

Criminal Procedure

Jury Selection

[State v. Hurd](#), ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 15, 2016). In this capital murder case involving an African American defendant and victims, the trial court did not err by sustaining the State’s reverse *Batson* challenge. The defendant exercised 11 peremptory challenges, 10 against white and Hispanic jurors. The only black juror that the defendant challenged was a probation officer. The defendant’s acceptance rate of black jurors was 83%; his acceptance rate for white and Hispanic jurors was 23%. When the State raised a *Batson* challenge, defense counsel explained that he struck the juror in question, Juror 10, a white male, because he indicated that he favored capital punishment as a matter of disposition. Yet, the court noted, that juror also stated that being in the jury box made him “stop and think” about the death penalty, that he did not have strong feelings for or against the death penalty, and he considered the need for facts to support a sentence. Also, the defendant accepted Juror 8, a black female, whose views were “strikingly similar” to those held by Juror 10. Additionally, the defendant had unsuccessfully filed a pretrial motion to prevent the State from exercising peremptory strikes against any prospective black jurors. This motion was not made in response to any discriminatory action of record and was made in a case that is not inherently susceptible to racial discrimination. In light of the record, the court concluded that the trial court did not err by sustaining the State’s *Batson* objection.

Counsel Issues

[State v. Cook](#), ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 15, 2016). (1) In this murder case, counsel’s statement in closing argument did not exceed the scope of consent given by the defendant during a *Harbison* inquiry. In light of the *Harbison* hearing, the defendant knowingly, intelligently and voluntarily, and with full knowledge of the awareness of the possible consequences agreed to counsel’s concession that he killed the victim and had culpability for some criminal conduct. The court noted that counsel’s trial strategy was to argue that the defendant lacked the mental capacity necessary for premeditation and deliberation and therefore was not guilty of first-degree murder. (2) The *Harbison* standard did not apply to counsel’s comments regarding the “dreadfulness” of the crimes because these comments were not concessions of guilt. Considering these statements under the *Strickland* standard, the court noted that counsel pointed out to the jury that while the defendant’s crimes were horrible, the central issue was whether the defendant had the necessary mental capacity for premeditation and deliberation. The defendant failed to rebut the strong presumption that counsel’s conduct was reasonable. Additionally no prejudice was established given the overwhelming evidence of guilt.

Jury Argument

[State v. Hurd](#), ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 15, 2016). The State’s closing argument in this capital murder case was not grossly improper. During closing the prosecutor argued that the defendant had killed a named witness. Because the State introduce testimony of two witnesses that the defendant had told them that he had killed the only witness who could put them in the relevant location at the time of the murder, the State’s argument was not grossly improper.

Sentencing

[State v. Sydnor](#), ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 15, 2016). (1) The trial court erred when sentencing the defendant as a habitual felon by assigning prior record level points for an assault inflicting serious bodily injury conviction where that same offense was used to support the habitual misdemeanor assault conviction and establish the defendant's status as a habitual felon. "Although defendant's prior offense of assault inflicting serious bodily injury may be used to support convictions of habitual misdemeanor assault and habitual felon status, it may not also be used to determine defendant's prior record level." (2) The trial court's restitution award of \$5,000 was not supported by competent evidence.

Sex Offenders

[State v. Blue](#), ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 15, 2016). (1) The court rejected the defendant's argument that because SBM is a civil, regulatory scheme, it is subject to the Rules of Civil Procedure and that the trial court erred by failing to exercise discretion under Rule 62(d) to stay the SBM hearing. The court concluded that because Rule 62 applies to a stay of execution, it could not be used to stay the SBM hearing. (2) With respect to the defendant's argument that SMB constitutes an unreasonable search and seizure, the trial court erred by failing to conduct the appropriate analysis. The trial court simply acknowledged that SBM constitutes a search and summarily concluded that the search was reasonable. As such it failed to determine, based on the totality of the circumstances, whether the search was reasonable. The court noted that on remand the State bears the burden of proving that the SBM search is reasonable.

[State v. Morris](#), ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 15, 2016). The trial court erred by failing to conduct the appropriate analysis with respect to the defendant's argument that SMB constitutes an unreasonable search and seizure. The trial court simply acknowledged that SBM constitutes a search and summarily concluded that the search was reasonable. As such it failed to determine, based on the totality of the circumstances, whether the search was reasonable. The court noted that on remand the State bears the burden of proving that the SBM search is reasonable.

Arrest, Search & Investigation

Searches

[State v. Ladd](#), ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 15, 2016). In this peeping with a photographic device case, the trial court erred by denying the defendant's motion to suppress with respect to evidence obtained during a search of the defendant's external hard drives. The court rejected the notion that the defendant consented to a search of the external hard drives, concluding that while he consented to a search of his laptops and smart phone, the trial court's findings of fact unambiguously state that he did not consent to a search of other items. Next, the court held that the defendant had a reasonable expectation of privacy in the external hard drives, and that the devices did not pose a safety

threat to officers, nor did the officers have any reason to believe that the information contained in the devices would have been destroyed while they pursued a search warrant, given that they had custody of the devices. The court found that the Supreme Court's *Riley* analysis with respect to cellular telephones applied to the search of the digital data on the external data storage devices in this case, given the similarities between the two types of devices. The court concluded: "Defendant possessed and retained a reasonable expectation of privacy in the contents of the external data storage devices The Defendant's privacy interests in the external data storage devices outweigh any safety or inventory interest the officers had in searching the contents of the devices without a warrant."

Evidence

Confrontation Clause Issues

[State v. McLaughlin](#), ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 15, 2016). In this child sexual assault case, no confrontation clause violation occurred where the victim's statements were made for the primary purpose of obtaining a medical diagnosis. After the victim revealed the sexual conduct to his mother, he was taken for an appointment at a Children's Advocacy Center where a registered nurse conducted an interview, which was videotaped. During the interview, the victim recounted, among other things, details of the sexual abuse. A medical doctor then conducted a physical exam. A DVD of the victim's interview with the nurse was admitted at trial. The court held that the victim's statements to the nurse were nontestimonial, concluding that the primary purpose of the interview was to safeguard the mental and physical health of the child, not to create a substitute for in-court testimony. Citing *Clark*, the court rejected the defendant's argument that state law requiring all North Carolinians to report suspected child abuse transformed the interview into a testimonial one.

Hearsay Issues

[State v. Cook](#), ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 15, 2016). In this murder case, the trial court did not err by admitting hearsay testimony under the Rule 803(3) state of mind hearsay exception. The victim's statement that she "was scared of" the defendant unequivocally demonstrated her state of mind and was highly relevant to show the status of her relationship with the defendant on the night before she was killed.

[State v. McLaughlin](#), ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 15, 2016). In this child sexual assault case, the trial court did not err by admitting the victim's statements to his mother under the excited utterance exception. The court rejected the defendant's argument that a 10-day gap between the last incident of sexual abuse and the victim's statements to his mother put them outside the scope of this exception. The victim made the statements immediately upon returning home from a trip to Florida; his mother testified that when the victim arrived home with the defendant, he came into the house "frantically" and was "shaking" while telling her that she had to call the police. The court noted that greater leeway with respect to timing is afforded to young victims and that the victim in this case was 15 years old. However it concluded: "while this victim was fifteen rather than four or five years of age, he was nevertheless a minor and that fact should not be disregarded in the analysis." The court also rejected

the defendant's argument that because the victim had first tried to communicate with his father by email about the abuse, his later statements to his mother should not be considered excited utterances.

Opinions

[*State v. McLaughlin*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 15, 2016). In this child sexual assault case, the trial court rejected the defendant's argument that the State's expert witness was not qualified to give testimony under amended Rule 702. Because the defendant was indicted on April 11, 2011, the amendments to Rule 702 do not apply to his case.

Criminal Offenses

Drugs

[*State v. Miller*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 15, 2016). The defendant's due process rights were violated when he was convicted under G.S. 90-95(d1)(1)(c) (possession of pseudoephedrine by person previously convicted of possessing methamphetamine is a Class H felony). The defendant's due process rights "were violated by his conviction of a strict liability offense criminalizing otherwise innocuous and lawful behavior without providing him notice that a previously lawful act had been transformed into a felony for the subset of convicted felons to which he belonged." The court found that "the absence of any notice to [the defendant] that he was subject to serious criminal penalties for an act that is legal for most people, most convicted felons, and indeed, for [the defendant] himself only a few weeks previously [before the new law went into effect], renders the new subsection unconstitutional as applied to him." The court distinguished the statute at issue from those that prohibit selling illegal drugs, possessing hand grenades or dangerous assets, or shipping unadulterated prescription drugs, noting that the statute at issue criminalized possessing allergy medications containing pseudoephedrine, an act that citizens would reasonably assume to be legal. The court noted that its decision was consistent with *Wolf v. State of Oklahoma*, 292 P.3d 512 (2012). It also rejected the State's effort to analogize the issue to cases upholding the constitutionality of the statute prescribing possession of a firearm by a felon.