Criminal Procedure

Indictment

State v. Cole, __ N.C. App. __, __ S.E.2d __ (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=2011/10-139-1.pdf). An indictment charging accessory after the fact to first-degree murder was sufficient to support a conviction of accessory after the fact to second-degree murder. The indictment alleged that a felony was committed, that the defendant knew that the person he assisted committed that felony, and that he rendered personal assistance to the felon; it thus provided adequate notice to prepare a defense and protect against double jeopardy.

Jury Instructions

State v. Starr, __ N.C. App. __, __ S.E.2d __ (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=2011/10-752-1.pdf). In an assault on a firefighter with a firearm case, the trial court did not err by denying the defendant's request for a jury instruction on the elements of assault where the defendant failed to submit his requested instruction in writing.

Jury Argument

State v. Oakes, __ N.C. App. __, __ S.E.2d __ (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=2011/09-1280-1.pdf). The prosecutor's statements during closing argument were not so grossly improper as to require the trial court to intervene ex mero motu. Although disapproving a prosecutor's comparisons between criminal defendants and animals, the court concluded that the prosecutor's statements equating the defendant's actions to a hunting tiger were not grossly improper; the statements helped to explain the State's theory of premeditated and deliberate murder.

Jury Deliberations

Deadlock

State v. Walters, __ N.C. App. __, __ S.E.2d __ (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=2011/10-281-1.pdf). Upon being notified that the jury was deadlocked, the trial judge did not err by giving an *Allen* instruction pursuant to N.C. Crim. Pattern Jury Instruction 101.40 and not G.S. 15A-1235, as requested by the defendant. Because there was no discrepancy between the pattern instruction and G.S. 15A-1235, it was not an abuse of discretion for the trial court to use the pattern instruction.

Jury's Request to Review Evidence

State v. Starr, __ N.C. App. __, __ S.E.2d __ (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=2011/10-752-1.pdf). (1) Although the trial judge did not explicitly state that he was denying, in his discretion, the jury's request to review testimony, the judge instructed the jurors to rely on their recollection of the evidence that they heard and therefore properly exercised its discretion in denying the request. (2) When defense

counsel consents to the trial court's communication with the jury in a manner other than in the courtroom, the defendant waives his right to appeal the issue. Here, although the trial judge failed to bring the jurors to the courtroom in response to their request to review testimony and instead instructed them from the jury room door, prior to doing so he asked for and received counsel's permission to instruct at the jury room door.

Judgment

State v. Kerrin, __ N.C. App. __, __ S.E.2d __ (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=2011/09-1153-1.pdf). In a criminal case, entry of judgment occurs when a judge announces the ruling in open court or signs the judgment containing the ruling and files it with the clerk. A trial judge is not required to announce all of the findings and details of its judgment in open court, provided they are included in the signed judgment filed with the clerk. Based on these rules, a written order on form AOC-CR-317 (Forfeiture of Licensing Privileges Felony Probation Revocation) was not invalid for failure to announce the order's details in open court.

Sentencing

State v. Mackey, __ N.C. App. __, __ S.E.2d __ (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=2011/09-1382-1.pdf). The defendant was improperly sentenced in the aggravated range when the State did not provide proper notice of its intent to present evidence of aggravating factors as required by G.S. 15A-1340.16(a6). The court rejected the State's argument that a letter regarding plea negotiations sent by the State to the defendant provided timely and sufficient notice of its intent to prove aggravating factors.

Probation

State v. Kerrin, __ N.C. App. __, __ S.E.2d __ (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=2011/09-1153-1.pdf). (1) The trial court improperly ordered a forfeiture of the defendant's licensing privileges without making a finding of fact required by G.S. 15A-1331A that the defendant failed to make reasonable efforts to comply with the conditions of her probation. The court noted that form AOC-CR-317 does not contain a section specifically designated for the required finding and encouraged revision of the form to add this required finding. (2) The term of the forfeiture exceeded statutory limits. A trial court revoking probation may order a license forfeiture under G.S. 15A-1331A(b)(2) at any time during the probation term, but the term of forfeiture cannot exceed the original probation term set by the sentencing court at the time of conviction. The defendant was placed on 24 months probation by the sentencing court, to end on December 15, 2009. His probation was revoked on April 1, 2009, eight months before his probation was set to expire, and the trial court ordered the forfeiture for 24 months from the date of revocation. Because the forfeiture term extended beyond the defendant's original probation, it was invalid. The court encouraged further revision of AOC-CR-317 (specifically the following note: "*The 'Beginning Date' is the date of the entry of this judgment, and the 'Ending Date' is the date of the end of the full probationary term imposed at the time of conviction.*") "to clarify this issue and perhaps avoid future errors based upon misinterpretation of the form."

Clerical Errors

State v. Kerrin, __ N.C. App. __, __ S.E.2d __ (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=2011/09-1153-1.pdf). The trial court committed a clerical error when, in a written order revoking probation, it found that the conditions violated and the facts of each violation were set forth in a violation report dated October 20, 2008, which was the date of a probation violation hearing, not a violation report.

Evidence

Rule 403

State v. Walters, __ N.C. App. __, __ S.E.2d __ (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=2011/10-281-1.pdf). The trial court did not abuse its discretion under Rule 403 by admitting, for purposes of corroboration, a testifying witness's prior consistent statement. The court noted that although the statement was prejudicial to the defendant's case, mere prejudice is not the determining factor under Rule 403; rather, the issue is whether unfair prejudice substantially outweighs the probative value.

Rule 404(b)

State v. Cole, __ N.C. App. __, __ S.E.2d __ (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=2011/10-139-1.pdf). Although it was error under Rule 404(b) to admit evidence regarding the defendant's criminal record, no plain error occurred. The evidence at issue included (1) disclosures made during a police interrogation DVD, admitted into evidence and shown to the jury, and (2) an accomplice's testimony that he knew the defendant "ever since he came home from prison."

Opinions

State v. Cole, __ N.C. App. __, __ S.E.2d __ (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=2011/10-139-1.pdf). No plain error occurred when a detective testified that after his evaluation of the scene, he determined that the case involved a robbery and resulting homicide. The court rejected the defendant's argument that the trial court improperly allowed the detective to give a legal opinion, concluding that the detective merely was testifying about police procedure.

State v. Oakes, __ N.C. App. __, __ S.E.2d __ (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=2011/09-1280-1.pdf). A murder defendant was not prejudiced by the trial court's denial of his motion that Dave Cloutier be received as an expert in the use of force. Cloutier's testimony was offered to rebut intent to kill. However, the defendant was convicted on the basis of premeditation and deliberation and felony murder (two underlying felonies: armed robbery and kidnapping); intent to kill was irrelevant to the felony murder theory.

Examination, Cross-Examination & Impeachment

State v. Walters, __ N.C. App. __, __ S.E.2d __ (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=2011/10-281-1.pdf). A testifying witness's prior consistent statement to a law enforcement officer was properly admitted for corroboration and with a limiting instruction.

Arrest, Search & Investigation

Standing to Contest Vehicle Search

State v. Mackey, __ N.C. App. __, __ S.E.2d __ (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=2011/09-1382-1.pdf). The defendant had no standing to challenge a search of a vehicle when he was a passenger, did not own the vehicle, and asserted no possessory interest in it or its contents.

Search Incident to Arrest

State v. Mbacke, __ N.C. App. __, __ S.E.2d __ (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=2011/09-1395-1.pdf). Over a dissent, the court held that a search of the defendant's vehicle after he was arrested for carrying a concealed weapon violated *Gant.* The court rejected the State's argument that the search was justified under *Gant* because the officers had reason to believe that they would find evidence in the vehicle supporting the crime of arrest, stating: "we find it unreasonable to believe an officer will find in, or even need to seek from, a defendant's vehicle further evidence of carrying a concealed weapon when the officer has found the defendant off the defendant's own premises and carrying a weapon which is concealed about his person."

Criminal Offenses

Accessory After the Fact

State v. Cole, __ N.C. App. __, __ S.E.2d __ (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=2011/10-139-1.pdf). (1) The State presented sufficient evidence of accessory after the fact to a second-degree murder perpetrated by Stevons. After Stevons shot the victim, the defendant drove Stevons away from the scene. The victim later died. The court rejected the defendant's argument that because he gave aid after the victim had been wounded but before the victim died, he did not know that Stevons had committed murder. It concluded that because the defendant knew that Stevons shot the victim at close range, a jury could reasonably infer that the defendant knew that the shot was fatal. (2) The State presented sufficient evidence of accessory after the fact to armed robbery when it showed both that an armed robbery occurred and that the defendant rendered aid after the crime was completed. The court rejected the defendant's argument that the robbery was not complete until the defendant arrived at a safe place, concluding that a taking is complete once the thief succeeds in removing the stolen property from the victim's possession. (3) Although a mere presence instruction may be appropriate for aiding and abetting or accessory before the fact, such an instruction is not proper for accessory after the fact and thus the trial judge did not err by declining to give this instruction.

Homicide

State v. Parlee, __ N.C. App. __, __ S.E.2d __ (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=2011/10-497-1.pdf). (1) There was sufficient evidence to survive a motion to dismiss in a case in which the defendant was charged with second-degree murder under G.S. 14-17 for having a proximately caused a murder by the unlawful distribution and ingestion of Oxymorphone. (a) There was sufficient evidence of malice where the victim and a friend approached the defendant to purchase prescription medication, the defendant sold them an Oxymorphone pill for $20.00, telling them that it was "pretty strong pain medication[,]" and not to take a whole pill or "do anything destructive with it." The defendant also told a friend that he liked Oxymorphone because it "messe[d]" him up. The jury could have reasonably inferred that the defendant knew Oxymorphone was an inherently dangerous drug and that he acted with malice when he supplied the pill. (b) There was sufficient evidence that the defendant's sale of the pill was a proximate cause of death where the defendant unlawfully sold the pill to the two friends, who later split it in half and consumed it; the victim was pronounced dead the next morning, and cause of death was acute Oxymorphone overdose. (c) There was sufficient evidence that the victim ingested the pill where toxicology reports showed lethal amounts of Oxymorphone in his blood and the cause of death was acute Oxymorphone overdose. (2) For purposes of double jeopardy, a second-degree murder conviction based on unlawful distribution of and ingestion of a controlled substance was not the same offense as sale or delivery of a controlled substance to a juvenile or possession with intent to sell or deliver a controlled substance.

Assaults

State v. Starr, __ N.C. App. __, __ S.E.2d __ (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=2011/10-752-1.pdf). In a case involving assault on a firefighter with a firearm, there was sufficient evidence that the defendant committed an assault. To constitute an assault, it is not necessary that the victim be placed in fear; it is enough if the act was sufficient to put a person of reasonable firmness in apprehension of immediate bodily harm. "It is an assault, without regard to the aggressor's intention, to fire a gun at another or in the direction in which he is standing." Here, the defendant shot twice at his door while firefighters were attempting to force it open and fired again in the direction of the firefighters after they forced entry. The defendant knew that people were outside the door and shot the door to send a warning.

Drug Offenses

State v. Parlee, __ N.C. App. __, __ S.E.2d __ (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=2011/10-497-1.pdf). For purposes of double jeopardy, a second-degree murder charge based on unlawful distribution of and ingestion of a controlled substance was not the same offense as sale or delivery of a controlled substance to a juvenile or possession with intent to sell or deliver a controlled substance.

Motor Vehicle Offenses

State v. Dewalt, __ N.C. App. __, __ S.E.2d __ (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=2011/10-559-1.pdf). The trial court did not err by instructing the jury that in order to constitute an aggravating factor elevating speeding to elude arrest to a felony, driving while license revoked must occur on a highway. Although the offense of driving while license revoked under G.S. 20-28 requires that the defendant drive on a highway, driving while license revoked can aggravate speeding to elude even if it occurs on a public vehicular area. While the felony speeding to elude arrest statute lists several other aggravating factors with express reference to the motor vehicle statutes proscribing those crimes (e.g., passing a stopped school bus as proscribed by G.S. 20-217), the aggravating factor of driving while license revoked does not reference G.S. 20-28.

Judicial Administration

Recusal

State v. Oakes, __ N.C. App. __, __ S.E.2d __ (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=2011/09-1280-1.pdf). The defendant failed to demonstrate grounds for recusal. The defendant argued that recusal was warranted based on the trial judge's comments at various hearings and on the fact that "the trial court was often dismissive of defense counsel's efforts and made a number of rulings unfavorable to the Defendant." The court cautioned the trial court with respect to the following statement made at trial: "The other thing I want to do is put on the record that I leave to the appellate courts whether or not any recommendation as to discipline should be made to any of the responses or conduct of the attorneys based upon the record in this case as to whether any of the Rules of Practice or Rules of Conduct have been violated." The court concluded that although it was unclear what issue the trial court meant to address with this statement, "it is the trial court's responsibility initially to pass on these concerns if the court has them, especially in view of the fact that the trial court is in a better position than a Court of the Appellate Division both to observe and control the trial proceedings. . . . It is not for the trial court to abdicate its role in managing the conduct of trial to an appellate court whose task is to review the cold record" (citation omitted).