Criminal Procedure

Appeal

State v. Blackmon, __ N.C. App. __, __ S.E.2d __ (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-417-1.pdf). Although the defendant moved to dismiss the charges at the close of the State's evidence, he failed to renew the motion at the close of all evidence and therefore waived appellate review of the trial court's denial of his motion to dismiss.

State v. Potts, __ N.C. App. __, __ S.E.2d __ (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-516-1.pdf). (1) Although the defendant made an objection the first time the evidence at issue was elicited from a witness, he failed to preserve the issue for appeal because the same evidence later was admitted without objection. (2) By failing to object at trial, the defendant failed to preserve the issue of whether the trial court erred by admitting evidence for corroboration.

Correcting Errors

State v. Dobbs, __ N.C. App. __, __ S.E.2d __ (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-388-1.pdf). The court treated as a clerical error the trial court's mistake on the judgment designating an offense as Class G felony when it in fact was a Class H felony. The court remanded for correction of the clerical error.

State v. Treadway, __ N.C. App. __, __ S.E.2d __ (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-287-1.pdf). On the judicial findings and order for sex offender form, the trial court erroneously indicated that the defendant had been convicted of an offense against a minor under G.S. 14-208.6(1i) when in fact he was convicted of a sexually violent offense under G.S. 14-208.6(5). The court remanded for correction of the clerical error.

Indictment Issues

State v. Clark, __ N.C. App. __, __ S.E.2d __ (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-235-1.pdf). (1) Although the State is not required to allege the felony or larceny intended in an indictment charging breaking or entering a vehicle, if it does so, it will be bound by that allegation. (2) An indictment properly alleges the fifth element of breaking and entering a motor vehicle—with intent to commit a felony or larceny therein—by alleging that the defendant intended to steal the same motor vehicle.

Motions

Motions to Dismiss

State v. Blackmon, __ N.C. App. __, __ S.E.2d __ (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-417-1.pdf). Evidence of felonious larceny and breaking or entering was sufficient to survive a motion to dismiss. The victim's computer tower was left outside the victim's house after a break-in. A fingerprint from the tower matched the defendant's print. The tower was in full view of the victim's back door and anyone inspecting the equipment would be able to see broken glass in the back door. There was no path behind the house and the victim did not know defendant or give him permission to be at her house.

State v. Daniel, __ N.C. App. __, __ S.E.2d __ (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/09-1264-1.pdf). Over a dissent, the court held that the trial court did not err by denying the defendant's *Knoll* motion in an impaired driving case in which

the defendant was detained for almost 24 hours. The court upheld the trial court's finding that an individual who appeared to take responsibility for the defendant was not a sober responsible adult; a police officer smelled alcohol on the individual's breath and the individual indicated that he had been drinking. The only statutory violation alleged was a failure to release to a sober, responsible adult, but the individual who appeared was not a sober, responsible adult. The trial court's conclusions that no violation occurred or alternatively that the defendant failed to show irreparable prejudice was supported by the evidence. The defendant was advised that she could request an attorney or other witness to observe her Intoxilyzer test but she declined to request a witness. Also, the individual who appeared was allowed to see the defendant within 25 minutes of her exiting the magistrate's office, to meet personally with the defendant, and to talk with and observe the defendant for approximately eight minutes.

Suppression Motion

State v. Baker, __ N.C. App. __, __ S.E.2d __ (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-98-1.pdf). The trial court erred by failing to make findings of fact and conclusions of law in connection with its denial of the defendant's motion to suppress. When a trial court's failure to make findings of fact and conclusions of law is assigned as error, the trial court's ruling on a motion to suppress is fully reviewable for a determination as to whether (1) the trial court provided the rationale for its ruling from the bench; and (2) there was a material conflict in the evidence presented at the suppression hearing. If a reviewing court concludes that both criteria are met, then the findings of fact are implied by the trial court's denial of the motion to suppress and will be binding on appeal, if supported by competent evidence. If a reviewing court concludes that either of the criteria is not met, then a trial court's failure to make findings of fact and conclusions of law is reversible error. A material conflict in the evidence exists when evidence presented by one party controverts evidence presented by an opposing party such that the outcome of the matter is likely to be affected. Turning to the case at hand, the court held that the defendant had presented evidence that controverts the State's evidence as to whether a seizure occurred. Because there was a material conflict in the evidence, the trial court's failure to make findings of fact and conclusions of law is fatal to the validity of its ruling. The court reversed and remanded for findings of fact and conclusions of law. The court noted that even when there is no material conflict in the evidence, the better practice is for the trial court to make findings of fact.

Jury Instructions

Instructing on Lesser Included Offenses

State v. Bedford, __ N.C. App. __, __ S.E.2d __ (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-255-1.pdf). The trial court did not err by declining to instruct the jury on second-degree murder when no evidence negated the State's evidence of first-degree murder. The defendant argued that the evidence showed that he killed the victim in a "frenzied, crack-fueled explosion" of a long-simmering "rage of jealousy." However, the court noted, premeditation and deliberation do not imply a lack of passion, anger or emotion. Nor, the court noted, does the defendant's possible drug intoxication support an inference that he did not premeditate and deliberate. The State presented evidence of the defendant's conduct and statements before the killing, including threats towards the victim; ill-will and previous difficulties between the parties; lethal blows rendered after the victim had been felled and rendered helpless; the brutality of the killing; and the extreme nature and number of the victim's wounds.

Sexual Offense

State v. Treadway, __ N.C. App. __, __ S.E.2d __ (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-287-1.pdf). In a child sexual offense case in

which the indictment specified digital penetration and the evidence supported that allegation, the trial court was not required to instruct the jury that it only could find the defendant guilty if the State proved the specific sex act stated in the indictment.

Verdict—Inconsistent & Mutually Exclusive Verdicts

State v. Blackmon, __ N.C. App. __, __ S.E.2d __ (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-417-1.pdf). The trial court properly denied the defendant's motion for judgment notwithstanding the verdict based on inconsistent verdicts. The jury found the defendant guilty of felonious larceny after a breaking or entering and of being a habitual felon but deadlocked on a breaking or entering charge. Citing, *State v. Mumford* , __ N.C. __, __ S.E.2d __ (Oct. 8, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/32PA10-1.pdf), the court held that the verdicts were merely inconsistent and not mutually exclusive.

State v. Johnson, __ N.C. App. __, __ S.E.2d __ (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-519-1.pdf). Guilty verdicts of breaking or entering and discharging a firearm into occupied property were not mutually exclusive. The defendant argued that he could not both be in the building and shooting into the building at the same time. The court rejected this argument noting that the offenses occurred in succession, the defendant would be guilty of the discharging offense regardless of whether or not he was standing on a screened-in porch at the time, and that in any event the defendant was not in the building when he was standing on the porch.

Sentencing

Aggravating Factors

State v. Mackey, __ N.C. App. __, __ S.E.2d __ (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/09-1382-1.pdf). The trial court erred by sentencing the defendant in the aggravated range when the State failed to provide proper notice of its intent to present evidence of aggravating factors as required by G.S. 15A-1340.16(a6). Although the State argued that a letter regarding plea negotiations sent to defendant provided timely notice of the State's intent to prove aggravating factors, that letter was not included in the record on appeal.

Gang Offenses

State v. Dubose, __ N.C. App. __, __ S.E.2d __ (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-213-1.pdf). The trial court erred by making a determination under G.S. 14-50.25 that the offenses involved criminal street gang activity outside of defendant's presence and without giving him an opportunity to be heard; vacating and remanding for a new sentencing hearing. A finding of criminal street gang activity was a "substantive change" in the judgments that must be made in defendant's presence and with an opportunity to be heard.

Sex Offenders—Satellite-Based Monitoring (SBM)

State v. Treadway, __ N.C. App. __, __ S.E.2d __ (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-287-1.pdf). Following *State v. Phillips*, __ N.C. App. __, 691 S.E.2d 104 (2010), the court held that first-degree sexual offense under G.S. 14-27.4(a)(1) (child victim under 13) is not an aggravated offense for purposes of SBM. To be an aggravated offense, the child must be less than 12 years old; "a child under the age of 13 is not necessarily also a child less than 12 years old." The court reversed and remanded for consideration of whether the defendant is a sexually violent predator, a recidivist, or whether his conviction involved the physical, mental, or

sexual abuse of a minor, and based on the risk assessment performed by the Department of Correction, defendant requires the highest possible level of supervision and monitoring.

Evidence

Rule 403

State v. Bedford, __ N.C. App. __, __ S.E.2d __ (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-255-1.pdf). In a murder case in which the victim suffered many distinct injuries to different parts of her body, the trial court did not abuse its discretion by admitting photographs of the victim's body, even though the defendant offered to stipulate to cause of death. Two of the photos were taken of the victim's body just after being removed from a grave and were used to illustrate the testimony of officers who unearthed the body. Eighteen color photographs of the victim's decomposing body were used to illustrate the testimony of the pathologist who did the autopsy and were projected onto a six-foot by eight-foot screen.

State v. Crandell, __ N.C. App. __, __ S.E.2d __ (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-439-1.pdf). In a murder case involving a shooting, the trial court did not abuse its discretion by allowing a detective to give lay opinion testimony concerning the calibers of bullets recovered at the crime scene. Although the testimony was prejudicial, the trial judge correctly ruled that its probative value (helping the jury understand the physical evidence) was not substantially outweighed by the degree of prejudice.

Hearsay

State v. Treadway, __ N.C. App. __, __ S.E.2d __ (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-287-1.pdf). (1) In a child sexual assault case, the trial court did not commit plain error by allowing a witness to testify about her step-granddaughter's statements. The evidence was properly admitted for the non-hearsay purpose of explaining the witness's subsequent conduct of relaying the information to the victim's parents so that medical treatment could be obtained. Also, the victim's statements corroborated her trial testimony. (2) The trial court did not commit plain error by allowing an expert in clinical social work to relate the victim's statements to her when the statements corroborated the victim's trial testimony. (3) The defendant could not complain of the victim's hearsay statements related by an expert witness in the area of child mental health when the defendant elicited these statements on cross-examination.

Opinions

Lay Opinions

State v. Crandell, __ N.C. App. __, __ S.E.2d __ (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-439-1.pdf). In a murder case involving a shooting, the trial court did not abuse its discretion by allowing a detective to give lay opinion testimony concerning the calibers of bullets recovered at the crime scene. The detective testified that as a result of officer training, he was able to recognize the calibers of weapons and ammunition. The detective's testimony was based upon on his own personal experience and observations relating to various calibers of weapons, and was admissible under Rule 701.

State v. Williams, __ N.C. App. __, __ S.E.2d __ (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-58-1.pdf). Lay testimony by an officer that a substance is crack cocaine is insufficient to establish that the substance is cocaine. "The State must . . . present evidence as to the chemical makeup of the substance."

Expert Opinions

State v. Dobbs, __ N.C. App. __, __ S.E.2d __ (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-388-1.pdf). The trial court did not err by denying the defendant's motion to dismiss a charge of trafficking by sale or delivery in more than four grams and less than fourteen grams of Dihydrocodeinone when the State's expert sufficiently identified the substance at issue as a controlled substance. Special Agent Aharon testified as an expert in chemical analysis. She compared the eight tablets at issue with information contained in a pharmaceutical database and found that each was similar in coloration and had an identical pharmaceutical imprint; the pharmaceutical database indicated that the tablets consisted of hydrocodone and acetaminophen. Agent Aharon performed a confirmatory test on one of the tablets, using a gas chromatograph mass spectrometer. This test revealed that the tablet was an opiate derivative. The tablets weighed a total of 8.5 grams. Relying on *State v. Ward*, 364 N.C. 133 (2010), the defendant argued that because the State cannot rely upon a visual inspection to identify a substance as a controlled substance, the State was required to test a sufficient number of pills to reach the minimum weight threshold for a trafficking offense. The court concluded that even if the issue had been properly preserved, the defendant's argument was without merit, citing *State v. Myers*, 61 N.C. App. 554, 556 (1983) (a chemical analysis test of a portion of pills, coupled with a visual inspection of the rest for consistency, supported a conviction for trafficking in 10,000 or more tablets of methaqualone).

State v. Crandell, __ N.C. App. __, __ S.E.2d __ (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-439-1.pdf). In a murder case involving a shooting, the trial court did not commit plain error by allowing a Special Agent with the State Bureau of Investigation to testify as an expert in the field of bullet identification, when his testimony was based on sufficiently reliable methods of proof in the area of bullet identification, he was qualified as an expert in that area, and the testimony was relevant. The trial court was not required to make a formal finding as to a witness' qualification to testify as an expert because such a finding is implicit in the court's admission of the testimony in question.

State v. Treadway, __ N.C. App. __, __ S.E.2d __ (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-287-1.pdf). The trial court erred when it allowed the State's expert in clinical social work to testify that she had diagnosed the victim with sexual abuse when there was no physical evidence consistent with abuse. However, the error did not constitute plain error given other evidence in the case.

Crawford Issues—Substitute Analysts

State v. Williams, __ N.C. App. __, __ S.E.2d __ (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-58-1.pdf). The defendant's confrontation clause rights were violated when a substitute analyst testified about a non-testifying expert's report identifying a substance as a controlled substance. Forensic chemist Ann Charlesworth detailed lab processes for testing substances. Specifically, analysts conduct a preliminary color test and then extract a small amount of the substance to put with a solvent in a GC Mass Spec instrument. Charlesworth testified that in this case a color test was done twice and a GC Mass Spec test was done once. She testified that these are the same tests that she and other experts in her field reasonably rely upon when forming an opinion as to the weight and nature of substances. Charlesworth explained that the GC Mass Spec generates a graphical result which a forensic chemist must interpret. Chemists look at retention time, which is specific for each chemical substance, and the graphical result from the GC Mass Spec, to see how well the graph matches the known standard for the substance. Once a chemist completes an analysis, the case is peer reviewed. Explaining peer review, Charlesworth indicated that she looks at the worksheet, the description of the item, its weight, and the tests conducted; she looks at the printouts from the GC

Mass Spec and interprets them to see if she agrees with the chemist's results; and she examines the report to make sure it appears correct. Charlesworth conducted the same type of review on the substance at issue that she would have done for a peer review. She agreed with the original forensic chemist, DeeAnne Johnson, "that from the printouts from the GC Mass Spec that the cocaine did come out, and it chemically matche[d] with the cocaine standard . . . in [the] library." On cross-examination, she acknowledged that she did not analyze the substance, was not present when the tests were run, and did not generate her own report. Rather, she explained that it was her role to assure that Johnson followed the protocol and procedures to correctly analyze the substance. On this record, the court concluded that Charlesworth did not offer an independent opinion but rather merely summarized Johnson's report; admission of this testimony was reversible error.

Arrest, Search & Investigation

Standing

State v. Mackey, __ N.C. App. __, __ S.E.2d __ (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/09-1382-1.pdf). The defendant had no standing to challenge the search of a vehicle. The defendant was a passenger, did not own the vehicle, and did not assert a possessory interest in the vehicle or its contents. Although a passenger who has no possessory interest in a vehicle has standing to challenge a vehicle stop or a detention beyond the scope of the initial seizure, a passenger who has no possessory interest in the vehicle or its contents has no standing to challenge a search of the vehicle.

Criminal Offenses

States of Mind—Transferred Intent

State v. Crandell, __ N.C. App. __, __ S.E.2d __ (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-439-1.pdf). There was sufficient evidence of premeditation and deliberation when, after having a confrontation with an individual named Thomas, the defendant happened upon Thomas and without provocation began firing at him, resulting in the death of the victim, an innocent bystander. Citing the doctrine of transferred intent, the court noted that "malice or intent follows the bullet."

Conspiracy

State v. Dubose, __ N.C. App. __, __ S.E.2d __ (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-213-1.pdf). The trial court did not err by denying the defendant's motion to dismiss a charge of conspiracy to discharge a firearm into occupied property. The defendant, Ray, Johnson, and Phelps left a high school basketball game because of the presence of rival gang members. As they left, the defendant suggested that he was going to kill someone. A gun was retrieved from underneath the driver's side seat of Johnson's vehicle and Johnson let Ray drive and the defendant to sit in the front because the two "were about to do something." Ray and the defendant argued over who was going to shoot the victim but in the end Ray drove by the gym and the defendant fired twice at the victim, who was standing in front of the gym. The court rejected the defendant's argument that the evidence failed to show an agreement to discharge the firearm into occupied property, noting that the group understood and impliedly agreed that the defendant would shoot the victim as they drove by, the victim was standing by the gym doors, and there was a substantial likelihood that the bullets would enter or hit the gym.

Robbery

State v. Johnson, __ N.C. App. __, __ S.E.2d __ (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-519-1.pdf). The trial court erred by denying the defendant's motion to dismiss a charge of attempted armed robbery when there was no evidence that the defendant attempted to take the victim's personal property. Because the defendant's conviction for felony breaking or entering was based on an intent to commit armed robbery, the trial court also erred by failing to dismiss that charge.

Breaking of Entering a Motor Vehicle

State v. Clark, __ N.C. App. __, __ S.E.2d __ (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-235-1.pdf). An indictment properly alleges the fifth element of breaking and entering a motor vehicle—with intent to commit a felony or larceny therein—by alleging that the defendant intended to steal the same motor vehicle.