

Criminal Procedure Counsel Issues

[*State v. Curlee*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 20, 2016). The trial court erred by requiring the defendant to proceed to trial pro se. On February 7, 2013, the defendant was determined to be indigent and counsel was appointed. On May 30, 2014, the defendant waived his right to assigned counsel, indicating that he wished to hire a private lawyer, Mr. Parker. Between May 2014 and May 2015 the trial was continued several times to enable the defendant to obtain funds to pay Parker. On May 11, 2015, Parker informed the court that the defendant had not retained him and that if the court would not agree to continue the case, Parker would move to withdraw. Although the defendant was employed when he first indicated his desire to hire Parker, he subsequently lost his job and needed time to obtain funds to pay counsel. The trial court continued the case for two months, to give the defendant more time to obtain funds to pay Parker. On June 29, 2015, Parker filed a motion to withdraw for failure to pay. On July 6, 2015, after the trial court allowed Parker to withdraw, the defendant asked for new counsel. The trial court declined this request, the case proceeded pro se, and the defendant was convicted. The court found that the trial court's ruling requiring the defendant to proceed pro se was based in part on the ADA's false representation that at the May 11, 2015 hearing the defendant was asked if he wanted counsel appointed, was warned that the case would be tried in July regardless of whether he were able to hire Parker, and was explicitly warned that if he had not retained counsel by July he would be forced to proceed to trial pro se. The court concluded: "None of these representations are accurate." Thus, the court held that the trial court's denial of defendant's request for appointed counsel and its ruling that the defendant had waived the right to appointed counsel were not supported by competent evidence.

Speedy Trial

[*State v. Johnson*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 20, 2016). In a case where the trial was delayed because of backlogs at the crime lab and because of issues with counsel, the trial court properly denied the defendant's speedy trial motion, made shortly before trial. Applying the *Barker v. Wingo* four-part speedy trial analysis, the court began by noting that the 28-month delay between arrest and trial raises a question of reasonableness requiring the court to consider the additional *Barker* factors. As to the second factor--reason for the delay--it was undisputed that the last four months of delay resulted from issues with defense counsel. Delay caused by the defendant's indecision about counsel, counsel's lapse in communicating with the defendant, and counsel's scheduling conflicts should not be weighed against the State. The primary cause of the delay was a backlog at the state crime lab, a matter over which the prosecutor had no control. Acknowledging that governmental responsibility for delay should be weighed against the State, the court concluded that the defendant failed to make a prima facie showing that either the prosecution or the crime lab negligently or purposefully underutilized resources available to prepare the State's case for trial. Thus, the 18 months of delay caused by crime lab backlogs was a "neutral reason." Turning to the third factor in the analysis--the defendant's assertion of a speedy trial right--the court held that the "eleventh-hour nature of Defendant's speedy trial motion carries minimal weight in his favor." The court was also unpersuaded by the defendant's argument with respect to the fourth factor in the analysis, prejudice.

Double Jeopardy

[*State v. Schalow*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 20, 2016). The court vacated the defendant's attempted murder conviction on double jeopardy grounds. The defendant was originally charged and

indicted for attempted murder of his wife. After the trial began, the trial court, over the defendant's objection, ruled that the indictment was fatally defective because it failed to allege that the defendant acted with malice aforethought and declared a mistrial. When the defendant was re-indicted for attempted murder, he asserted that the second prosecution was barred by double jeopardy. The defendant argued that there was no fatal defect in the first indictment; that the trial court abused its discretion in declaring the mistrial; and that once jeopardy attached on the dismissed indictment for attempted voluntary manslaughter, the defendant could not be prosecuted again for the greater offense of attempted murder. The trial court denied the defendant's motion to dismiss and the defendant was convicted. The court first determined that although the original indictment failed to properly charge attempted first-degree murder, it sufficiently alleged attempted voluntary manslaughter. Thus, the trial court's decision to terminate the first prosecution was based on the erroneous belief that the defect in the indictment deprived the court of jurisdiction. An order of mistrial after jeopardy has attached may only be entered over the defendant's objection where manifest necessity exists. If a mistrial results from manifest necessity, double jeopardy does not bar retrial. However if there is no manifest necessity and the order of mistrial has been improperly entered over a defendant's objection, jeopardy bars a subsequent prosecution. Here, the original indictment was not fatally defective because it sufficiently alleged attempted voluntary manslaughter. Since the trial court retained jurisdiction, it could have proceeded on attempted voluntary manslaughter, as the defendant requested. The court was careful to distinguish this case from those in which a dismissal or mistrial is entered on the defendant's motion or with the defendant's consent, noting: "if a *defendant* successfully seeks to avoid his trial prior to its conclusion by actions or a motion of mistrial or dismissal, the Double Jeopardy Clause is generally not offended by a second prosecution." Having found that no manifest necessity existed to declare a mistrial on the first indictment that properly charged attempted voluntary manslaughter, the court held that double jeopardy precluded a second prosecution for the greater offense of attempted first-degree murder.

Pleas and Plea Agreements

[*State v. Kirkman*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 20, 2016). As conceded by the State, the trial court erred by resentencing the defendant to a sentence greater than that provided for in his plea agreement without giving the defendant an opportunity to withdraw his plea, as required by G.S. 15A-1024.

Jury Argument

[*State v. Martinez*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 20, 2016). (1) During closing statements to the jury, the prosecutor did not impermissibly comment on the defendant's failure to take the stand. In context, the prosecutor's statements summarized the evidence before the jury and asserted that no evidence was presented to support defense counsel's assertions in his opening statement. Even if the prosecutor's statements constituted an impermissible comment on the defendant's right to remain silent, the error was harmless beyond a reasonable doubt. (2) The court rejected the defendant's argument that the prosecutor improperly misled the jury during closing argument by asserting facts not in evidence. The defendant failed to show any gross impropriety that was likely to influence the verdict. (3) The defendant failed to show gross impropriety warranting intervention ex mero motu to when the prosecutor handled a rifle in evidence by pointing it at himself. The defendant argued that the prosecutor's actions inflamed the jurors' emotions and causing them to make a decision based on fear (4) Notwithstanding these conclusions, the court noted that it found the prosecutor's words and actions "troublesome," stating: "the prosecutor flew exceedingly close to the sun during his closing argument.

Only because of the unique circumstances of this case has he returned with wings intact.” It went on to emphasize that a prosecutor “has the responsibility of the Minister of Justice and not simply that of an advocate; the prosecutor’s duty is to seek justice, not merely to convict” (quotation omitted).

Sentencing

[*State v. Johnson*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 20, 2016). In this assault inflicting serious injury case, the evidence was sufficient for a bulletproof vest sentencing enhancement. The victim testified that when he punched the defendant’s chest, it felt padded; the victim told two police officers that both attackers wore bulletproof vests; and when the defendant’s vehicle was stopped after the shooting, a bulletproof vest was found on the floor where the defendant was sitting.

[*State v. Robinson*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 20, 2016). The trial court’s jury instruction regarding the bulletproof vest enhancement was not improper. The defendant argued that the trial court erred by instructing the jury that it could find this enhancement if it found that he wore *or* had in his immediate possession a bulletproof vest. The defendant argued that this instruction improperly presented the jury with two alternative theories, only one of which was supported by the evidence. The court rejected the defendant’s argument that there was no evidence that he had such a vest in his immediate possession. Among other things, the police found a bulletproof vest in the back of the vehicle where the defendant had been sitting when fleeing the crime scene.

Probation Issues

[*State v. Moore*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 20, 2016). Over a dissent, the court held that the trial court properly revoked the defendant’s probation. The trial court revoked based on its determination that the defendant had committed new criminal offenses. The court rejected the defendant’s argument that the State failed to give adequate notice that it was alleging a revocation-eligible violation. The notice alleged that the defendant violated probation because of three expressly mentioned pending charges but failed to state that committing these offenses violated the condition of probation that he commit no new criminal offenses. The defendant had adequate notice that the State was alleging a revocation-eligible violation: “we conclude that where the notice fails to allege specifically which condition was violated but where the allegations in the notice could only point to a revocation-eligible violation, the notice is adequate to confer jurisdiction to revoke probation.” The court noted that its result may have been different if the violation report had stated that the defendant had been charged with the crime of possessing illegal drugs without referring to a specific condition violated; in such a case the defendant would have had to guess whether the State was alleging that he committed a non-revocation-eligible violation of possessing illegal drugs or a revocation-eligible violation of committing a new criminal offense. The court concluded by noting, “it is always the better practice for the State to *expressly* state which condition of probation it is alleging has been violated.”

Evidence

Character Evidence

[*State v. Rios*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 20, 2016). In this drug case, a new trial was required where character evidence was improperly admitted. When cross-examining the defendant’s witness, the prosecutor elicited testimony that the defendant had been incarcerated for a period of time. The court viewed this testimony as being equivalent to testimony regarding evidence of a prior conviction. Because the defendant did not testify at trial, the State could not attack his credibility with

evidence of a prior conviction. The court rejected the State's argument that the defendant opened the door to this testimony, finding that the defendant did not put his good character at issue.

Arrest, Search & Investigation

Knock and Talk

[*State v. Kirkman*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 20, 2016). In this drug case, an officer lawfully approached the front of the defendant's home and obtained information that was later used to procure a search warrant. Specifically, he heard a generator and noticed condensation and mold, factors which in his experience and training were consistent with the conditions of the home set up to grow marijuana. "It is well-established that an officer may approach the front door of a home, and if he is able to observe conditions from that position which indicate illegal activity, it is completely proper for him to act upon that information."

Search Warrants

[*State v. Kirkman*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 20, 2016). In this drug case, a search warrant was properly supported by probable cause. At issue was whether a confidential informant was sufficiently reliable to support a finding of probable cause. The affidavit noted that the confidential informant was familiar with the appearance of illegal narcotics and that all previous information the informant provided had proven to be truthful and accurate. This information was sufficient to establish the confidential informant's reliability.

Search Incident to Arrest

[*State v. Martinez*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 20, 2016). After the defendant's arrest for impaired driving, officers properly searched his vehicle as a search incident to arrest. Applying *Arizona v. Gant*, the court found that the officer had a reasonable basis to believe that evidence of impaired driving might be found in the vehicle. The defendant denied ownership, possession, and operation of the vehicle to the officer both verbally and by throwing the car keys under the vehicle. Based on the totality of the circumstances, including the strong odor of alcohol on the defendant, the defendant's efforts to hide the keys and refusal to unlock the vehicle, and the officer's training and experience with regard to impaired driving investigations, the trial court properly concluded that the officer reasonably believed that the vehicle may contain evidence of the offense. In the factual discussion, the court noted that the officer had testified that he had conducted between 20-30 impaired driving investigations, that at least 50% of those cases involved discovery of evidence associated with impaired driving inside the vehicle, such as open containers of alcohol, and that he had been trained to search a vehicle under these circumstances.

Traffic Stops/Consent Searches

[*State v. Miller*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 20, 2016). (1) An officer unlawfully extended a traffic stop under *Rodriguez*. An officer stopped the vehicle for speeding and failure to pay insurance premiums. The owner of the vehicle was in the passenger seat; the defendant was driving. The officer asked the defendant for his drivers license. When he learned that the passenger was the registered owner of the vehicle, the officer inquired about the status of his insurance. The passenger handed the officer an insurance card showing that he recently purchased car insurance. At the officer's request the passenger also produced his drivers license and told the officer they were coming from a friend's house

on Randleman Road. The officer found this response interesting in light of where the vehicle was stopped. He then ordered the passenger out of the vehicle. As the passenger complied, the officer asked him if he had any weapons or drugs. When the passenger said that he did not, he was motioned to stand with another officer who had arrived on the scene. The officer then asked the defendant to step out of the vehicle. As the defendant complied, the officer asked him if he had any weapons or drugs. The defendant said that he did not. According to the officer he then asked the defendant, "Do you mind if I check?" To which the defendant allegedly responded, "No." The officer then search the defendant and found cocaine. The defendant was charged with possession of cocaine and convicted. Applying *Rodriguez*, the court held that the officer unduly extended the traffic stop. The court noted that the officer "was more concerned with discovering contraband than issuing traffic tickets." It noted:

He readily accepted [the passenger's] insurance card as proof that [the passenger] had been paying the premiums, and he even testified at trial that he had no way to determine if the insurance card was invalid. Thereafter, [the] Officer . . . took no action to issue a citation, to address the speeding violation, or to otherwise indicate a diligent investigation into the reasons for the traffic stop. Instead, he ordered [the passenger] and defendant out of the vehicle and began an investigation into the presence of weapons and drugs.

Here, the State did not allege, nor did the evidence show, that the encounter had become consensual. Moreover, the court rejected the State's argument that the officer had reasonable suspicion to extend the stop. The only facts offered by the State to support this conclusion were that the officer observed the vehicle while patrolling "problem areas," that the defendant gave supposedly "incongruent" answers to questions about his travel, that the defendant raised his hands as he stepped out of the vehicle, and that the defendant was driving the vehicle instead of the passenger, its registered owner. The court noted in part that the defendant's responses in fact were not "incongruent." (2) Even assuming that the traffic stop was lawful up to the point when the defendant consented to the search, his consent was not valid. Although the officer testified that the defendant verbally agreed to the search, footage from the body camera revealed a different version of the interaction. Specifically, the officer had the defendant turned around, facing the rear of the vehicle with his arms and legs spread before he asked for his consent. The court concluded: "this was textbook coercion. If defendant did respond to Officer Harris's request—and it is still not apparent that he did—it was certainly not a free and intelligent waiver of his constitutional rights."

DWI Procedures

[*State v. Mung*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 20, 2016). The trial court did not err by denying the defendant's motion to suppress in this DWI case. The defendant had argued that the arresting officer failed to comply with the requirements of G.S. 20-16.2. Specifically, the defendant asserted that he was not adequately informed of his rights under the statute due to the fact that English is not his first language and that the officer's failure to ensure that these rights were communicated to him in his native language of Burmese resulted in violation of the statute. The court held that *State v. Martinez*, ___ N.C. App. ___, 781 S.E.2d 346 (2016) (holding that the admissibility of the results of a chemical analysis test are not conditioned on a defendant's subjective understanding of the information disclosed to him pursuant to the requirements of G.S. 20-16.2(a)), was controlling. It held: "as long as the rights delineated under N.C. Gen. Stat. § 20-16.2(a) are disclosed to a defendant — which occurred in the present case — the requirements of the statute are satisfied and it is immaterial whether the defendant comprehends them."

Criminal Offenses

Acting in Concert

[*State v. Johnson*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 20, 2016). The evidence was sufficient to sustain a charge of assault with a deadly weapon inflicting serious injury based on a theory of acting in concert. It was undisputed that the victim sustained serious injury; the only real issue was whether the evidence was sufficient to allow a reasonable inference that the defendant was a perpetrator of the crime. Another individual, Mr. Robinson, shot the victim. The evidence showed that the defendant and the victim's wife drove to the victim's residence, where the victim and his wife engaged in a dispute over custody of their children until the police arrived and required the defendant and the victim's wife to leave without the children. The next evening the defendant drove his vehicle, with Robinson and the victim's wife, back to the victim's residence, carrying with them firearms, bulletproof vests, and walkie-talkie radios that were turned on and set the same channel. The vehicle was waiting in the victim's apartment parking lot when he arrived home. Robinson, who did not know the victim, shot the victim and asked him if he wanted to die. The defendant assisted Robinson in restraining the victim, placed a handcuff on one of the victim's wrists, tried to cuff both of the victim's wrists, searched the victim's pockets, and escorted the victim's children from his apartment to the vehicle where the victim's wife was waiting. After neighbors found the victim bleeding from gunshot wounds, the defendant sped away from the scene with the victim's wife, Robinson, and the children. This evidence was sufficient to sustain and acting in concert charge.

Sexual Battery

[*In re S.A.A.*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 20, 2016). The State failed to introduce sufficient evidence of sexual battery. The 13-year-old juvenile was adjudicated delinquent in part based on two counts of sexual battery against two 11-year-old female schoolmates. It was alleged that he draped his arms around the girls' shoulders in order to smear a glowing liquid on them during an evening of Halloween trick-or-treating. The State failed to introduce sufficient evidence that the juvenile touch the tops of the girls' breasts for a sexual purpose. One girl testified that the juvenile rubbed "this green glow stick stuff" on her leaving glowing liquid on her shirt above her collarbone. The other girl testified that the juvenile reached his arm around her shoulder and "put this weird green glowing stuff" on her arm and back, also touching her "boobs" over her sweatshirt. In criminal cases involving adult defendants the element of acting for the purpose of sexual arousal, sexual gratification, or sexual abuse may be inferred from the very act itself. However, an intent to arouse or gratify sexual desires may not be inferred in children under the same standard. Rather, a sexual purpose does not exist without some evidence of the child's maturity, intent, experience, or other factor indicating his purpose in acting. Here, the juvenile denied touching either girl's breasts, saying that he only put his hand around their shoulders; this account was supported by witnesses. Neither the location nor the alleged manner of the touching was secretive in nature; rather, the incident occurred on a busy public street on Halloween. The evidence was undisputed that the juvenile have been wiping green glowing liquid on trees, signs, and other young people during the evening. Nothing about his attitude suggested a sexual motivation; neither girl said that he made any sexual remarks. And when the girls ran away, he did not try to pursue them.

Defenses

Accident

[*State v. Robinson*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 20, 2016). In a case involving attempted murder and other charges, the defendant was not entitled to a jury instruction on the defense of

accident. The defendant testified that his gun discharged accidentally during the fight with the victim. The evidence, however, even considered in the light most favorable to the defendant, shows the defendant was engaged in wrongdoing when he shot the victim. The defendant admitted that he physically assaulted the victim and had his hand on the trigger of his gun when it discharged. By his own admission, he was engaged in wrongful conduct when he shot the victim. He thus was not entitled to a jury instruction on the defense of accident.