

Case Summaries—Court of Appeals (2/18/2020)

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Neither snow nor rain nor heat nor gloom of night stays the School of Government from swift completion of their case summaries. This post summarizes opinions issued by the North Carolina Court of Appeals on February 18, 2020. Everyone stay safe during this wintry weather.

PJC counts as conviction under statute defining conviction as including adjudication of guilt

[Mace v. North Carolina Department of Insurance](#), ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 18, 2020)

The petitioner was found guilty of simple assault in a bench trial before a district court judge, who entered a prayer for judgment continued (PJC). In reliance on the advice of his attorney, the petitioner, an insurance agent, did not believe that he was required to report the PJC to the North Carolina Department of Insurance (DOI). The DOI found that the petitioner's failure to report the PJC violated G.S. 58-2-69(c), which requires licensees to notify the DOI of criminal convictions and defines conviction as including "an adjudication of guilt, a plea of guilty, or a plea of nolo contendere." Because of his reliance on the advice of counsel, the DOI imposed a \$100 civil penalty instead of suspending or revoking the petitioner's license. The petitioner appealed. Reviewing several previous decisions about the treatment of PJCs, the Court of Appeals recognized that a PJC constitutes an adjudication of guilt and upheld the DOI's determination.

State's impeachment of witness by prior inconsistent statements was not substantive evidence; evidence that was substantive was insufficient to support conviction of aiding and abetting robbery with a dangerous weapon

[State v. Ingram](#), ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 18, 2020)

The basic facts of this case are as follows: Marvin Price closed his account at the Mountain Credit Union, withdrawing \$25,000 in cash. He put \$300 to \$400 in his wallet and the remainder in an envelope. When he arrived home and got out of his car, he was robbed at gunpoint by Michael Ingram, who asked Price, "Where is the \$25,000?" Price claimed that he deposited it at another bank, although he had not actually done so, and Michael Ingram took the wallet only. In a separate case, Michael Ingram was convicted of robbery with a dangerous weapon. The defendant in this case is Michael Ingram's brother. He was tried jointly with Ms. Robinson, who worked at the credit union and with whom the defendant had a child, on charges of conspiracy to commit robbery with a dangerous weapon and aiding and abetting robbery with a dangerous weapon. They were acquitted of conspiracy and found guilty of aiding and abetting. This appeal concerned the defendant only.

The question addressed by the Court of Appeals was whether the State offered sufficient evidence to withstand the defendant's motion to dismiss, which the trial judge had denied. At trial, the State called Michael Ingram, who testified that he did not remember the robbery and did not know why he had been convicted. He did not testify to anything incriminating about the defendant. The State then called a detective to impeach Michael Ingram. The detective testified that Michael Ingram said that the defendant told him about the \$25,000 bank withdrawal and drove him to Price's home. The Court of Appeals recognized that the detective's testimony was limited to impeaching Michael

Angram's credibility. The only substantive evidence offered by the State was that Ms. Robinson had a relationship with the defendant, that she was working at the credit union along with three other employees when Price withdrew the \$25,000, and that she talked on the phone with the defendant while Price was at the credit union. The State argued that the jury could infer from this evidence that Ms. Robinson told the defendant of the withdrawal and that the defendant then arranged with his brother to rob Price. The Court found that while circumstantial evidence may support conviction of a crime, the State's argument was speculative. The Court concluded that without the information from the detective's testimony, which was not admitted for substantive purposes, there was not substantial evidence to withstand the defendant's motion to dismiss. The Court concluded that the trial judge should have granted the defendant's motion and reversed the judgment. [Note: The Court found it unnecessary to address the defendant's other issue on appeal—that the trial judge erred in permitting the detective to testify about Michael Angram's statements because the State was aware that Michael Angram would not be forthcoming as a witness; the real purpose of the detective's testimony was to get otherwise inadmissible hearsay before the jury in violation of *State v. Hunt*, 324 N.C. 343 (1989); and the testimony was unduly prejudicial and not cured by the trial judge's limiting instruction.]

- (1) The defendant was not entitled to a limiting instruction to guide the jury's consideration of his prior convictions in habitual DWI case where he testified to the convictions on direct examination**
(2) The defendant failed to preserve for appellate review his motion for the arresting officers' personnel records where he did not renew the motion after his first trial, which resulted in a mistrial

[State v. Davis](#), ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 18, 2020)

(1) At his trial for habitual DWI, the defendant took the stand, denied driving, and admitted his prior DWI convictions in explaining why he did not drive on the night in question and why, based on his past interactions with law enforcement, he did not speak to the arresting officers. On cross-examination, the State asked the defendant about the offense, date, and place of each of those convictions. The defendant asked the trial judge to instruct the jury pursuant to North Carolina Pattern Jury Instruction 105.40, which instructs that the jury should not consider a defendant's prior convictions as evidence of the defendant's guilt in the current case. The trial judge refused to give the instruction. Relying on *State v. Jackson*, 161 N.C. App. 118 (2003), the Court of Appeals found no error. Per that opinion, a defendant is not entitled to a special instruction instructing the jury to consider a defendant's testimony about prior convictions for purposes of the defendant's credibility only, where the defendant initially offers the testimony on direct examination. The Court held that the State's cross-examination of the defendant in this case was limited and did not constitute sufficient impeachment to require the instruction. The Court rejected the defendant's argument that it should reconsider *Jackson*, finding that it was bound by the prior decision. (2) Before his first trial on the habitual DWI charge, the defendant moved for and the trial judge conducted an in camera review of the arresting officers' personnel records. The trial judge denied release, finding no favorable and material evidence, and the Court of Appeals upheld the denial in an unpublished opinion. On appeal in this case, the defendant asked the Court of Appeals to review the records, which the trial judge had placed under seal at the first trial. The Court of Appeals held that the defendant failed to preserve the issue for appeal, having failed to make any motion asking the trial judge to review the records before his second trial. The Court stated that a mistrial has the legal effect of no trial. Therefore, the defendant could not rely on a motion made at his first trial to preserve issues for appeal at his later trial.

Applying the North Carolina Supreme Court's reasoning from *State v. Grady*, the Court of Appeals holds that an order imposing 30 years of SBM for a reportable offense against a minor is an unreasonable search in violation of the Fourth Amendment

[State v. Griffin](#), ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 18, 2020)

In *State v. Grady*, 372 N.C. 509 (2019), the North Carolina Supreme Court held that lifetime satellite-based monitoring (SBM) is unconstitutional as applied to any person who is ordered to enroll in SBM because he or she is a recidivist. The Court held that SBM in those circumstances constitutes an unreasonable search in violation of the Fourth

Amendment. [Note: For a further discussion of the *Grady* decision, see Jamie Markham, [Satellite-Based Monitoring Is Unconstitutional for All Unsupervised Recidivists](#) (Sept. 12, 2019).] The Court of Appeals in this case considered the constitutionality of a 30-year SBM order against a person who was not a recidivist and not automatically subject to SBM. The defendant was convicted of first-degree sex offense with a child and was sentenced to 144 to 182 months in prison. On his release from prison in 2015, he was placed on a five-year term of post-release supervision. The State sought SBM under G.S. 14-208.40(a)(2), which allows a judge to impose SBM for a term of years against a person who has committed an offense involving the physical, mental, or sexual abuse of a minor. Following a hearing, the trial judge ordered the defendant to submit to SBM for 30 years. The defendant did not contest the imposition of SBM for the five-year period of post-release supervision but argued that the imposition of SBM for an additional 25 years was unconstitutional. Applying the reasoning of *Grady*, the Court of Appeals agreed. It found first that the imposition of SBM for 25 years, although less than the lifelong term at issue in *Grady*, constituted a significantly lengthy and burdensome warrantless search. It found further that the State did not meet its burden of showing SBM's efficacy in meeting its professed aims, having failed to offer any evidence that SBM is effective in apprehending sex offenders, preventing new sex offenses, or otherwise protecting the public. The Court also found that the trial judge's findings in imposing SBM in this case—that the defendant had betrayed the minor victim's trust, had not completed a sex offender treatment program (SOAR) in prison, and had a moderate-low risk of reoffending based on the Static-99—did not support imposition of SBM. One judge concurred in the result only.

State was permitted to obtain new habitual felon indictment after trial of underlying felony although original habitual felon indictment was marked as “NOT A TRUE BILL”

[State v. Hodge](#), ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 18, 2020)

The defendant was charged with three counts of breaking and entering, three counts of larceny after breaking and entering, two counts of obtaining property by false pretenses, and one count of felonious possession of stolen goods. The State ostensibly indicted the defendant as an habitual felon, for which the defendant waived arraignment, but the grand jury had returned the indictment marked as “NOT A TRUE BILL.” At the close of the State's evidence at the trial of the underlying felonies, the trial judge granted the defendant's motion to dismiss the breaking and entering charges, the related larceny charges, and one of the false pretenses counts. The jury convicted the defendant of one false pretense count and of the lesser offense of misdemeanor possession of stolen goods. Those convictions rested on the defendant's possession of five stolen videogames and the sale of those videogames to a pawn shop for \$12. After the jury's verdict, the trial judge granted the State's request to continue sentencing to obtain a new habitual felon indictment. The defendant was thereafter tried on the new habitual felon indictment and sentenced to 115 to 150 months in prison.

The defendant argued at trial and on appeal that the trial court did not have jurisdiction to try and sentence the defendant as an habitual felon. A majority of the Court of Appeals rejected the defendant's argument, relying on *State v. Oakes*, 113 N.C. App. 332 (1994). Quoting from a portion of the *Oakes* opinion, the majority stated that an habitual felon indictment must be part of a prosecution “for which no judgment” has yet been entered. *Oakes*, 113 N.C. App. at 340. Accordingly, because judgment had not yet been entered, the State could obtain and prosecute a new habitual felon indictment. The majority also held that the trial judge did not abuse her discretion in granting a continuance to allow the State to obtain a new habitual felon indictment, rejecting the defendant's argument that the continuance was improper because it resulted in an exponential increase in his sentence. The dissenting judge distinguished the current case from *Oakes*. The dissent observed that *Oakes* found that the defect in the habitual felon indictment was “technical” and “[a]t the time defendant entered his plea to the underlying substantive felony and proceeded to trial, there was pending against him an habitual felon indictment presumed valid by virtue of its ‘return by the grand jury as a true bill.’” *Id.*, 113 N.C. App. at 339. Here, there was not a true bill of indictment, and allowing the State to obtain a new habitual felon indictment after the defendant entered his plea to the underlying felony was, in the dissent's view, “beyond the boundaries of due process.” [Note: For a further discussion of case law on when the State may obtain a superseding habitual felon indictment, see Jeff Welty, [North Carolina's Habitual Felon, Violent Habitual Felon, Habitual Breaking and Entering Laws](#), Administration of Justice Bulletin No. 2013/07, at 14–16 (Aug. 2013) (discussing cases

allowing superseding habitual felon indictment for technical defects after trial of underlying felony but not for substantive changes).]

(1) By eliciting contested testimony in voir dire and securing a ruling from the judge, the defendant preserved for appeal the issue of the judge's refusal to allow the testimony

(2) The trial judge did not abuse his discretion by refusing to allow the defendant to cross-examine the complaining witness about her mental health and treatment

(3) The defendant could not complain of jury instructions to which he agreed

[State v. Kowalski](#), ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 18, 2020)

During cross-examination of the complaining witness in a case involving a charge of assault on a female, the defendant began a line of questions to which the State objected. The trial judge excused the jury and conducted a voir dire, during which the defendant's counsel demonstrated the proposed cross-examination of the witness, including questions about her mental health and treatment. The trial judge ruled that those questions were not relevant and that to the extent they were relevant they were more prejudicial than probative. When cross-examination resumed in front of the jury, the defendant did not attempt to elicit testimony about the witness's mental health. (1) The Court of Appeals rejected the State's argument that the defendant failed to preserve for appellate review the issue of the judge's refusal to allow the testimony. The defendant was not required to elicit the testimony before the jury where, as here, the defendant elicited the testimony in voir dire and secured a ruling from the trial judge. The Court distinguished *State v. Coffey*, 326 N.C. 268 (1990), where the trial judge conducted a voir dire, ruled that most of the proposed testimony was inadmissible, but indicated that counsel could ask other questions, which the judge would rule on when the questions were asked. When the jurors returned, however, the defendant did not ask any questions, including questions not yet ruled on by the judge. (2) The Court recognized that North Carolina allows cross-examination of a key witness regarding the witness's past mental problems or defects to challenge the witness's credibility, citing *State v. Williams*, 330 N.C. 711 (1992). The Court found in this case that the excluded testimony concerned prior instances of the witness's mental health and treatment and that one instance involved treatment the witness had sought for childhood trauma; however, the Court stated that the defendant did not ask or attempt to introduce evidence about a mental health diagnosis or mental state. The Court held that the defendant failed to show that the trial judge abused his discretion in finding that the excluded testimony was not relevant or to the extent it was relevant that it was more prejudicial than probative. (3) The defendant argued that the trial judge committed plain error by charging the jury that the alleged assault involved "grabbing, pushing, dragging, kicking, slapping, and/or punching" when the criminal summons alleged "striking her neck and ear." The Court rejected the defendant's variance argument because the defendant failed to object to the instruction at trial, did not request that the trial judge including the "striking" language from the summons, and contributed to the variance by proposing that the judge add the words slapping and punching to the instruction.

Revocation of defendant's probation for absconding upheld

[State v. Mills](#), ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 18, 2020)

The Court of Appeals upheld the trial judge's revocation of the defendant's probation for absconding on the following facts: The defendant was released from custody on December 21, 2018, following a plea of guilty to assault with a deadly weapon on a government official. He failed to report to his probation officer by January 11, 2019, when the probation violation report was filed. The probation officer tried to contact the defendant at his sister's house, which the defendant had given to the probation officer as his address. When the probation officer called the listed phone number, his sister said she had not had contact with him in some time and didn't know he was out of custody; and when the officer went to the address provided by the defendant, the homeowner said he didn't know the defendant. On this evidence, the Court concluded that the trial judge did not abuse his discretion in finding that the defendant had absconded. The Court rejected the defendant's argument that the trial judge may have revoked his probation based on other alleged violations that could not be grounds for revocation, such as failing to attend community support meetings.

The Court found that the trial judge specifically revoked the defendant's probation for absconding.

(1) Certain evidentiary rulings were erroneous but did not amount to plain error
(2) Single conspiracy to shoot two people supported one conspiracy conviction only

[State v. Mitchell](#), ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 18, 2020)

The defendant was convicted of first-degree murder based on felony murder, attempted first-degree murder, felonious discharge of a firearm into an occupied vehicle in operation, and two counts of conspiracy to commit first-degree murder. The defendant's brother was the shooter and was convicted in a separate case. (1) On appeal the defendant argued that the trial judge committed plain error by admitting the following evidence. (A) A witness testified that the defendant knew that the defendant's brother intended to shoot the victims. The Court found that the testimony was inadmissible because a witness may not testify to another person's mind or purpose without personal knowledge of the person's mind or purpose, a foundation not laid by the State. The Court concluded, however, that erroneous admission of the testimony did not have a probable impact on the jury's finding that the defendant counseled and knowingly aided the shooting by assisting in luring the victims to the place where the defendant's brother shot them. (B) Two witnesses who were not called as experts, one of whom was a detective, testified that the defendant concealed evidence about the planned shooting by using a smartphone texting app. Applying Rule 701 of the North Carolina Rules of Evidence, which requires that opinion testimony by lay witnesses be rationally based on a witness's perception and helpful to the jury, the Court found that the State failed to lay a foundation showing that the witnesses were familiar with how the use of such apps affects cell phone records. The Court concluded that the erroneous admission of the testimony was not plain error because other evidence showed that the defendant was communicating with her brother via cellphone, that her brother destroyed his cellphone, and there were no records of their communications, which the jury could have viewed in a manner disadvantageous to the defendant. (C) A witness testified to the good character of one of the victims—that he was kind, protective, and nonviolent, among other qualities. The Court held that this testimony was inadmissible under Rule 404(a)(2) because it was not offered to rebut any evidence by the defendant that the victim was the first aggressor in the altercation. The Court concluded that the erroneous admission of the testimony was not plain error given other evidence consistent with the defendant's guilt. (2) The defendant argued, the State conceded, and the Court found that the trial judge erred in allowing the jury to convict her of two counts of conspiracy because the evidence showed a single conspiracy to shoot two people. The Court therefore vacated one of the conspiracy convictions and remanded for resentencing. One judge concurred in the result only.

Final mandate of jury instruction, in which trial judge erroneously stated that the jury could convict the defendant of voluntary manslaughter even if the State failed to prove the defendant did not act in self-defense, was not plain error

[State v. Richardson](#), ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 18, 2020)

The defendant was convicted of voluntary manslaughter and sentenced to 73 to 100 months in prison for shooting her boyfriend, Timothy Lee Fry, with whom she had lived for approximately three years. The evidence showed that their relationship was good at first but started to deteriorate after about a year. Fry verbally and physically abused her. He would choke her, pull her hair, and push her face. A gun enthusiast who kept loaded guns around the house, Fry would point the laser sight at the defendant's forehead and chest. The abuse also included repeated instances in which Fry would coerce her into having sex with him and other, older men. The defendant suffered from depression and had once attempted suicide. On the day of the shooting, the defendant returned home from work to find Fry in the basement of their home. He asked her to go with him to South Carolina to have sex with an older man. When she refused, Fry held a handgun to her chest, acted like he was pulling the trigger, and told her he would kill her if she didn't go. The defendant went upstairs. When she returned to the basement, Fry repeated that he was going to kill her if she didn't go and grabbed where the gun was and started towards her. The defendant grabbed a shotgun leaning against the bathroom wall and fired five rounds, hitting him four times. The defendant testified, "The closer he came, the more I

would shoot because he wouldn't stop, he just kept coming towards me." After each shot, she had to load a new shell into the chamber, push the slide forward, and pull the trigger. Two shots entered Fry's chest. Another two entered through his left arm and armpit, traveling through his left lung and fracturing five ribs. The State's forensic pathologist testified that any one of the shots would have been enough to incapacitate and kill Fry. Three bullet holes from the shotgun's slugs were found in the carpet beneath Fry's body, suggesting that he was on the ground when shot; and each of the four bullet wounds had a downward trajectory. After shooting Fry, the defendant called 911 and told the operator that she had shot her boyfriend.

The trial judge instructed the jury on first-degree murder, second-degree murder, voluntary manslaughter, self-defense, voluntary intoxication, and diminished capacity. In the final mandate on voluntary manslaughter, the offense for which the defendant was convicted, the trial judge instructed the jury as follows but without the underlined phrase:

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant intentionally wounded the alleged victim with a deadly weapon and thereby proximately caused the alleged victim's death, and that the defendant . . . used excessive force, it would be your duty to find the defendant guilty of voluntary manslaughter, even if the State has failed to prove that the defendant did not act in self-defense.

The Court of Appeals held that the defendant failed to preserve the erroneous omission of the underlined language for appellate review. The defendant did not object to the omission and, after the judge excused the jury to commence its deliberations, did not request any modifications to the instructions when asked by the judge. The Court distinguished decisions finding no waiver in which the trial judge agreed to give a specific instruction and failed to give it altogether rather than omitting a portion of the instruction as in this case. Reviewing the instruction for plain error, the Court found that the defendant failed to show reversible error because the trial judge in other portions of the jury instructions included the language omitted from the final mandate.