

Criminal Procedure

Law of the Case & Related Doctrines

[State v. Knight](#), ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 16, 2016). (1) The court rejected the defendant's argument that on a second trial after a mistrial the second trial judge was bound by the first trial judge's suppression ruling under the doctrine of law of the case. The court concluded that doctrine only applies to an appellate ruling. However, the court noted that another version of the doctrine provides that when a party fails to appeal from the tribunal's decision that is not interlocutory, the decision below becomes law of the case and cannot be challenged in subsequent proceedings in the same case. However, the court held that this version of the doctrine did not apply here because the suppression ruling was entered during the first trial and thus the State had no right to appeal it. Moreover, when a defendant is retried after a mistrial, prior evidentiary rulings are not binding. (2) The court rejected the defendant's argument that the second judge's ruling was improper because one superior court judge cannot overrule another, noting that once a mistrial was declared, the first trial court's ruling no longer had any legal effect. (3) The court rejected the defendant's argument that collateral estoppel barred the State from relitigating the suppression issue, noting that doctrine applies only to an issue of ultimate fact determined by a final judgment.

Jurisdiction

[State v. Collins](#), ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 16, 2016). (1) The superior court was without subject matter jurisdiction with respect to three counts of first-degree statutory rape, where no evidence showed that the defendant was at least 16 years old at the time of the offenses. The superior court may obtain subject matter jurisdiction over a juvenile case only if it is transferred from the district court according to the procedure set forth in Chapter 7B; the superior court does not have original jurisdiction over a defendant who is 15 years old on the date of the offense. (2) Over a dissent, the majority held that jurisdiction was also proper with respect to a fourth count of statutory rape which alleged a date range for the offense (January 1, 2011 to November 30, 2011) that included periods before the defendant's sixteenth birthday (September 14, 2011). Unchallenged evidence showed that the offense occurred around Thanksgiving 2011, after the defendant's sixteenth birthday. The court noted the relaxed temporal specificity rules regarding offenses involving child victims and that the defendant could have requested a special verdict to require the jury to find the crime occurred after he turned sixteen or moved for a bill of particulars to obtain additional specificity.

Control of the Defendant during Trial

[State v. Sellers](#), ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 16, 2016). By failing to object at trial, the defendant waived assertion of any error regarding shackling on appeal. The defendant argued that the trial court violated G.S. 15A-1031 by allowing him to appear before the jury in leg shackles and erred by failing to issue a limiting instruction. The court found the issue waived, noting that "other structural errors similar to shackling are not preserved without objection at trial." However it continued:

Nevertheless, trial judges should be aware that a decision by a sheriff to shackle a problematic criminal defendant in a jail setting or in transferring a defendant from the jail to a courtroom, is not, without a trial court order supported by adequate findings of fact, sufficient to keep a defendant shackled during trial. Failure to enter such an order can, under the proper circumstances, result in a failure of due process

Counsel Issues

[State v. Blakeney](#), ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 16, 2016). The trial court erred by requiring the defendant to proceed pro se. After the defendant was indicted but before the trial date, the defendant signed a waiver of the right to assigned counsel and hired his own lawyer. When the case came on for trial, defense counsel moved to withdraw, stating that the defendant had been rude to him and no longer desired his representation. The defendant agreed and indicated that he intended to hire a different, specifically named lawyer. The trial court allowed defense counsel to withdraw and informed the defendant that he had a right to fire his lawyer but that the trial would proceed that week, after the trial court disposed of other matters. The defendant then unsuccessfully sought a continuance. When the defendant's case came on for trial two days later, the defendant informed the court that the lawyer he had intended to hire wouldn't take his case. When the defendant raised questions about being required to proceed pro se, the court indicated that he had previously waived his right to court-appointed counsel. The trial began, with the defendant representing himself. The court held that the trial court's actions violated the defendant's Sixth Amendment right to counsel. The defendant never asked to proceed pro se; although he waived his right to court-appointed counsel, he never indicated that he intended to proceed to trial without the assistance of any counsel. Next, the court held that the defendant had not engaged in the type of severe misconduct that would justify forfeiture of the right to counsel. Among other things, the court noted that the defendant did not fire multiple attorneys or repeatedly delay the trial. The court concluded:

[D]efendant's request for a continuance in order to hire a different attorney, even if motivated by a wish to postpone his trial, was nowhere close to the "serious misconduct" that has previously been held to constitute forfeiture of counsel. In reaching this decision, we find it very significant that defendant was not warned or informed that if he chose to discharge his counsel but was unable to hire another attorney, he would then be forced to proceed pro se. Nor was defendant warned of the consequences of such a decision. We need not decide, and express no opinion on, the issue of whether certain conduct by a defendant might justify an immediate forfeiture of counsel without any preliminary warning to the defendant. On the facts of this case, however, we hold that defendant was entitled, at a minimum, to be informed by the trial court that defendant's failure to hire new counsel might result in defendant's being required to represent himself, and to be advised of the consequences of self-representation.

Indictment Issues

[*State v. Dale*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 16, 2016). A statement of charges, alleging that the defendant engaged in disorderly conduct in or near a public building or facility sufficiently charged the offense. Although the statute uses the term “rude or riotous noise,” the charging instrument alleged that the defendant did “curse and shout” at police officers in a jail lobby. The court found that the charging document was sufficient, concluding that “[t]here is no practical difference between ‘curse and shout’ and ‘rude or riotous noise.’”

[*State v. Gates*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 16, 2016). There was no fatal variance in an indictment where the State successfully moved to amend the indictment to change the date of the offense from May 10, 2013 to July 14, 2013 but then neglected to actually amend the charging instrument. Time was not of essence to any of the charged crimes and the defendant did not argue prejudice. Rather, he asserted that the very existence of the variance was fatal to the indictment.

Jury Instructions

[*State v. Dale*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 16, 2016). The trial court did not commit plain error in instructing the jury on disorderly conduct in a public building or facility where it required the State to prove an element not required by the statute (that the “utterance, gesture or abusive language that was intended and plainly likely to provoke violent retaliation, and thereby caused a breach of the peace”). Because the State had to prove more than was required to obtain a conviction, the defendant did not suffer prejudice.

Sentencing

[*State v. Bowlin*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 16, 2016). (1) The trial court erred by erroneously sentencing the defendant for three counts of sexual offense against a child by an adult under G.S. 14-27.4A,, when he was actually convicted of three counts of first-degree sexual offense under G.S. 14-27.4(a)(1). (2) The defendant’s constitutional rights were not violated when the trial court sentenced him on three counts of first-degree sexual offense, where the offenses were committed when the defendant was fifteen years old. The court found that the defendant had not brought the type of categorical challenge at issue in cases like *Roper* or *Graham*. Rather, the defendant challenged the proportionality of his sentence given his juvenile status at the time of the offenses. The court concluded that the defendant failed to establish that his sentence of 202-254 months for three counts of sexual offense against a six-year-old child was so grossly disproportionate as to violate the Eighth Amendment.

Sex Offenders--SBM

[*State v. Alldred*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 16, 2016). Relying on prior binding opinions, the court rejected the defendant’s argument that the trial court’s order directing the defendant to enroll in lifetime SBM violated ex post facto and double jeopardy. The court noted that prior opinions have held that the SBM program is a civil regulatory scheme which does not implicate either ex post facto or double jeopardy.

Arrest, Search & Investigation

Miranda Issues

[*State v. Knight*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 16, 2016). Over a dissent, the majority held that although the trial court erred in concluding that the defendant voluntarily waived his *Miranda* rights, the defendant was not prejudiced by the error. The court found that “there is no persuasive evidence that the defendant actually understood his *Miranda* rights” before waiving them. Although the defendant had experience in the criminal justice system, there was no evidence that he had ever been *Mirandized* before or that if he had, he understood his rights on those previous occasions. Additionally, the court concluded, “[j]ust because defendant appeared to have no mental disabilities does not mean he understood the warnings expressly mandated by *Miranda*.” The court found “no indication that defendant understood he did not have to speak with [the Detective], and that he could request counsel.” Finally, the court noted that when asked if he understood his rights, the defendant never affirmatively acknowledged that he did. In this respect, the court held: “As a constitutional minimum, the State had to show that defendant intelligently relinquished a known and understood right.” Thus, while the State presented sufficient evidence of an implied waiver, it did not show that the defendant had a meaningful awareness of his *Miranda* rights and the consequences of waiving them. The dissenting judge believed that the State failed to demonstrate that the error was harmless beyond a doubt.

Evidence

[*State v. Ford*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 16, 2016). In this voluntary manslaughter case, where the defendant’s pit bull attacked and killed the victim, the trial court did not err by admitting a rap song recording into evidence. The defendant argued that the song was irrelevant and inadmissible under Rule 403, in that it contained profanity and racial epithets which offended and inflamed the jury’s passions. The song lyrics claimed that the victim was not killed by a dog and that the defendant and the dog were scapegoats for the victim’s death. The song was posted on social media and a witness identified the defendant as the singer. The State offered the song to prove that the webpage in question was the defendant’s page and that the defendant knew his dog was vicious and was proud of that characteristic (other items posted on that page declared the dog a “killa”). The trial court did not err by determining that the evidence was relevant for the purposes offered. Nor did it err in determining that probative value was not substantially outweighed by prejudice. (2) The trial court did not err by admitting as evidence screenshots from the defendant’s webpage over the defendant’s claim that the evidence was not properly authenticated. The State presented substantial evidence that the website was actually maintained by the defendant. Specifically, a detective found the MySpace page in question with the name “Flexugod/7.” The page contained photos of the defendant and of the dog allegedly involved in the incident. Additionally, the detective found a certificate awarded to the defendant on which the defendant is referred to as “Flex.” He also found a link to a YouTube video depicting the defendant’s dog. This evidence was sufficient to support a prima facie showing that the MySpace page was the defendant’s webpage. It noted: “While tracking the webpage directly to defendant through an

appropriate electronic footprint or link would provide some technological evidence, such evidence is not required in a case such as this, where strong circumstantial evidence exists that this webpage and its unique content belong to defendant.” (3) The trial court did not commit plain error by allowing a pathologist to opine that the victim’s death was due to dog bites. The court rejected the defendant’s argument that the expert was in no better position than the jurors to speculate as to the source of the victim’s puncture wounds.

Criminal Offenses

Sexual Assault

[*State v. Gates*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 16, 2016). Where there was evidence to support a finding that the victim suffered serious personal injury, the trial court did not err in instructing the jury on first-degree sexual offense. The trial court’s instructions were proper where an officer saw blood on the victim’s lip and photographs showed that she suffered bruises on her ribs, arms and face. Additionally the victim was in pain for 4 or 5 days after the incident and due to her concerns regarding lack of safety the victim, terminated her lease and moved back in with her family. At the time of trial, roughly one year later, the victim still felt unsafe being alone. This was ample evidence of physical injury and lingering mental injury.

Kidnapping

[*State v. Knight*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 16, 2016). (1) Where a kidnapping indictment alleged that the defendant confined and restrained the victim for purposes of facilitating a forcible rape, the State was not required to prove both confinement and restraint. (2) In a case where the defendant was charged with sexual assault and kidnapping, there was sufficient evidence of restraint for purposes of kidnapping beyond that inherent in the assault charge. Specifically, the commission of the underlying sexual assault did not require the defendant to seize and restrain the victim and to carry her from her living room couch to her bedroom.

Disorderly Conduct

[*State v. Dale*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 16, 2016). The court rejected the defendant’s constitutional challenge to G.S. 14-132(a)(1), proscribing disorderly conduct in a public building or facility. Because the North Carolina Supreme Court has already decided that a statute “that is virtually identical” to the one at issue is not void for vagueness, the court found itself bound to uphold the constitutionality of the challenge the statute.