

Criminal Procedure

Appellate Issues

[*State v. Parlier*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 7, 2017). In this child sexual assault case, because the defendant did not make an offer of proof to show what the victim's responses to questions about her past sexual behavior would have been, he failed to preserve for appellate review whether he should have been allowed to question the victim regarding her general sexual history (a Rape Shield issue).

Waiver of a Jury Trial

[*State v. Swink*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 7, 2017). In this child sexual assault case, the court upheld the defendant's conviction, obtained after a bench trial. (1) The court rejected the defendant's argument that the trial court lacked authority to try him without a jury. The defendant asserted that the statute allowing a jury trial waiver applies only to cases arraigned on or after December 1, 2014. The defendant argued that the statute did not apply to him because he was never formally arraigned and thus should not have been allowed to waive his jury trial right. The court noted in part that arraignment is not mandatory, and will be held only if a defendant files a written request for arraignment. Here, the defendant never made such a request. Additionally, the March 2, 2015 hearing on the defendant's motion to waive a jury trial--a hearing date after the statute's effective date--"essentially served the purpose of an arraignment." (2) The defendant's waiver of his jury trial right was knowing and voluntary where the court engaged in a full colloquy with the defendant.

Collateral Estoppel

[*State v. Williams*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 7, 2017). The trial court properly applied the doctrine of collateral estoppel when it denied the defendant's second motion to suppress. The defendant was in possession of a bag containing two separate Schedule I substances, Methyldone and 4-Methylethcathinone. He was charged with possession with intent to manufacture, sell or deliver Methyldone (Charge 1) and with possession with intent to manufacture, sell or deliver Methylethcathinone (Charge 2). Before trial he filed a motion to suppress, which was denied. He was convicted on both counts. On appeal, the court affirmed his conviction on the first charge but vacated the second because of a defective indictment. The State then re-indicted on the second charge. The then defendant filed a motion to suppress that was functionally identical to the motion to suppress filed before his first trial. The trial court denied the second motion based on the doctrine of collateral estoppel. The defendant was tried and found guilty. The trial court properly applied the doctrine of collateral estoppel when it denied the defendant's second motion where the parties and the issues raised by the motions were the same; the issues were raised and fully litigated during the hearing on the first motion; the issue was material and relevant to the disposition of the prior action; and the trial court's determination was necessary and essential to the final judgment.

Sentencing

[*State v. Jefferson*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 7, 2017). The defendant's sentence of life imprisonment with the possibility of parole after a term of 25 years does not violate the Eighth Amendment under *Miller v. Alabama*, 132 S. Ct. 2455 (2012). As a 15-year-old, the defendant was charged with first-degree murder. He was found guilty under the felony murder rule and under then-applicable law, was sentenced to a mandatory term of life without the possibility of parole. While the

defendant's appeal was pending, the United States Supreme Court decided *Miller*, holding that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment. The General Assembly then amended the statute to provide that the sentence for a defendant found guilty of first-degree murder solely under the felony murder rule shall be life in prison with the possibility of parole; a defendant sentenced under this provision must serve a minimum of 25 years before becoming eligible for parole. The defendant's sentence was vacated on appeal and remanded to the trial court for resentencing pursuant to the new statute. The trial court held a resentencing hearing and imposed a life sentence with the possibility of parole after 25 years. The court declined the defendant's invitation to extend *Miller* to sentences that include the possibility of parole. It added, however:

Nevertheless, we note there may indeed be a case in which a mandatory sentence of life with parole for a juvenile is disproportionate in light of a particular defendant's age and immaturity. That case is not now before us. Defendant chooses only to assert that [the statute] fails to provide a trial judge with discretion to consider the mitigating factors of youth and immaturity. He does not show the existence of circumstances indicating the sentence is particularly cruel or unusual as-applied to him.

The court affirmed the sentence, noting that the defendant had failed to meet the burden of the facial constitutional challenge and did not bring an as-applied challenge.

Evidence

Opinions

[*State v. Babich*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 7, 2017). In this DWI case, the trial court erred by admitting retrograde extrapolation testimony by the State's expert witness. That expert used the defendant's 0.07 blood alcohol concentration 1 hour and 45 minutes after the traffic stop to extrapolate that the defendant had a blood alcohol concentration of 0.08 to 0.10 at the time of the stop. To reach this conclusion, the expert assumed that the defendant was in a post-absorptive state at the time of the stop, meaning that alcohol was no longer entering the defendant's bloodstream and thus her blood alcohol level was declining. The expert conceded that there were no facts to support this assumption. The expert made this assumption not because it was based on any facts in the case, but because her retrograde extrapolation calculations could not be done unless the defendant was in a post-absorptive state. The expert's testimony was inadmissible under the *Daubert* standard that applies to Evidence Rule 702. The court added: "Although retrograde extrapolation testimony often will satisfy the *Daubert* test, in this case the testimony failed *Daubert*'s 'fit' test because the expert's otherwise reliable analysis was not properly tied to the facts of this particular case." It explained:

[W]hen an expert witness offers a retrograde extrapolation opinion based on an assumption that the defendant is in a post-absorptive or post-peak state, that assumption must be based on at least some underlying facts to support that assumption. This might come from the defendant's own statements during the initial stop, from the arresting officer's observations, from other witnesses, or from circumstantial evidence that offers a plausible timeline for the defendant's consumption of alcohol.

When there are at least some facts that can support the expert's assumption that the defendant is post-peak or post-absorptive, the issue then becomes one of weight and credibility, which is the proper subject for cross-examination or competing expert witness testimony. But where, as here, the expert concedes that her opinion is based entirely on a speculative assumption about the defendant—one not based on any

actual facts—that testimony does not satisfy the *Daubert* “fit” test because the expert’s otherwise reliable analysis is not properly tied to the facts of the case.

The court went on to find that in light of the strength of the State’s evidence that the defendant was appreciably impaired, the error was not prejudicial.

Evidence Regarding the Defendant’s Attempt to Hire a Lawyer

[*State v. Stroud*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 7, 2017). Although the trial court erred by allowing the introduction of evidence regarding the defendant’s attempts to hire legal counsel prior to his arrest, the error did not rise to the level of plain error. On appeal, the defendant argued that admission of this testimony violated his Sixth Amendment rights. Although the court had “no difficulty” concluding that the evidence violated the defendant’s Sixth Amendment right to counsel and should not have been admitted, the error did not constitute plain error.

Arrest, Search & Investigation

Miranda

[*State v. Parlier*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 7, 2017). In this child sexual assault case, the court rejected the defendant’s argument that his confession was obtained in violation of *Miranda*. During an interview at the sheriff’s department, the defendant admitted that he had sex with the victim. The transcript and videotape of the interview was admitted at trial. The court rejected the defendant’s argument that a custodial interrogation occurred. The defendant contacted a detective investigating the case and voluntarily traveled to the sheriff’s department. After the detective invited the defendant to speak with her, the defendant followed her to an interview room. The defendant was not handcuffed or restrained and the interview room door and hallway doors were unlocked. The defendant neither asked to leave nor expressed any reservations about speaking with the detective. A reasonable person in the defendant’s position would not have understood this to be a custodial interrogation.

Criminal Offenses

Child Abuse

[*State v. Varner*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 7, 2017). In this misdemeanor child abuse case, where the defendant hit his son with a paddle, the trial court committed reversible error with respect to the jury instructions. After the defendant paddled his 10-year-old son for refusing to eat at the family dinner table, the child experienced bruising and pain for several days. The defendant was charged with felony child abuse. At the charge conference, the trial judge told the parties that he would instruct the jury that it could not convict the defendant if it found that the child’s injuries were inflicted as a result of the defendant’s “moderate punishment to correct” his child. Neither party objected to this instruction. The trial judge further indicated that he would give an instruction defining “moderate punishment” as “punishment that does not cause lasting injury.” The State objected to this definition, arguing that moderate punishment should not be limited to that which produced lasting injuries. The trial judge agreed and, over the defendant’s objection, struck this definition. Thus, the trial judge left the term moderate punishment undefined. The jury found the defendant guilty of misdemeanor child abuse. On appeal the defendant argued that the trial court erred when it struck the proposed instruction defining moderate punishment as punishment which caused lasting injury to the child. The court agreed that the instructions impermissibly allowed the jury to convict the defendant simply because they thought his degree of punishment was excessive, even if they thought he was acting in good faith and did not inflict a lasting injury on the child. The court reversed and remanded for a new trial, noting that based on the

case law discussed in the court's opinion, "it would have been proper for the State to request an instruction advising the jury that it could nonetheless convict if it determined that Defendant acted out of 'wickedness of purpose,' irrespective of the extent of the physical injuries."

Larceny and Robbery

[*State v. Stroud*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 7, 2017). The court rejected the defendant's argument that the evidence was insufficient to establish that he was the perpetrator of a felony larceny and armed robbery that supported a felony murder verdict. Among other things, evidence put the defendant at the scene of the crime, the defendant was in possession of the victim's motorcycle, the defendant's DNA was found on the victim's wallet which was discovered in the defendant's vehicle, and forensic testing matched shell casings found at the crime scene to a handgun found hidden in the defendant's bedroom.

Obtaining Property by False Pretenses

[*State v. Phillips*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 7, 2017). The trial court did not err by denying the defendant's motion to dismiss a charge of attempting to obtain property by false pretenses. After an officer learned about larcenies of Michael Kors items from a local store, he found an online posting for similar items in an online flea market. Using a fake name and address, the officer created a social media account and started a conversation with the seller, later determined to be the defendant, to discuss purchase of the items. The two agreed to meet. Unbeknownst to the defendant, the officer decided to set up an undercover purchase for one of the items to determine if it in fact was stolen from the local store or whether it was counterfeit merchandise. The undercover purchase occurred and the item in question was determined to be counterfeit. Noting that actual deceit is not an element of attempting to obtain property by false pretenses, the court held that the evidence was sufficient to sustain the conviction. The court rejected the defendant's argument that because he did not actually represent the item as an authentic Michael Kors item, there was no evidence of a false pretense or intent to deceive. The court noted that the defendant advertised the items as Michael Kors bags and described them as such to the undercover officer. Additionally, the defendant purchased the bags from a warehouse in Atlanta that sold them for only a fraction of their worth, suggesting that the defendant knew the merchandise was counterfeit. The court also rejected the defendant's argument that because the offense was completed, a conviction for attempt was improper. The offense only occurs if the property actually is obtained in consequence of the victim's reliance on the false pretense. Here, because of the undercover operation, the officer was never deceived by the defendant's misrepresentation.

Drug Offenses

[*State v. Williams*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 7, 2017). Where the defendant was in possession of a bag containing two separate Schedule I controlled substances, Methyline and 4-Methylethcathinone, two convictions were proper. Noting that it had already rejected the argument advanced by the defendant in another case, the court held that the defendant could be punished for two offenses where two different drugs are found in the same mixture.