

Criminal Procedure

Indictment Issues

[*State v. Maloney*](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). An indictment charging the defendant with possession of methamphetamine precursors was fatally defective and the defect could not be cured by amendment. Specifically, the indictment failed to allege that the defendant possessed the precursors knowing or having reasonable cause to believe that they would be used to manufacture methamphetamine. The trial court allowed the State to amend the indictment to add this allegation at trial. The amendment was improper and the indictment was fatally defective.

Continuance

[*State v. Moore*](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). In this case involving charges of fleeing to allude arrest, resisting an officer, driving without a license and other charges, the trial court did not err by denying the defendant's motion for a continuance. Following the defendant's arrest on May 22, 2015 attorney Doyle was appointed to represent the defendant. The defendant was later charged with first-degree murder in an unrelated case and attorney Mannette was appointed to represent him on that charge. On March 9, 2016, the defendant's homicide case was continued until September 2016. Attorney Doyle was present at the hearing and moved the trial court to allow him to withdraw as counsel on the charges at issue in this case and appoint Ms. Mannette. The prosecutor informed the court that the charges were scheduled for trial on April 18, 2016. Mannette said that she believed the charges were headed towards resolution but that she would not be prepared to try the case in a month. The trial court indicated that the "bottom line" was that the case was "going to get continued" if the State was prepared to proceed to trial on April 18th. When the case was called for trial on April 18, 2016, Mannette orally moved for a continuance, explaining that when she took the case she indicated that if the parties could not reach a non-trial disposition she would not be prepared to try the case. Defense counsel acknowledged that she had received discovery a month earlier. Counsel stated that she had not interviewed a witness or conducted legal research to support her pretrial motions. The trial court denied the continuance motion. On appeal the defendant argued that the denial of his motion to continue deprived him of his constitutional right to effective assistance of counsel because counsel had insufficient time to prepare a defense. The court rejected this argument. First, it rejected the defendant's argument that the trial court's remark made at the March 9th hearing constituted a judgment or order that could not be overruled by another judge. The court noted that an order rendered in open court is not enforceable until it is entered, that is, reduced to writing, signed by the judge, and filed with the clerk of court. Thus, the oral statement by the judge, which was not reduced to writing or entered as an order or judgment, was not a judgment or order that may not be overruled by another judge. Second, the court rejected the defendant's argument regarding his need for additional time to prepare a defense. At the pretrial hearing, defense counsel stated that there was a lay witness she had not interviewed, a suppression motion for which she had not conducted the necessary research, and other unspecified motions in limine that needed to be filed and argued. Defense counsel did not identify the witness or articulate any material factual issue upon which the witness might testify. Nor did counsel offer an explanation, other than her reliance on the prior judge's comment at the earlier hearing, for failure to interview the witness, conduct the necessary research, or file a properly supported written motion to continue. Additionally, the trial was not unusual or complex. The court thus concluded that the defendant had failed to establish that the denial of his continuance motion violated his constitutional rights.

Jury Selection

[*State v. Martinez*](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). In this child sexual assault case, the court rejected the defendant's argument that a statement made by a prospective juror violated his constitutional right to an impartial jury and constituted plain error. Specifically, the defendant argued that the prospective juror's statement that her uncle was a local defense attorney who had told her his job was to "get the bad guys off" amounted to a comment on the defendant's guilt from a reliable source. The court found that the statement in question was generic and did not imply any particular knowledge of the defendant's case or the possibility that the defendant might be guilty.

Jury Instructions

[*State v. Martinez*](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). In this child sex case, no prejudicial error occurred when the trial court instructed the jury on a sexual act that was not supported by the evidence. The defendant was convicted of four felonies under G.S. 14-27.4(a)(1) (first degree sexual offense with a child) and two felonies under G.S. 14-27.7(a) (sex offense in a parental role). Both statutes require that the defendant engage in a "sexual act" with the victim. The term sexual act is defined as cunnilingus, fellatio, anilingus, or anal intercourse. The evidence at trial showed that the defendant engaged in fellatio and anal intercourse with victim. There was however no evidence that the defendant engaged in anilingus with the victim. However, the trial court instructed the jury that it could find the defendant guilty of the six felonies if it found that he committed fellatio, anal intercourse, or anilingus with the victim. The court noted that it cannot be discerned from the verdict sheets which theory the jury relied upon to find the defendant guilty. In its first opinion in the case, the court held that the trial court's inclusion of anilingus, where no evidence of that act was offered at trial, constituted plain error per se. The Supreme Court however remanded, instructing the court to revisit its holding in light of *State v. Boyd*, 366 N.C. 548 (2013). In *Boyd*, the trial court instructed the jury that it could convict the defendant of kidnapping based on three alternative theories: confinement, restraint, or removal. On appeal to the court of appeals, two members of the panel held that the instruction constituted plain error because there was no evidence that the defendant had removed the victim. A dissenting judge agreed with the majority that the trial court erred by instructing on the theory of removal but disagreed that the error rose to the level of plain error. The dissenting judge did not assume that the jury relied on the theory of removal to support the kidnapping conviction; rather, she cited the overwhelming evidence supporting the other kidnapping theories, confinement and restraint, to conclude that the defendant failed to show that absent the error the jury would have returned a different verdict. The Supreme Court reversed the court of appeals in *Boyd*, adopting the dissenting opinion from the intermediate appellate court. In this second appeal, the court noted that the Supreme Court's approach in *Boyd* represented a shift away from the per se rule that had been previously applied in cases involving disjunctive instructions where one of the theories was not supported by the evidence. Turning to the case at hand, the court concluded that the defendant failed to meet his burden of showing that the trial court's inclusion of anilingus in the jury instruction had any probable impact on the verdict. It noted that the victim was clear in her testimony regarding the occasions where fellatio and anal intercourse had occurred.

[*State v. Fowler*](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). In this impaired driving case, the trial court committed reversible error by instructing the jury that it could find the defendant guilty if he was driving under the influence of an impairing substance or had a blood alcohol concentration of .08 or more, where no evidence supported a conviction under the .08 prong of the impaired driving statute. Although disjunctive jury instructions generally are permissible for impaired driving, in this case the State presented no evidence supporting the .08 prong. The trial court improperly instructed the jury on

alternative theories, one of which is not supported by the evidence. Because it is impossible to conclude, based on the record and the general verdict form, upon which theory the jury based its verdict, the court found that it must assume that the jury based its verdict on the theory for which it received an improper instruction. The court went on to reject the State's argument that the error was harmless or non-prejudicial and noted that this is not a case where there is overwhelming evidence of impaired driving.

Evidence

Expert Opinions

[*State v. Martinez*](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). In this child sexual assault case, the State's medical expert did not impermissibly testify that the victim had been abused. Case law holds that in the absence of physical evidence to support a diagnosis of sexual abuse, expert testimony that sexual abuse has in fact occurred is not admissible because it is an impermissible opinion regarding the victim's credibility. Here however the expert's statement, considered in context, does not amount to an assertion that the child was in fact abused. Rather, the expert was speaking of a hypothetical victim when she made the statement in question. In fact, she testified that the victim's medical exam was normal and that she could not determine from the exam whether or not the child had been sexually abused.

Impeachment

[*State v. Martinez*](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). In this child sexual assault case, the trial court erred by excluding evidence which tended to show the victim's mother's bias against the defendant. After concluding that the defendant failed to preserve his challenges with respect to three pieces of impeachment evidence, the court concluded that exclusion of impeachment evidence that the mother had previously accused the defendant of domestic abuse constituted error. The evidence at issue showed that the mother had accused the defendant of domestic violence, that the police declined to prosecute, that she subsequently took out a private warrant, and that she failed to prosecute those charges. The court agreed that exclusion of this evidence was error, explaining: "Evidence that Mother had accused Defendant of domestic violence could have indicated Mother's bias against Defendant and may have influenced the jury's assessment of her credibility as a witness." However, considering the entire record, the court went on to conclude that there was no reasonable possibility that had the jury heard the evidence a different result would have been reached at trial.

Videotape Evidence

[*State v. Moore*](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). The State failed to lay a proper foundation for the introduction of a video as either illustrative or substantive evidence. An officer testified that the day after the incident in question, he asked the manager of a Kangaroo convenience store for a copy of the surveillance video made by cameras at the store. The manager allowed the officer to review the video. The officer used the video camera function on his cell phone to make a copy of the surveillance footage. At trial he testified that the cell phone video accurately showed the contents of the video he had seen at the store. The store clerk also reviewed the video but was not asked any questions about the creation of the original video or whether it accurately depicted the events that he observed on the day in question. No testimony was elicited at trial concerning the type of recording equipment used to make the video, its condition on the day in question or its general reliability. No witness was

asked whether the video accurately depicted events that he had observed, and no testimony was offered on the subject. However, the court went on to hold that the error was not prejudicial.

404(b) Evidence

[*State v. Williams*](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). In this possession of a firearm by a felon case, the court held, over a dissent, that the trial court erred by admitting 404(b) evidence. The current charges were filed after officers found an AK-47 rifle in the back seat of a vehicle and a Highpoint .380 pistol underneath the vehicle, next to the rear tire on the passenger side. At trial, the State offered, and the trial court admitted, evidence of a prior incident in which officers found a Glock 22 pistol in a different vehicle occupied by the defendant. The evidence was admitted to show the defendant's knowledge and opportunity to commit the crime charged. The defendant offered evidence tending to show that he had no knowledge of the rifle or pistol recovered from the vehicle. The trial court erred by admitting the evidence as circumstantial proof of the defendant's knowledge. The court reasoned, in part, that "[a]bsent an immediate character inference, the fact that defendant, one year prior, was found to be in possession of a different firearm, in a different car, at a different location, during a different type of investigation, does not tend to establish that he was aware of the rifle and pistol in this case." The court found that the relevance of this evidence was based on an improper character inference. The court further held that the trial court abused its discretion by admitting the evidence as circumstantial proof of the defendant's opportunity to commit the crime charged. The court noted, in part, that the State offered no explanation at trial or on appeal of the connection between the prior incident, opportunity, and possession. The court went on to hold that the trial court's error in admitting the evidence for no proper purpose was prejudicial and warranted a new trial. The dissenting judge believed that the defendant did not properly preserve his objection, that the issue should be reviewed under the plain error standard, and that no plain error occurred.

Arrest, Search & Investigation

Miranda

[*State v. Burris*](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). In this impaired driving case, the court rejected the defendant's argument that the trial court erred by denying his motion to suppress self-incriminating statements made without *Miranda* warnings, finding that the defendant was not in custody at the time. The standard for determining whether an individual is in custody for purposes of *Miranda* is, based on the totality of the circumstances, whether there was a formal arrest or restraint on freedom of movement to a degree associated with a formal arrest. In this case, the defendant argued that when the detective retained his drivers license he was seized, not free to leave, and thus entitled to *Miranda* warnings. The court found that the defendant had erroneously conflated the *Miranda* custody standard with the standard for a seizure. Noting that the defendant was not under formal arrest at the time he was questioned, the court determined that under the totality of the circumstances the defendant's movement was not restrained to the degree associated with a formal arrest. The court noted that the inquiry is an objective one, not a subjective one. Here, the defendant was standing outside of his own vehicle while speaking with the detective. He was not told he was under arrest or handcuffed, and other than his license being retained, his movement was not stopped or limited further. No mention of any possible suspicion of the defendant being involved in criminal activity, impaired driving or otherwise, had yet been made. A reasonable person in these circumstances would not have believed that he was under arrest at the time.

[*State v. Moore*](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). The trial court properly denied the defendant's suppression motion where the defendant's statements were not made in response to police interrogation. Here, there was no dispute that the defendant made inculpatory statements while in custody and without being given his *Miranda* rights. The defendant made the statements in question after being arrested and while being transported to the police department. While en route to the police department, the defendant heard the officer's lieutenant asking questions of the officer over the police radio and offered the statements in question. The trial court found that the defendant's statements were spontaneous utterances and not made in response to questions posed to him. The court of appeals agreed, relying on prior case law and holding that the defendant's statements were not the result of an interrogation.

Warrantless Blood Draw

[*State v. Burris*](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). In this impaired driving case the trial court properly denied the defendant's motion to suppress where exigent circumstances supported a warrantless blood draw. The defendant tested at .10 on a roadside test, was arrested at 2:48 AM and then was transported to the police department, where he arrived 18 minutes later. When the defendant refused to comply with further testing within 2 to 3 minutes after arriving at the police department, the detective decided to compel a blood test. The closest hospital was approximately 4 miles away from the police department and 8 miles from the magistrate's office. The detective read the defendant his rights regarding the blood draw at the hospital at 3:24 AM and waited for the defendant to finish making a phone call before starting the blood draw at 3:55 AM. The detective testified that based on the information he had at the time, he thought the defendant was close to a blood alcohol level of .08. The detective further indicated that he thought it would have taken an additional hour to an hour and half to get a search warrant. The detective was the only officer on the scene and would have had to wait for another officer to arrive before he could travel to the magistrate to get the search warrant. The trial court's finding regarding the detective's reasonable belief that the delay would result in the dissipation of alcohol in the defendant's blood was supported by competent evidence. Thus, the trial court did not err in denying the defendant's motion to suppress the blood draw.

Warrantless Search of Probationer's Home

[*State v. Powell*](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). Because the State failed to meet its burden of demonstrating that a warrantless search was authorized by G.S. 15A-1343(b)(13), the trial court erred by denying the defendant's motion to suppress. The defendant was subjected to the regular condition of probation under G.S. 15A-1343(b)(13). This provision requires that the probationer "Submit at reasonable times to warrantless searches by a probation officer of the probationer's person and of the probationer's vehicle and premises while the probationer is present, for purposes directly related to the probation supervision . . ." Here, the search of the defendant's home occurred as part of an ongoing operation of a US Marshal's Service task force. The court noted that while prior case law makes clear that the presence or participation of law enforcement officers does not, by itself, render a warrantless search under the statute unlawful, the State must meet its burden of satisfying the "purpose" element of the statute. The State failed to meet its burden here. To conclude otherwise would require the court to read the phrase "for purposes directly related to the probation supervision" out of the statute. The court emphasized however that its opinion should not be read as diminishing the authority of probation officers to conduct warrantless searches of probationers' homes or to utilize the assistance of law enforcement officers in conducting such searches. Rather, it held that on the specific

facts of this case the State failed to meet its burden of demonstrating that the search was authorized under the statute.

Criminal Offenses

Drug Offenses

[*State v. Maloney*](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). The court rejected the defendant's argument that the trial court erred by entering judgment for two separate counts of manufacturing methamphetamine. The defendant had argued that the crime was a single continuing offense and that therefore one of the conviction should be vacated. However two separate methamphetamine labs were discovered, in the trunk of a vehicle and in a storage unit. It was clear that the separate and distinct locations contained two separate methamphetamine manufacturing processes. Thus, the trial court did not err by entering judgment for two separate counts of manufacturing methamphetamine.

Impaired Driving

[*State v. Burris*](#), ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). In this impaired driving case the court rejected the defendant's argument that the trial court erred by denying his motion to dismiss at the close of the State's evidence. The defendant had argued that there was no independent evidence, other than his admission, to establish that he was operating a motor vehicle at any relevant time period. Here, the defendant admitted to the detective that he had been driving the vehicle and described in detail the route he took to get to the scene. When the detective approached the vehicle, the engine was not running but it was parked under an overhang area by the front door of a hotel, where guests typically stop to check in. The detective observed the defendant sitting in the drivers seat and the vehicle was registered to the defendant. The circumstantial evidence, along with the defendant's admissions to driving the vehicle and the route he took, was sufficient evidence for the jury to determine that the defendant drove the vehicle.