Criminal Procedure

Competency to Stand Trial

State v. Whitted, __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC03MzktMS5wZGY). The trial court erred by failing to sua sponte inquire into the defendant's competency. In light of the defendant's history of mental illness, including paranoid schizophrenia and bipolar disorder, her remarks that her appointed counsel was working for the State and that the trial court wanted her to plead guilty, coupled with her irrational behavior in the courtroom, constituted substantial evidence and created a bona fide doubt as to competency. The court rejected the State's argument that the trial court did in fact inquire into competency when, after defense counsel mentioned that she had recently undergone surgery and was taking pain medication, the trial court asked the defendant and counsel whether the medication was impairing her ability to understand the proceedings or her decision to reject the plea bargain offered by the State. Both replied in the negative. The trial court also asked the defendant about her ability to read and write and whether she understood the charges against her. However, this inquiry pertained only to effects of the pain medication. More importantly, it was not timely given that the defendant's refusal to return to the courtroom and resulting outbursts occurred two days later. The court remanded for a determination of whether a meaningful retrospective competency hearing could be held.

Counsel Issues

In Re Watson, __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zNjUtMS5wZGY). (1) Because the trial court failed to comply with the statutory mandates of G.S. 15A-1242, 122C-268(d), and IDS Rule 1.6, the respondent's waiver of counsel in his involuntary commitment hearing was ineffective. The court adopted language from *State v. Moore*, 362 N.C. 319, 327-28 (2008), endorsing a fourteen-question checklist for taking a waiver of counsel. [Author's note: this same checklist appears in the Superior Court Judges On-Line Bench Book (The "Survival Guide") at: http://www.sog.unc.edu/faculty/smithjess/documents/CounselIssues.pdf]. The court also noted with approval language from an Arizona case suggesting the proper inquiry in involuntary commitment cases. (2) The fact that the respondent had standby counsel did not cure the improper waiver of counsel.

Indictment Issues

In Re A.W., __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC03MTMtMS5wZGY). There was no fatal variance between a juvenile delinquency petition for indecent liberties alleging an offense date of November 14, 2008, and the evidence which showed an offense date of November 7-9, 2008. The juvenile failed to show that his ability to present an adequate defense was prejudiced by the variance.

State v. Garnett, __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTEtMS5wZGY). Theories included in the trial judge's jury instructions were supported by the indictment. The indictment charged the defendant with maintaining a dwelling "for keeping *and* selling a controlled substance." The trial court instructed the jury on maintaining a dwelling "for keeping *or* selling marijuana." The use of the conjunctive "and" in the indictment did not require the State to prove both theories alleged.

State v. Moore, __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC03NjQtMS5wZGY). Stating in dicta that an indictment alleging obtaining property by false pretenses need not identify a specific victim.

Jury Instructions

Flight

State v. Bonilla, __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zNTEtMS5wZGY). In a kidnapping, sexual assault, and murder case, the trial court did not err by instructing the jury on flight. The defendant and an accomplice left the victims bound, placed a two-by-four across the inside of the apartment door, hindering access from the outside, and exited through a window. Despite the fact that the defendant lived at the apartment, there was no indication he ever returned. Although a warrant for the defendant's arrest was issued immediately, ten years passed before the defendant was extradited.

Trial in the Defendant's Absence

State v. Whitted, __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC03MzktMS5wZGY). (1) The trial court did not err by failing to instruct the jury about the defendant's absence from the habitual felon phase of the trial. Because the trial court did not order the defendant removed from the courtroom, G.S. 15A-1032 did not apply. Rather, the defendant asked to be removed. (2) The trial court did not err by accepting the defendant's oral waiver of her right to be present during portions of her trial.

Sentencing

State v. Garnett, __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTEtMS5wZGY). The trial court did not abuse its discretion by refusing the defendant's request for a mitigated sentence despite uncontroverted evidence of mitigating circumstances. The defendant offered uncontroverted evidence of mitigating factors and the trial court considered this evidence during the sentencing hearing. That the trial court did not, however, find any mitigating factors and chose to sentence the defendant in the presumptive range was within its discretion.

State v. Whitted, __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC03MzktMS5wZGY). The trial judge's comments about the judgment and conviction form did not suggest that it incorrectly thought that it could not impose a sentence in the presumptive range when aggravating and mitigating factors were in equipoise.

State v. Moore, __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC03NjQtMS5wZGY). (1) In an obtaining property by false pretenses case, the victim need not be identified in the indictment in order to receive restitution. (2) In a case in which the defendant obtained property by false pretenses when he received money for rental of a house that he did not own or have the right to rent, the homeowner was harmed as a direct and proximate cause of the defendant's actions. (3) Over a dissent, the court held that the evidence was insufficient to support an award of restitution in the amount of $39,332.49. Although the victim had testified that a "repair person" estimated that repairs would cost "[t]hirty-something thousand dollars," this was merely a guess or conjecture. The only record mention of $39,332.49 is on the restitution worksheet, which cannot support the award of restitution.

Evidence

Rule 403

State v. Gomez, __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNTEtMS5wZGY). The trial court did not abuse its discretion under Rule 403 by admitting a recording of phone calls between the defendant and other persons that were entirely in Spanish. The defendant argued that because there was one Spanish-speaking juror, the jurors should have been required to consider only the certified English translation of the recording.

***Crawford* Issues**

State v. Garnett, __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTEtMS5wZGY). Holding, in a drug case, that although the trial court erred by allowing the State's expert witness to testify as to the identity and weight of the "leafy green plant substance" where the expert's testimony was based on analysis performed by a non-testifying forensic analyst, the error was not prejudicial in light of the overwhelming evidence of guilt. With regard to the *Crawford* substitute analyst issue, the court found the case indistinguishable from *State v. Williams*, __ N.C. App. __, __ S.E.2d __, No. 10-58 (Dec. 7, 2010), *temporary stay allowed*, __ N.C. __, __ S.E.2d __ (Dec. 20, 2010).

Opinions

State v. Garnett, __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTEtMS5wZGY). An expert in forensic chemistry properly made an in-court visual identification of marijuana. Citing *State v. Fletcher*, 92 N.C. App. 50, 57 (1988), but not mentioning *State v. Ward*, 364 N.C. 133 (June 17, 2010), the court noted that it had previously held that a police officer experienced in the identification of marijuana may testify to a visual identification.

Criminal Offenses

Homicide

State v. Bonilla, __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zNTEtMS5wZGY). In a first-degree murder case, there was sufficient evidence of premeditation, deliberation, and intent to kill. After the defendant and an accomplice beat and kicked the victim, they hog-tied him so severely that his spine was fractured, and put tissue in his mouth. Due to the severe arching of his back, the victim suffered a fracture in his thoracic spine and died from a combination of suffocation and strangulation.

Sexual Assaults

In Re A.W., __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC03MTMtMS5wZGY). (1) The evidence was insufficient to sustain an adjudication of delinquency based on a violation of G.S. 14-27.5 (second-degree sexual offense). On appeal, the State conceded that there was no evidence that the victim was mentally disabled, mentally incapacitated, or physically helpless. (2) The court rejected the juvenile's argument that the evidence was insufficient to establish indecent liberties in that it failed to show that he acted with a purpose to arouse or gratify his sexual desires. The facts showed that: the juvenile was thirteen and the victim was ten years younger; the juvenile told the victim that the juvenile's private parts "taste like candy," and had the victim lick his penis; approximately eleven months prior, the juvenile admitted to having performed fellatio on a four-year-old male relative. The court concluded that the juvenile's age and maturity, the age disparity between him and the victim, coupled with the inducement he employed to convince the victim to perform the act and the suggestion of his prior sexual activity

before this event, was sufficient evidence of maturity and intent to show the required element of "for the purpose of arousing or gratifying sexual desire."

State v. Bonilla, __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zNTEtMS5wZGY). The trial court did not commit plain error by instructing the jury that it could consider whether or not the use of a bottle constituted a deadly weapon during the commission of a sexual offense. The defendant and his accomplice, after tying the victim's hands and feet, shoved a rag into his mouth, pulled his pants down, and inserted a bottle into his rectum. The victim thought that he was going to die and an emergency room nurse found a tear in the victim's anal wall accompanied by "serious drainage."

Kidnapping

State v. Bonilla, __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zNTEtMS5wZGY). (1) The evidence was sufficient to establish that the defendant confined and restrained Victims Alvarez and Cortes for the purpose of terrorizing them and doing them serious bodily harm. The evidence was sufficient to establish a purpose of terrorizing Alvarez when the defendant beat and kicked Alvarez repeatedly while wrestling him to the floor; the defendant bound Alvarez's hands and feet and placed a rag in his mouth; the defendant and an accomplice threatened to kill Alvarez; the defendant pulled Alvarez's pants down, and the accomplice forced a bottle into his rectum; and Alvarez testified that he thought he was going to die. There was sufficient evidence as to the purpose of doing serious bodily harm to Alvarez given the sexual assault. As to Cortes, the defendant and the accomplice knocked him to the floor, and kicked him in the stomach repeatedly; Cortes was hog-tied so severely that his spine was fractured; he had lacerations to the lips and abrasions on his face, neck, chest, and abdomen; tissue paper was in his mouth; the spine fracture would have paralyzed the lower part of his body; and cause of death was a combination of suffocation and strangulation, with a contributing factor being the fracture of the thoracic spine. (2) The trial court's instruction clearly and appropriately defined "terrorizing" and "serious bodily harm" as required for kidnapping. The trial court instructed that: "Terrorizing means more than just putting another in fear. It means putting that person in some high degree of fear, a state of intense fright or apprehension, or doing serious bodily injury to that person. Serious bodily injury may be defined as such physical injury as causes great pain or suffering." (3) A person who is killed in the course of a kidnapping is not left in a safe place. Alternatively, if the victim still was alive when left by the defendant and his accomplice, he was not left in a safe place given that he was bound so tightly that he suffered a fracture to his spine and ultimately suffocated.

Frauds

State v. Moore, __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC03NjQtMS5wZGY). There was sufficient evidence of obtaining property by false pretenses when the defendant received money for rental of a house that the defendant did not own or have the right to rent.

Post-Conviction

Clerical Errors

State v. Moore, __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC03NjQtMS5wZGY). Trial judge's failure to mark the appropriate box in the judgment indicating that the sentence was in the presumptive range was a clerical error.