

Criminal Procedure Appeal

State v. Clayton, __ N.C. App. __, __ S.E.2d __ (Aug. 3, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090987-1.pdf>). Following *State v. Brooks*, __ N.C. App. __, __, 693 S.E.2d 204 (2010), and holding that oral notice pursuant to N.C.R. APP. P. 4(a)(1) is insufficient to confer appellate jurisdiction for a defendant's appeal from a trial court order requiring enrollment in satellite-based monitoring (SBM); instead a defendant must give notice of appeal pursuant to N.C.R. APP. P. 3(a), as is proper in a civil action or special proceeding. Although the provisions of Rule 3 are jurisdictional and the defendant failed to comply with the rule, the court treated the defendant's brief as a petition for writ of certiorari and granted the petition to address the merits of his appeal.

State v. Oxendine, __ N.C. App. __, __ S.E.2d __ (Aug. 3, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090858-1.pdf>). The court cited *Brooks* and concluded that the defendant's oral notice of appeal was insufficient to confer jurisdiction over an appeal from a trial court ruling ordering SBM enrollment. However, the court ex mero motu treated the defendant's brief as a petition for certiorari and granted the petition to address the merits of the appeal.

State v. Inman, __ N.C. App. __, __ S.E.2d __ (Aug. 3, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091151-1.pdf>). Over a dissent, the court followed *Brooks* and held that because there was no written notice of appeal, it lacked jurisdiction to consider the defendant's appeal from a trial court order requiring SBM enrollment. The court declined to treat the defendant's appeal as a petition for writ of certiorari. The dissenting opinion would have treated the defendant's appeal as a writ of certiorari and affirmed the trial court's order.

Jury Selection

State v. Headen, __ N.C. App. __, __ S.E.2d __ (Aug. 3, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090606-1.pdf>). The trial court did not err by overruling the defendant's *Batson* objection to the State's peremptory challenge of an African-American juror. The defendant, who is African-American, was tried for murder. In response to the defendant's *Batson* objection, the prosecutor explained to the trial court that the juror was challenged because he was heavily tattooed and dressed in baggy, low hanging jeans decorated with a blood-red colored splatter. The prosecutor expressed concern over what the juror chose to wear to court and "his choice of applying . . . that much ink." The court found the State's reason for striking the juror to be race-neutral. It also held that the trial court did not err by finding that the defendant failed to prove purposeful discrimination. The court determined that the defendant's statistical evidence was not helpful because the jury pool contained only one or two African-Americans. Although defense counsel had suggested to the trial court that there were "racial overtones" in the defendant's prior trials, no evidence of this was presented. The court also rejected the defendant's argument that the State's explanation for excluding the juror was pretextual. Finally, the court noted that both the victim and the defendant were African-American, the State asked no racially motivated questions, the State's method of questioning the juror did not differ from its method of questioning other jurors, the State used only two peremptory challenges and contemporaneously challenged both a black and white prospective juror, the defendant left unresolved the question whether one of the jurors accepted by the State was African-American, and the defendant failed to show that any other prospective jurors wore clothing or had tattooing similar to that displayed by the juror in question.

Expunction

State v. Frazier, __ N.C. App. __, __ S.E.2d __ (Aug. 3, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100019-1.pdf>). The trial court erred by applying G.S. 14-50.30 and expunging the defendant's conviction for an offense occurring on February 6, 1995. At the time, the statute only applied to offenses occurring on or after December 1, 2008.

**Sex Offenders
Satellite-Based Monitoring
Appeal**

State v. Clayton, __ N.C. App. __, __ S.E.2d __ (Aug. 3, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090987-1.pdf>). Following *State v. Brooks*, __ N.C. App. __, __, 693 S.E.2d 204 (2010), and holding that oral notice pursuant to N.C.R. APP. P. 4(a)(1) is insufficient to confer appellate jurisdiction for a defendant's appeal from a trial court order requiring enrollment in satellite-based monitoring (SBM); instead a defendant must give notice of appeal pursuant to N.C.R. APP. P. 3(a), as is proper in a civil action or special proceeding. Although the provisions of Rule 3 are jurisdictional and the defendant failed to comply with the rule, the court treated the defendant's brief as a petition for writ of certiorari and granted the petition to address the merits of his appeal.

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State v. Inman, __ N.C. App. __, __ S.E.2d __ (Aug. 3, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091151-1.pdf>). Over a dissent, the court followed *Brooks* and held that because there was no written notice of appeal, it lacked jurisdiction to consider the defendant's appeal from a trial court order requiring SBM enrollment. The court declined to treat the defendant's appeal as a petition for writ of certiorari. The dissenting opinion would have treated the defendant's appeal as a writ of certiorari and affirmed the trial court's order.

Jurisdiction

State v. Clayton, __ N.C. App. __, __ S.E.2d __ (Aug. 3, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090987-1.pdf>). Because the trial court previously held a hearing pursuant to G.S. 14-208.40B (SBM determination after sentencing) and determined that the defendant was not required to enroll in SBM, the trial court lacked jurisdiction to later hold a second SBM hearing on the same reportable conviction. In this case, the defendant was summoned for the second SBM hearing after a probation violation. The trial court required the defendant to enroll in SBM based on the fact that his probation violation was sexual in nature. The court reasoned that a probation violation is not a crime and cannot constitute a new reportable conviction.

Aggravated Offense

State v. Oxendine, __ N.C. App. __, __ S.E.2d __ (Aug. 3, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090858-1.pdf>). Following *State v. McCravey*, __ N.C. App. __, __ S.E.2d __ (May 4, 2010) (applying the "elements test," second-degree rape committed by force and against the victim's will is an aggravated offense triggering lifetime SBM), the court granted the State's petition for writ of certiorari and remanded for entry of an order requiring lifetime SBM enrollment on the basis of the defendant's second-degree rape conviction, which involved a

mentally disabled victim. A concurring opinion agreed that the second-degree rape conviction was an aggravated offense, but not as a direct result of *McCravey*.

Highest Level of Supervision and Monitoring

State v. Oxendine, __ N.C. App. __, __ S.E.2d __ (Aug. 3, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090858-1.pdf>). Following *State v. Kilby*, __ N.C. App. __, 679 S.E.2d 430 (2009) (findings of fact were insufficient to support the trial court's conclusion that the defendant required the highest possible level of supervision and monitoring based on a "moderate" risk assessment from DOC), and *State v. Causby*, __ N.C. App. __, 683 S.E.2d 262 (2009) (applying *Kilby*), the court held that the trial court erroneously determined that the defendant required the highest level of supervision and monitoring. The Static 99 concluded that the defendant posed a low risk of re-offending and no other evidence supported the trial court's determination.

Verdict

State v. Sargeant, __ N.C. App. __, __ S.E.2d __ (Aug. 3, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090262-1.pdf>). Over a dissent, the court held that by taking a partial verdict, the trial court violated the defendant's state constitutional right to a unanimous verdict and that the error was not harmless beyond a reasonable doubt. The defendant was convicted of first-degree murder, first-degree kidnapping, robbery with a dangerous weapon, and burning of personal property. At the end of the first day of deliberations, the jury had not reached a unanimous decision as to each of the charges. The trial court asked the jury to submit verdict sheets for any of the charges for which it had unanimously found the defendant guilty. The trial court then received the jury's verdicts finding the defendant guilty of first-degree kidnapping, robbery with a dangerous weapon, and burning of personal property, as well as first-degree murder on the bases of both felony murder and lying in wait. The only issue left for the jury to decide was whether the defendant was guilty of first-degree murder on the basis of premeditation and deliberation. The next morning, the court gave the jury a new verdict sheet asking only whether the defendant was guilty of first-degree murder on the basis of premeditation and deliberation. The jury returned a guilty verdict later that day. The trial court erred by taking a verdict as to lying in wait and felony murder when the jury had not yet agreed on premeditation and deliberation. Premeditation and deliberation, felony murder, and lying in wait are not crimes, but rather theories of first-degree murder. The trial court cannot take a verdict on a theory. Therefore, the trial court erred by taking partial verdicts on theories of first-degree murder. Because the State had not proved that the error was not harmless beyond a reasonable doubt, the court ordered a new trial on the murder charge.

Evidence

Authentication

State v. Mobley, __ N.C. App. __, __ S.E.2d __ (Aug. 3, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090975-1.pdf>). The trial court did not abuse its discretion by concluding that an audio recording of a booking-area phone call was properly authenticated under Rule 901 as having been made by the defendant. The State's authentication evidence showed: (1) the call was made to the same phone number as later calls made using the defendant's jail positive identification number; (2) the voice of the caller was similar to later calls placed from the jail using the defendant's jail positive identification number; (3) a witness familiar with the defendant's voice identified the defendant as the caller; (4) the caller identified himself as "Little Renny" and the defendant's name is Renny Mobley; and (5) the caller discussed circumstances similar to those involved with the defendant's arrest.

Hearsay

State v. Sargeant, __ N.C. App. __, __ S.E.2d __ (Aug. 3, 2010)

(<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090262-1.pdf>). Over a dissent, the court ordered a new trial on grounds that the trial court erred by excluding defense evidence of an accomplice's hearsay statement, proffered under the residual hearsay exception. The court noted that the only factor in dispute under the six-factor residual exception *Triplett* test was the circumstantial guarantees of trustworthiness factor. To evaluate that factor, a court must assess, among other things, (1) the declarant's personal knowledge of the underlying event; (2) the declarant's motivation to speak the truth; (3) whether the declarant recanted; and (4) the reason for the declarant's unavailability. In this case, it was clear that the declarant had personal knowledge. However, for reasons discussed in the opinion, the court held that the trial court erred with respect to its findings as to factors (2) – (4) and by assessing the trustworthiness of the statement by comparing it to other evidence presented at trial.

Criminal Offenses

Obstruction of Justice

State v. Wright, __ N.C. App. __, __ S.E.2d __ (Aug. 3, 2010)

(<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090674-1.pdf>). The trial court did not err by denying the defendant's motion to dismiss a charge of felony obstruction of justice. The State argued that the defendant knowingly filed with the State Board of Elections (Board) campaign finance reports with the intent of misleading the Board and the voting public about the sources and uses of his campaign contributions. The defendant was a member of the House of Representatives and a candidate for re-election. He was required to file regular campaign finance disclosure reports with the Board to provide the Board and the public with accurate information about his compliance with campaign finance laws, the sources of his contributions, and the nature of his expenditures. His reports were made under oath or penalty of perjury. The defendant's sworn false reports deliberately hindered the ability of the Board and the public to investigate and uncover information to which they were entitled by law: whether defendant was complying with campaign finance laws, the sources of his contributions, and the nature of his expenditures. Further, his false reports concealed illegal campaign activity from public exposure and possible investigation. The lack of any pending judicial proceeding or a specific investigation into whether the defendant had violated campaign finance laws was immaterial. The court also rejected the defendant's argument that the trial court's jury instructions deviated from the indictment. The defendant argued that the indictment alleged that he obstructed public access to the information but that the jury instructions focused on obstructing the Board's access to information. The court found this to be a distinction without a difference.

Counterfeit Controlled Substances

State v. Mobley, __ N.C. App. __, __ S.E.2d __ (Aug. 3, 2010)

(<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090975-1.pdf>). There was sufficient evidence to support the defendant's conviction of conspiracy to sell a counterfeit controlled substance. The court concluded that G.S. 90-87(6) (definition of counterfeit controlled substance) requires only that the substance be intentionally represented as a controlled substance, not that a defendant have specific knowledge that it is counterfeit. There was sufficient evidence that the defendant intentionally represented the substance as a controlled substance in this case: when an undercover officer asked for a "40" (\$40 worth of crack cocaine), an accomplice produced a hard, white substance packaged in two small corner baggies, which the officers believed to be crack cocaine. There also was substantial evidence that the defendant conspired with the accomplice: the defendant initiated contact with the officers, directed them where to park, spoke briefly with the accomplice who emerged from a building with the substance, and the defendant brokered the deal.