

Criminal Procedure

Counsel Issues

[*State v. Givens*](#), __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2016). In this murder case, trial counsel did not render ineffective assistance by failing to produce evidence, as promised in counsel's opening statement to the jury, that the shooting in question was justified or done in self-defense. After the trial court conducted a *Harbison* inquiry, defense counsel admitted to the jury that the defendant had a gun and shot the victim but argued that the evidence would show that the shooting was justified. The concession regarding the shooting did not pertain to a hotly disputed factual matter given that video surveillance footage of the events left no question as to whether the defendant shot the victim. The trial court's *Harbison* inquiry was comprehensive, revealing that the defendant knowingly and voluntarily consented to counsel's concession. The court also rejected the defendant's argument that making unfulfilled promises to the jury in an opening statement constitutes per se ineffective assistance of counsel. And it found that because counsel elicited evidence supporting a defense of justification, counsel did not fail to fulfill a promise made in his opening statement. The court stated: "Defense counsel promised and delivered evidence, but it was for the jury to determine whether to believe that evidence."

Jury Instructions

[*State v. Chavez*](#), __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2016). The trial court did not err by declining to instruct the jury on voluntary manslaughter. The trial judge instructed the jury on first- and second-degree murder but declined the defendant's request for an instruction on voluntary manslaughter. The jury found the defendant guilty of second-degree murder. The defendant argued that the trial court should have given the requested instruction because the evidence supported a finding that he acted in the heat of passion based on adequate provocation. The defendant and the victim had been involved in a romantic relationship. The defendant argued that he acted in the heat of passion as a result of the victim's verbal taunts and her insistence, shortly after they had sex, that he allow his cell phone to be used to text another man stating that the victim and the defendant were no longer in a relationship. The court rejected this argument, concluding that the victim's words, conduct, or a combination of the two could not serve as legally adequate provocation. Citing a North Carolina Supreme Court case, the court noted that mere words, even if abusive or insulting, are insufficient provocation to negate malice and reduce a homicide to manslaughter. The court rejected the notion that adequate provocation existed as a result of the victim's actions in allowing the defendant to have sex with her in order to manipulate him into helping facilitate her relationship with the other man. The court also noted that there was a lapse in time between the sexual intercourse, the victim's request for the defendant's cell phone and her taunting of him and the homicide. Finally the court noted that the defendant stabbed the victim 29 times, suggesting premeditation.

[*State v. Marshall*](#), __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2016). (1) In this case in which the defendant was convicted of several felonies, including attempted murder, assault with intent to kill, burglary, and numerous attempted sex offenses, the trial court did not err in responding to the deliberating jury's request that it explain the "legal definition of intent." The State proposed that the

court read to the jury the pattern instruction on intent, N.C.P.I. -Crim. 120. 10. This instruction includes a footnote setting out additional, optional instructions related to specific intent and general intent. The defendant was charged with multiple offenses, including both specific intent and general intent crimes. The defendant asked the trial court to read a special instruction pertaining only to specific intent and referencing only the charged crimes that required specific intent, omitting the charged general intent crimes. The State objected to the defendant's proposed instruction on grounds that it was too specific and did not answer the question that the jury asked. The trial court gave State's instruction, adding an additional sentence. The trial court's decision to give the State's instruction was well within its broad discretion. (2) The defendant failed to preserve for review language in the trial court's instruction on intent that deviated from the pattern instruction. Specifically, the defendant failed to object to the additional sentence when proposed by the trial court. The court noted that the defendant failed to argue plain error on appeal.

Probation Issues

[*State v. Jakeco Johnson*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 1, 2016). (1) The trial court erred by revoking the defendant's probation where the State failed to prove violations of the absconding provision in G.S. 15A-1343(b)(3a). The trial court found that the defendant "absconded" when he told the probation officer he would not report to the probation office and then failed to report as scheduled on the following day. This conduct does not rise to the level of absconding supervision; the defendant's whereabouts were never unknown to the probation officer. (2) The other alleged violations could not support a probation revocation, where those violations were "unapproved leaves" from the defendant's house arrest and "are all violations of electronic house arrest." This conduct was neither a new crime nor absconding. The court noted that the defendant did not make his whereabouts unknown to the probation officer, who was able to monitor the defendant's whereabouts via the defendant's electronic monitoring device.

[*State v. Nicholas Johnson*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 1, 2016). The trial court did not err by revoking the defendant's probation where the evidence showed that he willfully absconded. The defendant moved from his residence, without notifying or obtaining prior permission from his probation officer, willfully avoided supervision for multiple months, and failed to make his whereabouts known to his probation officer at any time thereafter.

[*State v. Peele*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 1, 2016). The trial court lacked subject matter jurisdiction to revoke the defendant's probation because the State failed to prove that the violation reports were timely filed. As reflected by the file stamps on the violation reports, they were filed after the expiration of probation in all three cases at issue.

Arrest, Search & Investigation

[*State v. Smith*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 1, 2016). No fourth amendment violation occurred when officers entered the defendant's driveway to investigate a shooting. When detectives

arrived at the defendant's property they found the gate to his driveway open. The officers did not recall observing a "no trespassing" sign that had been reported the previous day. After a backup deputy arrived, the officers drove both of their vehicles through the open gate and up the defendant's driveway. Once the officers parked, the defendant came out of the house and spoke with the detectives. The defendant denied any knowledge of a shooting and denied owning a rifle. However, the defendant's wife told the officers that there was a rifle inside the residence. The defendant gave verbal consent to search the home. In the course of getting consent, the defendant made incriminating statements. A search of the home found a rifle and shotgun. The rifle was seized but the defendant was not arrested. After leaving and learning that the defendant had a prior felony conviction from Texas, the officers obtained a search warrant to retrieve the other gun seen in his home and a warrant for the defendant's arrest. When officers returned to the defendant's residence, the driveway gate was closed and a sign on the gate warned "Trespassers will be shot exclamation!!! Survivors will be shot again!!!" The team entered and found multiple weapons on the premises. At trial the defendant unsuccessfully moved to suppress all of the evidence obtained during the detectives' first visit to the property and procured by the search warrant the following day. He pled guilty and appealed. The court rejected the defendant's argument that a "no trespassing" sign on his gate expressly removed an implied license to approach his home. While the trial court found that a no trespassing sign was posted on the day of the shooting, there was no evidence that the sign was present on the day the officers first visited the property. Also, there was no evidence that the defendant took consistent steps to physically prevent visitors from entering the property; the open gate suggested otherwise. Finally, the defendant's conduct upon the detectives' arrival belied any notion that their approach was unwelcome. Specifically, when they arrived, he came out and greeted them. For these reasons, the defendant's actions did not reflect a clear demonstration of an intent to revoke the implied license to approach. The court went on to hold that the officers' actions did not exceed the scope of a lawful knock and talk. Finally, it rejected the defendant's argument his fourth amendment rights were violated because the encounter occurred within the curtilage of his home. The court noted that no search of the curtilage occurs when an officer is in a place where the public is allowed to be for purposes of a general inquiry. Here, they entered the property by through an open driveway and did not deviate from the area where their presence was lawful.

Criminal Offenses

Sexual Assaults

[*State v. Marshall*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 1, 2016). The evidence was sufficient to convict the defendant of both attempted sex offense and attempted rape. The court rejected the defendant's argument that the evidence was sufficient to permit the jury to infer the intent to commit only one of these offenses. During a home invasion, the defendant and his brother isolated the victim from her husband. One of the perpetrators said, "Maybe we should," to which the other responded, "Yeah." The defendant's accomplice then forced the victim to remove her clothes and perform fellatio on him at gunpoint. The defendant later groped the victim's breast and buttocks and said, "Nice." At this point, the victim's husband, who had been confined elsewhere, fought back to protect his wife and was shot. This evidence is sufficient for a reasonable jury to infer that the defendant intended to engage in a

continuous sexual assault involving both fellatio (like his accomplice) and ultimately rape, and that this assault was thwarted only because the victim's husband sacrificed himself so that his wife could escape.

Kidnapping

[State v. Curtis](#), ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 1, 2016). Over a dissent, the court held that where the restraint and removal of the victims was separate and apart from an armed robbery that occurred at the premises, the trial court did not err by denying the defendant's motion to dismiss kidnapping charges. The defendant and his accomplices broke into a home where two people were sleeping upstairs and two others--Cowles and Pina-- were downstairs. The accomplices first robbed or attempted to rob Cowles and Pina and then moved them upstairs, where they restrained them while assaulting a third resident and searching the premises for items that were later stolen. The robberies or attempted robberies of Cowles and Pina occurred entirely downstairs; there was no evidence that any other items were demanded from these two at any other time. Thus, the court could not accept the defendant's argument that the movement of Cowles and Pina was integral to the robberies of them. Because the removal of Cowles and Pina from the downstairs to the upstairs was significant, the case was distinguishable from others where the removal was slight. The only reason to remove Cowles and Pina to the upstairs was to prevent them from hindering the subsequent robberies of the upstairs residents and no evidence showed that it was necessary to move them upstairs to complete those robberies. Finally, the court noted that the removal of Cowles and Pina to the upstairs subjected them to greater danger.