

Criminal Procedure

Indictment Issues

[State v. Langley](#), ___ N.C. App. ____, ___ S.E.2d ___ (June 20, 2017). A habitual indictment was fatally defective with respect to its allegations as to two of the three prior felonies. With respect to these convictions, the indictment alleged offense dates for armed robbery and then gave conviction dates for common law robbery. The indictment was defective because it did not allege an offense date for the crimes for which the defendant was convicted (common law robbery).

Counsel Issues

[State v. Perry](#), ___ N.C. App. ____, ___ S.E.2d ___ (June 20, 2017). Counsel was not ineffective by failing to allege a Fourth Amendment violation in a motion to suppress a warrantless blood draw. Here, no prejudice occurred under the *Strickland* test because there was sufficient evidence for a conviction based driving while under the influence of an impairing substance prong of DWI such that BAC evidence for the .08 prong was not required.

Motions to Suppress

[State v. Perry](#), ___ N.C. App. ____, ___ S.E.2d ___ (June 20, 2017). The court declined to consider the defendant's argument that his motion to suppress a warrantless blood draw should have been granted because his Fourth Amendment rights were violated where the only ground the defendant asserted with respect to that motion at trial was a violation of G.S. 20-16.2.

Jury Instructions

[State v. Cook](#), ___ N.C. App. ____, ___ S.E.2d ___ (June 20, 2017). In this assault on a law enforcement officer case, the court held, over a dissent, that the trial court did not err by denying the defendant's request for a self-defense instruction. While executing a warrant for the defendant's arrest at his home an officer announced at a bedroom door that he was a police officer and that he was going to kick in the door. The officer's foot went through the door on the first kick. The defendant fired two gunshots from inside the bedroom through the still-unopened door and the drywall adjacent to the door, narrowly missing the officer. The charges at issue resulted. The defendant testified that he was asleep when the officer arrived at his bedroom door; that when his girlfriend woke him, he heard loud banging and saw a foot come through the door "a split second" after waking up; that he did not hear the police announce their presence but did hear family members "wailing" downstairs; that he was "scared for [his] life . . . thought someone was breaking in the house . . . hurting his family downstairs and coming to hurt [him] next;" and that he when fired his weapon he had "no specific intention" and was "just scared." Rejecting the defendant's appeal, the court explained: "our Supreme Court has repeatedly held that a defendant who fires a gun in the face of a perceived attack is *not* entitled to a self-defense instruction *if he testifies* that he did not intend to shoot the attacker when he fired the gun." Under this law, a person under an attack of deadly force is not entitled to defend himself by firing a warning shot, even if he believes that firing a warning shot would be sufficient to stop the attack; he must shoot to kill or injure the attacker to be entitled to the instruction. This is true even if there is, in fact, other evidence from which a jury could have determined that the defendant did intend to kill the attacker.

[State v. Clonts](#), ___ N.C. App. ____, ___ S.E.2d ___ (June 20, 2017). The trial court did not err by failing to instruct the jury on imperfect self-defense and imperfect defense of others where the defendant did

not request that the trial court give any instruction on imperfect self-defense or imperfect defense of others. In fact, when the State indicated that it believed that these defenses were not legally available to the defendant, defense counsel agreed with the State. The defendant cannot show prejudice from invited error.

Juror Misconduct

[State v. Langley](#), ___ N.C. App. ___, ___ S.E.2d ___ (June 20, 2017). Although juror misconduct occurred, the defendant’s challenge failed because the error was invited. After it was reported to the judge that a juror did an internet search of a term used in jury instructions, the judge called the jurors into court and instructed them to disregard any other information and to follow the judge’s instructions. When the defendant moved for mistrial, the trial court offered to continue the inquiry, offering to interview each juror. The defendant did not respond to the trial judge’s offer. The court held: “Defendant is not in a position to repudiate the action and argue that it is grounds for a new trial since he did not accept the trial court’s offer to continue the inquiry when the judge offered to do so. Therefore, if any error took place, Defendant invited it.”

Sentencing

[State v. Thompson](#), ___ N.C. App. ___, ___ S.E.2d ___ (June 20, 2017). The trial court erred by finding that the defendant had “gang affiliation” and ordering gang restrictions in the judgment. G.S. 14-50.25 provides that when a defendant is found guilty of a criminal offense relevant to the statute “the presiding judge shall determine whether the offense involved criminal street gang activity.” If the judge makes this determination, then he “shall indicate on the form reflecting the judgment that the offense involved criminal street gang activity.” Here, the judge made a judicial, not clerical error, where there was no evidence to support such a finding. The court declined to reach the defendant’s argument that the statute was unconstitutional under the *Apprendi* line of cases (holding that any fact other than a prior conviction that elevates a sentence must be submitted to the jury).

Sex Offenders

[State v. Dye](#), ___ N.C. App. ___, ___ S.E.2d ___ (June 20, 2017). The trial court erred by imposing satellite-based monitoring for a period of thirty years due to a violation of G.S. 14-208.40A. Here, the Static-99 revealed a risk assessment of four points, which translated into a “Moderate-High” risk category. Pursuant to existing law, the “Moderate-High” risk category is insufficient to support a finding that the highest possible level of supervision and monitoring was required.

Evidence

Rule 106

[State v. Hensley](#), ___ N.C. App. ___, ___ S.E.2d ___ (June 20, 2017). The trial court did not abuse its discretion by admitting a more complete version of a detective’s notes after the defendant opened the door by asking about one portion of those notes. The court rejected the defendant’s argument that it was improper to admit the notes under Rule 106 (remainder of or related writings or recorded statements) because the State’s request to do so was not done contemporaneously with the original cross-examination of the detective. The court went on to find that the trial court did not abuse its discretion under Rule 403 in admitting the notes.

Opinions—Drug Identification

[*State v. Alston*](#), ___ N.C. App. ___, ___ S.E.2d ___ (June 20, 2017). In this drug case, the trial court committed plain error by allowing a law enforcement officer to testify that pills found at the defendant's home were Alprazolam and Oxycodone, where the identification was based on a visual inspection of the pills and use of a website, drugs.com. Under North Carolina law, pills cannot be identified as controlled substances by visual identification.

Opinions—Child Sex Cases

[*State v. Dye*](#), ___ N.C. App. ___, ___ S.E.2d ___ (June 20, 2017). In this statutory rape case, the court rejected the defendant's argument that the trial court erred by allowing the State's witness, Dr. Rothe, to improperly bolster the victim's credibility. Rothe made no definitive diagnosis that the victim had experienced sexual abuse. Instead, Rothe detailed her examination of the victim, and testified that the absence of the victim's hymen in the 5-7 o'clock area was "suspicious" for vaginal penetration and that "having an absent hymen in that section of posterior rim is very suspicious for sexual abuse." Rothe appropriately cautioned that her findings, while suspicious for vaginal penetration and sexual abuse, were not conclusive; Rothe explained that "the only time . . . a clinical provider . . . can say sexual abuse happened is if we see that hymen within three days of the sexual abuse[.]" Since Rothe had not examined the victim within three days of the alleged sexual abuse, she explained that the "nomenclature becomes difficult." Rothe readily conceded on cross-examination that the gap of eight months between the alleged abuse and the examination would "affect [her] ability to determine some results" of her examination; that there is "a lot of variation in what one would consider normal in what a hymen of a prepubescent or pubescent girl looks like" and the appearance of the victim's hymen could fall within that normal variation; and that conclusive results were not possible without a "baseline" examination conducted before the alleged abuse. Rothe further testified on cross that the results of the victim's examination were "suspicious but not conclusive" for vaginal penetration. It is clear that Rothe did not opine that sexual abuse had in fact occurred. Rothe's testimony that the results of the victim's examination were "suspicious" of vaginal penetration and sexual abuse is consistent with testimony the court has found to be permissible, including an expert's opinion that the results of an examination are "consistent with" sexual abuse.

Hearsay & Confrontation Clause Issues

[*State v. Miller*](#), ___ N.C. App. ___, ___ S.E.2d ___ (June 20, 2017). In a case in which the defendant was charged with killing his estranged wife and injuring her boyfriend, the trial court erred by admitting evidence in violation of the defendant's confrontation clause rights. At trial, a law enforcement officer testified to what the defendant's wife told him during an earlier domestic abuse investigation. The victim's statements to the officer in that earlier incident were made after she fled from the defendant in her car and called the police from a safe location. The purpose of the officer's questions was to determine what happened, not what was happening. The court held: "These statements to the officer plainly addressed what happened, not what was happening, and they were not made during any immediate threat or ongoing emergency. Thus, we agree with [the defendant] that these statements were testimonial in nature and thus subject to the Confrontation Clause." The court went on to reject the State's argument that the defendant had a prior opportunity to cross-examine his wife at an earlier trial, noting that there was no evidence in the record that the wife made the statements at the prior trial or that if she did, the defendant was afforded an opportunity for cross-examination. The court also rejected the State's argument that the mere fact that he killed his wife constituted a forfeiture of his

confrontation rights, noting: forfeiture requires some showing that the defendant killed the witness at least in part to prevent the witness from testifying. [Author's note: For a primer on Crawford and the Confrontation Clause, see my benchbook chapter here: <http://benchbook.sog.unc.edu/evidence/guide-crawford-confrontation-clause>]

State v. Clonts, ___ N.C. App. ___, ___ S.E.2d ___ (June 20, 2017). In a case in which there was a dissenting opinion, the court held that the trial court erred by admitting a non-testifying witness's pretrial deposition testimony. (1) The trial court's findings were insufficient to establish that the witness was unavailable for purposes of the Rule 804(b)(1) hearsay exception and the Confrontation Clause. The entirety of the trial court's findings on this issue were: "The [trial court] finds [the witness] is in the military and is stationed outside of the State of North Carolina currently. May be in Australia or whereabouts may be unknown as far as where she's stationed." The trial court made no findings that would support more than mere inference that the State was unable to procure her attendance; made no findings concerning the State's efforts to procure the witness's presence at trial; and made no findings demonstrating the necessity of proceeding to trial without the witness's live testimony. The trial court did not address the option of continuing trial until the witness returned from deployment. It did not make any finding that the State made a good-faith effort to obtain her presence at trial, much less any findings demonstrating what actions taken by the State could constitute good-faith efforts. It thus was error for the trial court to grant the State's motion to admit the witness' deposition testimony in lieu of her live testimony at trial. (2) The court went on to find that even if the trial court's findings of fact and conclusions had been sufficient to support its ruling, the evidence presented to the trial court was insufficient to support an ultimate finding of "unavailability" for purposes of Rule 804. It noted in part that the State's efforts to "effectuate [the witness's] appearance" were not "reasonable or made in good faith." (3) A witness's pretrial deposition testimony, taken in preparation of the criminal case, was clearly testimonial for purposes of the Confrontation Clause. (4) The court found that the facts of the case did not support a finding that the witness was unavailable under the Confrontation Clause. In this respect, the court noted that no compelling interest justified denying the defendant's request to continue the trial to allow for the witness's live testimony. It added: "The mere convenience of the State offers no such compelling interest." It continued: "We hold that . . . in order for the State to show that a witness is unavailable for trial due to deployment, the deployment must, *at a minimum*, be in probability long enough so that, with proper regard to the importance of the testimony, the trial cannot be postponed." (quotation omitted).

Cross-Examination

State v. Thompson, ___ N.C. App. ___, ___ S.E.2d ___ (June 20, 2017). The trial court did not abuse its discretion by sustaining the State's objection to the introduction of an unauthenticated screenshot to impeach the victim's credibility. Although it was permissible for counsel to ask the defendant questions about the screenshot, he could not impeach the victim's credibility with extrinsic evidence to prove the contents of the screenshot where no foundation had been laid and the materiality of the post had not been demonstrated. [Author's note: For more information about the rules on impeachment, see my benchbook chapter here: <http://benchbook.sog.unc.edu/evidence/impeachment>]

Photograph for Illustrative Purposes

State v. Thompson, ___ N.C. App. ___, ___ S.E.2d ___ (June 20, 2017). The trial court did not commit plain error by admitting for illustrative purposes a Facebook picture of the defendant and an accomplice in which the defendant's middle finger was extended. At trial the State called a detective who testified

that the victim showed him a picture of the defendant and the accomplice on the defendant's Facebook page for identity purposes. The detective printed that picture and it was admitted at trial for illustrative purposes, over the defendant's objection. The trial court properly admitted the photograph pursuant to G.S. 8-97 to illustrate the detective's testimony that the victim used the photograph to identify the defendant and his accomplice. The photograph was properly authenticated and the trial court gave a limiting instruction as to its use.

Criminal Offenses

Larceny & Frauds

[*State v. Street*](#), ___ N.C. App. ___, ___ S.E.2d ___ (June 20, 2017). The doctrine of recent possession applies to obtaining property by false pretenses. Thus, the trial court did not err by instructing the jury on this doctrine.

Drug Offenses

[*State v. Alston*](#), ___ N.C. App. ___, ___ S.E.2d ___ (June 20, 2017). The evidence was sufficient to sustain a conviction for maintaining a dwelling. Officer recovered from the home a Schedule I controlled substance, marijuana, a glass jar that had the odor of marijuana, Garcia y Vega cigar wraps, a marijuana roach, digital scales, sandwich bags, and a security camera set up in the living room that observed the front yard. The defendant, a convicted felon, had constructive possession of a handgun. And an officer observed traffic at the residence over several days consistent with illegal drug trade and observed a confidential source successfully buy a controlled substance from the residence.