

## **Criminal Procedure Appeal**

*State v. Bettis*, \_\_ N.C. App. \_\_, \_\_ S.E. 2d \_\_ (Sept. 7, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091345-1.pdf>). Because he did not make an offer of proof at trial, the defendant failed to preserve for appellate review the question whether the trial court erred by excluding evidence regarding guilt of another.

### **Excluding Spectators from the Courtroom**

*State v. Register*, \_\_ N.C. App. \_\_, \_\_ S.E. 2d \_\_ (Sept. 7, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090629-1.pdf>). In a child sexual abuse case, the trial court did not err by excluding spectators from the courtroom during the victim's testimony. The court excluded all spectators except the victim's mother and stepfather, investigators for each side, and a high school class. Because the defendant did not argue that he was denied a public trial, the requirements of *Waller v. Georgia*, 467 U.S. 39 (1984), do not apply. The defendant waived any constitutional issues by failing to raise them at trial. The trial court's action was permissible under G.S. 15-166 (in sexual assault cases the trial judge may, during the victim's testimony, exclude from the courtroom everyone except the officers of the court, the defendant, and those engaged in the trial of the case). Furthermore, the court noted, G.S. 15A-1034(a) gives the trial court authority to restrict access to the courtroom to ensure orderliness in the proceedings. The State was concerned about the child victim being confronted with "a hostile environment with [defendant's] family sitting behind him;" the trial court was concerned about the potential for outbursts or inappropriate reactions by supporters of both the defendant and the victim. Although it was unusual to allow the high school class to stay, this decision was not unreasonable given that the issue was reactions by family members.

### **Jury Instructions Flight**

*State v. Bettis*, \_\_ N.C. App. \_\_, \_\_ S.E. 2d \_\_ (Sept. 7, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091345-1.pdf>). There was sufficient evidence to support an instruction on flight. A masked man robbed a store and left in a light-colored sedan. Shortly thereafter, an officer saw a vehicle matching this description and a high speed chase ensued. The vehicle was owned by the defendant. The driver abandoned the vehicle; a mask and a gun were found inside. Although the defendant initially reported that his car was stolen, he later admitted that his report was false. The court rejected the defendant's argument that the instruction was improper because there was only circumstantial evidence that defendant was the person who fled the scene.

### **Motions for Appropriate Relief (MAR) Claims of Newly Discovered Evidence**

*State v. Williamson*, \_\_ N.C. App. \_\_, \_\_ S.E. 2d \_\_ (Sept. 7, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091475-1.pdf>). Over a dissent, the court held that the trial court properly denied the defendant's MAR claim of newly

discovered evidence. The evidence was an accomplice's statement that the gun used in the armed robbery was inoperable. The trial court properly determined that the defendant failed to show that the evidence was probably true; based on the accomplice's prior statements, his refusal to say whether he discussed the operability of the gun with his attorney, and his plea of guilty to armed robbery, the court concluded that the accomplice's testimony that the gun was inoperable was not uncontroverted. The trial court properly concluded that the defendant failed to show that due diligence was used to procure the evidence at trial noting that the State left a report about the accomplice's statement in defense counsel's court mailbox the day before trial and defense counsel interviewed the accomplice at the end of the first day of trial. The court concluded that because the accomplice already had made the statement about the inoperable nature of the gun to the State, a reasonable interview by defense counsel should have revealed this same information.

### **Court's Order**

*State v. Williamson*, \_\_ N.C. App. \_\_, \_\_ S.E. 2d \_\_ (Sept. 7, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091475-1.pdf>). Over a dissent, the court rejected the defendant's argument that the trial court erred by failing to enter a written order containing its findings of fact and conclusions of law when denying the defendant's MAR. The trial court's oral order, containing findings of fact and conclusions of law and appearing in the transcript, was sufficient. It concluded: "While it is the best practice for the trial court to enter a written order with its findings of fact and conclusions of law when ruling on a defendant's MAR, this practice is not required by the MAR statute."

### **Evidence**

#### **Competency**

*State v. Forte*, \_\_ N.C. App. \_\_, \_\_ S.E. 2d \_\_ (Sept. 7, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091591-1.pdf>). The trial court did not abuse its discretion by finding an elderly victim to be competent. The witness correctly testified to his full name and birth date and where he lived. He was able to correctly identify family members, the defendant, and his own signature. He understood that he was at the courthouse, that a trial was occurring, and his duty to tell the truth. His testimony also demonstrated his ability to tell the truth from a lie. Noting that some of his answers were ambiguous and vague and that he was unable to answer some questions, the court concluded that it would not be unusual for an elderly person to have some difficulty in responding coherently to all of the voir dire questions.

#### **404(b) Evidence**

*State v. Register*, \_\_ N.C. App. \_\_, \_\_ S.E. 2d \_\_ (Sept. 7, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090629-1.pdf>). In a child sexual abuse case involving a female victim, the trial court did not err by allowing testimony from four individuals (three females and one male) that the defendant sexually abused them when they were children. The events occurred 14, 21, and 27 years prior to the abuse at issue. Citing *State v. Jacob*, 113 N.C. App. 605 (1994), and *State v. Frazier*, 121 N.C. App. 1 (1995), the court rejected the defendant's argument that the evidence lacked sufficient temporal proximity to the

events in question. The challenged testimony, showing common plan, established a strikingly similar pattern of sexually abusive behavior by the defendant over a period of 31 years in that: the defendant was married to each of the witnesses' mothers or aunt; the victims were prepubescent; the incidents occurred when the defendant's wife was at work and he was watching the children; and the abuse involved fondling, fellatio, or cunnilingus, mostly taking place in the defendant's wife's bed. Although there was a significant gap in time between the last abuse and the events in question, that gap was the result of defendant's not having access to children related to his wife and thus did not preclude admission under Rule 404(b). Finally, the court held that trial judge did not abuse his discretion by admitting this evidence under Rule 403.

### **Expert Opinions in Child Sexual Abuse Cases**

*State v. Livengood*, \_\_ N.C. App. \_\_, \_\_ S.E. 2d \_\_ (Sept. 7, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091414-1.pdf>). In a child sexual abuse case, the trial court did not abuse its discretion by overruling a defense objection to a response by the State's expert. On direct examination, the expert testified that the child's physical examination revealed no signs of trauma to the hymen. On cross-examination, she opined, without objection, that her physical findings could be consistent with rape or with no rape. On recross-examination, defense counsel asked: "And the medical aspects of this case physically are that there are no showings of any rape; correct?" The witness responded: "There's no physical findings which do not rule out her disclosure, sir." The trial judge overruled a defense objection to this response. The court rejected the defendant's argument that the expert's answer impermissibly commented on the victim's credibility, concluding that the expert's response was consistent with her prior testimony that her physical findings were consistent with rape or no rape.

*State v. Register*, \_\_ N.C. App. \_\_, \_\_ S.E. 2d \_\_ (Sept. 7, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090629-1.pdf>). The trial court erred by denying the defendant's motion to strike a response by the State's expert witness in a child sexual abuse case. During cross-examination, defense counsel asked whether the victim told the expert that she had been penetrated. The expert responded: "She described the rubbing; and, I would say that, as far as vaginal penetration, since the oral penetration — well, I'm not discussing that. I mean, I felt that that was very graphic and believable." The testimony was not responsive to the question and was opinion testimony on the victim's credibility. The court rejected the State's argument that the statement was offered as a basis of the expert's opinion. However, the court found that the error was harmless.

### **Criminal Offenses**

#### **Sexual Assaults**

*State v. Williams*, \_\_ N.C. App. \_\_, \_\_ S.E. 2d \_\_ (Sept. 7, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100011-1.pdf>). In a sexual offense case, there was sufficient evidence that the victim, an adult with 58 I.Q., was mentally disabled and that the defendant knew or should reasonably have known this. (1) Because the parties agreed that the victim was capable of appraising the nature of his conduct and of communicating an unwillingness to submit to a sexual act (he told the defendant he did not want

to do the act), the issue on the mentally disabled element was whether the victim was substantially capable of resisting a sexual act. The victim was mildly mentally retarded. He had difficulty expressing himself verbally, was able to read very simple words and solve very simple math problems, and had difficulty answering questions about social abilities and daily tasks. He needed daily assistance with cooking and personal hygiene. Notwithstanding the victim's communication of his unwillingness to receive oral sex, the defendant completed the sexual act, allowing an inference that the victim was unable to resist. (2) There was sufficient evidence that the defendant knew or should have known that the victim was mentally disabled. An officer testified that within three minutes of talking with the victim, it was obvious that he had some deficits. By contrast, the defendant appeared normal and healthy. While the defendant had a driver's license, held regular jobs, took care of the victim's mother, could connect a VCR, and could read "somewhat," the victim could not drive, never held a regular job, could cook only in a microwave, had to be reminded to brush his teeth, did not know how to connect a VCR, and could not read. Moreover, the defendant had sufficient opportunity to get to know the victim, having dated the victim's mother for thirteen years and having spent many nights at the mother's house, where the victim lived.

### **Stalking**

*State v. Van Pelt*, \_\_ N.C. App. \_\_, \_\_ S.E. 2d \_\_ (Sept. 7, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091361-1.pdf>). In a prosecution under the prior version of the stalking statute, there was sufficient evidence to sustain a conviction. The court rejected the defendant's argument that the evidence showed communications to persons other than the alleged victim on all but one occasion, concluding that all of the communications were directed to the victim. The defendant harassed the victim by written communications, pager, and phone with no legitimate purpose. The communications were directed to the victim, including those to his office staff, made with the request that they be conveyed to the victim. The harassment placed the victim in fear as evidenced by his testimony, his actions in having his staff make sure the office doors were locked and ensuring the outside lights were working along with encouraging them to walk in "twos" to their cars, his wife's testimony of his demeanor during and after his phone call with the defendant, his late night phone call to a police officer, his action in taking out a restraining order, and his visit to his children's school to speak with teachers and counselors and to have them removed from the school's website. The victim's fears were reasonable given the defendant's odd behavior exhibiting a pattern of escalation.

### **Harassing Phone Calls**

*State v. Van Pelt*, \_\_ N.C. App. \_\_, \_\_ S.E. 2d \_\_ (Sept. 7, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091361-1.pdf>). The evidence was sufficient to establish that the defendant violated G.S. 14-196(a)(3) by making harassing phone calls. The defendant repeatedly called the victim at work to annoy and harass him. It was not necessary for the State to show that defendant actually spoke with the victim.

### **Armed Robbery**

*State v. Bettis*, \_\_ N.C. App. \_\_, \_\_ S.E. 2d \_\_ (Sept. 7, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091345-1.pdf>). Where witness testimony indicated that the defendant used a gun in an armed robbery and there was no evidence that the gun was inoperable, the State was not required to affirmatively demonstrate operability and the trial court was not required to instruct on common law robbery.

*State v. Williamson*, \_\_ N.C. App. \_\_, \_\_ S.E. 2d \_\_ (Sept. 7, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091475-1.pdf>). The trial court did not err by failing to instruct the jury on the lesser included offense of common law robbery and by denying defendant's motion to dismiss the armed robbery charges. Because the defendant presented no evidence at trial to rebut the presumption that the firearm used in the robbery was functioning properly, he was not entitled to either an instruction on common law robbery or dismissal of the armed robbery charges.

### **Drug Offenses**

*State v. Biber*, \_\_ N.C. App. \_\_, \_\_ S.E. 2d \_\_ (Sept. 7, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090331-1.pdf>). Over a dissent, the court held that there was insufficient evidence that the defendant had constructive possession of the substance at issue, found in a motel room's bathroom light fixture while the defendant and two others were present. Ms. Hensley, who had rented the room with an unidentified friend, twice complained that people were using drugs in her room and that she did not want them there. The court found no competent evidence that the defendant intended and had the capability to maintain control and dominion over the room or the substance itself. In this regard it noted that because Ms. Hensley did not want the defendant in the room, his control over it was minimal. It also noted that there was no way to determine how long the defendant had been in the room before the officers arrived. Also, there was insufficient evidence of the defendant's proximity to the substance given that no evidence showed that he ever entered the bathroom. Rather, the evidence showed that when the officers entered the room, one of the other people present ran into the bathroom, refused to come out, and engaged in activity consistent with the destruction or concealing of contraband. [Note: Although the case was before the court on an appeal from an adverse ruling on a suppression motion, the court reached the issue of sufficiency of the evidence].

### **Exploitation of an Elder Adult**

*State v. Forte*, \_\_ N.C. App. \_\_, \_\_ S.E. 2d \_\_ (Sept. 7, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091591-1.pdf>). The defendant was charged with offenses under the current (G.S. 14-112.2) and prior (G.S. 14-32.3) statutes proscribing the crime of exploitation of an elder adult. (1) There was sufficient evidence that the victim was an elder adult. The victim was either 99 or 109 years old and had not driven a vehicle for years. Individuals helped him by paying his bills, driving him, bringing him meals and groceries, maintaining his vehicles, cashing his checks, helping him with personal hygiene, and making medical appointments for him. (2) There was sufficient evidence that the defendant was the victim's caretaker. The defendant assisted the victim by, among other things, performing odd jobs, running errands, serving as a driver, taking him shopping, purchasing items, doing projects

on the victim's property, writing checks, visiting with him, taking him to file his will, making doctor appointments, and cutting his toenails. Additionally, the two had a close relationship, the defendant was frequently at the victim's residence, and was intricately involved in the victim's financial affairs. The court rejected the defendant's argument that these activities were not sufficient to transform the "friendly relationship" into that of caretaker and charge.

## **Defenses**

### **Self-Defense**

*State v. Effler*, \_\_ N.C. App. \_\_, \_\_ S.E. 2d \_\_ (Sept. 7, 2010)

(<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100053-1.pdf>). The trial court did not commit plain error by instructing the jury that a defendant acting in self-defense is guilty of voluntary manslaughter if he was the aggressor, where there was sufficient evidence suggesting that the defendant was indeed the aggressor. Although the trial court erred by failing to include an instruction on no duty to retreat, the error did not rise to the level of plain error given the evidence suggesting that the defendant used excessive force and was the aggressor.