

Criminal Procedure

Appellate Issues

[*State v. China*](#), ___ N.C. App. ___, ___ S.E.2d. ___ (Feb. 21, 2017). The defendant failed to preserve for appellate review a challenge to the admission of evidence at trial concerning the defendant's previous incarceration. Although the defendant objected to the admission of the evidence during a hearing outside of the jury's presence, he did not subsequently object when the evidence was actually introduced at trial. Thus the defendant failed to preserve for appellate review the trial court's decision to admit this evidence.

[*State v. Gulette*](#), ___ N.C. App. ___, ___ S.E.2d. ___ (Feb. 21, 2017). In this drug trafficking case, the defendant did not preserve for appellate review his argument that the trial court erred by denying his motion to suppress in-court and out-of-court identifications. The trial court denied the defendant's pretrial motion to suppress, based on alleged violations of the Eyewitness Identification Reform Act (EIRA), concluding that the current version of the EIRA did not apply to the defendant's case because the statute came into force after the identification at issue. When the relevant evidence was offered at trial, the defendant did not object. It is well-settled that a trial court's evidentiary ruling on a pretrial motion to suppress is not sufficient to preserve the issue of admissibility for appeal unless the defendant renews the objection during trial. The court rejected the defendant's argument that he could raise the issue on appeal because the trial court failed to apply a statutory mandate in the EIRA and that violations of statutory mandates are preserved without the need for an objection at trial. It concluded that the trial court did not violate any statutory mandate because the mandates of the statute only arise if the court determines that the EIRA applies to the case in question.

Post-Conviction Issues

[*State v. Hyman*](#), ___ N.C. App. ___, ___ S.E.2d. ___ (Feb. 21, 2017). Over a dissent, the court reversed the trial court's order denying the defendant's motion for appropriate relief (MAR). (1) The trial court erred by concluding that the defendant's MAR was procedurally barred. In the defendant's capital murder trial, he was represented by lawyers Smallwood and High. When the State called eyewitness Speller to testify, Smallwood told High that she previously represented Speller in an unrelated probation matter and had spoken to him about the defendant's case. Smallwood's notes from the conversation undermined Speller's trial testimony. Smallwood attempted to cross-examine Speller about their conversation to show that Speller had previously identified another person as the shooter. Speller conceded that he spoke with Smallwood but denied making statements reflected in her notes. The trial court did not allow Smallwood to show Speller her notes or to admit the notes into evidence. The defendant was convicted and appealed. The appellate court remanded for evidentiary hearing on the attorney conflict of interest claim. The MAR judge concluded that Smallwood's representation of the defendant was not adversely affected by her previous representation of Speller. The Court of Appeals affirmed. The defendant then filed a writ of habeas corpus in Federal District Court. The federal court concluded that the defendant was entitled to relief and vacated his conviction, concluding that Smallwood's actual conflict of interest adversely affected her performance. The State appealed to the Fourth Circuit which ended up staying the appeal to provide the North Carolina courts with an opportunity to weigh in on the relevant issues. The defendant then filed a MAR asserting that his sixth amendment right to effective, conflict free counsel was violated because one of his lawyers was also a crucial defense witness who did not testify due to her conflict of interest. At a hearing on the MAR the defendant could not produce Smallwood, who had been disbarred for separate misconduct and had left the state. The trial court denied the MAR concluding that any evidence Smallwood would have offered

was inadmissible and that the defendant had presented no credible evidence that the conversation between Smallwood and Speller ever took place or that Smallwood's notes were made contemporaneously with the conversation. The trial court also found that the defendant's exculpatory witness claim was procedurally barred. The defendant sought review. The court began by holding that the defendant's claim was not procedurally barred under G.S. 15A-1419(a)(3) (upon a previous appeal the defendant was in a position to adequately raise the ground or issue but did not do so) because the defendant had in fact adequately raised the claim on direct appeal. (2) The court also held that the trial court erred by concluding that the defendant's claim had no evidentiary support. It was undisputed that at the time of trial Smallwood had evidence that Speller gave a prior inconsistent statement concerning the shooter's identity. The exculpatory witness claim raised in the defendant's MAR was whether Smallwood's failure to withdraw and testify as to that alleged prior inconsistent statement was ineffective assistance of counsel. Evidence that Smallwood was privy to a conversation in which Speller identified the shooter as someone other than the defendant would have been both relevant and material had it been offered at trial. It was thus error to conclude that the claim was meritless for lack of evidentiary support. (3) The trial court also erred by concluding that the defendant could demonstrate neither deficient performance nor prejudice in connection with his *Strickland* ineffective assistance of counsel claim. Citing precedent, the court analyzed the defendant's claim under the *Strickland* attorney error standard rather than under the *Cuyler* conflict of interest standard. The court went on to reject the MAR judge's conclusion that Smallwood's testimony would not have been admissible at trial, noting that "It cannot seriously be disputed that the identity of the shooter was a material issue in defendant's murder trial." Smallwood, who possessed evidence of Speller's prior inconsistent statement regarding the shooter's identity was not bound to accept Speller's answers on cross-examination. Smallwood's testimony, had it been offered, would have been admissible to impeach Speller. The court continued, holding that contrary to the trial court's conclusion, "we do not believe such exculpatory evidence would have been inconsequential so as to justify Smallwood's failure to withdraw." The court concluded that by failing to withdraw and testify, Smallwood's conduct fell below an objective standard of reasonableness. The court further held that the defendant satisfied the requisite showing of prejudice.

Criminal Offenses

Kidnapping

[*State v. China*](#), ___ N.C. App. ___, ___ S.E.2d. ___ (Feb. 21, 2017). Over a dissent, the court held that because there was no evidence that the defendant restrained the victim beyond the degree of restraint that is inherent in the commission of a sexual or physical assault, the evidence was insufficient on the restraint element of kidnapping. The case involved a sudden attack, in which the defendant broke down the door of an apartment, ran into the bedroom where the victim was dressing, and assaulted him. After the defendant entered the bedroom, he immediately punched the victim hard enough to throw the victim onto the bed. The defendant continued punching the victim while he committed a brief, brutal sexual attack. After the sexual offense, the defendant dragged the victim off the bed and the defendant and his companion kicked the victim in the head and body. The entire incident took no more than a few minutes. The court agreed with the defendant that there was no evidence that the victim was subjected to any restraint beyond that inherent in the defendant's commission of the sex offense and assault.