

Criminal Procedure Appeal

State v. Dye, __ N.C. App. __, __ S.E.2d __ (Oct. 19, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091574-1.pdf>). By failing to move to strike objected-to testimony, the defendant failed to preserve for appellate review the issue whether the evidence was properly admitted.

State v. Wilson, __ N.C. App. __, __ S.E.2d __ (Oct. 19, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100268-1.pdf>). The defendant's objection to testimony from one witness did not carry over to testimony elicited from another witness when, among other things, more than 150 pages of trial transcript separated the defendant's objection from the challenged testimony.

State v. Williams, __ N.C. App. __, __ S.E.2d __ (Oct. 19, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100347-1.pdf>). Although the defendant's oral notice of appeal of the trial court's ruling that he enroll in lifetime satellite-based monitoring (SBM) was insufficient, the court granted his petition for certiorari and addressed the merits of his appeal.

State v. Ross, __ N.C. App. __, __ S.E.2d __ (Oct. 19, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091021-1.pdf>). Plain error analysis did not apply to the trial court's comments following the jury's indications that it had reached a deadlock. The trial court's comments were discretionary rulings and not jury instructions.

Jury Deliberations

State v. Ross, __ N.C. App. __, __ S.E.2d __ (Oct. 19, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091021-1.pdf>). (1) The bailiff's delivery of an exhibit to the jury, with an instruction from the trial judge that it would need to be returned to the trial court did not prejudice the defendant, even though the trial court violated G.S. 15A-1233(a) by failing to bring the jury into the courtroom when the jury's asked to review the exhibit. As to the instruction delivered by the bailiff, the court distinguished prior case law, in part, because the communication did not pertain to matters material to the case. (2) The trial court's entry into the jury room during deliberations to determine the jury's progress was not subject to plain error review. However, the court admonished the trial court that it should refrain from such conduct "to avoid the possibility of improperly influencing the jury and to avoid disruptions in the juror's deliberation process." (3) The trial court did not abuse its discretion by failing to give an *Allen* instruction after the jury reported for the third time that it was deadlocked when the trial judge had given such an instruction 45 minutes earlier.

Mistrial

State v. Dye, __ N.C. App. __, __ S.E.2d __ (Oct. 19, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091574-1.pdf>). The trial court did not abuse its discretion by denying the defendant's mistrial motion, made after the jury returned guilty verdicts. The motion was based on the fact that the child victim in this sexual assault case twice interrupted defense counsel's closing argument. After the initial interruption, the trial court, out of the jury's presence, instructed the victim to remain quiet. After her second outburst, the victim was removed from the courtroom. Additionally, the trial provided the defendant with an opportunity to request remedial measures, including mistrial, an invitation that was declined until after the verdict was returned.

Sex Offenders

State v. Williams, __ N.C. App. __, __ S.E.2d __ (Oct. 19, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100347-1.pdf>). (1) On appeal from a trial court order requiring lifetime SBM, the court held that the trial court erred by concluding that indecent liberties is an offense against a minor under G.S. 14-208.6(1i); that offense is a sexually violent offense requiring reporting under G.S. 14-208.6(5). (2) As conceded by the State, the defendant's conviction did not involve the physical, mental, or sexual abuse of a minor. (2) Notwithstanding these errors, the trial court's order was supported by necessary findings where the defendant pleaded guilty to two sexually violent offenses and the State presented evidence that he was a recidivist and the trial court so found. (3) Following prior case law, the court rejected the defendant's arguments that SBM violates prohibitions against ex post facto and double jeopardy.

Evidence

Rule 401—Relevance

State v. Ross, __ N.C. App. __, __ S.E.2d __ (Oct. 19, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091021-1.pdf>). In the habitual felon phase of the defendant's trial, questions and answers contained in the Transcript of Plea form for the predicate felony pertaining to whether, at the time of the plea, the defendant was under the influence of alcohol or drugs and his use of such substances were irrelevant. Although admission of this evidence did not result in prejudice, the court noted that "*preferred method* for proving a prior conviction includes the introduction of the judgment," not the transcript of plea.

Impeachment

State v. Gabriel, __ N.C. App. __, __ S.E.2d __ (Oct. 19, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091669-1.pdf>). The trial court did not err by admitting a witness's out of court statements. When a State's witness gave trial testimony inconsistent with his prior statements to the police, the State cross-examined him regarding his prior statements. After the witness denied making the statements, the trial court overruled a defense objection and admitted, for purposes of impeachment by the State, a transcript of the witness's prior statements. (1) The court rejected the argument that this constituted improper use of extrinsic evidence for impeachment. The rule against using extrinsic evidence to impeach a witness on collateral matters prohibits the introduction of the substance of a prior statement to impeach a witness's denial that he or she made the prior statement because the truth or falsity of that denial was a collateral matter. However, when the witness not only denies making the prior statements but also testifies inconsistently with them, the rule does not prohibit impeaching a witness's inconsistent testimony with the substance of the prior statements. Here, the substance of the witness's prior statements properly was admitted to impeach his inconsistent testimony, not his denial. (2) The court rejected the defendant's argument that the State used the guise of impeaching its own witness as subterfuge for admitting otherwise inadmissible evidence. Distinguishing prior case law, the court noted that the trial judge gave an appropriate limiting instruction, the evidence was important to the State's case, and nothing suggested that the State expected the witness's testimony.

Opinions

State v. Nabors, __ N.C. App. __, __ S.E.2d __ (Oct. 19, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100176-1.pdf>). The trial court erred by denying the defendant's motion to dismiss drug charges when the sole evidence that the substance at issue was crack cocaine consisted of lay opinion testimony from the charging police officer and an undercover informant based on visual observation. The court held that *State v. Ward*, 364 N.C. 133 (2010), calls into

question “the continuing viability” of *State v. Freeman*, 185 N.C. App. 408 (2007) (officer can give a lay opinion that substance was crack cocaine), and requires that in order to prove that a substance is a controlled substance, the State must present expert witness testimony based on a scientifically valid chemical analysis and not mere visual inspection.

State v. Dye, __ N.C. App. __, __ S.E.2d __ (Oct. 19, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091574-1.pdf>). In a child sexual assault case, the court held that even assuming that the State’s medical expert’s testimony regarding “secondary gain” improperly vouched for the victim’s credibility, the error did not rise to the level of plain error.

Arrest, Search & Investigation

Show Ups

State v. Rawls, __ N.C. App. __, __ S.E.2d __ (Oct. 19, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091029-1.pdf>). (1) The Eyewitness Identification Reform Act, G.S. 15A-284.52, does not apply to show ups. (2) Although a show up procedure was unduly suggestive, there was no substantial likelihood of irreparable misidentification and thus the trial judge did not err by denying a motion to suppress the victim’s pretrial identification. The show up was unduly suggestive when an officer told the witness beforehand that “they think they found the guy,” and at the show up, the defendant was detained and several officers were present. However, there was no substantial likelihood of irreparable misidentification when, although only having viewed the suspects for a short time, the witness looked “dead at” the suspect and made eye contact with him from a table’s length away during daylight hours with nothing obstructing her, the show up occurred fifteen minutes later, and the witness was “positive” about her identification of the three suspects, as “she could not forget their faces.”

Juveniles

In Re K.D.L., __ N.C. App. __, __ S.E.2d __ (Oct. 19, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091653-1.pdf>). The trial court erred by denying a juvenile’s motion to suppress when the juvenile’s confession was made in the course of custodial interrogation but without the warnings required by *Miranda* and G.S. 7B-2101(a), and without being apprised of and afforded his right to have a parent present. Following *In re J.D.B.*, 363 N.C. 664 (2009), the court concluded that when determining whether in-school questioning amounted to a custodial interrogation, the juvenile’s age was not relevant. The court found that that the juvenile was in custody, noting that he knew that he was suspected of a crime, he was questioned by a school official for about six hours, mostly in the presence of an armed police officer, and he was frisked by the officer and transported in the officer’s vehicle to the principal’s office where he remained alone with the officer until the principal arrived. Although the officer was not with the juvenile at all times, the juvenile was never told that he was free to leave. Furthermore, the court held that although the principal, not the officer, asked the questions, an interrogation occurred, noting that the officer’s conduct significantly increased the likelihood that the juvenile would produce an incriminating response to the principal’s questioning. The court concluded that the officer’s near-constant supervision of the juvenile’s interrogation and “active listening” could cause a reasonable person to believe that the principal’s interrogation was done in concert with the officer or that the person would endure harsher criminal punishment for failing to answer.

Criminal Offenses

Acting in Concert

State v. Gabriel, __ N.C. App. __, __ S.E.2d __ (Oct. 19, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091669-1.pdf>). There was sufficient

evidence of acting in concert with respect to a murder and felony assault, notwithstanding the defendant's exculpatory statement that he "got caught in the middle" of the events in question. Other evidence permitted a reasonable inference that the defendant and an accomplice were shooting at the victims pursuant to a shared or common purpose.