

Criminal Procedure

Speedy Trial

[State v. Kpaeyeh](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 5, 2016). In this child sexual abuse case, the defendant was not denied his right to a speedy trial. The more than three-year delay between indictment and trial is sufficiently long to trigger analysis of the remaining speedy trial factors. Considering those factors, the court found that the evidence “tends to show that the changes in the defendant’s representation caused much of the delay” and that miscommunication between the defendant and his first two lawyers, or neglect by these lawyers, also “seems to have contributed to the delay.” Also, although the defendant made pro se assertions of a speedy trial right, he was represented at the time and these requests should have been made by counsel. The court noted, however, that the defendant’s “failure of process does not equate to an absence of an intent to assert his constitutional right to a speedy trial.” Finally, the defendant failed to show prejudice caused by the delay. Given that DNA testing confirmed that he was the father of a child born to the victim, the defendant’s argument that the delay hindered his ability to locate alibi witnesses failed to establish prejudice.

Indictment Issues

[State v. Oxendine](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 5, 2016). (1) Over a dissent, the court held that an indictment charging possession of methamphetamine precursors was defective because it failed to allege either the defendant’s intent to use the precursors to manufacture methamphetamine or his knowledge that they would be used to do so. The indictment alleged only that the defendant processed the precursors in question; as such it failed to allege the necessary specific intent or knowledge. (2) An indictment charging manufacturing of methamphetamine was sufficient. The indictment alleged that the defendant “did knowingly manufacture methamphetamine.” It went on to state that the manufacturing consisted of possessing certain precursor items. The latter language was surplusage; an indictment need not allege how the manufacturing occurred.

[State v. Stith](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 5, 2016). (1) In this drug case, the court held, over a dissent, that an indictment charging the defendant with possessing hydrocodone, a Schedule II controlled substance, was sufficient to allow the jury to convict the defendant of possessing hydrocodone under Schedule III, based on its determination that the hydrocodone pills were under a certain weight and combined with acetaminophen within a certain ratio to bring them within Schedule III. The original indictment alleged that the defendant possessed “acetaminophen and hydrocodone bitartrate,” a substance included in Schedule II. Hydrocodone is listed in Schedule II. However, by the start of the trial, the State realized that its evidence would show that the hydrocodone possessed was combined with a non-narcotic such that the hydrocodone is considered to be a Schedule III substance. Accordingly, the trial court allowed the State to amend the indictment, striking through the phrase “Schedule II.” At trial the evidence showed that the defendant possessed pills containing hydrocodone bitartrate combined with acetaminophen, but that the pills were of such weight and combination to bring the hydrocodone within Schedule III. The court concluded that the jury did not convict the defendant of possessing an entirely different controlled substance than what was charged in the original

indictment, stating: “the original indictment identified the controlled substance ... as hydrocodone, and the jury ultimately convicted Defendant of possessing hydrocodone.” It also held that the trial court did not commit reversible error when it allowed the State to amend the indictment. The court distinguished prior cases, noting that here the indictment was not changed “such that the identity of the controlled substance was changed. Rather, it was changed to reflect that the controlled substance was below a certain weight and mixed with a non-narcotic (the identity of which was also contained in the indictment) to lower the punishment from a Class H to a Class I felony.” Moreover, the court concluded, the indictment adequately apprised the defendant of the controlled substance at issue. (2) The court applied the same holding with respect to an indictment charging the defendant with trafficking in an opium derivative, for selling the hydrocodone pills.

Discovery and Related Issues

[*State v. Stimson*](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 5, 2016). In this drug trafficking case, the trial court did not err in quashing a subpoena the defendant issued to a North Carolina Department of Revenue employee to testify at trial and produce “[a]ll documents related to the Unauthorized Substance Tax action against [defendant].” In part because the relevant statute in effect at the time provided that information obtained by the Department cannot be used in evidence in a criminal prosecution, the trial court did not abuse its discretion in quashing the subpoena.

Sentencing

De Novo Resentencing

[*State v. Watkins*](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 5, 2016). Because the court’s prior decision is properly construed as a general rather than a limited remand, the trial court erred by failing to conduct a de novo resentencing.

Satellite-Based Monitoring

[*State v. Kpaeyeh*](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 5, 2016). Because the defendant’s conviction for statutory rape, based on acts committed in 2005, cannot be considered a “reportable conviction,” the defendant was not eligible for satellite-based monitoring.

Post-Conviction

[*State v. Hallum*](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 5, 2016). The trial court did not have jurisdiction to resentence the defendant for obtaining property by false pretenses, where the defendant’s motion for appropriate relief (MAR), which was granted by the trial court, challenged only his conviction for possession of stolen goods, a separate CRS case that was not consolidated with the fraud conviction.

Evidence

Relevancy and Its Limits

[*State v. Moultry*](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 5, 2016). In this case involving second-degree murder arising out of a vehicle collision, the trial court did not err by admitting staged photographs into evidence. An expert in crash investigation and reconstruction explained to the jury, without objection, how the accident occurred. The photographs were relevant as visual aids to this testimony. Furthermore, the trial court gave a limiting instruction explaining that the photographs were only to be used for the purpose of illustrating the witness's testimony.

404(b) Evidence

[*State v. Watts*](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 5, 2016). In this child sexual assault case, the court held, over a dissent, that the trial court committed reversible error by admitting 404(b) evidence. The evidence involved allegations by another person—Buffkin—that resulted in the defendant being charged with rape and breaking or entering, charges which were later dismissed. The court held that the trial court erred by determining that the evidence was relevant to show opportunity, explaining: “there is no reasonable possibility that Buffkin’s testimony concerning an alleged sexual assault eight years prior was relevant to show defendant’s opportunity to commit the crimes now charged.” The court further found that the evidence was not sufficiently similar to show common plan or scheme. The similarities noted by the trial court—that both instances involved sexual assaults of minors who were alone at the time, the defendant was an acquaintance of both victims, the defendant’s use of force, and that the defendant threatened to kill each minor and the minor’s family—were not “unusual to the crimes charged.” Moreover, “the trial court’s broad labeling of the similarities disguises significant differences in the sexual assaults,” including the ages of the victims, the circumstances of the offenses, the defendant’s relationships with the victims, and that a razor blade was used in the Buffkin incident but that no weapon was used in the incident in question.

Opinion Testimony

[*State v. Watts*](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 5, 2016). The defendant did not establish plain error with respect to his claim that the State’s expert vouched for the credibility of the child sexual assault victim. The expert testified regarding the victim’s bruises and opined that they were the result of blunt force trauma; when asked whether the victim’s account of the assault was consistent with her medical exam, she responded that the victim’s “disclosure supports the physical findings.” This testimony did not improperly vouch for the victim’s credibility and amount to plain error. Viewed in context, the expert was not commenting on the victim’s credibility; rather she opined that the victim’s disclosure was not inconsistent with the physical findings or impossible given the physical findings.

Arrest, Search and Investigation Stop & Frisk

[*State v. James Johnson*](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 5, 2016). Because a police officer lacked reasonable suspicion for a traffic stop in this DWI case, the trial court erred by denying the defendant’s

motion to suppress. While on routine patrol, the officer observed the defendant's truck stopped at a traffic light waiting for the light to change. The defendant revved his engine and when the light changed to green, abruptly accelerated into a left-hand turn. Although his vehicle fishtailed, the defendant regained control before it struck the curb or left the lane of travel. The officer was unable to estimate the speed of the defendant's truck. Snow was falling at the time and slush was on the road. These facts do not support the conclusion that the officer had reasonable suspicion that the defendant committed a violation of unsafe movement or traveling too fast for the conditions.

[*State v. Taseen Johnson*](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 5, 2016). (1) In this drug trafficking case, the officer had reasonable suspicion to extend a traffic stop. After Officer Ward initiated a traffic stop and asked the driver for his license and registration, the driver produced his license but was unable to produce a registration. The driver's license listed his address as Raleigh, but he could not give a clear answer as to whether he resided in Brunswick County or Raleigh. Throughout the conversation, the driver changed his story about where he resided. The driver was speaking into one cell phone and had two other cell phones on the center console of his vehicle. The officer saw a vehicle power control (VPC) module on the floor of the vehicle, an unusual item that might be associated with criminal activity. When Ward attempted to question the defendant, a passenger, the defendant mumbled answers and appeared very nervous. Ward then determined that the driver's license was inactive, issued him a citation and told him he was free to go. However, Ward asked the driver if he would mind exiting the vehicle to answer a few questions. Officer Ward also asked the driver if he could pat him down and the driver agreed. Meanwhile, Deputy Arnold, who was assisting, observed a rectangular shaped bulge underneath the defendant's shorts, in his crotch area. When he asked the defendant to identify the item, the defendant responded that it was his male anatomy. Arnold asked the defendant to step out of the vehicle so that he could do a patdown; before this could be completed, a Ziploc bag containing heroin fell from the defendant's shorts. The extension of the traffic stop was justified: the driver could not answer basic questions, such as where he was coming from and where he lived; the driver changed his story; the driver could not explain why he did not have his registration; the presence of the VPC was unusual; and the defendant was extremely nervous and gave vague answers to the officer's questions. (2) The officer properly frisked the defendant. The defendant's nervousness, evasiveness, and failure to identify what was in his shorts, coupled with the size and nature of the object supported a reasonable suspicion that the defendant was armed and dangerous.

Criminal Offenses

Frauds

[*State v. Hallum*](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 5, 2016). (1) The trial court did not err by denying the defendant's motion to dismiss a charge of obtaining property by false pretenses. The indictment alleged that the defendant obtained US currency by selling to a company named BIMCO electrical wire that was falsely represented not to have been stolen. The defendant argued only that there was insufficient evidence that his false representation in fact deceived any BIMCO employee. He argued that the evidence showed that BIMCO employees were indifferent to legal ownership of scrap metal purchased by them and that they employed a "nod and wink system" in which no actual

deception occurred. However, the evidence included paperwork signed by the defendant representing that he was the lawful owner of the materials sold and showed that based on his representation, BIMCO paid him for the materials. From this evidence, it logically follows that BIMCO was in fact deceived. Any conflict in the evidence was for the jury to decide. (2) The trial court erred by instructing the jury on acting in concert with respect to an obtaining property by false pretenses charge where there was a “complete lack of evidence ... that anyone but defendant committed the acts necessary to constitute the crime.” However, because all the evidence showed that the defendant was the sole perpetrator of the crime, no prejudice occurred.

Sexual Assaults

[*State v. Kpaeyeh*](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 5, 2016). The trial court did not err by denying the defendant’s motion to dismiss a charge of taking indecent liberties with a child. The victim testified that the defendant repeatedly raped her while she was a child living in his house and DNA evidence confirmed that he was the father of her child. The defendant argued that there was insufficient evidence of a purpose to arouse or gratify sexual desire; specifically he argued that evidence of vaginal penetration is insufficient by itself to prove that the rape occurred for the purpose of arousing or gratifying sexual desire. The court rejected the argument that the State must always prove something more than vaginal penetration in order to satisfy this element of indecent liberties. The trial court correctly allowed the jury to determine whether the evidence of the defendant’s repeated sexual assaults of the victim were for the purpose of arousing or gratifying sexual desire.

Weapons Offenses

[*State v. Bonetsky*](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 5, 2016). The court rejected the defendant’s contention that the possession of a firearm by a felon statute was unconstitutional as applied to him. Although rejecting the defendant’s challenge, the court agreed that the trial court erred when it found that the defendant’s 1995 Texas drug trafficking conviction “involve[d] a threat of violence.” The trial court also erred by concluding that the remoteness of the 1995 Texas conviction should be assessed from the point that the defendant was released from prison--13 years ago--instead of the date of the conviction-- 18 years ago. The court went on to find that because the defendant’s right to possess a firearm in North Carolina was never restored, he had no history of responsible, lawful firearm possession. And it found that the trial court did not err by concluding that the defendant failed to assiduously and proactively comply with the 2004 amendment to the firearm statute. The court rejected the defendant’s argument that this finding was erroneous because there was no reason to believe that the defendant was on notice of the 2004 amendment, noting that it has never held that a defendant’s ignorance of the statute’s requirement should weigh in the defendant’s favor when reviewing an as applied challenge. Finally, the court held that even though the trial court erred with respect to some of its analysis, the defendant’s as applied challenge failed as a matter of law, concluding:

Defendant had three prior felony convictions, one of which was for armed robbery and the other two occurred within the past two decades; there is no relevant time period in which he could have *lawfully* possessed a firearm in North Carolina; and, as a convicted

felon, he did not take proactive steps to make sure he was complying with the laws of this state, specifically with the 2004 amendment to [the statute]. (footnote omitted).

Drug Offenses

[State v. Garrett](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 5, 2016). (1) The court reversed the defendant's conviction for possession with intent to sell or deliver methamphetamine, concluding that the State failed to present substantial evidence of constructive possession. The case arose out of a controlled drug buy. However the State's evidence showed that "at nearly all relevant times" two other individuals—Fisher and Adams--were in actual possession of the methamphetamine. The defendant led Fisher and Adams to a trailer to purchase the drugs. The defendant entered the trailer with Fisher and Adams' money to buy drugs. Adams followed him in and ten minutes later Adams returned with the methamphetamine and handed it to Fisher. This evidence was insufficient to establish constructive possession. (2) The trial court did not err by denying the defendant's motion to dismiss a charge of conspiracy to sell methamphetamine, given the substantial evidence of an implied understanding among the defendant, Fisher, and Adams to sell methamphetamine to the informants. The informants went to Fisher to buy the drugs. The group then drove to the defendant's house where Fisher asked the defendant for methamphetamine. The defendant said that he didn't have any but could get some. The defendant led Fisher and Adams to the trailer where the drugs were purchased. (3) The trial court did not err by denying the defendant's motion to dismiss the charge of possession of drug paraphernalia. When the arresting officer approached the vehicle, the defendant was sitting in the back seat and did not immediately show his hands at the officer's request. Officers subsequently found the glass pipe on the rear floor board of the seat where the defendant was sitting. The defendant admitted that he smoked methamphetamine out of the pipe while in the car. Additionally Fisher testified that the pipe belonged to the defendant and the defendant had been carrying it in his pocket.