

Criminal Procedure

Indictment Issues

[*State v. Glidewell*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 15, 2017). (1) In this habitual misdemeanor larceny case, the court rejected the defendant's argument that the trial court created a fatal variance when it instructed the jury on a theory of acting in concert not alleged in the indictment. Citing prior case law, the court held that the theory of acting in concert need not be alleged in the indictment. (2) The court rejected the defendant's argument that a fatal variance existed between the indictment, the jury instructions, and the verdict sheets because each held him accountable for stealing a different number of items. Neither the jury instructions nor the verdict sheet were required to specify the number of items stolen.

Joinder

[*State v. Voltz*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 15, 2017). The trial court did not err by joining for trial offenses that occurred on different dates. The first set of offenses occurred on May 15, 2015 and involved assaults and sexual assaults on B.A. The second set of charges arose from a breaking or entering that occurred approximately eight months later, when the defendant entered a neighbor's home looking for B.A. The defendant argued that certain testimony offered by the neighbor was inadmissible character evidence as to the first set of charges but was essential testimony as to the second set of charges, to establish guilt of another. The court however found that the evidence would not have been admissible for that purpose; to be admissible, guilt of another evidence must do more than create mere conjecture of another's guilt. Here, the evidence was mere speculation that another person committed the crime. Furthermore the testimony was not inconsistent with the defendant's guilt.

Motion to Suppress Procedure

[*State v. Williams*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 15, 2017). Because the trial court summarily denied the defendant's motion to suppress, a full hearing with sworn testimony was not required under G.S. 15A-977 (motion to suppress procedure). The defendant's own affidavit clearly laid out facts establishing that the officer had reasonable suspicion to detain the defendant. The information presented in the affidavit was sufficient to allow the trial court to determine that the defendant's allegation did not merit a full suppression hearing because the affidavit did not as a matter of law support the ground alleged for suppression.

Jury Instructions

[*State v. Voltz*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 15, 2017). (1) The court rejected the defendant's argument that the trial court erred by providing the jury with written jury instructions on the charge of felonious breaking or entering which conflicted and materially differed from the court's earlier oral instructions. As a general rule, when there are conflicting instructions on a material point, a new trial is required. Here, the trial court's initial oral instructions stated, in part, that the jury must find that, at the time of the breaking or entering, the defendant intended to commit the felony of assault. Subsequently, the trial court noted to counsel that he wanted to add the definition of "the felony of assault" in written instructions to be given to the jury. Both sides agreed to the trial court's proposed language. The revised language stated that the felony of assault would be assault with a deadly weapon with intent to kill, inflicting serious bodily injury or an attempt to commit that crime. The court rejected the defendant's

argument that the oral and written instructions conflicted. Here, recognizing that the oral instructions may have been insufficient, the trial court provided the additional language simply to further define “the felony of assault.” The trial court may clarify its jury instructions. (2) Even assuming that the trial court erred in its jury instructions, the error did not rise to the level of plain error.

Sentencing

[*State v. Bryant*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 15, 2017). (1) In calculating prior record level, the trial court did not err by concluding that the defendant’s South Carolina conviction for criminal sexual conduct in the third degree was substantially similar to the North Carolina Class C felonies of second-degree forcible rape and second-degree forcible sex offense. The court rejected the defendant’s argument that the South Carolina conviction could be a violation of either second-degree forcible rape or second-degree forcible sexual offense, but not both because North Carolina’s rape statute only applies to vaginal intercourse and the sexual offense statute specifically excludes vaginal intercourse. This argument was “a distinction without a difference.” (2) Over a dissent, the court held that the trial court erred by concluding that the defendant’s South Carolina conviction for criminal sexual conduct in the first degree was substantially similar to the North Carolina Class BI felonies of statutory rape of a child by an adult and statutory sex offense with the child by an adult. These offenses are not substantially similar due to their disparate age requirements. Specifically, although both North Carolina statutes require that the offender be at least 18 years old, a person of any age may violate the South Carolina statute. Also, the North Carolina statutes apply to victims under the age of 13, while South Carolina’s protects victims who are less than 11 years old. Thus, the North Carolina and South Carolina statutes apply to different offenders and different victims and are not substantially similar.

[*State v. May*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 15, 2017). (1) Because the trial court failed to make statutorily required findings of fact addressing statutory mitigating factors prior to sentencing the juvenile defendant to life imprisonment without the possibility of parole, a new sentencing hearing was required. The defendant was convicted of first-degree murder and attempted robbery with a dangerous weapon. The trial court sentenced the defendant to life imprisonment without the possibility of parole on the murder charge. Immediately after judgment was entered, the defendant gave oral notice of appeal. Almost one month later, the trial court entered an order making findings of fact based on G.S. 15A-1340.19B to support its determination that the defendant should be sentenced to life imprisonment without the possibility of parole, as opposed to a lesser sentence of life imprisonment with the possibility of parole. The court agreed with the defendant that the trial court erred by sentencing him to life imprisonment without the possibility of parole, where it failed to make findings of fact and conclusions of law in support of the sentence. (2) Because the trial court had no jurisdiction to enter findings of fact after the defendant gave notice of appeal, the court vacated the order entered upon these findings. Once the defendant gave notice of appeal, the trial court’s jurisdiction was divested. Note: one judge concurred, but wrote separately to note concern about how the trial courts are addressing discretionary determinations of whether juvenile should be sentenced to life imprisonment without the possibility of parole.

Probation Violations

[*State v. Posey*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 15, 2017). Over a dissent, the court dismissed as moot the defendant’s appeal from a judgment revoking his probation and activating his suspended sentence. After finding that the defendant was not at home during a mandatory curfew on two occasions, that these absences constituted willful violations of probation, and that the violations

constituted absconding, the trial court revoked the defendant's probation and activated his suspended sentence. The defendant appealed. The case was before the appellate court on writ of certiorari. The State conceded that the trial court lacked jurisdiction to revoke the defendant's probation under the Justice Reinvestment Act because the underlying offenses occurred prior to December 1, 2011. The State argued however that the appeal was moot because the defendant had served his time. The defendant countered, arguing that he may suffer collateral consequences as a result of the trial court's alleged error if he is subsequently convicted of a new crime. Specifically, he noted that under North Carolina law, an aggravating sentencing factor may be found when the defendant previously has been found in willful violation of probation. The court rejected this argument, noting that the defendant made no assertion that the trial court erred in finding him in willful violation of probation, the factor that triggers application of the aggravating factor. Rather, the defendant only argued that the trial court erred in revoking his probation based on application of the Justice Reinvestment Act, which did not take effect until after he violated his probation. However, the fact that the defendant's probation was revoked does not in itself trigger application of the aggravating factor. The only part of the trial court's judgment which could have any future detrimental effect is the finding that the defendant was in willful violation of probation, a finding he did not challenge. Here, the trial court acted within its authority in entering its finding of willfulness. Specifically, the court stated: "the conditions of Defendant's probation included a mandatory curfew; Defendant was cited for violating this curfew; the trial court had the jurisdiction to hold its hearing to consider Defendant's violation; and the trial court found that Defendant violated his curfew and that the violation was willful. Therefore, since Defendant will not suffer future collateral consequences stemming from the trial court's error *in revoking his probation*, we conclude that Defendant's appeal is moot."

Evidence

Opinions

[State v. Carter](#), ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 15, 2017). In this drug case, the court held that although the trial court erred by allowing lay opinion testimony identifying the substance at issue as crack cocaine based on a visual identification, the error was not prejudicial where the State presented expert testimony, based on a scientifically valid chemical analysis, that the substance was a controlled substance. The trial court allowed the arresting officer, a Special Agent Kluttz with the North Carolina Department of Alcohol Law Enforcement, to identify the substance as crack cocaine. Agent Kluttz based his identification on his training and experience and his perceptions of the substance and its packaging. He was not tendered as an expert. The State also introduced evidence in the form of a Lab report and expert testimony by a chemical analyst with the North Carolina State Crime Laboratory. This witness testified that the results of testing indicated that the substance was consistent with cocaine. North Carolina Supreme Court precedent establishes two rules in this area: First, the State is required to present either a scientifically valid chemical analysis of the substance in question or some other sufficiently reliable method of identification. And second, testimony identifying a controlled substance based on visual inspection—whether presented as an expert or lay opinion—is inadmissible. Applying this law, the court agreed with the defendant that Agent Kluttz's identification of the substance as crack cocaine was inadmissible lay opinion testimony. However given the other admissible evidence that identified the substance as a controlled substance based on a chemical analysis, the defendant failed to demonstrate prejudice and therefore to establish plain error. [Author's note: For a comprehensive discussion of opinion testimony with respect to drug identification, see my Judges' Benchbook Chapter here: <http://benchbook.sog.unc.edu/evidence/expert-testimony>]

Rule 403 & Rape Shield

[*State v. West*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 15, 2017). When a trial court properly determines, pursuant to Evidence Rule 403, that the probative value of evidence about a victim’s sexual history is substantially outweighed by its potential for unfair prejudice, the trial court does not err by excluding the evidence, regardless of whether it falls within the scope of the Rape Shield Rule. The defendant was convicted of second-degree sexual offense. On appeal he argued that the trial court erred by denying his ability to cross-examine the victim regarding the victim’s commission of sexual assault when he was a child. Specifically, the victim had told an officer that he had sexually assaulted his half-sister when he was eight or nine years old and thereafter was placed in a facility until he reached 18 years old. The defendant asserted that the victim’s statement about this assault was admissible for impeachment because it was inconsistent with the victim’s previous statements to law enforcement about how and when he was removed from his home as a child. The trial court found that the victim’s statement about sexually assaulting his sister was evidence of prior sexual behavior protected by the Rape Shield Law and also was inadmissible because any probative value is substantially outweighed by the likelihood of unfair prejudice and confusion to the jury. The court declined to address the defendant’s argument that a prior sexual assault committed by a victim is not protected under the Rape Shield law, concluding instead that the trial court properly excluded the evidence under Rule 403. The sexual behavior at issue occurred more than a decade earlier and involved no factual elements similar to the charges in question. The incident is disturbing and highly prejudicial and the circumstances of the victim’s removal from his family home as a child are of remote relevance to the offense charged. Moreover, other evidence, including testimony that the defendant’s DNA matched a swab taken from the victim shortly after the assault, render the victim’s inconsistent statements about facts less relevant to the contested factual issues at trial, namely the defendant’s denial that any sexual encounter occurred. The court also rejected the defendant’s argument that exclusion of this evidence impermissibly prevented the jury from hearing evidence that the victim was not a virgin of the time of the offense, contrary to his statement to the defendant that he was a virgin.

Arrest, Search & Investigation

Protective Sweep and Plain View Doctrine

[*State v. Smith*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 15, 2017). In this felon in possession of a firearm case, the trial court erred by denying the defendant’s motion to suppress. Three officers entered the defendant’s apartment to execute arrest warrants issued for misdemeanors. While two officers made the in-home arrest, the third conducted a protective sweep of the defendant’s apartment, leading to the discovery and seizure of the stolen shotgun. The shotgun was leaning against the wall in the entry of the defendant’s bedroom. The bedroom door was open and the shotgun was visible, in plain view, from the hallway. The officer walked past the shotgun when checking the defendant’s bedroom to confirm that no other occupants were present. After completing the sweep, the officer secured the shotgun “to have it in . . . control and also check to see if it was stolen.” The officer located the serial number on the shotgun and called it into the police department, which reported that the gun was stolen. The officer then seized the weapon. The defendant moved to suppress the shotgun, arguing that the officer lacked authority to conduct a protective sweep and that the seizure could not be justified under the plain view doctrine. The trial court denied the defendant’s motion to suppress. (1) The court began by finding that the protective sweep was proper. Specifically, the officer was authorized to conduct a protective sweep, without reasonable suspicion, because the rooms in the apartment—including the bedroom where the shotgun was found—were areas immediately adjoining the place of arrest from which an attack could be immediately launched. The court rejected the defendant’s argument that the bedroom area was not immediately adjoining the place of arrest. The defendant was in the living room when the officers placed

him in handcuffs. The third officer immediately conducted the protective sweep of the remaining rooms for the sole purpose of determining whether any occupants were present who could launch an attack on the officers. Every room in the apartment was connected by a short hallway and the apartment was small enough that a person hiding in any area outside of the living room could have rushed into that room without warning. Based on the size and layout of the apartment, the trial court properly concluded that all of the rooms, including the bedroom where the shotgun was found, were part of the space immediately adjoining the place of arrest and from which an attack could have been immediately launched. (2) Over a dissent, the court held that the plain view doctrine could not justify seizure of the shotgun. The defendant argued that the seizure could not be justified under the plain view doctrine because the incriminating nature of the shotgun was not immediately apparent. He also argued that the officer conducted an unlawful search, without probable cause, by manipulating the shotgun to reveal its serial number. The court concluded that observing the shotgun in plain view did not provide the officer with authority to seize the weapon permanently where the State's evidence failed to establish that, based on the objective facts known to him at the time, the officer had probable cause to believe that the weapon was contraband or evidence of a crime. The officers were executing arrest warrants for misdemeanor offenses and were not aware that the defendant was a convicted felon. Before the seizure, the officer asked the other officers in the apartment if the defendant was a convicted felon, which they could not confirm. The court went on to find that the incriminating character of the shotgun became apparent only upon some further action by the officers, here, exposing its serial number and calling that number into the police department. Such action constitutes a search, separate and apart from the lawful objective of the entry. The search cannot be justified under the plain view doctrine because the shotgun's incriminating nature was not immediately apparent. There was no evidence to indicate that the officer had probable cause to believe that the shotgun was stolen. It was only after the unlawful search that he had reason to believe it was evidence of a crime.

Criminal Offenses

Participants in Crime

[*State v. Glidewell*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 15, 2017). In this habitual misdemeanor larceny case, the evidence was sufficient to support the trial court's instruction on the theory of acting in concert. On appeal, the defendant argued that the State's evidence was insufficient to show that he and his accomplice acted with a common purpose to commit a larceny or that he aided or encouraged his accomplice. According to the defendant, the evidence showed that he was simply present when his accomplice committed the crime. Here, the evidence showed that the defendant rode with his accomplice in the same car to the store; the two entered the store together; they looked at merchandise in the same section of the store; they were seen on surveillance video returning to the same area behind the clothing rack, stuffing shirts into their pants; and the two left the store within seconds of each other and exited the parking lot in a vehicle driven by the accomplice.

Assaults and Resisting

[*State v. Williams*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 15, 2017). (1) The trial court did not err by denying the defendant's motion to dismiss a charge of resisting an officer. The court rejected the defendant's argument that the officer was not discharging a lawful duty at the time of the stop because he did not have reasonable suspicion that the defendant had committed a crime. Having held otherwise in another portion of the opinion, the court rejected this argument. (2) The trial court erred by denying the defendant's motion to dismiss charges of assault inflicting serious bodily injury where there was insufficient evidence that the officer sustained serious bodily injury from the defendant's bites. There

was insufficient evidence of a permanent or protracted condition that causes extreme pain. Although there was evidence that the bite caused swelling and bruising that resolved in about one month, there was no evidence that the injury continued to cause the officer significant pain subsequent to his initial hospital treatment. Furthermore there was insufficient evidence of serious, permanent disfigurement, notwithstanding discoloration at the site of the bite.

Drug Offenses

[*State v. Yisrael*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 15, 2017). Over a dissent, the court held that the trial court did not err by denying the defendant's motion to dismiss a charge of possession with intent to sell or deliver marijuana. The defendant argued that the State failed to present sufficient evidence of his intent to sell or deliver the drugs and that the evidence shows the marijuana in his possession was for personal use. As to the quantity of marijuana, here 10.88 grams. Although the amount of drugs may not be sufficient, standing alone, to support an inference of intent to sell or deliver, other facts supported this element, including the packaging of the drugs. Additionally, the 20-year-old defendant was carrying a large amount of cash (\$1,540) and was on the grounds of a high school. Moreover, a stolen, loaded handgun was found inside the glove compartment of the vehicle.