Evidence

Pre-Arrest Silence

State v. Taylor, ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 1, 2015). In this larceny and obtaining property by false pretenses case, the court held: "[t]estimony that the investigating detective was unable to reach defendant to question him during her investigation was admissible to describe the course of her investigation, and was not improper testimony of defendant's pre-arrest silence." The testimony at issue involved the State's questioning of the detective about her repeated unsuccessful efforts to contact the defendant and his lack of participation in the investigation. Noting that pre-arrest silence may not be used as substantive evidence of guilt, the court noted that none of the relevant cases involve a situation where "there has been no direct contact between the defendant and a law enforcement officer." It continued: "Pre-arrest silence has no significance if there is no indication that a defendant was questioned by a law enforcement officer and refused to answer." Here, the detective never made contact with the defendant, never confronted him in person, and never requested that he submit to questioning. Additionally, the court noted there was no indication that the defendant knew the detective was trying to talk to him and that he refused to speak to her. Thus, the court concluded "it cannot be inferred that defendant's lack of response to indirect attempts to speak to him about an ongoing investigation was evidence of pre-arrest silence."

Opinions

State v. Walston, ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 1, 2015). In this sexual assault case involving adult victims and assaults that allegedly occurred when they were young children, the trial court improperly excluded the defendant's expert witness based on the erroneous belief that the testimony was not admissible as a matter of law. The defendant's expert, Dr. Artigues, would have given testimony concerning the suggestibility of children. Although the trial court did not make findings of fact and conclusions of law in rending its decision, the court reviewed the record and determined that the trial court excluded the testimony for two reasons. First, the trial court determined that the case did not involve repressed memory and therefore the testimony was not relevant. Second, the trial court agreed with the State that it could not allow an expert witness to testify about the general susceptibility of children to suggestion if the expert had not interviewed the alleged victims. The court rejected the notion that its decision in *State v. Robertson*, 115 N.C. App. 249, (1994), created a per se rule to that effect. Rather, *Robertson* simply held that the trial court had not abused its discretion by excluding the expert testimony under Rule 403. It continued: "Neither *Robertson* nor any other North Carolina appellate opinion we have reviewed recognizes any such *per se* rule. We hold that expert opinion regarding the general reliability of children's statements may be admissible so long as the requirements of Rules 702 and 403 … are met." The court went on to reject the notion that such expert testimony only can be allowed when the witness has interviewed the victims, noting that the defendant's expert here had no right to access the victims absent their consent. It continued: "The ability of a defendant to present expert witness testimony on his behalf cannot be subject to the agreement of the prosecuting witness, for that agreement will rarely materialize." The court continued:

> General opinions related to credibility and suggestibility are informed by ongoing practice and research, not based upon interviews with a particular alleged victim of sexual assault. If expert testimony concerning general traits, behaviors, or phenomena can be helpful to the trier of fact — and it satisfies the requirements of Rule 702 and Rule 403 — it is admissible. This is true whether or not the expert has had the opportunity to personally interview the prosecuting witness.

The court was careful to note that expressing an opinion concerning truthfulness of a prosecuting witness is generally forbidden. But here, the defendant's argument was not that the prosecuting witnesses were lying but rather that their alleged memories of abuse were the result of repeated suggestions from people close to them that the abuse had in fact occurred. The defendant argued that the evidence was more consistent with false memories implanted through suggestion than with repressed memories. Dr. Artigues' testimony was directly relevant to this defense; it would have supported the idea that the children's alleged memories have been the result of repeated suggestion.

Criminal Offenses

Indecent Exposure

State v. Pugh, ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 1, 2015). (1) The trial court properly denied the defendant's motion to dismiss in this felony indecent exposure case. The evidence showed that a neighbor and her 4-year-old daughter saw the defendant masturbating in front of his garage. The court rejected the defendant's argument that because he was on his own property he was not in a "public place" within the meaning of the statute. The court noted that prior case law has held that a public place includes one that is open to the view of the public at large. Here, the defendant's garage was directly off a public road and was in full view from the street and from the front of his neighbor's house. (2) Where the neighbor and her daughter saw the defendant as they exited their car, the trial court did not commit plain error by failing to instruct the jury that the defendant must have been in view of the public with the naked eye and without resort to technological aids. Even if such an instruction may be appropriate in some cases here it was wholly unsupported by the evidence.