Criminal Procedure

Counsel issues

State v. Cholon, ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 7, 2017). In this case, involving charges of statutory sexual offense and taking indecent liberties with a child, no *Harbison* error occurred when defense counsel admitted some elements of the charged offenses. In his closing argument to the jury, defense counsel conceded that the victim was a minor and that the defendant's oral and written confessions to the police were true. In those statements, the defendant admitted engaging in sexual activity with the victim, who had represented himself to be 18 years old. With respect to those statements, counsel argued to the jury that the defendant was truthful with the police. The court rejected the defendant's argument that this constituted a *Harbison* error, reasoning that counsel "only implicitly conceded some--but not all--of the elements of each charge and urged jurors to find Defendant not guilty of each charge." The court noted that *Harbison* and its progeny applies when counsel concedes the defendant's guilt to either the offense charged or to a lesser included offense without the defendant's consent. It continued, stating that the courts have distinguished cases, like this one, where counsel did not expressly concede guilt or admitted only certain elements of the charged offense. Finally, the court held that even if the defendant could establish that counsel's conduct was deficient under the *Strickland* standard, he could not show prejudice in light of the overwhelming evidence of guilt. [Author's note: For more information about both types of ineffective assistance of counsel claims, see my judges' Benchbook chapter here; http://benchbook.sog.unc.edu/criminal/counsel-issues]

Indictment Issues

State v. Frazier, ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 7, 2017). In this child abuse case the trial court erred by allowing the State to amend the indictment. The defendant was indicted for negligent child abuse under G.S. 14-318.4(a5) after police discovered her unconscious in her apartment with track marks on her arms and her 19-month-old child exhibiting signs of physical injury. Under that statute, a parent is guilty of negligent child abuse if the parent's "willful act or grossly negligent omission in the care of the child shows a reckless disregard for human life" and the parent's act or omission "results in serious bodily injury to the child." The indictment charged that the defendant committed this offense by negligently failing to treat her child's wounds. At trial, the trial court allowed the State to amend the indictment "to include failure to provide a safe environment as the grossly negligent omission as well." This amendment was improper because it constituted a substantial alteration of the indictment. The amendment alleged conduct that was not alleged in the original indictment and which constituted the "willful act or grossly negligent omission," an essential element of the charge. The amendment thus allowed the jury to convict the defendant of conduct not alleged in the original indictment. Additionally, the amendment violated the North Carolina Constitution, which requires the grand jury to indict and the petit jury to convict for offenses charged by the grand jury.

State v. McLean, ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 7, 2017). The State conceded, and the court held, that the indictment was insufficient to support a conviction for discharging a firearm within an enclosure to incite fear. The indictment improperly alleged that the defendant discharged a firearm "into" an occupied structure; the statute, G.S. 14-34.10, requires that the defendant discharge a firearm "within" an occupied building.

DWI Procedure

State v. Parisi, ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 7, 2017). For reasons discussed in the court's opinion, the court held that it lacked jurisdiction to hear the State's appeal of the defendant's motion to suppress and that the superior court erred when it remanded the case to the district court with instructions to dismiss. [Author's note: My colleague Shea Denning will be blogging about this case tomorrow]

Sentencing Issues

State v. McLean, ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 7, 2017). In this case involving armed robbery and other charges, the trial court erred by assessing a fee against the defendant for the State's expert witness. The expert medical witness testified regarding treatment he administered to the victim. The trial court ordered that the defendant, as a condition of any early release or post-release supervision, reimburse the State $780 for the expert's testimony. The court concluded that there was no statutory authority for the trial court to require this payment as a condition of early release or post-release supervision.

State v. Wilson-Angeles, ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 7, 2017). The trial court erred by assessing one prior record level point because the offense was committed while the offender was on probation, parole, or post-release supervision where the State did not give notice of its intent to seek this point. Including a prior record level worksheet in discovery materials is insufficient to meet the notice requirement.

Evidence

404(b) Evidence

State v. Wilson-Angeles, ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 7, 2017). In this arson case, the trial court properly admitted 404(b) evidence to show the defendant's intent. The evidence in question pertained to another arson which was sufficiently similar to the incident in question. Both arsons occurred in the same town during nighttime hours and involved the same building location. In both instances the defendant was intoxicated, knew the buildings were occupied, and was angry about a perceived harm perpetrated against her by an occupant of the residence. Although the other incident occurred approximately four years earlier, there was a sufficient temporal proximity to the conduct at issue.

Opinions

State v. McLean, ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 7, 2017). In this case involving armed robbery and other charges, the trial court erred by allowing an officer to testify that when the victim provided a statement he "seemed truthful." The error however did not rise to the level of plain error. At trial, the prosecutor asked the officer to describe the victim's demeanor. The officer responded that he was agitated and seemed to be in pain but that "he was—to me, he seemed truthful." This constituted improper vouching for the witness.

State v. Rogers, ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 7, 2017). In this drug case, officers did not offer improper opinion testimony. The defendant argued that the officers' testimony constituted improper opinion testimony as to the defendant's guilt. Both officers testified about the defendant's conduct and how it related, in their experience, to activity by drug dealers. The officers' testimony was not improper

opinion testimony concerning guilt but rather ordinary testimony expressing their own experiences and observations.

Hearsay

State v. McLean, ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 7, 2017). The trial court did not err by allowing a witness to testify that after the incident in question and while she was incarcerated, a jailer told her that the defendant was in an adjacent cell. The defendant argued that because the jailer did not testify at trial, this was inadmissible hearsay. The court disagreed, finding that the statement was not offered to prove its truth but rather to explain why the witness was afraid to testify.

State v. Rogers, ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 7, 2017). In this drug case, the trial court did not err by allowing an officer to testify about information collected from a non-testifying witness during an investigation. The statement was not offered for its truth but rather to explain the officer's subsequent conduct and how the investigation of the defendant unfolded.

Arrest, Search & Investigation

Search Warrants

State v. Brody, ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 7, 2017). In this drug case, a search warrant application relying principally upon information obtained from a confidential informant was sufficient to support a magistrate's finding of probable cause and a subsequent search of the defendant's home. The court rejected the defendant's argument that the affidavit failed to show that the confidential informant was reliable and that drugs were likely to be found in the home. The affidavit stated that investigators had known the confidential informant for two weeks, that the informant had previously provided them with information regarding other people involved in drug trafficking and that the detective considered the informant to be reliable. The confidential informant had demonstrated to the detective that he was familiar with drug pricing and how controlled substances are packaged and sold for distribution. Moreover, the informant had previously arranged, negotiated and purchased cocaine from the defendant under the detective's direct supervision. Additionally, the confidential informant told the detective that he had visited the defendant's home approximately 30 times, including within 48 hours before the affidavit was prepared, and saw the defendant possessing and selling cocaine each time. The court noted: "The fact that the affidavit did not describe the precise outcomes of the previous tips from the [informant] did not preclude a determination that the [informant] was reliable." It added: "although a general averment that an informant is 'reliable' -- taken alone -- might raise questions as to the basis for such an assertion," the fact that the detective also specifically stated that investigators had received information from the informant in the past "allows for a reasonable inference that such information demonstrated the [confidential informant's] reliability." Moreover, the detective had further opportunity to gauge his reliability when the informant arranged, negotiated and purchased cocaine from the defendant under the detective's supervision.

Extending the Duration of a Traffic Stop

State v. Downey, ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 7, 2017). Over a dissent, the court held that reasonable suspicion supported extension of the traffic stop. After an officer stopped the defendant for a traffic violation, he approached the vehicle and asked to see the driver's license and registration. As the defendant complied, the officer noticed that his hands were shaking, his breathing was rapid, and that he failed to make eye contact. He also noticed a prepaid cell phone inside the vehicle and a Black

Ice air freshener. The officer had learned during drug interdiction training that Black Ice freshener is frequently used by drug traffickers because of its strong scent and that prepaid cell phones are commonly used in drug trafficking. The officer determined that the car was not registered to the defendant, and he knew from his training that third-party vehicles are often used by drug traffickers. In response to questioning about why the defendant was in the area, the defendant provided vague answers. When the officer asked the defendant about his criminal history, the defendant responded that he had served time for breaking and entering and that he had a cocaine-related drug conviction. After issuing the defendant a warning ticket for the traffic violation and returning his documentation, the officer continued to question the defendant and asked for consent to search the vehicle. The defendant declined. He also declined consent to a canine sniff. The officer then called for a canine unit, which arrived 14 minutes after the initial stop ended. An alert led to a search of the vehicle and the discovery of contraband. The court rejected the defendant's argument that the officer lacked reasonable suspicion to extend the traffic stop, noting that before and during the time in which the officer prepared the warning citation, he observed the defendant's nervous behavior; use of a particular brand of powerful air freshener favored by drug traffickers; the defendant's prepaid cell phone; the fact that the defendant's car was registered to someone else; the defendant's vague and suspicious answers to the officer's questions about why he was in the area; and the defendant's prior conviction for a drug offense. These circumstances constituted reasonable suspicion to extend the duration of stop.

Criminal Offenses

Conspiracy

State v. Glisson, ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 7, 2017). (1) The evidence was sufficient to support a conviction for conspiracy to traffic in opium by sale and delivery. The defendant was indicted on multiple drug offenses arising from three separate controlled buys. On appeal the defendant argued that the State failed to present evidence, aside from an accomplice's mere presence at the second control buy, that the defendant conspired with the accomplice to traffic in opium. The court rejected this argument, noting, among other things that the defendant brought the accomplice to the drug transaction location for all three controlled buys. The location of the second exchange was one the defendant did not like and the sale took place at or near dark. The drugs were maintained in the same vehicle as the accomplice and the defendant exchanged the drugs and counted the money in front of him. From this evidence, it would be reasonable for the jury to infer that the accomplice was present at the defendant's behest to provide safety and comfort to the defendant during the transaction. (2) The evidence supported multiple conspiracy charges. The court rejected the defendant's argument that the evidence showed only one agreement to engage in three separate transactions. It noted that the first two transactions were separated by one month and that approximately three months passed between the second and third buys. There was no evidence suggesting that the defendant planned the transactions as a series. Rather, the informant or the detective initiated each.

Robbery

State v. McLean, ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 7, 2017). In this armed robbery case, there was sufficient evidence that the defendant committed a taking from the victim's person or presence. The evidence showed that the defendant and three other men entered a building in the early morning. The armed intruders ordered the occupants to lie face-down on the ground and take off their clothing. The defendant ordered, "Give me all your money," and the victim's cell phone was taken at this time.

Drug Offenses

State v. Rogers, ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 7, 2017). Over a dissent, the court held that "[b]ecause the evidence did not establish continuous possession of a vehicle for the purpose of keeping or selling a controlled substance, the trial court erred in denying defendant's motion to dismiss the charge of maintaining a vehicle for the keeping and/or selling of a controlled substance." The State failed to demonstrate continuous maintenance or possession of the vehicle by the defendant beyond the brief period of time when he was observed by the police on the afternoon of his arrest or that the defendant had used the vehicle on a prior occasion to keep or sell drugs. The evidence showed only that the defendant possessed drugs in the vehicle on one occasion.

Defenses

Voluntary Intoxication

State v. Wilson-Angeles, ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 7, 2017). In this arson case, the evidence was not sufficient to entitle the defendant to a voluntary intoxication instruction. While the evidence showed that the defendant was intoxicated at the time in question, there was no evidence about how much alcohol she had consumed or about the length of time over which she had consumed it. The evidence showed only that the defendant had consumed some amount of some type of alcohol over some unknown period. The court also noted that the defendant's conduct in committing the crime and behavior with law enforcement afterwards indicated some level of awareness of her situation.