

Criminal Procedure

Indictment Issues

[*State v. Murrell*](#), ___ N.C. ___, ___ S.E.2d ___ (Sept. 29, 2017). Affirming an unpublished opinion of the Court of Appeals, the court held that a robbery indictment was fatally defective. The indictment alleged, in relevant part, that the defendant committed the bank robbery “by way of reasonably appearing to the [named] victim . . . that a dangerous weapon was in the defendant’s possession, being used and threatened to be used by communicating that he was armed to her in a note.” The Court of Appeals had held that the indictment was defective because it failed to name any dangerous weapon that the defendant allegedly employed. The Supreme Court noted that an essential element of armed robbery is that the defendant possessed, used, or threatened use of a firearm or other dangerous weapon. Here, the indictment does not adequately allege this element. The court instructed: an armed robbery indictment “must allege the presence of a firearm or dangerous weapon used to threaten or endanger the life of a person.”

Jury Argument

[*State v. Huey*](#), ___ N.C. ___, ___ S.E.2d ___ (Sept. 29, 2017). Reversing a unanimous decision of the Court of Appeals in this murder case, the court held that while certain statements made by the prosecutor in his closing argument were improper, the arguments did not amount to prejudicial error. The ADA opened closing arguments by saying “Innocent men don’t lie.” During his argument, the prosecutor used some variation of the verb “to lie” at least thirteen times. The prosecutor also made negative comments regarding defense counsel and regarding a defense expert witness. Regarding the defense expert, the prosecutor argued that the expert made more than \$300,000 per year working for defendants, that he was not impartial and that “he’s just a \$6,000 excuse man.” Defense counsel did not object and the trial court did not intervene ex mero motu. The Court of Appeals held that the trial court erred by failing to intervene ex mero motu, concluding that the defendant’s entire defense was predicated on his credibility and on the credibility of his expert witness. The court reversed. It began by holding that there was “no doubt” that the prosecutor’s statements directed at the defendant’s credibility were improper. However it went on to hold that the statements were not so grossly improper as to result in prejudice, noting that the evidence supports the inference that the defendant’s testimony lacked credibility. For example, the defendant gave six different versions of the shooting, five to the police and one to the jury. The court concluded: “While we do not approve of the prosecutor’s repetitive and dominant insinuations that defendant was a liar, we do believe sufficient evidence supported the premise that defendant’s contradictory statements were untruthful.” The court also found that the prosecutor’s assertion that the defense expert was “just a \$6,000 excuse man” also was improper in that it implied the witness was not trustworthy because he was paid for his testimony. While a lawyer may point out potential bias resulting from payment, it is improper to argue that an expert should not be believed because he would give untruthful or inaccurate testimony in exchange for pay. The court also noted that the prosecutor’s use of the word “excuse” amounts to name-calling, “which is certainly improper.” Finally, the court agreed that the prosecutor improperly argued that defense counsel should not be believed because he was paid to represent the defendant. Although ultimately concluding that it was not reversible error for the trial court to fail to intervene ex mero motu, the court added:

Nonetheless, we are disturbed that some counsel may be purposefully crafting improper arguments, attempting to get away with as much as opposing counsel and the trial court will allow, rather than adhering to statutory requirements and general standards of professionalism. Our concern stems from the fact that the same closing

argument language continues to reappear before this Court despite our repeated warnings that such arguments are improper. . . . Our holding here, and other similar holdings finding no prejudice in various closing arguments, must not be taken as an invitation to try similar arguments again. We, once again, instruct trial judges to be prepared to intervene ex mero motu when improper arguments are made.

Evidence

Opinions

[*State v. Crabtree*](#), ___ N.C. ___, ___ S.E.2d ___ (Sept. 29, 2017). The court per curiam affirmed the decision below, [*State v. Crabtree*](#), ___ N.C. App. ___, 790 S.E.2d 709 (Sept. 6, 2016). In this child sexual assault case, the Court of Appeals held that neither a child interviewer from the Child Abuse Medical Evaluation Clinic nor a DSS social worker improperly vouched for the victim’s credibility; however, the court of appeals held, over a dissent, that although a pediatrician from the clinic improperly vouched for the victim’s credibility, no prejudice occurred. In the challenged portion of the social worker’s testimony, the social worker, while explaining the process of investigating a report of child sexual abuse, noted that the pediatrician and her team “give their conclusions or decision about those children that have been evaluated if they were abused or neglected in any way.” This statement merely described what the pediatrician’s team was expected to do before sending a case to DSS; the social worker did not comment on the victim’s case, let alone her credibility. In the challenged portion of the interviewer’s testimony, he characterized the victim’s description of performing fellatio on the defendant as “more of an experiential statement, in other words something may have actually happened to her as opposed to something [seen] on a screen or something having been heard about.” This testimony left the credibility determination to the jury and did not improperly vouch for credibility. However, statements made by the pediatrician constituted improper vouching. Although the pediatrician properly described the five-tier rating system that the clinic used to evaluate potential child abuse victims, she ventured into improper testimony when she testified that “[w]e have sort of five categories all the way from, you know, we’re really sure [sexual abuse] didn’t happen to yes, we’re really sure that [sexual abuse] happened” and referred to the latter category as “clear disclosure” or “clear indication” of abuse in conjunction with her identification of that category as the one assigned to the victim’s interview. Also, her testimony that her team’s final conclusion that the victim “had given a very clear disclosure of what had happened to her and who had done this to her” was an inadmissible comment on the victim’s credibility. However, the defendant was not prejudiced by these remarks.

Arrest, Search & Investigation

Miranda

[*State v. Hammonds*](#), ___ N.C. ___, ___ S.E.2d ___ (Sept. 29, 2017). Because the defendant was in custody while confined under a civil commitment order, the failure of the police to advise him of his *Miranda* rights rendered inadmissible his incriminating statements made during the interrogation. On December 10, 2012, a Stephanie Gaddy was robbed. On December 11, 2012, after the defendant was taken to a hospital emergency room following an intentional overdose, he was confined pursuant to an involuntary commitment order upon a finding by a magistrate that he was “mentally ill and dangerous to self or others.” Officers identified the defendant as a suspect in the robbery and learned he was confined to the hospital under the involuntary commitment order. On December 12 they questioned him without informing him of his *Miranda* rights. The defendant provided incriminating statements. At

trial he unsuccessfully moved to suppress the statements made during the December 12th interview. The defendant was convicted and he appealed. Before the Court of Appeals, the majority determined that the trial court properly found that the defendant was not in custody at the time of the interview and that the trial court's findings of fact supported its conclusion of law that the confession was voluntary. A dissenting judge concluded that the trial court's findings of fact were insufficient. The defendant filed an appeal of right with the Supreme Court, which vacated the opinion of the Court of Appeals and instructed the trial court to hold a new hearing on the suppression motion. After taking additional evidence the trial court again denied the motion. When the case came back before the Supreme Court, it reversed. The court noted, in part, that the defendant's freedom of movement was already severely restricted by the civil commitment order. However the officers failed to inform him that he was free to terminate the questioning and, more importantly, communicated to him that they would leave only after he spoke to them about the robbery. Specifically, they told him that "as soon as he talked, they could leave." The court found that "these statements, made to a suspect whose freedom is already severely restricted because of an involuntary commitment, would lead a reasonable person in this position to believe that he was not at liberty to terminate the interrogation without first answering his interrogators' questions about his suspected criminal activity." (quotations omitted).

Stops

[*State v. Goins*](#), ___ N.C. ___, ___ S.E.2d ___ (Sept. 29, 2017). For the reasons stated in the dissenting opinion below, the court reversed the decision of the Court of Appeals in [*State v. Goins*](#), ___ N.C. App. ___, 789 S.E.2d 466 (July 5, 2016). In that case, the Court of Appeals held, over a dissent, that a stop of the defendant's vehicle was not supported by reasonable suspicion. The stop occurred in an area of high crime and drug activity. The Court of Appeals majority concluded that the defendant's mere presence in such an area cannot, standing alone, provide the necessary reasonable suspicion for the stop. Although headlong flight can support a finding of reasonable suspicion, here, it determined, the evidence was insufficient to show headlong flight. Among other things, there was no evidence that the defendant saw the police car before leaving the premises and he did not break any traffic laws while leaving. Although officers suspected that the defendant might be approaching a man at the premises to conduct a drug transaction, they did not see the two engage in suspicious activity. The officers' suspicion that the defendant was fleeing from the scene, without more, did not justify the stop. The dissenting judge concluded that the officers had reasonable suspicion for the stop. The dissenting judge criticized the majority for focusing on a "fictional distinction" between suspected versus actual flight. The dissenting judge concluded: considering the past history of drug activity at the premises, the time, place, manner, and unbroken sequence of observed events, the defendant's actions upon being warned of the police presence, and the totality of the circumstances, the trial court correctly found that the officers had reasonable suspicion for the stop.