

Criminal Procedure

Indictment issues

[State v. Hunt](#), ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 1, 2016). The indictment properly charge the defendant with burning certain buildings in violation of G.S. 14-62. The indictment alleged that the “defendant . . . unlawfully, willfully and feloniously did set fire to, burn, cause to be burned and aid the burning of an office and utility building located at 917 Wadesboro Street, Durham, North Carolina 27703.” The court rejected the defendant’s argument that the indictment was defective because it did not allege that the defendant acted “wantonly,” noting that North Carolina courts have held that the terms “willfully” and “wantonly” are essentially the same.

Counsel Issues

[State v. Ward](#), ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 1, 2016). Where the defendant and counsel reached an impasse regarding whether to cross-examine the State’s witness on an issue of sample contamination in this child sexual assault case, the trial court did not did not violate the defendant’s Sixth Amendment rights by ruling that it would be improper for counsel to pursue a frivolous line of questioning. The witness in question was a DNA analyst from the crime lab. Prior to her testimony, the trial court heard ex parte arguments from the defendant and his lawyer about an impasse regarding a proposed line of questioning intended for cross examination of the analyst. The trial court ruled in favor of defense counsel and the trial resumed. The absolute impasse rule does not require an attorney to comply with the client’s request to assert frivolous or unsupported claims. Here, although the defendant wanted to challenge the analyst with respect to contamination, there was no factual basis for such a challenge. The court went on to conclude that even if the defendant’s sixth amendment rights had been violated, in light of the overwhelming evidence of guilt the error was harmless beyond a reasonable doubt. [Author’s note: for a discussion of the absolute impasse rule, see my Benchbook chapter [here](#).]

[State v. Hunt](#), ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 1, 2016). (1) Counsel did not render ineffective assistance by failing to object to a witness’s expert testimony. The expert testified that the fire was intentionally set with the use of an accelerant. However, the defendants defense did not challenge this issue but rather focused on whether the State had proved that the defendant was the perpetrator. In light of this, counsel made a reasonable, strategic decision not to object to the witness’s testimony. (2) Counsel did not render ineffective assistance by failing to renew a motion to dismiss at the close of all of the evidence. The defendant could not show prejudice we are such a motion, had been made, would have been denied.

Pleas and Plea Agreements

[State v. Zubieng](#), ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 1, 2016). The court held that the defendant did not have a right to appellate review of the trial court’s denial of her post-sentencing motion to withdraw her guilty plea and dismissed her appeal. The court noted that where the defendant challenges the plea on grounds that the trial court violated G.S. 15A-1024 (providing that if at the time of sentencing the judge imposes a sentence other than that provided for in a plea arrangement, the judge must so inform the defendant and allow the defendant to withdraw the plea), review is by writ of certiorari.

Sentencing

[State v. Hardy](#), ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 1, 2016). (1) Over a dissent, the court held that the trial court properly conducted a de novo sentencing hearing on remand from the appellate division. Notwithstanding the fact that the new sentence was the same as the original sentence, the court rejected the defendant’s argument that the trial court merely deferred to the prior judge’s sentencing determination. (2) On remand the trial court did not err by leaving the original restitution order in place against the defendant. Here, the appellate decision remanding the case found no error with respect to the amount of restitution; that decision thus “clearly resolved and foreclosed any consideration” of the originally entered restitution award.

[State v. Hunt](#), ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 1, 2016). The trial court erred by ordering the defendant to pay \$5,000 in restitution where no evidence supported that award. Here, only an unsworn statement by the prosecutor was offered in support of the restitution award.

Evidence

Opinions

[State v. Hunt](#), ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 1, 2016). In this burning of buildings case, the trial court did not commit plain error by allowing Investigator Gullie to offer expert opinion testimony. The Investigator testified at trial without objection. Noting the procedural posture of the case, the court continued:

In challenging the trial court’s performance of its gatekeeping function for plain error, defendant implicitly asks this Court to hold the trial court’s failure to *sua sponte* render a ruling that Investigator Gullie was qualified to testify as an expert pursuant to Rule 702 amounted to error. And to accept defendant’s premise would impose upon this Court the task of determining from a cold record whether Investigator Gullie’s opinion testimony *required* that he be qualified as an expert in fire investigation, where neither the State nor defendant respectively sought to proffer Investigator Gullie as an expert or challenge his opinion before the trial court.

The court went on to hold that even assuming the trial court erred, the defendant could not establish plain error in light of other evidence presented in the case.

Arrest, Search & Investigation

Criminal Offenses

Sexual Assault

[State v. Ward](#), ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 1, 2016). Mistake of age and consent are not defenses to statutory rape.