

Criminal Procedure

Indictment Issues

[*State v. Hill*](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 3, 2016). (1) Fatal variance issues not raised at trial are waived on appeal. (2) Exercising discretion to consider one such argument with respect to a theft of money and an iPod from a frozen yogurt shop, the court held that a fatal variance existed. The State alleged that the property belonged to Tutti Frutti, LLC, but it actually belonged to Jason Wei, the son of the sole member of that company, and the State failed to show that Tutti Frutti was in lawful custody and possession of Wei's property when it was stolen. It clarified: "there is no fatal variance between an indictment and the proof at trial if the State establishes that the alleged owner of stolen property had lawful possession and custody of the property, even if it did not actually own the property." (3) The court rejected the defendant's fatal variance argument regarding injury to real property charges, noting that the North Carolina Supreme Court recently held that an indictment charging this crime need only identify the real property, not its owner.

Jury Instructions

[*State v. Singletary*](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 3, 2016). The trial court did not err by denying the defendant's request for a jury instruction on the testimony of an interested witness (N.C.P.I.-Crim. 104.20), where it gave a different instruction leaving "no doubt that it was the jury's duty to determine whether the witness was interested or biased."

Sentencing

[*State v. Singletary*](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 3, 2016). In this sexual offense with a child by adult offender case, the State conceded, and the court held, that the trial court violated the defendant's sixth amendment right to a trial by jury by sentencing him under G.S. 14-27.4A(c) to a term above that normally provided for a Class B1 felony on the trial court's own determination, and without notice, that egregious aggravation existed. G.S. 14-27.4A(c) provides that a defendant may be sentenced to an active term above that normally provided for a Class B1 felony if the judge finds egregious aggravation. The court held that the statutory sentencing scheme at issue was unconstitutional under the *Apprendi/Blakely* rule. See *Blakely v. Washington*, 542 U.S. 296 (2004) (holding that any factor, other than a prior conviction, that increases punishment beyond the prescribed statutory maximum must be submitted to the jury and proved beyond a reasonable doubt). Specifically, the statute fails to require notice that "egregious aggravation" factors may be used, does not require that such aggravation be proved beyond a reasonable doubt and does not provide any mechanism for submitting such factors to a jury. The court rejected the State's argument that under G.S. 14-27.4A, the trial court may submit egregious aggravation factors to a jury in a special verdict, concluding, in part, that the statute explicitly gives only "the court," and not the jury, the ability to determine whether the nature of the offense and the harm inflicted require a sentence in excess of what is otherwise permitted by law. Because the defendant did not challenge that portion of the statute setting a 300-month mandatory minimum

sentence, the court did not address the constitutionality of that provision. The court remanded for resentencing.

[*State v. James*](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 3, 2016). (1) In this murder case where the defendant, who was a juvenile at the time of the offense, was resentenced to life in prison without parole under the State's *Miller*-compliant sentencing scheme (G.S. 15A-1340.19A et seq.), the court rejected the defendant's argument that his resentencing under this scheme violated the prohibition on ex post facto laws. Although the relevant statute was enacted after the defendant committed his offense, he was not disadvantaged by its application; under the new statute the harshest penalty remains life without parole, but the trial court has the option of imposing a lesser sentence of life imprisonment with parole. (2) The court rejected the defendant's argument that G.S. 15A-1340.19A et seq. violates the constitutional guarantees against cruel and unusual punishment because it presumptively favors a sentence of life without parole for juveniles convicted of first-degree murder and therefore the risk of disproportionate punishment is as great as it was under the old statute, which mandated a sentence of life without parole for juveniles convicted of such a crime. It concluded: "we hold it is not inappropriate, much less unconstitutional, for the sentencing analysis in N.C. Gen. Stat. § 15A-1340.19A et seq. to begin with a sentence of life without parole and require the sentencing court to consider mitigating factors to determine whether the circumstances are such that a juvenile offender should be sentenced to life with parole instead of life without parole. Life without parole as the starting point in the analysis does not guarantee it will be the norm." (3) The court rejected the defendant's argument that G.S. 15A-1340.19A et seq. deprived him of due process because the law is unconstitutionally vague and will lead to arbitrary sentencing decisions for juvenile offenders. (4) The trial court failed to make adequate findings of fact to support its decision to impose a sentence of life without parole. Specifically, it failed to "include findings on the absence or presence of any mitigating factors" as mandated by the statute. The court remanded for further sentencing proceedings.

[*State v. Hill*](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 3, 2016). An award of restitution that included restitution from a larceny for which the defendant was acquitted was improper.

Arrest, Search and Investigation

Traffic Stops

[*State v. Bedient*](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 3, 2016). (1) In this post-*Rodriguez* case, the court held that because no reasonable suspicion existed to prolong the defendant's detention once the purpose of a traffic stop had concluded, the trial court erred by denying the defendant's motion to suppress evidence obtained as a result of a consent search of her vehicle during the unlawful detention. The court found that the evidence showed only two circumstances that could possibly provide reasonable suspicion for extending the duration of the stop: the defendant was engaging in nervous behavior and she had associated with a known drug dealer. It found the circumstances insufficient to provide the necessary reasonable suspicion. Here, the officer had a legitimate basis for the initial traffic stop: addressing the defendant's failure to dim her high beam lights. Addressing this infraction was the original mission of the traffic stop. Once the officer provided the defendant with a warning on the use of

high beams, the original mission of the stop was concluded. Although some of his subsequent follow-up questions about the address on her license were supported by reasonable suspicion (regarding whether she was in violation of state law requiring a change of address on a drivers license), this “new mission for the stop” concluded when the officer decided not to issue her a ticket in connection with her license. At this point, additional reasonable suspicion was required to prolong the detention. The court agreed with the defendant that her nervousness and association with a drug dealer did not support a finding of reasonable suspicion to prolong the stop. Among other things, the court noted that nervousness, although a relevant factor, is insufficient by itself to establish reasonable suspicion. It also concluded that “a person’s mere association with or proximity to a suspected criminal does not support a conclusion of particularized reasonable suspicion that the person is involved in criminal activity without more competent evidence.” These two circumstances, the court held, “simply give rise to a hunch rather than reasonable, particularized suspicion.” (2) The defendant’s consent to search the vehicle was not obtained during a consensual encounter where the officer had not returned the defendant’s drivers license at the time she gave her consent.

[*State v. Castillo*](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 3, 2016). (1) In this post-*Rodriguez* case, the court held that reasonable suspicion supported the officer’s extension of the duration of the stop, including: the officer smelled marijuana on the defendant’s person, the officer learned from the defendant him that he had an impaired driving conviction based on marijuana usage, the defendant provided a “bizarre” story regarding the nature of his travel, the defendant was extremely nervous, and the officer detected “masking odors.” (2) The defendant’s consent to search his car, given during a lawful extension of the stop, was clear and unequivocal.

Evidence

Opinions

[*State v. Hill*](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 3, 2016). In this case involving breaking and entering, larceny and other charges, the trial court did not err by failing to exclude the testimony of two law enforcement officers who identified the defendant in a surveillance video. The officers were familiar with the defendant and recognized distinct features of his face, posture, and gait that would not have been evident to the jurors. Also, because the defendant’s appearance had changed between the time of the crimes and the date of trial, the officer’s testimony helped the jury understand his appearance at the time of the crime and its similarity to the person in the surveillance videos.

Cross-Examination

[*State v. Singletary*](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 3, 2016). The trial court erred by preventing the defendant from making any inquiry into the compensation paid to the State’s expert witness. “The source and amount of a fee paid to an expert witness is a permissible topic for cross-examination, as it allows the opposing party to probe the witnesses’ partiality, if any, towards the party by whom the expert was called.” However, the defendant failed to show “harmful prejudice.”

Criminal Offenses

Child Abuse

[State v. Watkins](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 3, 2016). The evidence was sufficient to survive the defendant's motion to dismiss a misdemeanor child abuse charge under G.S. 14-318.2(a). The case arose from an incident in which the defendant left her young child unattended in a vehicle on a cold day. The State proceeded on the theory that she had created or allowed to be created a substantial risk of physical injury to the child. The court found the evidence sufficient, noting that she left the child, who was under 2 years old, alone and helpless and outside of her line of sight for over 6 minutes inside a vehicle with one of its windows rolled more than halfway down in 18° weather with accompanying sleet, snow and wind. It concluded: "Given the harsh weather conditions, [the child's] young age, and the danger of him will being abducted (or of physical harm being inflicted upon him) due to the window being open more than halfway, we believe a reasonable juror could have found that Defendant 'created a substantial risk of physical injury' to him by other than accidental means."