the homicide statute, G.S. 14-17. The State's evidence showed, among other things that the murder victim's injuries could have been caused by the bottle. Thus, the State presented sufficient evidence that the broken beer bottle constituted a deadly weapon. The court also rejected the defendant's argument that the

State failed to prove that the defendant used the broken bottle during the commission of the felonious larceny, noting that the evidence showed that after incapacitating the victim with the broken bottle the defendant stole the victim's vehicle. Finally, the court rejected the defendant's argument that the State failed to prove that the killing was committed in the perpetration of the larceny, finding sufficient evidence of a continuous transaction. (2) Where the defendant was convicted of felony murder with the underlying felony being felony larceny, the trial court erred by failing to arrest judgment on the underlying felony.