

## **Criminal Procedure**

### **Counsel Issues**

[State v. Garrison](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Aug. 2, 2016). Because the trial court did not take a proper of waiver of counsel, the defendant was entitled to a new trial. The State conceded error, noting that the defendant had not been advised of the range of permissible punishments as required by G.S. 15A-1242.

[State v. Burrow](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Aug. 2, 2016). In this attempted felony breaking or entering and habitual felon case, the court rejected the defendant's argument that he received ineffective assistance of counsel because his trial counsel did not attempt to introduce certain items into evidence. The defendant failed to show that counsel's performance was deficient or that he was prejudiced by counsel's action.

[State v. Gates](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Aug. 2, 2016). In this sex offense case, the court rejected the defendant's argument that he received ineffective assistance of counsel when counsel failed to object to 404(b) evidence that was properly admitted.

### **Indictment Issues**

[State v. Gates](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Aug. 2, 2016). In this second-degree sex offense case, the court vacated and remanded for entry of judgment on attempted sexual offense where the indictment charged the defendant only with an attempted, not a completed, sex offense. The indictment, labeled "Second Degree Sexual Offense," alleged that the defendant "did attempt to engage in a sex offense with the victim." Notwithstanding this, the trial court instructed the jury on the completed offense and provided no instruction on attempt.

### **Motions to Suppress—Procedure**

[State v. Smith](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Aug. 2, 2016). The trial court did not err by denying the defendant's motion to suppress as untimely under G.S. 15A-976 where the defendant failed to file the motion within the requisite time following receipt of the State's notice.

### **Jury Deliberations**

[State v. Lee](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Aug. 2, 2016). The court rejected the defendant's argument that the trial court committed plain error by requiring a jury to deliberate for an unreasonable length of time. Jury deliberations began at 2:15 pm. At 8:43 pm the jury sent a note indicating that it was deadlocked. Several minutes later, and with defense counsel's consent, the trial court gave an *Allen* instruction. At 10:50 pm the trial court returned the jury to the courtroom and requested an update on deliberations. The foreperson indicated that the jury was a lot closer "than the first time." Both parties agreed to let deliberations resume. The jury returned a verdict at 11:34 pm. The court rejected the

defendant's argument that by allowing the jury to continue deliberations until nearly midnight it violated G.S. 15A-1235(c). When the trial court allowed the jury to continue deliberating at 10:50 pm the statute was not implicated because it no longer appeared that the jury was unable to agree.

### **Contempt**

[\*State v. Burrow\*](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Aug. 2, 2016). The trial court did not err by imposing consecutive sentences for multiple findings of contempt. The trial court had sentenced the defendant to six consecutive 30-day terms of imprisonment based on six findings of direct criminal contempt.

### **Sentencing**

[\*State v. Lee\*](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Aug. 2, 2016). Because the trial court did not depart from the presumptive range in sentencing the defendant, it was not required to make any findings regarding mitigation. The court rejected the defendant's argument that the trial court erroneously failed to "consider" evidence of mitigating factors proved by the State's own evidence.

### **Probation Revocation**

[\*State v. Hancock\*](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Aug. 2, 2016). The trial court properly revoked the defendant's probation, where the defendant committed a new crime while on probation.

### **Attorney's Fees**

[\*State v. Charleston\*](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Aug. 2, 2016). The trial court did not err by assigning attorney's fees to the judgment against the defendant for possession of a firearm by a felon, the payment of which was a condition of the defendant's probation for that conviction. The defendant argued that the fees should have been assigned to the judgment for discharging a weapon into an occupied dwelling, for which the defendant received a jail sentence and the fees would have been docketed as a civil lien.

### **Arrest, Search and Investigation** **Searches**

[\*State v. Cobb\*](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Aug. 2, 2016). In this drug case, the court held that the defendant's consent to search his room in a rooming house was voluntarily given. The court rejected the defendant's argument that he was in custody at the time consent was given. There was no evidence that the defendant's movements were limited by the officers during the encounter. Also, the officers did not supervise the defendant while they were in the home; rather, they simply followed the defendant to his room after he gave consent to search.

[State v. Marrero](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Aug. 2, 2016). In this drug case, the trial court properly denied a motion to suppress where no illegal seizure of the defendant occurred during a knock and talk and where exigent circumstances justified the officers' warrantless entry into the defendant's home. The court rejected the defendant's argument that he was illegally seized during a knock and talk because he was coerced into opening the front door. The officers knocked on the front door a few times and stated that they were with the police only once during the 2-3 minutes it took the defendant to answer the door. There was no evidence that the defendant was aware of the officer's presence before he opened the door. Blue lights from nearby police cars were not visible to the defendant and no takedown lights were used. The officers did not try to open the door themselves or demand that it be opened. The court concluded: "the officers did not act in a physically or verbally threatening manner" and no seizure of defendant occurred during the knock and talk. (2) Exigent circumstances supported the officers' warrantless entry into the defendant's home (the defendant did not challenge the existence of probable cause). Officers arrived at the defendant's residence because of an informant's tip that armed suspects were going to rob a marijuana plantation located inside the house. When the officers arrived for the knock and talk, they did not know whether the robbery had occurred, was in progress, or was imminent. As soon as the defendant open his door, an officer smelled a strong odor of marijuana. Based on that odor and the defendant's inability to understand English, the officer entered the defendant's home and secured it in preparation for obtaining a search warrant. On these facts, the trial court did not err in concluding that exigent circumstances warranted a protective sweep for officer safety and to ensure the defendant or others would not destroy evidence.

[State v. Pigford](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Aug. 2, 2016). In this drug case, the court held, deciding an issue of first impression, that an odor of marijuana emanating from inside a vehicle stopped at a checkpoint did not provide an officer with probable cause to conduct an immediate warrantless search of the driver. The defendant was driving the stopped vehicle; a passenger sat in the front seat. The officer was unable to establish the exact location of the odor but determined that it was coming from inside the vehicle. Upon smelling the odor, the officer ordered the defendant out of the vehicle and searched him, finding cocaine and other items. On appeal the defendant argued that although the officer smelled marijuana emanating from the vehicle, there was no evidence that the odor was attributable to the defendant personally. It was not contested that the officer had probable cause to search the vehicle. Probable cause to search a vehicle however does not justify search of a passenger. The State offered no evidence that the marijuana odor was attributable to the defendant. The court held: the officer "may have had probable cause to search the vehicle, but he did not have probable cause to search defendant."

### **Checkpoints**

[State v. Ashworth](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Aug. 2, 2016). In this impaired driving case, the trial court erred by denying the defendant's motion to suppress, which had asserted that a checkpoint stop violated his constitutional rights. When considering a constitutional challenge to a checkpoint, a two-part inquiry applies: the court must first determine the primary programmatic purpose of the checkpoint; if a legitimate primary programmatic purpose is found the court must judge its

reasonableness. The defendant did not raise an issue about whether the checkpoint had a proper purpose. The court noted when determining reasonableness, it must weigh the public's interest in the checkpoint against the individual's fourth amendment privacy interest. Applying the *Brown v. Texas* three-part test (gravity of the public concerns served by the seizure; the degree to which the seizure advances the public interest; and the severity of the interference with individual liberty) to this balancing inquiry, the court held that the trial court's findings of fact did not permit the judge to meaningfully weigh the considerations required under the second and third prongs of the test. This constituted plain error.

## **Evidence**

### **Relevancy**

[State v. Young](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Aug. 2, 2016). The court rejected the defendant's argument that two photos from a photo line-up were irrelevant. The victims had identified the photographs during a photo lineup as depicting the perpetrator. The photographs were admitted as substantive evidence and published to the jury at trial without objection. The court rejected the defendant's argument that the photos were irrelevant where no witness testified that the defendant was in fact the person depicted in them. The court found that the photographs were properly authenticated by testifying witnesses and the jury "was well able" to look at them and to look at the defendant in the courtroom and draw their own conclusions about whether he was the person depicted.

### **Opinion Testimony**

[State v. Abrams](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Aug. 2, 2016). In this drug case, the trial court did not abuse its discretion by admitting expert testimony identifying the substance at issue as marijuana. At trial, Agent Baxter, a forensic scientist with the N.C. State Crime Lab, testified that she examined the substance, conducted relevant tests, and that the substance was marijuana. The *Daubert* test requires the court to evaluate qualifications, relevance and reliability. In the instant case, the defendant did not dispute Baxter's credentials or the relevancy of her testimony; he challenged only its reliability. The court noted that *Daubert* articulated five factors from a nonexhaustive list that can bear on reliability. Those factors however are part of a flexible inquiry and do not form a definitive checklist or test; the trial court is free to consider other factors that may help assess reliability. Additionally, Rule 702 does not mandate any particular procedural requirements for the trial court when exercising its gatekeeping function over expert testimony. Here, Baxter's testimony established that she analyzed the substance in accordance with State Lab procedures, providing detailed testimony regarding each step in her process. The court concluded: "Based on her detailed explanation of the systematic procedure she employed to identify the substance ..., a procedure adopted by the N.C. Lab specifically to analyze and identify marijuana, her testimony was clearly the 'product of reliable principles and methods' sufficient to satisfy ... Rule 702(a)." The court went on to reject the defendant's argument that Baxter's testimony did not establish that she applied the principles and methods reliably to the facts of the case.

[\*State v. Daughtridge\*](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Aug. 2, 2016). (1) In this murder and possession of a firearm by a felon case, the trial court did not commit plain error by allowing the admission of an investigator's testimony concerning the defendant's demeanor. At trial, the investigator, who had interviewed the defendant, was asked to clarify why he thought that the defendant's earlier statement didn't "add up." The investigator noted the defendant's demeanor testifying, among other things, that the defendant did not express emotion when talking about his wife's alleged suicide. The court rejected the defendant's argument that the statements constituted impermissible lay opinions under Rule 701. Rather, it concluded that in context, the investigator was simply explaining the steps he took in his ongoing investigation; his statements expressing skepticism over the defendant's account served merely to provide context explaining his rationale for subjecting the defendant to further scrutiny. The court further rejected the defendant's argument that the investigator's testimony regarding certain text messages sent from the victim's phone also constituted improper lay opinion testimony. The investigator examined these messages to determine whether the victim's death was a suicide. Like the investigator's other testimony, this testimony provided context for his decision-making regarding the investigation; his testimony explained why he conducted a homicide investigation rather than concluding that the victim's death was a suicide. Regarding the investigator's testimony that the defendant "was deceptive," the court concluded that because the statements were elicited by the defense on cross examination the invited error doctrine applied. (2) Applying the *Daubert* standard, the court held that the trial court improperly allowed a medical examiner to testify that the victim's death was a homicide, when that opinion was based not on medical evidence but rather on non-medical information provided to the expert by law enforcement officers. However, the error did not rise to the level of plain error.

### **Victim Impact Evidence**

[\*State v. Charleston\*](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Aug. 2, 2016). Although the trial court erred by admitting victim impact evidence during the guilt-innocence phase of the trial, in light of the extensive evidence of the defendant's guilt, the error did not constitute plain error.

### **Admissibility of Medical Records**

[\*State v. Smith\*](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Aug. 2, 2016). The court rejected the defendant's argument that the trial court erred by admitting his medical records into evidence. The court began by rejecting the defendant's argument that under the plain language of the physician-patient privilege statute, G.S. 8-53, disclosure of a patient's medical records may be compelled only by judicial order after determination that such disclosure is necessary to a proper administration of justice. No authority suggests that this statute provides the exclusive means of obtaining patient medical records. G.S. 90-21.20B allows law enforcement to obtain such records through a search warrant and permits disclosure of protected health information notwithstanding G.S. 8-53. Next the court rejected the defendant's argument that G.S. 90-21.20B did not permit the disclosure to law enforcement and use at trial of the medical records.

## **Criminal Offenses**

### **Conspiracy**

[State v. Young](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Aug. 2, 2016). There was sufficient evidence of conspiracy to commit armed robbery. Although circumstantial, the evidence supported the inference that the defendant and his accomplices agreed to commit the robbery and other unlawful acts.

### **Kidnapping**

[State v. James](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Aug. 2, 2016). The trial court properly denied the defendant's motion to dismiss a first-degree kidnapping charge. (1) The restraint of the victim was not inherent in the also charged offense of assault by strangulation. The evidence showed two separate, distinct restraints sufficient to support the two offenses. After the initial restraint when the defendant choked the victim into unconsciousness, leaving her unresponsive on the ground, he continued to restrain her by holding her hair, wrapping his arm around her neck, and dragging her to a new location 100 to 120 feet away. (2) There was sufficient evidence that the defendant removed the victim for the purpose of terrorizing her where multiple witnesses heard the defendant threaten to kill her in broad daylight. The defendant assaulted the victim, placed her in headlock, and choked her. Evidence showed that the victim was in a state of intense fright and apprehension; several witnesses heard her yelling for help. (3) The defendant did not leave the victim in a safe place where he dragged her to the middle of a gravel driveway and left her, unconscious and injured. The defendant did not consign her to the care of the witnesses who happened to be nearby; he was running away because they saw him. Additionally, the defendant took one of her cell phones, perhaps not realizing that she had a second phone. Additionally, the statute requires finding either that the victim was not left in a safe place or that the victim suffered serious injury (or sexual assault, not at issue here). Here, the State's evidence established that the victim suffered serious injury requiring emergency room treatment, as well as serious emotional trauma which required therapy for many months continuing through the time of trial. (3) The trial court did not err by failing to instruct the jury on the lesser-included offense of false imprisonment where substantial evidence showed that the defendant threatened and terrorized the victim.

### **Discharging a Firearm into Occupied Property**

[State v. Charleston](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Aug. 2, 2016). (1) The trial court did not err by denying the defendant's motion to dismiss a charge of discharging a firearm into occupied property. The trial court improperly instructed the jury that it had to find that the defendant knew or had reasonable grounds to believe that the dwelling *was* occupied; this instruction raised the evidentiary bar for the State, as this offense only requires proof that the defendant had reasonable grounds to believe that the building *might be* occupied. The court rejected the defendant's argument that the State was bound by the higher standard stated in the jury instruction. Evidence that the shooting occurred in a residential neighborhood in the evening and resident's car was parked outside of her home sufficiently established that the defendant knew or had reasonable grounds to believe that the dwelling might be occupied. (2)

The court rejected the defendant's argument that the trial court's jury instruction on discharging a firearm into occupied property was an improper disjunctive instruction. The defendant was indicted for firing into the home of Ms. Knox. At trial, all the evidence pertains to Knox's home. The trial court's jury instruction referred to discharging a firearm "into a dwelling," without specifying Knox's home. The jury instruction was not phrased in the disjunctive nor did it have "the practical effect of disjunctive instruction," as argued by the defendant.

### **Breaking or Entering a Motor Vehicle**

[State v. Covington](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Aug. 2, 2016). The trial court did not commit plain error by failing to instruct the jury on first-degree trespass as a lesser-included of breaking or entering a motor vehicle. Although the defendant argued that he may have broken into the vehicle in order to sleep and thus lacked the intent to commit a larceny therein, no evidence supported that argument.

### **Defenses**

#### **Duress**

[State v. Burrow](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Aug. 2, 2016). In this attempted felony breaking or entering and habitual felon case, the trial court did not err by denying the defendant's request to instruct the jury on duress. To be entitled to an instruction on duress, a defendant must present evidence that he feared he would suffer immediate death or serious bodily injury if he did not act. Moreover, duress cannot be invoked as an excuse by someone who had a reasonable opportunity to avoid doing the act without undue exposure to death or serious bodily harm. Here, the evidence showed that the defendant's accomplice drove the defendant's vehicle to the home in question while the defendant was a passenger. The accomplice, carrying a knife, and the defendant, carrying a lug wrench walked to the premises. After realizing that the resident was taking their pictures, both fled. When asked if he attempted to get away from his accomplices at any point, the defendant testified only that his accomplices "pretty much had control of my car;" he also testified that at some point he "did get scared" of his accomplices because they talked about stealing his truck. He admitted however that they never pulled a weapon on him. Additionally, although the defendant argued that his accomplices held him against his will for several days, he had at least two opportunities to seek help and escape, including one instance when he was alone with an officer. Based on this evidence, the defendant was not entitled to a jury instruction on duress.

#### **Self Defense**

[State v. Lee](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Aug. 2, 2016). In this second-degree murder case, the trial court did not err with respect to its self-defense instruction. (1) The court rejected the defendant's argument that the trial court committed plain error by omitting a no duty to retreat instruction, reasoning, in part, that the no duty to retreat defense is limited by statute to a lawful occupant within his or her home, motor vehicle, or workplace. Here, the defendant was standing in the intersection of a public street several houses down from his residence. (2) The trial court did not commit plain error by

instructing the jury that the defendant was not entitled to the benefit of self-defense if he was the aggressor with the intent to kill or inflict serious bodily injury upon the deceased. The court rejected the defendant's argument that there was no evidence to support a finding that he was the aggressor. (3) The trial court did not commit plain error by omitting a jury instruction on lawful defense of another. At the time the defendant shot the victim, the defendant was aware that the threat of harm to the third-party had concluded.