

Criminal Procedure

Appellate Issues

[*State v. Campbell*](#), ___ N.C. ___, ___ S.E.2d ___ (June 9, 2017). The Court of Appeals failed to recognize its discretion under Rule 2 of Rules of Appellate Procedure to refrain from undertaking a review of the defendant's fatal variance claim, apparently acting under the erroneous belief that it was required to reach the merits of the claim. The defendant was found guilty of felony larceny. On appeal, he asserted in part that the trial court erred by failing to dismiss the larceny charge due to a fatal variance with respect to ownership of the property. Because counsel failed to raise the issue at trial, the defendant sought review under Rule 2. Noting that a previous panel of the court had invoked that Rule to review a fatal variance issue, the Court of Appeals, without further discussion or analysis, addressed the merits of the defendant's argument, finding a fatal variance and vacating the larceny convictions. The State petitioned the Supreme Court for discretionary review on the issue of whether the Court of Appeals erred by invoking Rule 2 under the circumstances of the case. The Supreme Court noted that Rule 2 relates to the residual power of the appellate courts to consider "in exceptional circumstances" significant issues. Whether a case warrants application of Rule 2 must be determined based on a case-by-case basis and "precedent cannot create an automatic right to review via Rule 2." Here, the Court of Appeals erroneously believed that a fatal variance issue automatically entitled the defendant to appellate review under Rule 2. In so doing, it failed to recognize its discretion to refrain from undertaking such a review. The court reversed and remanded to the Court of Appeals "so that it may independently and expressly determine whether, on the facts and under the circumstances of this specific case, to exercise its discretion to employ Rule 2" to reach the merits of the defendant's claim.

Counsel Issues

[*State v. Todd*](#), ___ N.C. ___, ___ S.E.2d ___ (June 9, 2017). The Court of Appeals erred by holding that the defendant received ineffective assistance of counsel when appellate counsel failed to challenge the sufficiency of the evidence supporting the defendant's armed robbery conviction. Before the Supreme Court, the State argued that appellate counsel made a strategic decision not to challenge the sufficiency of the evidence. However, because the lower courts did not determine whether there was a strategic reason for counsel to refrain from addressing the sufficiency of the evidence, the record was insufficient to determine the merits of the ineffective assistance claim. The court reversed and remanded so that the trial court could fully address whether counsel made a strategic decision not to raise the sufficiency of the evidence argument, if such a decision was reasonable and whether the defendant suffered prejudice. [Author's note: For more information about ineffective assistance of counsel claims, see my judges' benchbook chapter [here](#).]

Jury Instructions

[*State v. Holloman*](#), ___ N.C. ___, ___ S.E.2d ___ (June 9, 2017). Reversing the Court of Appeals, the Supreme Court held that the trial court's self-defense instructions were not erroneous. The court began by considering whether "North Carolina law allows an aggressor to regain the right to utilize defensive force based upon the nature and extent of the reaction that he or she provokes in the other party." Although historically North Carolina law did not allow an aggressor using deadly force to regain the right to exercise self-defense when the person to whom his or her aggression was directed responds by using deadly force in defense, changes in statutory law allow aggressor to regain the right to utilize defensive force under certain circumstances. But, G.S. 14-51.4(2)(a), allowing an aggressor to regain that right under certain circumstances, does not apply where the aggressor initially uses deadly force against the

person provoked. Thus, the trial court did not err by instructing that a defendant who was the aggressor using deadly force had forfeited the right to use deadly force and that a person who displays a firearm to his opponent with the intent to use deadly force against him or her and provokes the use of deadly force in response is an aggressor. The court continued, noting that it also must determine whether the trial court erred by failing to instruct the jury, in accordance with the defendant's request, that he might have regained the right to use defensive force based on the victim's reaction to any provocative conduct in which the defendant might have engaged. The court concluded that a defendant "could have only been entitled to the delivery of such an instruction to the extent that his provocative conduct involved non-deadly, rather than deadly, force." Here, there was a complete absence of any evidence tending to show that the defendant used non-deadly force.

[State v. Godwin](#), ___ N.C. ___, ___ S.E.2d ___ (June 9, 2017). In this DWI case, the trial court did not err by denying the defendant's request for a special jury instruction explaining that results of a chemical breath test are not conclusive evidence of impairment. Following the pattern jury instructions for DWI, the trial court explained to the jury that impairment could be proved by an alcohol concentration of .08 or more and that a chemical analysis was "deemed sufficient evidence to prove a person's alcohol concentration." The trial court also inform the jury that they were the sole judges of the credibility of each witness and the weight to be given to each witness's testimony. This statement signaled to the jury that it was free to analyze the weight and effect of the breathalyzer evidence, along with all the evidence presented at trial. Therefore, the standard jury instruction on credibility was sufficient and the trial court adequately conveyed the substance of the defendant's request instructions to the jury.

Post-Conviction Procedures

[State v. Todd](#), ___ N.C. ___, ___ S.E.2d ___ (June 9, 2017). The Supreme Court held that it had jurisdiction to decide an appeal from a divided decision of the Court of Appeals reversing a trial court's ruling denying a MAR. The defendant was convicted of armed robbery. He was unsuccessful on his direct appeal. The defendant then filed an MAR arguing that the evidence was insufficient to support his conviction and that his appellate counsel was ineffective for failing to raise this claim on appeal. The trial court denied the defendant's MAR. A divided Court of Appeals reversed, with instructions to grant the MAR and vacate the conviction. The Supreme Court noted that G.S. 7A-30(2) provides an automatic right of appeal based on a dissent at the Court of Appeals. However, that automatic right of appeal is limited by G.S. 7A-28, which states that decisions of the Court of Appeals upon review of G.S. 15A-1415 MARs (MARs by the defendant filed more than 10 days after entry of judgment) are final and not subject to further review. However, the supervisory authority granted to the court by Article IV, Section 12 of the North Carolina Constitution gave the court a restriction to hear the appeal. [Author's note: For more information about MAR procedure, see my judges' benchbook chapter [here](#).]

Evidence

Experts

[State v. Godwin](#), ___ N.C. ___, ___ S.E.2d ___ (June 9, 2017). Reversing the Court of Appeals, the court held that Evidence Rule 702(a1) does not require the trial court to *explicitly* recognize a law enforcement officer as an expert witness pursuant to Rule 702(a) before he can testify to the results of a HGN test. Rather, the court noted, prior case law establishes that an implicit finding will suffice. Reviewing the record before it, the court found that here, by overruling the defendant's objection to the witness's testimony, the trial court implicitly found that the officer was qualified to testify as an expert. The court noted however that its ability to review the trial court's decision "would have benefited from

the inclusion of additional facts supporting its determination” that the officer was qualified to testify as an expert.

Confrontation Clause Issues

[*State v. McKiver*](#), ___ N.C. ___, ___ S.E.2d ___ (June 9, 2017). Reversing the Court of Appeals, the Supreme Court held that the statements made by an anonymous 911 caller informing the police of a possible incident involving a firearm and describing the suspect were nontestimonial. The circumstances surrounding the caller’s statements objectively indicate that the primary purpose was to enable law enforcement to meet an ongoing emergency. The primary purpose of the call was to inform the police of a possible dispute involving an unidentified man brandishing a firearm outside the caller’s home on a public street in a residential subdivision. The caller reacted by going to her home and staying away from the window and an officer retrieved his patrol rifle before entering the scene. “As is evident from the precautions taken by both the caller and the officers on the scene, they believed the unidentified suspect was still roving subdivision with a firearm, posing a continuing threat to the public and law enforcement.” To address this threat, an officer requested that the dispatcher place a reverse call to the caller to get more information about the individual at issue and, once received, quickly relayed that information to other officers to locate and apprehend the suspect. [Author’s note: For more information about the Confrontation Clause, see my judges’ benchbook chapter [here](#).]

Arrest, Search & Investigation

Miranda

[*State v. Knight*](#), ___ N.C. ___, ___ S.E.2d ___ (June 9, 2017). Applying *Berghuis v. Thompkins*, 560 U.S. 370 (2010), the court held that the defendant understood his *Miranda* rights and through a course of conduct indicating waiver, provided a knowing and voluntary waiver of those rights. During the interrogation, the defendant never said that he wanted to remain silent, did not want to talk with the police, or that he wanted an attorney. In fact, the 40-minute video of the interrogation shows that the defendant was willing to speak with the detective. After being read his rights, the defendant indicated that he wanted to tell his side of the story and he talked at length during the interrogation, often interrupting the detective, and responding without hesitation to the detective’s questions. The video also shows that the defendant emphatically denied any wrongdoing; provided a detailed account of the evening’s events; and seemed to try to talk his way out of custody. The court found this last point “worth emphasizing because it appears that, when faced with a choice between invoking his rights or trying to convince the police that he was innocent, defendant chose to do the latter.” The court concluded that the defendant’s course of conduct indicating waiver was much more pronounced than that of the defendant in *Berghuis*, who largely remained silent during a lengthy interrogation and who gave very limited responses when he did speak and nonetheless was found to have implicitly waived his rights. The court went on to conclude that, as in *Berghuis*, there was no evidence that the defendant’s statements were involuntary. The defendant was not threatened in any way and the detective did not make any promises to get the defendant to talk. The interrogation was conducted in a standard room and lasted less than 40 minutes. The only factor that could even arguably constitute coercion was the fact that the defendant’s arm was handcuffed to a bar on the wall in the interrogation room. The court noted however that his chair had an armrest, his arm had an ample range of motion, and he did not appear to be in discomfort during the interrogation. Thus, the court concluded, the defendant voluntarily waived his *Miranda* rights. The court went on to reject the defendant’s argument that he did not understand his rights, again citing *Berghuis*. Here, the detective read all of the rights aloud, speaking clearly. The video shows that the defendant appeared to be listening and paying attention and that he

speaks English fluently. The court noted that the defendant was mature and experienced enough to understand his rights, in part because of his prior experience with the criminal justice system. The trial court found the defendant gave no indication of cognitive issues, nor was there anything else that could have impaired his understanding of his rights. The court rejected the defendant's argument that the State must prove that the defendant explicitly stated that he understood his rights. Rather, it concluded that the State simply must prove, under the totality of the circumstances, that the defendant in fact understand them. The court went on to conclude that even if the defendant had expressly denied that he understood his rights, such a bare statement, without more, would not be enough to outweigh other evidence suggesting that he in fact understand them. The court summarized:

[T]he fact that a defendant affirmatively denies that he understands his rights cannot, on its own, lead to suppression. Again, while an express written or oral statement of waiver of *Miranda* rights is usually strong proof of the validity of that waiver, it is neither necessary nor sufficient to establish waiver. Likewise, a defendant's affirmative acknowledgement that he understands his *Miranda* rights is neither necessary nor sufficient to establish that a defendant in fact understood them, because the test for a defendant's understanding looks to the totality of the circumstances. Just because a defendant says that he understands his rights, after all, does not mean that he actually understands them. By the same token, just because a defendant claims not to understand his rights does not necessarily mean that he does not actually understand them. In either situation, merely stating something cannot, in and of itself, establish that the thing stated is true. That is exactly why a trial court must analyze the totality of the circumstances to determine whether a defendant in fact understood his rights. As a result, even if defendant here had denied that he understood his rights—and again, in context it appears that he did not—that would not change our conclusion in this case. (citation omitted).

It continued, noting that any suggestion in the Court of Appeals' opinion suggesting that a defendant must make some sort of affirmative verbal response or affirmative gesture to acknowledge that he has understood his *Miranda* rights for his waiver to be valid "is explicitly disavowed." (citation omitted).

Warrantless Blood Draws

[*State v. Romano*](#), ___ N.C. ___, ___ S.E.2d ___ (June 9, 2017). The court held, in this DWI case, that in light of the U.S. Supreme Court's decisions in *Birchfield v. North Dakota* (search incident to arrest doctrine does not justify the warrantless taking of a blood sample; as to the argument that the blood tests at issue were justified based on the driver's legally implied consent to submit to them, the Court concluded: "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense"), and *Missouri v. McNeely* (natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant; exigency must be determined on a case-by-case basis), G.S. 20-16.2(b) (allowing blood draw from an unconscious person) was unconstitutional as applied to defendant because it permitted a warrantless search that violates the Fourth Amendment. An officer, relying on G.S. 20-16.2(b), took possession of the defendant's blood from a treating nurse while the defendant was unconscious without first obtaining a warrant. The court rejected the State's implied consent argument: that because the case involved an implied consent offense, by driving on the road, the defendant consented to having his blood drawn for a blood test and never withdrew this statutorily implied consent before the blood draw. It continued:

Here there is no dispute that the officer did not get a warrant and that there were no exigent circumstances. Regarding consent, the State's argument was based solely on N.C.G.S. § 20-16.2(b) as a per se exception to the warrant requirement. To be sure, the implied-consent statute, as well as a person's decision to drive on public roads, are factors to consider when analyzing whether a suspect has consented to a blood draw, but the statute alone does not create a per se exception to the warrant requirement. The State did not present any other evidence of consent or argue that under the totality of the circumstances defendant consented to a blood draw. Therefore, the State did not carry its burden of proving voluntary consent. As such, the trial court correctly suppressed the blood evidence and any subsequent testing of the blood that was obtained without a warrant.

Criminal Offenses

Sexual Assault

[*State v. Baker*](#), ___ N.C. ___, ___ S.E.2d ___ (June 9, 2017). Reversing the Court of Appeals, the court held that the evidence was sufficient to support the defendant's conviction for attempted first-degree rape of a child. The Court of Appeals had reversed the defendant's conviction finding, in part, that the evidence supported only a conviction for completed rape, not an attempted rape. Citing precedent, the Supreme Court held that evidence of a completed rape is sufficient to support an attempted rape conviction.

Larceny

[*State v. Jones*](#), ___ N.C. ___, ___ S.E.2d ___ (June 9, 2017). The evidence was sufficient to support the defendant's convictions for three counts of felony larceny. The defendant, a truck driver who worked as an independent contractor, was overpaid because a payroll processor accidentally typed "\$120,000" instead of "\$1,200" into a payment processing system, resulting in an excess deposit in the defendant's bank account. Although the defendant was informed of the error and was asked not to remove the excess funds from his bank account, he made a series of withdrawals and transfers totaling over \$116,000. In connection with one of the withdrawals, the defendant went to a bank branch. The teller who assisted him noted the large deposit and asked the defendant about it. The defendant replied that he had sold part of the business and requested further withdrawals. Because of the defendant's actions, efforts to reverse the deposit were unsuccessful. The defendant was convicted of three counts of larceny on the basis of his three withdrawals of the erroneously deposited funds. The Court of Appeals vacated the defendant's convictions, finding that he had not committed a trespassory taking. The Supreme Court reversed. The court noted that to constitute a larceny, a taking must be wrongful, that is, it must be "by an act of trespass." A larcenous trespass however may be either actual or constructive. A constructive trespass occurs when possession of the property is fraudulently obtained by some trick or artifice. However the trespass occurs, it must be against the possession of another. Like a larcenous trespass, another's possession can be actual or constructive. With respect to construing constructive possession for purposes of larceny, the court explicitly adopted the constructive possession test used in drug cases. That is, a person is in constructive possession of the thing when, while not having actual possession, he has the intent and capability to maintain control and dominion over that thing. The court found that the depositor retained constructive possession of the excess funds even after they had been transferred to the defendant's account. Specifically, the depositor had the intent and capability to maintain control and dominion over the funds by affecting a reversal of the deposit. The fact that the reversal order was not successful does not show that the depositor lacked constructive possession. The

court went on to conclude that the defendant did not simultaneously have possession of the funds while they were in his account, a fact that would have precluded a larceny conviction. The court concluded that the defendant “was simply the recipient of funds that he knew were supposed to be returned in large part. He therefore had mere custody of the funds, not possession of them.” It reasoned that when a person has mere custody of a property, he or she may be convicted of larceny when the property is appropriated to his or her own use with felonious intent.

Drug Offenses

[*State v. Miller*](#), ___ N.C. ___, ___ S.E.2d ___ (June 9, 2017). Reversing a unanimous decision of the Court of Appeals, *State v. Miller*, ___ N.C. App. ___, ___, 783 S.E.2d 512 (2016), the court rejected the defendant’s as-applied challenge to the constitutionality of G.S. 90-95(d1)(1)(c) (felony to possess a pseudoephedrine product when the defendant has a prior conviction for possession or manufacture of methamphetamine). After holding that the General Assembly intended the statute to be a strict liability offense, the Court of Appeals had gone on to hold that the statute was unconstitutional “as applied to a defendant in the absence of notice to the subset of convicted felons whose otherwise lawful conduct is criminalized thereby or proof beyond a reasonable doubt by the State that a particular defendant was aware that his possession of a pseudoephedrine product was prohibited by law.” The Supreme Court began by noting that, as a general rule, ignorance of the law or a mistake of law is no defense to a criminal prosecution. In *Lambert v. California*, 355 U.S. 225 (1957), however, the United States Supreme Court sustained an as-applied challenge to a municipal ordinance making it unlawful for any individual who had been convicted of a felony to remain in Los Angeles for more than five days without registering with the Chief of Police. In that case the defendant had no actual knowledge of the registration requirement and the ordinance did not require proof of willfulness. The issue presented was whether the registration act violated due process when applied to a person who has no actual knowledge of the duty to register, and where no showing is made of the probability of such knowledge. Acknowledging the rule that ignorance of the law is no excuse, the U.S. Supreme Court pointed out that due process conditions the exercise of governmental authority on the existence of proper notice where a person, wholly passive and unaware of any criminal wrongdoing, is charged with criminal conduct. Because the ordinance at issue in *Lambert* did not condition guilt on “any activity” and there were no surrounding circumstances which would have moved a person to inquire regarding registration, actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply were necessary before a conviction under the ordinance could stand consistent with due process. *Lambert* thus carves out a narrow exception to the general rule that ignorance of the law is no excuse. The subsequent *Bryant* decision from this court establishes that if the defendant’s conduct is not “wholly passive,” because it arises either from the commission of an act or failure to act under circumstances that reasonably could alert the defendant to the likelihood that inaction would subject him or her to criminal liability, *Lambert* does not apply. Turning to the facts of the case, the court noted that the defendant actively procured the pseudoephedrine product at issue. Moreover, the defendant never argued that he was ignorant of the fact that he possessed a pseudoephedrine product or that he had previously been convicted of methamphetamine possession. His conduct thus differs from that at issue in *Lambert* and in this court’s *Bryant* decision in that it was not a “wholly passive” failure to act. The court found no need to determine whether the surrounding circumstances should have put the defendant on notice that he needed to make inquiry into his ability to lawfully purchase products containing pseudoephedrine and that his as-applied challenge failed. And it went on to conclude that the issue of whether the statute was a strict liability offense was not properly before it.