

Criminal Procedure

Arrest & Initial Appearance Procedure

[*State v. Cox*](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 2, 2017). In this impaired driving second-degree murder case, the trial court did not err by denying the defendant's motion to dismiss which had asserted that violation of G.S. 15A-501 required dismissal of the charges. Under G.S. 15A-501, a law enforcement must bring a person arrested before a judicial official without unnecessary delay and must without unnecessary delay advise the person of his right to communicate with counsel and friends and must allow him a reasonable time and opportunity to do so. The vehicle crash occurred at 2:37 AM. An officer arrived at the scene between 3:15 and 3:20 AM and conducted field sobriety testing on the defendant. The defendant was arrested without a warrant for impaired driving and violation of his .04 BAC drivers license restriction. The defendant was taken to a hospital to have blood drawn. He arrived at the hospital around 4:33 AM. The officer advised the defendant of his rights and the defendant signed a rights form; he did not ask to have a witness or attorney present. A telephone was available to the defendant in the hospital room. The defendant's blood was drawn at 4:55 AM and he was examined by a physician and cleared. The defendant was then taken to a law enforcement center where the lead detective arrived to interview the defendant at about 5:52 AM. The interview began at about 6:15 AM, at which time the defendant was read his *Miranda* rights and waived his rights. The interview concluded after an hour. The defendant was then charged with second-degree murder and felony serious injury by vehicle. After the detective checked the defendant's criminal and driving history, an officer transported the defendant to the county jail for processing at 9:35 AM. He was brought before magistrate at approximately 11:11 AM. Prior to seeing the magistrate, the defendant made a phone call to a friend but did not ask the friend come to the jail until after he knew the conditions of his release. Reviewing these facts, the court noted that there was a seven hour delay between the defendant's arrest and his appearance before a magistrate. The court noted that the defendant was afforded multiple opportunities to have witnesses or an attorney present and chose not to take advantage of those opportunities. It concluded: "Defendant cannot now assert that he was prejudiced to gain relief, either by the absence of a witness or attorney or by the time period between his arrest and appearance before a magistrate."

Indictment Issues

[*State v. Reynolds*](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 2, 2017). Indictments charging the defendant with failing register under G.S. 14-208.11(a)(2) and (a)(7) were not fatally defective where the indictments substantially tracked the language of the statute.

Pleas and Plea Procedure

[*State v. Whitehurst*](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 2, 2017). The trial court did not err by denying the defendant's motion to withdraw his *Alford* plea. After finding that there was no support in the record for various factual assertions made by the defendant on appeal, the court found that the defendant had offered no fair and just reason for withdrawal of his plea. Among other things, the court rejected the defendant's argument that he entered his plea while under duress because he was in custody at the time, holding: "Defendant cites no authority for the proposition that the fact that a defendant is incarcerated is *per se* evidence of coercion, and we decline to adopt the position proposed by defendant."

Double Jeopardy

[*State v. Reynolds*](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 2, 2017). In this sex offender registration case, double jeopardy barred convictions under both G.S. 14-208.11(a)(2) and (a)(7). The defendant was convicted of two separate crimes: one pursuant to G.S. 14-208.11(a)(2) (failure to notify the last registering sheriff of a change in address) and one pursuant to 14-208.11(a)(7) (failure to report in person to the sheriff's office as required by, here, G.S. 14-208.9(a) (in turn requiring that a person report in person and provide written notice of an address change)). The court noted that it has previously held that the elements of an offense under G.S. 14-208.11(a)(2) and under G.S. 14-208.9(a) are the same: that the defendant is required to register; that the defendant changed his or her address; and that the defendant failed to notify the last registering sheriff of the change. It concluded: "Because in this case North Carolina General Statute § 14-208.11(a)(2) and (a)(7) have the same elements, one of defendant's convictions must be vacated for violation of double jeopardy." The court went on to reject the State's argument that the legislature intended to allow separate punishment under both subsection (a)(2) and (a)(7).

Jury Instructions

[*State v. Cox*](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 2, 2017). (1) In this impaired driving second-degree murder case, the court rejected the defendant's argument that the trial court's instruction on proximate cause was erroneous and that the trial court committed plain error by failing to instruct the jury on intervening negligence. The trial court instructed the jury that it had to find that "[T]he death of the victim was proximately caused by the unlawful act of the defendant" and that "[T]he State must prove beyond a reasonable doubt only that the defendant's negligence was a proximate cause." The court rejected the notion that the jury probably would have reached a different result if an instruction on intervening negligence was given. Overwhelming evidence showed that the defendant drove through a red light while grossly impaired and caused the crash. The only evidence hinting that the victim may have been negligent in causing the crash was the defendant's offhand question to an officer who arrived on the scene about whether the officer had tested "the person that ran the red light." Even if the victim had somehow been negligent, her negligent would most be a concurring proximate cause of her own death. (2) The trial court did not err in instructing the jury with respect to proximate cause as to the charge of felonious serious injury by vehicle. The defendant argued that the language of the statute "forecloses the possibility of the state proving proximate cause in conjunction with some other concurrent cause." The court disagreed, citing prior case law rejecting this argument.

Jury Deliberations & Verdict

[*State v. Johnson*](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 2, 2017). In this case where the defendant was charged with three counts of first-degree sex offense with a child and three counts of sex offense by a substitute parent, the trial court's jury instructions did not allow for a non-unanimous verdict. The indictments charged that the offenses all occurred within the same date range and did not provide details distinguishing the incidents. The evidence at trial showed multiple sexual interactions between the defendant and the victim. In its instructions to the jury, the trial court differentiated between the offenses based on where they were alleged to have occurred: inside the house, outside the house but on the property, and at the end of a dirt road near the house. The court rejected the defendant's argument that the trial court failed to sufficiently identify the incidents, thereby depriving him of his right to a unanimous jury verdict. Specifically, he asserted that the evidence presented at trial showed multiple, distinct incidents of sexual assault occurring inside the house and multiple, distinct instances of sexual assault occurring outside the house but on the property. The court rejected the defendant's

arguments, noting that prior case law has held no violation of the unanimity rule occurs in sexual assault cases even if the jurors considered a greater number of incidents than the number of counts charged and if the indictments lacked specific details to identify the specific incidents. It concluded: “Jury unanimity was shown as there was evidence of fellatio inside the house both at the computer table and in the bathroom, or that there was evidence of fellatio outside the house but on the property both inside a car and in the driveway.”

[*State v. Harris*](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 2, 2017). No plain error occurred with respect to a supplemental jury instruction given by the trial court in response to the jury’s note that it was “stuck” during deliberations. The noted indicated that the jury was split 11 to 1. Neither party objected to the trial court’s suggestion to give the jury an instruction urging them to do what they could to arrive at a unanimous verdict. The defendant argued that the trial court’s instruction violated G.S. 15A-1235. Although the court found that the trial court’s failure to give the full instructions as directed by the statute did not rise to the level of plain error, it stated: “[W]e must clarify that at the time the instruction was given, the trial court should reasonably have believed that the jury was deadlocked. Because the trial court gave some of the instructions, but not all of them, it did commit error.”

Sentencing

[*State v. Whitehurst*](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 2, 2017). The trial court erred by ordering the defendant to pay \$200 in restitution where no evidence was offered to support the amount of restitution ordered.

Probation Revocations

[*State v. Regan*](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 2, 2017). (1) The trial court had jurisdiction to revoke the defendant’s probation. The court rejected the defendant’s argument that the trial court in Harnett County lacked jurisdiction to commence a probation revocation hearing because the probation originated in Sampson County. It held: “A trial court located in a county where a defendant resides and violates the terms of her probation is vested with jurisdiction to revoke the defendant’s probation.” The court added however:

In order to avoid disputes, uncertainty, and costly litigation, the better practice for probation officers is to specify on probation violation reports any address relevant to alleged probation violations, such as the last known address of a probationer who has left the jurisdiction without permission or the address of the probation office where a defendant failed to attend a scheduled meeting. Additionally, in a probation violation hearing, the better practice for the State is to introduce direct evidence of any address relevant to an alleged probation violation. In this case, the indirect evidence—sufficient to allow the reasonable inference that Defendant resided in Harnett County when she fled the jurisdiction and violated her probation in Harnett County by failing to meet with her probation officer there—supports the trial court’s presumed findings necessary to support its judgment.

The court also rejected the defendant’s argument that the trial court lacked jurisdiction to revoke her probation because there was no record showing that her probation had been transferred from Sampson County to Harnett County. The court noted that the defendant had offered no authority to support this assertion. (2) The court rejected the defendant’s argument that the trial court erred by revoking her probation after its expiration because it did not make adequate findings of fact. Specifically, the defendant argued that the trial court erred by failing to make any written or oral findings of good cause

to revoke her probation. The court noted that the statute at issue, G.S. 15A-1344(f), does not require that the trial court make any specific findings and that, here, the record indicates that the trial court found good cause to revoke.

Sex Offender Registration & SBM

[State v. Johnson](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 2, 2017). (1) The trial court erred by ordering lifetime registration for the defendant. Although the defendant was convicted of reportable convictions and is therefore required to register as a sex offender, neither sexual offense with a child under G.S. 14-27.4A(a) nor sexual activity by a substitute parent under G.S. 14-27.7(a) constitute aggravated offenses requiring lifetime registration. (2) The trial court erred by ordering lifetime SBM without a determination that the program was a reasonable search as mandated under *Grady v. North Carolina*, ___ U.S. ___, 191 L. Ed. 2d 459 (2015). The parties agreed that no evidence was presented to demonstrate the reasonableness of lifetime SBM. The court thus reversed the SBM order and remanded for the reasonableness determination mandated by *Grady*.

Evidence

Hearsay

[State v. Harris](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 2, 2017). The trial court did not err by allowing the introduction of a video recording of the State's witness being interviewed by law enforcement as substantive evidence where the statement fell within the Rule 803(5) hearsay exception for past recollection recorded. The court rejected the notion that the video had been introduced to refresh the witness's recollection.

Cross-Examination

[State v. Cox](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 2, 2017). In this impaired driving second-degree murder case, the trial court did not err by preventing the defendant from cross-examining witness Cooke regarding the contents of a verified complaint that Cooke had filed against the defendant and the estate of the deceased victim on behalf of himself and Cooke's son, who was injured in the crash. The State filed a motion in limine to prevent the defendant from cross-examining Cooke regarding the contents of the verified civil complaint. The trial court granted the State's motion and prohibited the defendant from cross-examining Cooke regarding the allegations in the complaint or about any bias that might result from Cooke's financial interest in the defendant's prosecution. Cooke was called by the State to testify about his family and the child's injuries. The State did not elicit any testimony from him regarding cause of the crash and he did not offer any testimony that would tend to sway the jury in deciding the defendant's guilt. The defendant failed to show that the trial court's decision to limit the scope of cross-examination influenced the jury's verdict.

Corroboration

[State v. Harris](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 2, 2017). The trial court did not err by allowing the introduction of a video recording of the State's witness being interviewed by law enforcement to corroborate the officer's prior testimony about the interview.

Miscellaneous Cases

[*State v. Cox*](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 2, 2017). In this impaired driving second-degree murder case, the trial court did not err by excluding evidence that a child victim was not properly restrained in a child seat. Although G.S. 20-127.1 provides that passengers less than 16 years old must be properly secured in a vehicle, the statute also provides that evidence of failure to wear a seatbelt is not admissible in any criminal action, subject to exceptions that do not apply in this case.

Criminal Offenses

Sex Offender Registration Crimes

[*State v. Reynolds*](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 2, 2017). In this sex offender registration case where the defendant was charged with failing to notify of an address change, there was sufficient evidence that the defendant changed his address. After the defendant registered in 2011, he was incarcerated and then released in 2013. The Supreme Court has clarified that while incarcerated, a registrant's address is that of the facility or institution in which he is confined and that when he is released from incarceration, his address necessarily changes. The court rejected the defendant's argument that his incarceration for only a month was not long enough to establish a new address at his place of confinement.