

Criminal Procedure Appeal

State v. Cowan, __ N.C. App. __, __ S.E.2d __ (Sept. 21, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091415-1.pdf>). Although the defendant's oral notice of appeal pursuant to N.C.R. App. P. 4(a)(1) from the trial court's order requiring him to enroll in satellite-based monitoring was insufficient to confer jurisdiction on the court of appeals, the court granted the defendant's request to treat his brief as a petition for writ of certiorari and considered his challenge to the trial court's order.

State v. May, __ N.C. App. __, __ S.E.2d __ (Sept. 21, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100140-1.pdf>). Same as *Cowan* above.

Motion to Suppress

State v. Reavis, __ N.C. App. __, __ S.E.2d __ (Sept. 21, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091425-1.pdf>). The defendant's motion to suppress his statement made during a police interview was untimely. The motion was not made until trial and there was no argument that the State failed to disclose evidence of the interview or statement in a timely manner.

Jury Argument

State v. Ferguson, __ N.C. App. __, __ S.E.2d __ (Sept. 21, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091507-1.pdf>). (1) The prosecutor's reference, in closing argument during the guilt phase of a murder trial, to victim impact evidence was not so grossly improper as to require the trial court's intervention ex mero moto. (2) The prosecutor did not call the defendant a liar in closing arguments; the prosecutor merely asked the jury to conclude that the defendant was lying because he had lied several times about his name and had given multiple accounts of the events. (3) Although the prosecutor's closing argument that "[i]f you are convicted of voluntary manslaughter, you can get as little as 38 months in the jail" was improper, the defendant failed to show that the argument was so grossly improper that it impeded his right to a fair trial.

Jury Instructions

State v. Ferguson, __ N.C. App. __, __ S.E.2d __ (Sept. 21, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091507-1.pdf>). The trial court properly instructed the jury according to N.C.P.I. – Crim. 104.70 pertaining to confessions where the defendant told the police that he stabbed the victim and described the altercation in detail.

Sentencing Restitution

State v. Ferguson, __ N.C. App. __, __ S.E.2d __ (Sept. 21, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091507-1.pdf>). The trial court erroneously ordered the defendant to pay restitution where the State offered only the Restitution Worksheet in support of the award.

Satellite-Based Monitoring (SBM)

State v. Cowan, __ N.C. App. __, __ S.E.2d __ (Sept. 21, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091415-1.pdf>). (1) G.S. 14-208.40B (procedure for determining SBM eligibility when eligibility was not determined when judgment was imposed) applies to SBM proceedings initiated after December 1, 2007, even if those proceedings involve offenders who had been sentenced or had committed the offenses that resulted in SBM eligibility before that date. The defendant received a probationary sentence for solicitation of indecent liberties on August 30, 2007 and thus was subject to SBM requirements, which apply to any offender sentenced to intermediate punishment on or after August 16, 2006. He challenged the trial court's later order requiring him to enroll in SBM, arguing that G.S. 14-208.40B did not apply to offenses committed prior to December 1, 2007, the statute's effective date. (2) Following prior case law, the court held that the SBM statute did not violate the constitutional prohibition against ex post facto laws. (3) Assuming without deciding that an elements-based approach should be used when determining eligibility for SBM under G.S. 14-208.40(a)(2), the trial court did not err by requiring the defendant to enroll in SBM on the grounds that the offense involved the physical, mental, or sexual abuse of a minor. Interpreting the word "involve," the court concluded that eligibility for SBM under G.S. 14-208.40(a)(2) includes both completed acts and acts that create a substantial risk that such abuse will occur. The court determined that an attempt to take an indecent liberty has "within or as part of itself" the physical, mental, or sexual abuse of a minor. It concluded that although solicitation of an indecent liberty need not involve the commission of the completed crime, an effort to "counsel, entice, or induce" another to commit that crime also creates a substantial risk that the "physical, mental, or sexual abuse of a minor" will occur, so that such a solicitation has the sexual abuse of a minor "as a "necessary accompaniment." (4) The trial court erred in requiring lifetime SBM under G.S. 14-208.40(a)(2); that provision subjects a person to SBM for a term of years. (5) The defendant did not receive adequate notice of the basis for the Department of Correction's preliminary determination that he should be required to enroll in SBM under the version of G.S. 14-208.40B(b) applicable to the defendant's case. Specifically the notice failed to specify the category set out in G.S. 14-208.40(a) into which the Department had determined that the defendant fell or to briefly state the factual basis for its conclusion.

Correcting Clerical Errors

State v. May, __ N.C. App. __, __ S.E.2d __ (Sept. 21, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100140-1.pdf>). When the trial court intended to check one box on AOC-CR-615 (judicial findings and order for sex offenders) but another box was marked on the form signed by the judge, this was a clerical error that could be corrected on remand.

Evidence

404(b)

State v. Ferguson, __ N.C. App. __, __ S.E.2d __ (Sept. 21, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091507-1.pdf>). In a murder case, the trial court did not abuse its discretion by excluding under Rule 404(b) defense evidence that the murder victim was openly homosexual and had a preference for heterosexual individuals. The defendant testified that the victim said he would forgive the defendant's debt in exchange for sex and that when the defendant refused this offer, the victim drew a knife and cut him, starting the altercation. The defendant argued that the evidence proved that the victim "made aggressive homosexual advances on heterosexual men for sex in exchange for favors." Citing, *State v. Laws*, 345 N.C. 585 (1997) (victim's homosexuality has no more tendency to prove that he would be likely to sexually assault a male than would a victim's heterosexuality show that he would be likely to sexually assault a female; because an individual's sexual orientation bears no relationship to the likelihood that one would threaten a sexual assault, it bears no relationship to defendant's claim that he killed in self-defense in response to a threatened sexual assault), the court rejected the defendant's argument.

Crawford Issues

State v. Blackwell, __ N.C. App. __, __ S.E.2d __ (Sept. 21, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091476-1.pdf>). The court ordered a new trial in a drug case in which the trial court admitted laboratory reports regarding the identity, nature, and quantity of the controlled substances where the State had not complied with the notice and demand provisions in G.S. 90-95(g) and (g1). Instead of sending notice directly to the defendant, who was *pro se*, the State sent notice to a lawyer who was not representing the defendant at the time.

Cross-Examination, Impeachment, and Related Concepts

State v. Ferguson, __ N.C. App. __, __ S.E.2d __ (Sept. 21, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091507-1.pdf>). (1) Under the rationale of *State v. Wallace*, 351 N.C. 481 (2000), the trial court did not abuse its discretion in a murder case by allowing the State to cross-examine the defendant's expert psychiatrist concerning a 2005 murder. At a pretrial hearing, the trial court held that the evidence was inadmissible. At trial, the defendant called the expert, Dr. Corbin, who opined that the victim's conduct triggered a traumatic reaction in defendant and that it was improbable that defendant intentionally planned the murder. On cross, the State examined Corbin concerning the 2005 homicide and why that murder was committed without the traumatic reaction that Corbin stated was caused by the victim's conduct. The court noted that as in *Wallace*, the issue was presented during the guilt-innocence phase; also, the prosecutor's questions pertained to the bases of the expert's opinion and were not solely designed to put the 2005 murder before the jury, the trial court's initial exclusion of the murder charges showed its awareness of the potential danger of undue prejudice, and in accordance with *Wallace*, the trial court gave a detailed limiting instruction to the jury. (2) The court rejected the defendant's argument that the trial court erred by allowing the prosecutor to impeach the defendant with evidence regarding his exercise of his right to counsel. The State cross-examined the defendant concerning whether he had talked to his

attorneys, how many times he talked with them, whether they discussed his trial testimony, whether they discussed the strengths and weaknesses of his case, whether defendant changed his story after learning the difference in punishment for voluntary manslaughter and murder, and whether he understood the felony murder rule. The focus of the testimony was to show that the defendant changed his story to avoid the most serious consequences of his actions. Defense counsel made a general objection to the first question but did not lodge further objections. The court held that in the absence of a specific objection raising attorney-client privilege or a constitutional issue, the trial court did not abuse its discretion in overruling defendant's objection. (3) Distinguishing *State v. Locklear*, 294 N.C. 210 (1978) (improper for a lawyer to assert that witness is lying), the court held that the prosecutor did not call the defendant a liar or state that he was lying. The defendant admitted lying during direct examination. On cross, the prosecutor asked the defendant how many people he had lied to. (4) Although the court found that the prosecutor's cross-examination mentioning potential sentencing ranges was "fraught with . . . dangers of misleading the jury," it did not rise to the level of plain error.

State v. Reavis, __ N.C. App. __, __ S.E.2d __ (Sept. 21, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091425-1.pdf>). The defendant opened the door to the State's cross-examination of a defense expert regarding prior offenses. On direct examination, the defendant's psychiatric expert reviewed the defendant's history of mental illness, including mention of his time in prison in 1996 for robbery. Defense counsel presented evidence as to defendant's time in prison, the year of the crime, the type of crime, defendant's time on probation, and a probation violation which returned him to prison. On cross-examination, the State questioned the expert about the defendant's time in prison, the defendant's previous "pleas which ultimately sent [defendant] to prison[.]" and the exact dates and times of the incidents, one of which led to the defendant's incarceration. The defendant raised no objection until the State presented police reports from the defendant's prior robbery conviction. Because the expert had testified about the robbery, the State could inquire into his knowledge of the events which led to the conviction.

Victim Impact Evidence

State v. Ferguson, __ N.C. App. __, __ S.E.2d __ (Sept. 21, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091507-1.pdf>). Although admission of victim impact evidence during the guilt phase of a murder trial was "likely" error, it did not rise to the level of plain error. The victim's sister testified that that "[w]hen [the victim] entered the room, it was like sunshine. He brought sunshine to our family. He was that person that no matter what, he loved his family and we loved him. Now that he is gone, there is not going to be any peace in our family." Also, a photograph of the victim and his mother was introduced.

Criminal Offenses

Burglary

State v. Reavis, __ N.C. App. __, __ S.E.2d __ (Sept. 21, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091425-1.pdf>). Although the victim's testimony tended to show that the crime did not occur at nighttime, there was sufficient

evidence of this element where the victim called 911 at 5:42 am; she told police the attack occurred between 5:00 and 5:30 am; a crime scene technician testified that “it was still pretty dark” when she arrived, and she used a flashlight to take photographs; and the defendant stipulated to a record from the U.S. Naval Observatory showing that on the relevant date the sun did not rise until 6:44 am.

First-Degree Murder

State v. Ferguson, __ N.C. App. __, __ S.E.2d __ (Sept. 21, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091507-1.pdf>). There was sufficient evidence of premeditation and deliberation where the defendant made contradictory statements to the police following the killing, the defendant and the victim had a dispute over money related to prior drug dealings, and the defendant inflicted 79 stab wounds on the victim, attempted to conceal evidence, and stole the victim’s motor vehicle.

Larceny

State v. Ferguson, __ N.C. App. __, __ S.E.2d __ (Sept. 21, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091507-1.pdf>). The evidence was sufficient to establish that the defendant intended to permanently deprive the victim of his property where the evidence showed that the defendant left the victim dead or dying in his apartment, stole his motor vehicle, and abandoned it at a car wash.

Robbery

State v. Ferguson, __ N.C. App. __, __ S.E.2d __ (Sept. 21, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091507-1.pdf>). The evidence was sufficient to establish armed robbery where the defendant’s taking of the victim’s vehicle following the murder was part of one continuous transaction.

Defenses

Self-Defense

State v. Pittman, __ N.C. App. __, __ S.E.2d __ (Sept. 21, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091190-1.pdf>). In a murder case, the trial court did not err by declining to instruct on self-defense where there was no evidence that would support a finding that the defendant reasonably believed that he needed to use deadly force against the victim to prevent death or serious bodily injury. Although the victim had threatened the defendant repeatedly, there was no evidence that he threatened to kill the defendant or attempted to harm him. There was no evidence that anyone had ever seen the victim with a weapon or attack another person. There was no indication that the victim had a reputation for violence; in fact, although the victim was angry with the defendant for a while, their conflict had never escalated beyond threats. There was no evidence that the victim threatened to hurt or attack the defendant on the day in question or that the encounter between them was more heated than earlier disputes. Instead, the evidence established that the defendant approached the victim with a gun, fired multiple shots at the victim, and continued firing as the victim attempted to

retreat. The victim's prior threats against the defendant, without more, did not establish a reasonable need for deadly force. The defendant's description of the victim's conduct immediately prior to the shooting did not, whether considered in isolation or in the context of the victim's prior threats, suffice to support a self-defense instruction. The fact that the victim may have been "edging up" on the defendant while reaching behind his back did not support a finding that the defendant reasonably believed that he needed to use lethal force given that the defendant did not claim to have seen the victim with a weapon on that or any occasion, the victim had not threatened him immediately prior to the shooting, and the defendant had no other objective basis, aside from prior threats, for believing that the victim was about to attack him and create a risk of death or great bodily injury.