

Criminal Procedure

Mistrial

[*State v. King*](#), ___ S.E.2d ___, ___ N.C. App. ___ (Sept. 6, 2016). The trial court did not err by failing to declare a mistrial sua sponte in this sexual assault and kidnapping case after a law enforcement officer stated that the victim had “been reliable to me” in prior interactions. The trial court in fact sustained the defendant’s objection to this testimony.

Sentencing

[*State v. Wagner*](#), ___ S.E.2d ___, ___ N.C. App. ___ (Sept. 6, 2016). (1) In this child sexual assault case, the trial court did not err by failing to find the mitigating factor that the defendant successfully completed a substance abuse program. Because the defendant completed the program prior to his arrest, his participation in it did not meet the requirements of G.S. 15A-1340.16(e)(16). (2) The court rejected the defendant’s argument that the trial court abused its discretion by failing to treat his completion of the program as a non-statutory mitigating factor. (3) The trial court did not err by failing to find the mitigating factor that the defendant had a positive employment history. Even if the defendant’s evidence established that he had a professional bull riding career, he retired from that profession in 2007 and did not present evidence that he was gainfully employed between that date and his arrest in 2014.

Clerical Errors

[*State v. Allen*](#), ___ S.E.2d ___, ___ N.C. App. ___ (Sept. 6, 2016). Where a plea agreement contemplated that the defendant would be sentenced to community punishment and the trial court indicated that it was so sentencing the defendant, the court remanded for correction of a clerical error in the judgment stating that the sentence was an intermediate one.

Arrest, Search & Investigation

Search Warrants

[*State v. Downey*](#), ___ S.E.2d ___, ___ N.C. App. ___ (Sept. 6, 2016). In this drug case, the court rejected the defendant’s argument that the trial court erred by denying his motion to suppress evidence collected from his residence on the grounds that the inventory list prepared by the detective was unlawfully vague and inaccurate in describing the items seized. The defendant argued that the evidence gathered from his residence was obtained in substantial violation of G.S. 15A-254, which requires an officer executing a search warrant to write and sign a receipt itemizing the items taken. Specifically, he asserted that the inventory receipt was vague and inaccurate and thus failed to satisfy the statute’s requirements. In order for suppression to be warranted for a substantial violation of the statute, G.S. 15A-974 requires that the evidence be obtained as a result of officer’s unlawful conduct and that it would not have been obtained but for the unlawful conduct. Here, citing prior case law, the court held, in part, that because the evidence was seized before the inventory required by the statute had to be prepared, the defendant failed to show that the evidence would not have been obtained but for the alleged violations of G.S. 15A-254. The court held that G.S. 15A-254 “applies only after evidence has been obtained and does not implicate the right to be free from unreasonable search and seizure. In turn, because evidence cannot be obtained ‘as a result of’ a violation of [G.S.] 15A-254, [G.S.] 15A-974(a)(2) is inapplicable to either alleged or actual [G.S.] 15A-254 violations.”

Evidence

Relevance

[*State v. Clevinger*](#), ___ S.E.2d ___, ___ N.C. App. ___ (Sept. 6, 2016). Although statements made by a law enforcement officer during a videotaped interrogation of the defendant were not relevant, the defendant failed to show prejudice warranting a new trial. The court distinguished cases holding that statements by a law enforcement officer during a videotaped interrogation of the defendant are relevant to provide context for the defendant's answers, noting, among other things, that in this case the defendant never made any concessions or admissions during the interrogation; instead, he repeatedly denied involvement in the crime. For the same reason, the officer's statements were not relevant to show his interrogation techniques. Finally, because the defendant never wavered from his denials, the officer's statements were not relevant to show that the defendant conceded the truth or changed his story.

Opinion Testimony

[*State v. Hunt*](#), ___ S.E.2d ___, ___ N.C. App. ___ (Sept. 6, 2016). (1) In this drug case, testimony from the State's expert sufficiently established a trafficking amount of opium (over 4 grams). Following lab protocol, the forensic analyst grouped the pharmaceutically manufactured pills seized into four categories based on their unique physical characteristics. He then chemically analyzed one pill from three categories and determined that they tested positive for oxycodone. He did not test the pill in the final category because the quantity was already over the trafficking amount. Following prior case law, the court held that the analyst was not required to chemically analyze each individual tablet; his testimony provided sufficient evidence for a trafficking amount of opium such that an instruction on lesser included drug offenses was not required. The court also noted that any deviation that the analyst might have taken from the established methodology for analyzing controlled substances went to the weight of his testimony not its admissibility. (2) The analyst's testimony was properly admitted under Rule 702. The court began by holding that the analyst's testimony was the product of reliable principles and methods. Next, the court rejected the defendant's central argument that the analyst should not have been permitted to testify regarding pills that were not chemically analyzed and therefore that his testimony was not based on sufficient facts or data and that he did not apply the principles and methods reliably to the facts of the case. Rejecting this argument, the court noted the testing and visual inspection procedure employed by the analyst, as described above.

[*State v. Wagner*](#), ___ S.E.2d ___, ___ N.C. App. ___ (Sept. 6, 2016). In this child sexual assault case, the trial court did not commit plain error by allowing the defendant's wife to testify regarding "red flags" that she should have seen earlier regarding the defendant's conduct with the victim. In context, the witness was not offering an opinion as to the defendant's guilt but rather responding to a question whether she had ever observed unusual behavior to between the defendant and the victim.

Vouching for a Witness

[*State v. Crabtree*](#), ___ S.E.2d ___, ___ N.C. App. ___ (Sept. 6, 2016). In this child sexual assault case, neither a child interviewer from the Child Abuse Medical Evaluation Clinic nor a DSS social worker improperly vouched for the victim's credibility; however, the court held, over a dissent, that although a pediatrician from the clinic improperly vouched for the victim's credibility, no prejudice occurred. In the challenged portion of the social worker's testimony, the social worker, while explaining the process of investigating a report of child sexual abuse, noted that the pediatrician and her team "give their

conclusions or decision about those children that have been evaluated if they were abused or neglected in any way.” This statement merely described what the pediatrician’s team was expected to do before sending a case to DSS; the social worker did not comment on the victim’s case, let alone her credibility. In the challenged portion of the interviewer’s testimony, he characterized the victim’s description of performing fellatio on the defendant as “more of an experiential statement, in other words something may have actually happened to her as opposed to something [seen] on a screen or something having been heard about.” This testimony left the credibility determination to the jury and did not improperly vouch for credibility. However, statements made by the pediatrician constituted improper vouching. Although the pediatrician properly described the five-tier rating system that the clinic used to evaluate potential child abuse victims, she ventured into improper testimony when she testified that “[w]e have sort of five categories all the way from, you know, we’re really sure [sexual abuse] didn’t happen to yes, we’re really sure that [sexual abuse] happened” and referred to the latter category as “clear disclosure” or “clear indication” of abuse in conjunction with her identification of that category as the one assigned to the victim’s interview. Also, her testimony that her team’s final conclusion that the victim “had given a very clear disclosure of what had happened to her and who had done this to her” was an inadmissible comment on the victim’s credibility. However, the defendant was not prejudiced by these remarks.

Self-Incrimination

[*State v. Wagner*](#), ___ S.E.2d ___, ___ N.C. App. ___ (Sept. 6, 2016). In this child sexual assault case, the court rejected the defendant’s argument that the defendant’s wife improperly testified as to the defendant’s exercise of his constitutional right to remain silent after arrest. The defendant pointed to the witness’s answer to a question about whether she ever talked to him about the allegations at issue. She responded: “I want to say that I did ask him what had happened, and he said that he couldn’t talk over the phone because it was being recorded.” Because the testimony at issue was from the defendant’s wife, not a law enforcement officer, and was given by her to explain whether she had ever discussed the allegations with the defendant, her statement that he had declined to discuss them over the phone due to a concern that the call was being recorded “cannot properly be characterized as a violation of his privilege against self-incrimination.”

Criminal Offenses

Sexual Assault

[*State v. Crabtree*](#), ___ S.E.2d ___, ___ N.C. App. ___ (Sept. 6, 2016). In this child sexual assault case, the court rejected the defendant’s argument that the evidence was insufficient to show that fellatio had occurred. Although the child victim did not testify regarding fellatio, her statement regarding such an act to another person was admitted as substantive evidence without objection.

Kidnapping

[*State v. King*](#), ___ S.E.2d ___, ___ N.C. App. ___ (Sept. 6, 2016). In this kidnapping and sexual assault case, the evidence was sufficient to establish confinement or restraint for purposes of kidnapping that was separate and apart from the force necessary to facilitate the sexual offense. Here, the defendant forced the victim into his car *after* he had sexually assaulted her.

Armed Robbery

[State v. Whisenant](#), ___ S.E.2d ___, ___ N.C. App. ___ (Sept. 6, 2016). In this armed robbery case, the evidence was sufficient to establish that the defendant used a dangerous weapon in a way that endangered the victim. A store loss prevention officer questioned the defendant about having taken some store jewelry in the store foyer. During the exchange, the victim saw a knife in the defendant's pocket. The defendant attempted to force his way out of the store foyer and pulled the unopened knife out of his pocket. The victim grabbed the defendant's hand and wrestled the closed knife away from the defendant while the defendant repeatedly said, "I will kill you." Deciding an issue of first impression, the court cited cases from other jurisdictions and held that a closed knife can constitute a dangerous weapon for purposes of armed robbery. It stated: "Defendant's brandishing and use of the knife satisfied the element of a dangerous weapon. The manner and circumstances in which Defendant displayed the knife alludes to its purpose: Defendant yelled 'I will kill you,' attempted to push past [the victim], removed the knife from his pocket and brandished it when [the victim] mentioned police involvement." The court went on to hold that the State presented sufficient evidence tending to show that the victim's life was endangered or threatened by the defendant's actions and threats.

[State v. Clevinger](#), ___ S.E.2d ___, ___ N.C. App. ___ (Sept. 6, 2016). Where the State's evidence was positive and uncontroverted as to whether a weapon used during an armed robbery was in fact a dangerous weapon and there was no evidence from which a rational juror could find that the weapon was anything other than a dangerous one, no error occurred when the trial court submitted the issue of whether the weapon was dangerous to the jury but did not instruct on common law robbery. The State's evidence showed that during the robbery the defendant grabbed the victim, pulled her head back, and held a chef's knife against her neck as he threatened to slit her throat.