

Criminal Procedure

Indictment Issues

[*State v. Bacon*](#), ___ N.C. App. ___, ___ S.E.2d ___ (July 18, 2017). Although there was a fatal variance between the allegation in a felony larceny indictment as to the owner of the stolen property and the proof of ownership presented at trial, the variance did not warrant dismissal. The indictments alleged that all of the stolen items, a television, gaming system, video games, laptop, camera, and earrings were the personal property of April Faison. The evidence at trial indicated that Faison did not own all of those items. Specifically, her daughter owned the laptop and the camera; the gaming system belonged to a friend. Although the defendant conceded that some of the items listed in the indictment correctly named Faison as property owner, he argued that a fatal variance with respect to the other items required dismissal. The State's evidence would have been sufficient if it had established that Faison, while not the property owner, had some special interest in the items owned by others, for example, as a bailee. However, the State's evidence did not establish that. The court also rejected the argument that Faison had a special custody interest in her child's property because, here, her daughter was an adult who did not live in the home. Thus, while the evidence was sufficient to demonstrate that Faison was the owner of some of the property, there was a fatal variance with respect to ownership of other items. The court however went on to reject the argument that a larceny indictment that properly alleges the owner of certain stolen property, but improperly alleges the owner of additional property, must be dismissed in its entirety. Here, the problematic language was surplusage.

Discovery Issues

[*State v. Bacon*](#), ___ N.C. App. ___, ___ S.E.2d ___ (July 18, 2017). In this felony larceny case, the trial court did not abuse its discretion by excluding the defendant's witness as a sanction for the defendant's violation of discovery rules, specifically, the defendant's failure to timely file notice that he intended to call the witness as an alibi witness under G.S. 15A-905(c)(1). A voir dire of the witness revealed that his testimony was vague and certain inconsistencies in it made it unreliable and thus of minimal value. The court concluded: "Considering the materiality of [the witness's] proposed testimony, which we find minimal, and the totality of the circumstances surrounding Defendant's failure to comply with his discovery obligations, we cannot find that the trial court abused its discretion in excluding this testimony." The court went on to hold that even if it was error to exclude this testimony, the defendant failed to show prejudice.

[*State v. Broyhill*](#), ___ N.C. App. ___, ___ S.E.2d ___ (July 18, 2017). (1) In this murder case, the trial court did not err by excluding the testimony of a defense psychiatrist on the basis that the witness's proffered testimony constituted expert opinion testimony that had not been disclosed pursuant to a reciprocal discovery order. The witness, Dr. Badri Hamra, was a psychiatrist with the North Carolina Department of Public Safety who treated the defendant fifteen months after his arrest. On appeal, the defendant argued that Hamra was proffered as a fact witness regarding the issue of premeditation and deliberation. Defendant further argued that as a fact witness, she was outside of the scope of the reciprocal discovery order, which applied only to expert witnesses. The court agreed with the trial court that Hamra intended to offer expert opinion testimony. Hamra testified that the defendant had a psychiatric condition for which the doctor had prescribed medication. He clarified that his decision to prescribe medication was based not merely on his review of the defendant's medical history but on his own evaluation of the defendant. Finally he confirmed he would only have prescribed medication for a legitimate medical reason, dismissing the notion that he would write a prescription simply because the defendant asked him to do so. His testimony was tantamount to a diagnosis, which constitutes expert

testimony. (2) The court went on to hold that even if the doctor was not testifying as an expert, the trial court nevertheless acted within its discretion by excluding his testimony under Rule 403.

Motion to Continue

[*State v. Moore*](#), ___ N.C. App. ___, ___ S.E.2d ___ (July 18, 2017). (1) The trial court did not abuse its discretion by denying the defendant's motion to continue. The court rejected the defendant's argument that the trial court's denial of his motion to continue constituted an improper overruling or reversal of an earlier order or ruling by another judge. Specifically, the defendant asserted that a statement by the judge who presided over a pretrial hearing constituted a ruling or decision which could not be modified by another judge. The court rejected this argument, finding that the preliminary and informal remark made by the pretrial judge did not constitute an order or ruling continuing the case. (2) With respect to the defendant's argument that the denial of his motion to continue denied him his constitutional right to effective assistance of counsel, the court declined to presume prejudice in this case. And it found that the defendant had not articulated any argument related to the circumstances of the case to explain why defense counsel did not have a sufficient time to prepare for trial.

Jury Selection

[*State v. Broyhill*](#), ___ N.C. App. ___, ___ S.E.2d ___ (July 18, 2017). The court rejected the defendant's argument that the trial court erred during jury selection by unduly restricting the defendant's inquiry into whether prospective jurors could fairly evaluate credibility if faced with evidence that a person had lied in the past. The trial court properly sustained objections to the defendant's improper stakeout questions and questions tending to indoctrinate the jurors. Additionally, the trial court did not close the door on the defendant's inquiry into whether the prospective jurors could fairly assess credibility. Rather, the defendant was permitted to ask similar questions in line with the pattern jury instructions, which were an adequate proxy to gauge a prospective juror's ability to fairly assess credibility at trial.

Closing Argument

[*State v. Younts*](#), ___ N.C. App. ___, ___ S.E.2d ___ (July 18, 2017). In this DWI case, the trial court did not err by failing to intervene ex mero motu when the prosecutor speculated in closing argument about what the defendant's breathalyzer test would have been an hour before she was actually tested. The court found that the argument at issue was not so grossly improper as to require the trial court to intervene ex mero motu.

Jury Instructions

[*State v. Coleman*](#), ___ N.C. App. ___, ___ S.E.2d ___ (July 18, 2017). (1) In this homicide case, the trial court did not commit plain error in its jury instructions on the defense of automatism. The defendant argued that the jury instruction misleadingly implied that he had to prove the defense beyond a reasonable doubt. The trial court's instructions, which were almost entirely a verbatim recitation of the Pattern Jury Instructions, explained the proper burden of proof for the defense as well as the principle that if the jury found that the defendant had met his burden of proving the defense he would be not guilty of any crime. The instructions explicitly stated that the defendant's burden was "to establish this defense to the satisfaction of the jury," unlike the State, which must prove all the other elements beyond a reasonable doubt. (2) The trial court did not commit plain error by failing to instruct the jury on the lesser-included offense of involuntary manslaughter. In the context of a shooting, the charge of

involuntary manslaughter requires evidence of the absence of intent to discharge the weapon. This fact distinguishes involuntary manslaughter from its voluntary counterpart, which requires proof of intent. The defendant's argument fails because there was no evidence at trial suggesting that the defendant did not intend to shoot his wife. Rather, the defendant's defense relied on his argument that he was in a state of automatism--a complete defense to all criminal charges--which the jury rejected. Here, there was no evidence suggesting that the shooting was an accident.

Probation Revocations

[*State v. Johnson*](#), ___ N.C. App. ___, ___ S.E.2d ___ (July 18, 2017). The trial court lacked jurisdiction to revoke the defendant's probation based on the violations alleged. Here, the defendant did not waive his right to notice of his alleged probation violations and the State failed to allege a revocation-eligible violation. Thus, the trial court lacked jurisdiction to revoke.

Evidence

Cross-Examination

[*State v. Coleman*](#), ___ N.C. App. ___, ___ S.E.2d ___ (July 18, 2017). In this homicide case, the trial court did not err by allowing the State to question the defendant's expert witness on automatism regarding the amount of fees he received for testifying in other, unrelated criminal cases. The challenged evidence was relevant to "test partiality towards the party by whom the expert was called." It explained: "From the large sums of money that [the defendant]'s expert earned by testifying solely on behalf of criminal defendants, a reasonable jury could infer that the expert had an incentive to render opinions favorable to the criminal defendants who employ him."

Expert Opinions

[*State v. Coleman*](#), ___ N.C. App. ___, ___ S.E.2d ___ (July 18, 2017). In this homicide case, the trial court did not err by allowing the State's expert witness on automatism to testify to the defendant's state of mind at the time of the shooting. The expert endocrinologist testified that based on his experience with hypoglycemia and his review of the defendant's medical records and account of what had occurred on the day of the shooting, the defendant's actions were "not caused by automatism due to hypoglycemia." The court rejected the defendant's argument that this testimony, while couched in expert medical testimony, was merely speculation about the defendant state of mind at the time of the shooting. Here, the expert testified that in his opinion the defendant was not in a state of automatism at the time because he did not suffer from amnesia, a key characteristic of the condition. The trial court acted well within its discretion by admitting this testimony.

[*State v. Younts*](#), ___ N.C. App. ___, ___ S.E.2d ___ (July 18, 2017). In this DWI case to which the amended version of Evidence Rule 702 applied, the court held that a trial court does not err when it admits expert testimony regarding the results of a Horizontal Gaze Nystagmus (HGN) test without first determining that HGN testing is a product of reliable principles and methods as required by subsection (a)(2) of the rule. Evidence Rule 702(a1) obviates the State's need to prove that the HGN testing method is sufficiently reliable.

Video Evidence

[*State v. Moore*](#), ___ N.C. App. ___, ___ S.E.2d ___ (July 18, 2017). Although admission of video evidence was error, it was not prejudicial error. An officer testified that the day after the incident in question he asked the manager of a convenience store for a copy of the surveillance video made by store cameras. The manager allowed the officer to review the video but was unable to copy it. The officer used the video camera function on his cell phone to make a copy of the surveillance footage, which was copied onto a computer. At trial, he testified that the copy of the cell phone video accurately showed the contents of the video that 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 had observed on the day in question. The transcript reveals no testimony 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. As such, the State failed to offer a proper foundation for introduction of the video as either illustrative or substantive evidence. The court went on to find that introduction of the video was not prejudicial.

Rule 106 (Rule of Completeness)

[*State v. Broyhill*](#), ___ N.C. App. ___, ___ S.E.2d ___ (July 18, 2017). The trial court did not abuse its discretion by excluding statements from the defendant's custodial interviews on April 23rd and 25th while admitting statements from a third custodial interview on April 26th. On appeal the defendant argued that his prior statements should have been admitted under Rule 106 because they would have enhanced the jury's understanding of the third statement. The defendant failed to demonstrate that the third statement was out of context when it was introduced and that the two prior statements were either explanatory of or relevant to the third.

Arrest, Search & Investigation Stops

[*State v. Hester*](#), ___ N.C. App. ___, ___ S.E.2d ___ (July 18, 2017). The court held, over a dissent, that even if the initial stop was not supported by reasonable suspicion, the trial court properly denied the defendant's motion to suppress where the evidence sought to be suppressed--a stolen handgun--was obtained after the defendant committed a separate crime: pointing a loaded, stolen gun at the deputy and pulling the trigger. The evidence at issue was admissible under the attenuation doctrine, a doctrine holding that evidence is admissible when the connection between the unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that the interest protected by the constitutional guarantee that has been violated would not be served by suppression. Here, the State presented a sufficient intervening event--the defendant's commission of a crime--to break any causal chain between the presumably unlawful stop and the discovery of the stolen handgun. It added: "This Court can conceive only in the most rare instances where [the] deterrence benefits of police conduct to suppress a firearm outweigh[s] its substantial social costs of preventing a defendant from carrying a concealed, loaded, and stolen firearm, pulling it at an identified law enforcement officer and pulling the trigger." (quotations omitted). The court rejected the notion that the State could not assert the attenuation doctrine on appeal because it failed to argue that issue before the trial court.

Interrogations

State v. Saldierna, ___ N.C. App. ___, ___ S.E.2d ___ (July 18, 2017). Because the juvenile defendant did not knowingly, willingly, and understandingly waive his rights, the trial court erred by denying the defendant's motion to suppress his statement made to an interrogating officer. The then sixteen-year-old defendant was arrested at his home in South Carolina in connection with incidents involving several homes around Charlotte. Before questioning, the detective read the defendant his rights and asked whether he understood them. After initialing and signing an English version of the Juvenile Waiver of Rights form, the defendant asked to call his mother before undergoing custodial questioning. The call was allowed, but the defendant could not reach his mother. The custodial interrogation then began. During the interrogation the defendant confessed his involvement in the incidents. After he was charged, he unsuccessfully sought to suppress his statements. The court held that his motion should have been granted. The defendant had only an eighth grade education and Spanish was his primary language. He could write in English, but had difficulty reading English and understanding spoken English. The transcript of the audio recording in which the defendant was said to have waived his rights revealed that the detective spoke to the defendant entirely in English and that the defendant gave several "[unintelligible]" or non-responses to the detective's questions pertaining to whether or not he understood his rights. There was no indication that the defendant had any familiarity with the criminal justice system and the record indicates that the defendant did not fully understand (or might not have fully understood) the detective's questions. The court concluded: "Because the evidence does not support the trial court's findings of fact . . . that defendant understood [the] Detective's . . . questions and statements regarding his rights, we conclude that he did not legitimately waive[] his *Miranda* rights. As a result, we decline to give any weight to recitals, like the juvenile rights waiver form signed by defendant, which merely formalize[d] constitutional requirements." (quotations omitted). It added: "To be valid, a waiver should be voluntary, not just on its face, i.e., the paper it is written on, but in fact. It should be unequivocal and unassailable when the subject is a juvenile." Applying this standard to the case at hand, the court explained:

Here, the waiver was signed in English only, and defendant's unintelligible answers to questions such as, "Do you understand these rights?" do not show a clear understanding and a voluntary waiver of those rights. Defendant stated firmly to the officer that he wanted to call his mother, even after the officer asked (unnecessarily), "Now, before you talk to us?" Further, defendant reiterated this desire, even in spite of the officer's aside to other officers in the room: "He wants to call his mom." Such actions would show a reasonable person that this juvenile defendant did not knowingly, willingly, and understandingly waive his rights. Rather, his last ditch effort to call his mother (for help), after his prior attempt to call her had been unsuccessful, was a strong indication that he did not want to waive his rights at all. Yet, after a second unsuccessful attempt to reach his working parent failed, this juvenile, who had just turned sixteen years old, probably felt that he had no choice but to talk to the officers. It appears, based on this record, that defendant did not realize he had the choice to refuse to waive his rights, as the actions he took were not consistent with a voluntary waiver. As a result, any "choice" defendant had to waive or not waive his rights is meaningless where the record does not indicate that defendant truly understood that he had a choice at all.

Furthermore, the totality of the circumstances set forth in this record ultimately do not fully support the trial court's conclusions of law, namely, "[t]hat the State carried its burden by a preponderance of the evidence that [d]efendant knowingly, willingly, and understandingly waived his juvenile rights." Here, too much evidence contradicts the English language written waiver signed by defendant, which, in any event, is merely a "recital" of defendant's purported decision to waive his rights. Accordingly, it should

not be considered as significant evidence of a valid waiver. (citations and footnote omitted).

[*State v. Moore*](#), ___ N.C. App. ___, ___ S.E.2d ___ (July 18, 2017). The trial court did not err by denying the defendant's motion to suppress statements made to an officer while the officer was transporting the defendant to the law enforcement center. It was undisputed that the defendant made the inculpatory statements while in custody and before he had been given his *Miranda* rights. However, the court held that the defendant was not subjected to interrogation; rather, his statements were spontaneous utterances.

Searches

[*State v. Worley*](#), ___ N.C. App. ___, ___ S.E.2d ___ (July 18, 2017). The trial court properly denied the defendant's motion to suppress evidence seized during the executions of warrants to search his rental cabin and truck for stolen goods connected to a breaking and entering of a horse trailer. The defendant argued that the search warrant affidavit establish no nexus between the cabin and the criminal activity. The court found however "that under the totality of the circumstances, the accumulation of reasonable inferences drawn from information contained within the affidavit sufficiently linked the criminal activity to defendant's cabin." Among other things, the affidavit established that when one of the property owners hired the defendant to work at their farm, several tools and pieces of equipment went missing and were never recovered; immediately before the defendant moved out of state, someone broke into their daughter's car and stole property; the defendant rented a cabin close to their property around the same time as the reported breaking and entering and larceny; and the defendant had prior convictions for first-degree burglary and felony larceny. Based on this and other evidence discussed in detail in the court's opinion, the affidavit established a sufficient nexus between the criminal activity and the defendant's cabin.

Criminal Offenses

Homicide

[*State v. Coleman*](#), ___ N.C. App. ___, ___ S.E.2d ___ (July 18, 2017). The evidence was sufficient with respect to the defendant's voluntary manslaughter conviction. The defendant was charged with first-degree murder. At trial the defendant admitted that he shot and killed his wife. He argued however that as a result of diabetes, his blood sugar was dangerously low at the time of the shooting, causing him to act in a manner that was not voluntary. The defendant moved for a directed verdict on the first-degree murder charges as well as the lesser charges of second-degree murder and voluntary manslaughter. The judge denied this motion and the jury found him guilty of voluntary manslaughter. The court rejected the defendant's argument that acting in the "heat of passion" was an element of voluntary manslaughter, noting that for this offense the State need only prove that the defendant killed the victim by an intentional and unlawful act and that the defendant's act was a proximate cause of death. Here, the defendant admitted that he shot his wife. His sole defense was that he did not act voluntarily due to low blood sugar, which put him in a state of automatism. The State presented expert testimony that he was not in such a state. Thus, there was substantial evidence from which the jury could reject the defendant's automatism defense and conclude that the defendant intentionally shot and killed his wife—the only elements necessary to prove voluntary manslaughter.

Larceny

[*State v. Bacon*](#), ___ N.C. App. ___, ___ S.E.2d ___ (July 18, 2017). Because there was insufficient evidence to establish that the value of the stolen items exceeded \$1000, the trial court erred by failing to dismiss a charge of felonious larceny. The items in question, stolen during a home break-in, included a television and earrings. Although the State presented no specific evidence concerning the value of the stolen items, the trial court ruled that their value was a question of fact for the jury. This was error. A jury cannot estimate the value of an item without any evidence put forward to establish a basis for that estimation. Although certain property may, by its very nature, be of value obviously greater than \$1000 the television and earrings in this case are not such items.