

Criminal Procedure

Indictment Issues

[State v. Ricks](#), ___ N.C. App. ___, ___ S.E.2d ___ (Jan. 5, 2016). Over a dissent, the court held that an obtaining property by false pretenses indictment was not defective where it alleged that the defendant obtained “a quantity of U.S currency” from the defendant. The court found that G.S. 15-149 (allegations regarding larceny of money) supported its holding.

Jury Deliberations

[State v. Chapman](#), ___ N.C. App. ___, ___ S.E.2d ___ (Jan. 5, 2016). Although the trial court erred by failing to exercise discretion in connection with the jury’s request to review certain testimony, the defendant failed to show prejudice. In this armed robbery case, during deliberations the jury sent a note to the trial court requesting several items, including a deputy’s trial testimony. The trial court refused the request on grounds that the transcript was not currently available. This explanation was “indistinguishable from similar responses to jury requests that have been found by our Supreme Court to demonstrate a failure to exercise discretion.” However, the court went on to find that no prejudice occurred.

Sex Offenders

[State v. Springle](#), ___ N.C. App. ___, ___ S.E.2d ___ (Jan. 5, 2016). (1) The trial court’s conclusion that the defendant was a recidivist was not supported by competent evidence and therefore could not support the conclusion that the defendant must submit to lifetime sex offender registration and SBM. The trial court’s order determining that the defendant was a recidivist was never reduced to writing and made part of the record. Although there was evidence from which the trial court could have possibly determined that the defendant was a recidivist, it failed to make the relevant findings, either orally or in writing. The defendant’s stipulation to his prior record level worksheet cannot constitute a legal conclusion that a particular out-of-state conviction is “substantially similar” to a particular North Carolina offense. (2) Ineffective assistance of counsel claims cannot be asserted in SBM appeals; such claims can only be asserted in criminal matters.

Post-Conviction

[State v. Martin](#), ___ N.C. App. ___, ___ S.E.2d ___ (Jan. 5, 2016). (1) Because the defendant’s motion for appropriate relief (MAR) alleging ineffective assistance of counsel in this sexual assault case raised disputed issues of fact, the trial court erred by failing to conduct an evidentiary hearing before denying relief. The defendant claimed that counsel was ineffective by failing to, among other things, obtain a qualified medical expert to rebut testimony by a sexual abuse nurse examiner and failing to properly cross-examine the State’s witnesses. The defendant’s motion was supported by an affidavit from counsel admitting the alleged errors and stating that none were strategic decisions. The court concluded that these failures “could have had a substantial impact on the jury’s verdict” and thus the defendant

was entitled to an evidentiary hearing. The case was one of “he said, she said,” with no physical evidence of rape. The absence of any signs of violence provided defense counsel an opportunity to contradict the victim’s allegations with a medical expert, an opportunity he failed to take. Additionally, trial counsel failed to expose, through cross-examination, the fact that investigators failed to collect key evidence. For example, they did not test, collect, or even ask the victim about a used condom and condom wrapper found in the bedroom. Given counsel’s admission that his conduct was not the product of a strategic decision, an evidentiary hearing was required. (2) With respect to the defendant’s claim that the trial court erred by denying his motion before providing him with post-conviction discovery pursuant to G.S. 15A-1415(f), the court remanded for the trial court to address whether the State had complied with its post-conviction discovery obligations.

Arrest, Search & Investigation

Search Warrants

[State v. Allman](#), ___ N.C. App. ___, ___ S.E.2d ___ (Jan. 5, 2016). Over a dissent the court held in this drug case that the application in the search warrant failed to establish probable cause to search the defendant’s residence. The court found the case indistinguishable from *State v. Campbell*, 282 N.C. 125 (1972), where the affidavit stated that the defendant and two other residents of the premises had been involved with drug sales and possession but insufficiently identified facts indicating that controlled substances would be found in the dwelling to be searched. Here, the affidavit alleged that two individuals residing at the residence were engaged in drug trafficking. However, nothing in the application indicated that the officer had observed or received information that drugs were possessed or sold at the premises in question. The court rejected the State’s argument that such an inference arose naturally and reasonably from circumstances indicating that the two individuals were engaged in drug transactions, including the fact that both previously had been convicted of drug crimes and that an officer found marijuana, cash, and a cell phone with messages consistent with marijuana sales in one man’s possession during a traffic stop. These facts were relevant to whether those individuals were engaged in drug dealing, but as in *Campbell*, information that a person is an active drug dealer is “not sufficient, without more, to support a search of the dealer’s residence.” The fact that the men lied about living in the house “while perhaps suggestive that drugs might be present” there, “does not make the drug’s presence probable.” The court distinguished all cases offered by the State on grounds that in those cases, the relevant affidavits contained “some specific and material connection between drug activity and the place to be searched.”

Evidence

Hearsay

[State v. Chapman](#), ___ N.C. App. ___, ___ S.E.2d ___ (Jan. 5, 2016). In this armed robbery case, the statement at issue was not hearsay because it was not offered for the truth of the matter asserted. At trial one issue was whether an air pistol used was a dangerous weapon. The State offered a detective who performed a test fire on the air pistol. He testified that he obtained the manual for the air pistol to understand its safety and operation before conducting the test. He testified that the owner’s manual

indicated that the air pistol shot BBs at a velocity of 440 feet per second and had a danger distance of 325 yards. He noted that he used this information to conduct the test fire in a way that would avoid injury to himself. The defendant argued that this recitation from the manual was offered to prove that the gun was a dangerous weapon. The court concluded however that this statement was offered for a proper non-hearsay purpose: to explain the detective's conduct when performing the test fire.

Experimental Evidence

[*State v. Chapman*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Jan. 5, 2016). In this armed robbery case, the trial court did not err by admitting a videotape showing a detective test firing the air pistol in question. The State was required to establish that the air pistol was a dangerous weapon for purposes of the armed robbery charge. The videotape showed a detective performing an experiment to test the air pistol's shooting capabilities. Specifically, it showed him firing the air pistol four times into a plywood sheet from various distances. While experimental evidence requires substantial similarity, it does not require precise reproduction of the circumstances in question. Here, the detective use the weapon employed during the robbery and fired it at a target from several close-range positions comparable to the various distances from which the pistol had been pointed at the victim. The detective noted the possible dissimilarity between the amount of gas present in the air cartridge at the time of the robbery and the amount of gas contained within the new cartridge used for the experiment, acknowledging the effect the greater air pressure would have on the force of a projectile and its impact on a target.

Criminal Offenses

Larceny

[*State v. Jones*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Jan. 5, 2016). There was insufficient evidence to sustain the defendant's larceny conviction. The defendant worked as a trucker. After a client notified the defendant's office manager that it had erroneously made a large deposit into the defendant's account, the office manager contacted the defendant, notified him of the erroneous deposit and indicated that the client was having it reversed. However, the defendant withdrew the amount in question and was charged with larceny. The court held that because the client willingly made the deposit into the bank account, there was insufficient evidence of a trespass. The defendant did not take the funds from the client by an act of actual trespass. Rather, the money was put into his account without any action on his part. Thus, no actual trespass occurred. Although a trespass can occur constructively, when possession is fraudulently obtained by trick or artifice, here no such act allowed the defendant to obtain the money. The defendant did not trick anyone into depositing the money; rather it was deposited by mistake by the client. The court rejected the State's argument that the taking occurred when the defendant withdrew the funds after being made aware of the erroneous transfer, noting that at this point the funds were in the defendant's possession not the client's.

Robbery

[State v. Ricks](#), ___ N.C. App. ___, ___ S.E.2d ___ (Jan. 5, 2016). Because there was contradictory evidence as to whether a gun was used, the trial court did not err by instructing the jury on common law robbery as a lesser of armed robbery.