

Criminal Procedure Discovery

[*State v. Mylett*](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 18, 2017). In this assault on a government officer case, no *Brady* violation occurred when recordings from police body cameras were reviewed by the defendant's original trial counsel and then destroyed pursuant to the police department's evidence retention schedule. The defendant's original trial counsel reviewed the video recordings but opted not to obtain copies or use the footage at the defendant's district court trial. The defendant was convicted and appealed for trial de novo to superior court. In the meantime, the original recordings were destroyed in accordance with the police department's evidence retention schedule. The defendant's new trial counsel moved for a continuance to allow time for counsel to prepare a motion to dismiss, arguing that such a remedy was warranted because the recordings had been destroyed and thus were unavailable for use by the defense. The trial court denied the motion. The defendant was convicted and appealed. The court stated: "Defense counsel's decision not to make or preserve copies of the videos — regardless of counsel's reason for declining to do so — cannot serve as a basis for arguing a *Brady* violation was committed by the State."

Indictment Issues

[*State v. McNair*](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 18, 2017). (1) There was no fatal variance in a possession of burglar's tools indictment. The indictment identified the tools as a prybar and bolt cutters. The trial court instructed the jury that it could find the defendant guilty if he possessed either a prybar, bolt cutters, or work gloves. The court held that the indictment's identification of the specific tools was mere surplusage. (2) There was no fatal defect in an indictment charging the defendant with injury to personal property. The defendant asserted that the indictment was invalid because it failed to allege that the owner, a church, as an entity capable of owning property. In *State v. Campbell*, 368 N.C. 83 (2015), the Supreme Court held that alleging ownership of property in an entity identified as a church or other place of religious worship is sufficient to allege an entity capable of owning property. Here, count one of the indictment alleged breaking or entering a place of religious worship and identified the church expressly as "a place of religious worship." The count alleging injury to personal property simply referred to the church by name. The court found that identifying the church as a place of religious worship in the first count and subsequently listing the church as the owner of the personal property in a later count was sufficient. A contrary ruling, requiring the church to be identified as a place of worship in each portion of the indictment, "would constitute a hypertechnical interpretation of the requirements for indictments." (3) By failing to assert a claim of fatal variance between the indictment and the evidence with respect to a charge of injury to personal property, the defendant failed to preserve the issue for appellate review. Nevertheless, the court considered the issue and rejected the defendant's claim. The indictment alleged that the defendant injured the personal property of the church, specifically a lock on a door. The defendant asserted that the evidence showed that the damaged device was owned not by the church but rather by the lessor of the property. The court concluded however that the evidence was sufficient to allow the jury to find that the church owned the lock and that it was damaged.

Motion to Suppress a Prior Conviction

[*State v. Thorpe*](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 18, 2017). The trial court did not err by denying the defendant's motion to suppress filed under G.S. 15A-980. The defendant argued for suppression of a conviction used in two habitual misdemeanor assault indictments on grounds that it was obtained in violation of his right to counsel. At hearing on the motion the defendant testified that when he pleaded

guilty to the charge, he was not represented by counsel and did not waive his right to counsel. At the suppression hearing, an assistant clerk testified that the only remaining records of the proceeding indicated that the defendant was represented by a retained attorney. Specifically, the designations “R” and “N/A” appeared in the electronic record. She testified that the designation “R” was used to reflect the fact that a defendant had retained counsel. “N/A” was used when the handwritten notes on the shuck were not legible or the attorney’s name was unknown and the designation “N/A” was never used when a defendant was unrepresented. Applying the presumption of regularity, the court presumed that the information contained in the records was accurate and found that the defendant failed to rebut the presumption with competent, material and substantial evidence.

Instructions on the Right to Testify

[*State v. Little*](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 18, 2017). In this armed robbery case, the trial court did not err in its colloquy with the defendant about the right to testify. The trial court conducted a colloquy with the defendant in which it warned the defendant that he would be subject to cross-examination if he testified at trial, including cross-examination about his prior convictions. On appeal, the defendant argued that the trial court’s instructions impermissibly chilled his right to testify and incorrectly advised him regarding the scope of cross-examination pertaining to his prior convictions. Reviewing the trial court’s colloquy with the defendant, the court disagreed, finding the advisement was consistent with the use of prior convictions to impeach under Rule 609 and that the trial court accurately informed the defendant about the limiting instruction that would be provided with respect to his prior convictions.

Jury Instructions

[*State v. Malachi*](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 18, 2017). In this felon in possession of a firearm case, the trial court erred by instructing the jury, over the defendant’s objection, that it could find the defendant guilty based on actual or constructive possession of the firearm where no evidence supported a theory of constructive possession. After an officer’s frisk of the defendant revealed a revolver in his waistband, the defendant was arrested and brought to trial. After the trial court instructed the jury, the jury sought clarification of the “legal definition” of “possession of a firearm.” The trial court, again over defense counsel’s objection, responded with definitions of both actual and constructive possession. The jury found the defendant guilty. Finding that the trial court erred, the court noted that “[a]n instruction related to a theory not supported by the evidence confuses the issues, introduces an extraneous matter, and does not declare the law applicable to the evidence.” Additionally, cases “have consistently held that a trial court’s inclusion of a jury instruction unsupported by the evidence presented at trial is reversible error. The court noted that when the trial court has instructed on alternative theories of guilt, one of which is supported by the evidence and the other is unsupported, it has presumed that the defendant was found guilty based on the theory that was not supported by the evidence. This presumption has been applied regardless of whether a defendant properly objected to the instruction at trial. The court noted however that recently, in *State v. Boyd*, 366 N.C. 548, the Supreme Court declared that such an instructional error not objected to a trial is not plain error per se. The court however interpreted *Boyd* as applying only to plain error review and not as eliminating the long-established presumption that the jury relied on an erroneous disjunctive instruction not supported by the evidence when given over an objection. Here, the evidence supported only a theory of actual possession and the constructive possession instruction was given over defense counsel’s objection.

Evidence

Photographs for Illustrative Purposes

[*State v. Little*](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 18, 2017). In this armed robbery case, the trial court did not err by admitting photographs for illustrative purposes. The photographs were admitted solely to illustrate the testimony of witnesses and the trial court appropriately instructed the jury. The court rejected the defendant's argument that photographs admitted for illustrative purposes must be authenticated in the same manner as photographs admitted as substantive evidence.

Arrest, Search & Investigation Searches

[*State v. Huddy*](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 18, 2017). Because an officer violated the defendant's fourth amendment rights by searching the curtilage of his home without a warrant, the trial court erred by denying the defendant's motion to suppress. The officer saw a vehicle with its doors open at the back of a 150-yard driveway leading to the defendant's home. Concerned that the vehicle might be part of a break-in or home invasion, the officer drove down the driveway, ran the vehicle's tags, checked—but did not knock—on the front door, checked the windows and doors of the home for signs of forced entry, “cleared” the sides of the house, and then went through a closed gate in a chain-link fence enclosing the home's backyard and approached the storm door at the back of the house. As the officer approached the door, which was not visible from the street, he smelled marijuana, which led to the defendant's arrest for drug charges. At the suppression hearing, the State relied on two exceptions to the warrant requirement to justify the officer's search of the curtilage: the knock and talk doctrine and the community caretaker doctrine. The court found however that neither exception applies. First, the officer did more than nearly knock and talk. Specifically, he ran a license plate not visible from the street, walked around the house examining windows and searching for signs of a break-in, and went first to the front door without knocking and then to a rear door not visible from the street and located behind a closed gate. “These actions went beyond what the U.S. Supreme Court has held are the permissible actions during a knock and talk.” Likewise, the community caretaker doctrine does not support the officer's action. “The presence of a vehicle in one's driveway with its doors open is not the sort of emergency that justifies the community caretaker exception.” The court also noted that because the fourth amendment's protections “are at their very strongest within one's home,” the public need justifying the community caretaker exception “must be particularly strong to justify a warrantless search of a home.”

Criminal Offenses Assaults

[*State v. Mylett*](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 18, 2017). The evidence was sufficient to support a conviction for assault on a government officer under G.S. 14-33(c)(4). While attempting to separate the defendant from other individuals, the defendant spit at people walking behind the officer, hitting the officer with his spit. The defendant argued that because he intended to assault individuals standing behind the officer, the State failed to establish that he intended to assault the officer. The court rejected this argument, holding that the offense was a general intent crime. Here, the defendant conceded that he knew the victim was a law enforcement officer and that he intended to commit an assault. The court concluded: “we are satisfied that when Defendant spat at members of the crowd and [the] Officer . . . was struck by Defendant's spit, the requirements of [the statute] were satisfied.” It continued: “the knowledge element of assault on a government officer in violation of [G.S. 14-33(c)(4)]

is satisfied whenever a defendant while in the course of assaulting another individual instead assaults an individual he knows, or reasonably should know, is a government officer.”

Breaking or Entering and Related Offenses

[*State v. McNair*](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 18, 2017). (1) The evidence was insufficient to convict the defendant of breaking or entering into a place of religious worship. The defendant was alleged to have broken into a place of religious worship used by Vision Phase III International Outreach Center (“Vision”), a church engaged in international missions and renting a building called the “Chapel” for the purpose of conducting its church services. Several other structures were situated behind the Chapel, including a small barn, located approximately 50 away. The property owner allowed Vision to use the barn to store equipment that could not be kept in the Chapel. The only building that the defendant was alleged to have broken into was the barn, which the State conceded was not used for religious worship. However, the State argued that the barn was within the curtilage of the Chapel, and for this reason should be deemed an extension of the Chapel for purposes of the statute. The court rejected this argument reasoning, in part, that based on the statute’s wording “it is clear” that to be convicted of breaking or entering into a place of religious worship, the specific building broken into must be a “building that is regularly used, and clearly identifiable, as a place for religious worship.” (2) The evidence was sufficient to convict the defendant of felony breaking or entering a building. The court rejected the defendant’s argument that the evidence showed only his presence at the scene, noting, among other things, that responding to a possible break-in, officers found the defendant scaling a 10-foot brick wall near the barn. The court also found that the evidence was sufficient to support an inference that the defendant intended to commit a larceny when he entered the barn, noting, among other things, that items had been removed from the barn and placed in the fenced in area around it. (3) The court rejected the defendant’s argument that the evidence was insufficient to sustain a conviction for injury to personal property. As with the prior offense, the defendant asserted that his mere presence at the scene constituted insufficient evidence. However, citing other incriminating evidence, the court rejected this assertion. (4) The evidence was sufficient to convict the defendant of possession of burglar’s tools. Specifically, there was sufficient evidence that the defendant had constructive possession of a prybar and bolt cutters found at the scene. These tools were found within the fenced in area. Although the defendant was not in exclusive possession of them, there were other incriminating circumstances, including, among other things, that the defendant was found alone inside a privately owned fenced in area at 1 am and was scaling a 10-foot brick wall in an apparent attempt to avoid apprehension.

Weapons Offenses

[*State v. Battle*](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 18, 2017). In this felon in possession case, there was insufficient evidence that the defendant possessed the rifle in question. While attempting to locate the defendant, deputies established a perimeter around a large section of woods and deployed a canine, Max, to track human sent in the area. Following a scent, Max brought the officers to a loaded assault rifle. While Max continued to track the scent, another man emerged from the woods. After losing the scent and taking a rest break outside of the woods, Max resumed tracking, picking up a scent, and leading the officers to the defendant, who was discovered lying on the ground. The distance between where the rifle was recovered and where the defendant was found was between 75 and 100 yards. No evidence was presented regarding ownership of the rifle. DNA swabs taken from the rifle and compared to the defendant’s DNA were inconclusive. No other evidence connected the defendant to the rifle. Notwithstanding the fact that Max was trained not to veer off of one human sent and on to another, the

rifle was not found in the defendant's physical possession or in the immediate area over which he had the ability to control. Additionally, another man was present in the woods. The court noted that it had upheld convictions where defendants were identified as the perpetrator by tracking canines but found those cases distinguishable. Here, testimony of the canine's tracking behavior constituted the *only* evidence offered to establish constructive possession of the rifle. In one of those prior cases, hair and shoe print evidence also was presented to identify the defendant as the perpetrator. In the other, the canines were offered a scent source of the defendant and the codefendant and were tracking a known scent, as compared to the case at hand where Max was tracking an unknown scent. Also, in neither of the prior cases did the canine lose the track, take a break, and then resume. Additionally, here the defendant was not alone in the area and no other evidence linked him to the rifle or the site where it was recovered. The court concluded:

The officers' testimony is insufficient to establish any link between Defendant and the firearm. The canine tracking evidence on an unknown scent fails to raise, as a matter of law, a reasonable inference of either actual or constructive possession of a firearm by Defendant as a convicted felon. Viewed in the light most favorable to the State, the evidence raises only a "suspicion [or] conjecture" that Defendant possessed the rifle. The trial court erred in denying Defendant's motion to dismiss.