

Criminal Procedure

Appellate Issues

[*State v. Ledbetter*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 6, 2016). On remand for reconsideration in light of *State v. Thomsen*, ___ N.C. ___, 789 S.E.2d 639 (2016), and *State v. Stubbs*, 368 N.C. 40 (2016), the court held that the defendant’s petition for writ of certiorari to review the denial of her motion to dismiss, prior to her guilty plea, did not assert any of the procedural grounds set forth in Rule 21 of the Appellate Rules to issue the writ. Noting that the issue was not a jurisdictional one, the court explained that it was without a procedural process under either Rule 1 or 21 to issue the discretionary writ without invoking Rule 2. It went on to decline to invoke Rule 2 to suspend the requirements of the appellate rules.

Discovery

[*State v. Mendoza*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 6, 2016). In this child sexual assault case, the court rejected the defendant’s argument that the trial court erred by permitting certain testimony by the State’s experts because of a discovery violation. The experts included Blair Cobb, a licensed clinical social worker and pediatric therapist who testified as an expert in child counseling, and Cynthia Stewart, a social worker who testified as an expert in interviewing children in cases of suspected abuse or neglect. The defendant argued that the State violated G.S. 15A-903(a)(2) by not timely providing Stewart’s report and Cobb’s records and that as a result, he was prejudiced by lack of time to adequately prepare for cross-examination. The State served notice of expert witnesses on November 24, 2014, listing Stewart and Cobb, and indicating that the State would make the expert’s reports available during discovery and that their CVs would be forthcoming. The State provided initial discovery on December 2, 2014, including Stewart’s report, prepared after her interview with the child and stating her impressions and recommendations as well as a 30-page report by Cobb regarding her visits with the child and comprehensive clinical assessment. On January 29, 2015, the defendant filed a motion for additional materials, requesting that each expert prepare a meaningful and detailed report. At a hearing on February 2, 2015, the trial court instructed the State to have Stewart and Cobb couch their diagnoses in the form of opinions. In mid-February 2015, the State provided further discovery, including additional therapy notes from Cobb and a revised letter from Cobb outlining the basis of her opinion, as well as a DVD recording of Stewart’s interview with the child. The defendant then asked the trial court to either exclude the expert opinions or give the defense additional time to prepare. The trial court continued the matter until April 13, 2015. On these facts, the court rejected the defendant’s argument that he did not have time to adequately prepare to effectively cross-examine the experts.

Statute of Limitations

[*State v. Turner*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 6, 2016). Because the State failed to prosecute the defendant’s impaired driving misdemeanor charge within two years, the trial court did not err by dismissing that charge. According to the court, the defendant “received a citation for driving while impaired” and “was arrested and brought before a magistrate, who issued a magistrate’s order.” The court stated:

The issuance of a citation did not toll the statute of limitations pursuant to N.C. Gen. Stat. § 15-1; the State had two years to either commence the prosecution of its case, or to issue a warrant, indictment, or presentment which would toll the statute of limitations. Because the State failed to do so, the statute of limitations expired, and the State was barred from prosecuting this action. The trial court did not err in dismissing

the charge.

Jury Deliberations

[State v. Lyons](#), ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 6, 2016). In this murder case, although the trial court erred by making comments prior to closing arguments suggesting to the jury that it would be futile to request to review witness testimony, the error was not prejudicial. The trial judge had stated:

When you go back and start deliberating, if six of you say, Well, I remember this witness says things this way and the other six of you say, No, I don't remember it that way . . . you don't have the option of saying, Well, let's go ask the judge and let the judge tell us what did that witness really say. Because if you ask that question, my response is going to be, That's part of your job, to figure it out and to make that determination based on your recollection[.]

The court rejected the State's argument that the trial court's comments merely made it clear to the jurors that if they asked for his interpretation of witness testimony, the judge would instruct them to make that determination based on their own recollections. However, the court declined to find that the error was prejudicial.

Sex Offenders & SBM

[State v. Stroessenreuther](#), ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 6, 2016). In this appeal from the trial court's order imposing SBM, the court rejected the defendant's argument that the state's SBM laws are facially unconstitutional but remanded for a determination of the reasonableness of the imposition of SBM. Before the trial court, the defendant argued that imposition of SBM violated his fourth amendment rights under *Grady v. North Carolina*, 135 S. Ct. 1368 (2015). The trial court accepted the State's argument that there was no need to address reasonableness under the fourth amendment because SBM was required by the applicable statute. On appeal, the State conceded that the trial court erred by imposing SBM without first considering whether it was reasonable, once the defendant raised the fourth amendment issue. The court thus vacated the SBM order and remanded.

Evidence

Impeachment

[State v. Mendoza](#), ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 6, 2016). In this child sexual assault case, even if the trial court erred by denying the defendant's request to admit into evidence three letters to the editor written by the State's expert witness and published in a newspaper 10 years before the expert's interview with the child in question, the error was not prejudicial. The defendant contended that the letter showed possible bias or prejudice in child advocacy matters and that he should have been permitted to cross-examine the expert about their content. The court determined however that the defendant had failed to demonstrate a reasonable possibility that a different result at trial would have occurred if the letters have been admitted.

Opinions

[State v. Mendoza](#), ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 6, 2016). In this child sexual assault case, the defendant failed to preserve the argument that the trial court committed prejudicial error by allowing the State's expert witness to testify that she diagnosed the child with PTSD, thus improperly vouching for the witness. At trial, the defendant did not object to the expert's testimony on the basis that it

impermissibly vouched for the child's credibility or the veracity of the sexual abuse allegations; rather, his objection was grounded on the fact that a licensed clinical social worker is not sufficiently qualified to give an opinion or diagnosis regarding PTSD.

Rape Shield

[*State v. Mendoza*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 6, 2016). In this child sexual assault case, the trial court did not err by precluding the defendant from cross-examining the State's expert witness about information in the treatment records regarding the child's sexual activity with partners other than the defendant. The defendant unsuccessfully sought to cross-examine an expert who testified that the victim suffered from PTSD about information she learned regarding the victim's sexual activity with other individuals. During voir dire the expert testified that any information about the victim's consensual sexual activity with others did not play a role and was not relevant to her PTSD diagnosis. The trial court found the evidence to be irrelevant. The court noted that having so found, the trial court was not required to proceed under of a Rule 403 balancing test.

Arrest, Search & Investigation Hot Pursuit

[*State v. Adams*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 6, 2016). Exigent circumstances justified the officers' warrantless entry into the defendant's home to arrest him. It was undisputed that the officers had reasonable suspicion to stop the defendant for driving while license revoked. They pulled into the defendant's driveway behind him and activated blue lights as the defendant was exiting his vehicle and making his way toward his front door. The defendant did not stop for the blue lights and continued hurriedly towards the front door after the officers told him to stop. "At that point," the court explained, "the officers had probable cause to arrest defendant for resisting a public officer and began a 'hot pursuit' of defendant." The officers arrived at the front door just as the defendant was making his way across the threshold and were able to prevent him from closing the door. The officers then forced the front door open and detained and arrested the defendant just inside the door. The court held that the warrantless entry and arrest was proper under *United States v. Santana*, 427 U.S. 38 (1976). It explained: Hot pursuit been recognized as an exigent circumstance sufficient to justify a warrantless entry into a residence where there is probable cause, without consideration of immediate danger or destruction of evidence.

Vehicle Stops

[*State v. Magnum*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 6, 2016). (1) In this impaired driving case, the defendant was not seized within the meaning of the fourth amendment until he submitted to the officer's authority by stopping his vehicle. The court rejected the defendant's argument that the seizure occurred when the officer activated his blue lights. Because the defendant continued driving after the blue lights were activated, there was no submission to the officer's authority and no seizure until the defendant stopped his vehicle. As a result, the reasonable suspicion inquiry can consider circumstances that arose after the officer's activation of his blue lights but before the defendant's submission to authority. (2) The vehicle stop was supported by reasonable suspicion. An officer received an anonymous report that a drunk driver was operating a black, four-door Hyundai headed north on Highland Capital Boulevard. The officer located the vehicle as reported and observed that the defendant drove roughly 15 miles below the 35 mph speed limit; that the defendant stopped at an intersection without a stop sign or traffic signal for "longer than usual"; that the defendant stopped at a railroad

crossing and remained motionless for 15 to 20 seconds, although no train was coming and there was no signal to stop; that after the officer activated his blue lights, the defendant continued driving for approximately two minutes, eventually stopping in the middle of the road, and in a portion of the road with no bank or curb, having passed several safe places to pull over.

[*State v. Wilson*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 6, 2016). In this impaired driving case, the court held, over a dissent, that the trial court properly denied the defendant's motion to suppress where no seizure occurred. An officer went to a residence to find a man who had outstanding warrants for his arrest. While walking towards the residence, the officer observed a pickup truck leaving. The officer waved his hands to tell the driver—the defendant—to stop. The officer's intention was to ask the defendant if he knew anything about the man with the outstanding warrants; the officer had no suspicion that the defendant was the man he was looking for or was engaged in criminal activity. The officer was in uniform but had no weapon drawn; his police vehicle was not blocking the road and neither his vehicle's blue lights nor sirens were activated. When the defendant stopped the vehicle, the officer almost immediately smelled an odor of alcohol from inside the vehicle. After the defendant admitted that he had been drinking, the officer arrested the defendant for impaired driving. Because a reasonable person would have felt free to decline the officer's request to stop, no seizure occurred; rather, the encounter was a consensual one.

Criminal Offenses

Acting in Concert

[*State v. Holloway*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 6, 2016). In this drug case, the trial court committed plain error by instructing the jury on the theory of acting in concert. The State presented no evidence that the defendant had a common plan or purpose to possess the contraband with his alleged accomplice, McEntire. At most, the evidence showed that the two were acquainted and the defendant was present when the drugs were found at McEntire's home. Mere presence at the scene of a crime however is insufficient where the State presented no evidence that the two shared any criminal intent.

Drugs

[*State v. Holloway*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 6, 2016). (1) In this drug case, there was insufficient evidence of constructive possession. Officers responded to a report of a breaking and entering at a residence. They heard a commotion inside and noticed smoke coming from the house. Two men, Robert McEntire and the defendant, left through the front door. Because the officers had responded to a breaking and entering in progress, they placed the men in custody. The source of the smoke turned out to be a quantity of marijuana burning in the oven. A subsequent search of the premises found over 19 pounds of marijuana and other items including drug paraphernalia. Officers later learned that McEntire lived at the premises. A photograph of the defendant was found in a container in a bedroom. The defendant was indicted on multiple drug charges including trafficking, possession with intent, maintaining a dwelling and possession of drug paraphernalia. At trial, the defendant's mother explained why McEntire had a photograph of the defendant. McEntire testified that the defendant was merely visiting on the day in question, that the contraband belonged to McEntire and that the defendant did not know about its presence. The trial court denied the defendant's motion to dismiss, which asserted insufficiency of the evidence. The defendant was convicted. The court found that the State failed to present substantial evidence demonstrating the defendant's constructive possession of the contraband. The only evidence tying the defendant to the residence or the contraband was his presence on the afternoon in question and a single photograph of him found face down in a

plastic storage bin located in a bedroom. There was no evidence that the defendant had any possessory interest in the house, that he had a key to the residence, that his fingerprints were found on any of the seized items, that any items belonging to him were found in the residence (on this issue it noted that the photograph belong to McEntire), or that any incriminating evidence was found on his person. (2) The evidence was insufficient with respect to the maintaining a dwelling charge. There was no evidence that the defendant was the owner or lessee of the residence, there was no evidence that he paid for its utilities or upkeep, there was no evidence that he had been seen in or around the dwelling and there was no evidence that he lived there.

[*State v. Howell*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 6, 2016). G.S. 90-95(e)(3) operates as a sentence enhancement not a separate offense. The defendant was charged with possession of marijuana of over ½ ounce but less than 1½ ounces, a Class I misdemeanor, of having previously been convicted of any offense in violation of the Controlled Substances Act, and with attaining the status of habitual felon. The defendant pled guilty to the possession charge, acknowledged his prior conviction subjecting him to enhanced punishment and acknowledged attaining habitual felon status. The trial court treated the marijuana misdemeanor as a Class I felony because of the prior conviction and then elevated that conviction to a Class E felony because of habitual felon status. On appeal the defendant argued that under G.S. 90-95(e)(3), the prior conviction was merely a sentence enhancement, and could not serve to elevate the misdemeanor offense to a felony offense. The court agreed, concluding: “it appears that our General Assembly intended that section (e)(3) to act as a sentence enhancement rather than a separate offense.” It continued: “Thus, while defendant’s Class 1 misdemeanor is punishable as a felony under the circumstances present here, the substantive offense remains a Class 1 misdemeanor.” The court went on to conclude that as a result, the defendant’s habitual felon status had no impact on his sentence as a misdemeanor.