Criminal Procedure

Indictment Issues

State v. Carter, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC02NDgtMS5wZGY). In an indecent liberties case, the trial judge's jury instructions were supported by the indictment. The indictment tracked the statute and did not allege an evidentiary basis for the charge. The jury instructions, which identified the defendant's conduct as placing his penis between the child's feet, was a clarification of the evidence for the jury.

State v. McNeill, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC00NTYtMS5wZGY). An indictment for felonious larceny that failed to allege ownership in the stolen handgun was fatally defective.

Pretrial Testing

State v. Wright, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC04NTQtMS5wZGY). The defendant was not entitled to a new trial on grounds that the SBI Crime Lab refused to test four hair and fiber lifts taken from an item of clothing. The defendant did not argue that the prosecutor failed to make the lifts available to him for testing. In fact, one of the defendant's previous attorneys made a motion for independent testing of the clothing item and received the results of the testing. Because police do not have a constitutional duty to perform particular tests on crime scene evidence, no error occurred.

Jury Selection

State v. Johnson, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0yNi0xLnBkZg). The trial court did not improperly limit the defendant's voir dire questioning with respect to assessing the credibility of witnesses and the jurors' ability to follow the law on reasonable doubt. Because the trial judge properly sustained the State's objections to the defendant's questions, no abuse of discretion occurred. Even if any error occurred, the defendant suffered no prejudice.

Motion to Continue

State v. Banks, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xMTUwLTEucGRm). The trial court's denial of a motion to continue in a murder case did not violate the defendant's right to due process and effective assistance of counsel. The defendant asserted that he did not realize that certain items of physical evidence were shell casings found in defendant's room until the eve of trial and thus was unable to procure independent testing of the casings and the murder weapon. Even though the relevant forensic report was delivered to the defendant in 2008, the defendant did not file additional discovery requests until February 3, 2009, followed by *Brady* and *Kyles* motions on February 11, 2009. The trial court afforded the defendant an opportunity to have a forensic examination done during trial but the defendant declined to do so. The defendant was not entitled to a presumption of prejudice on grounds that denial of the motion created made it so that no lawyer could provide effective assistance. The defendant's argument that had he been given additional time, an independent examination *might* have

shown that the casings were not fired by the murder weapon was insufficient to establish the requisite prejudice.

State v. Wright, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC04NTQtMS5wZGY). The trial court did not abuse its discretion by denying the defendant's motion to continue to test certain hair and fiber lifts from an item of clothing. The defendant had six months to prepare for trial and obtain independent testing, but waited until the day of trial to file his motion, in violation G.S. 15A-952(c). This failure to file the motion to continue within the required time period constituted a waiver of the motion. Also, because the item had already been DNA tested by the State, the lifts were not the only physical evidence obtained.

Motion to Dismiss

State v. Buddington, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0yODYtMS5wZGY). The trial court erred by granting the defendant's motion to dismiss a charge of felon in possession of a firearm on grounds that the statute was unconstitutional as applied to him. The defendant's motion was unverified, trial court heard no evidence, and there were no clear stipulations to the facts. To prevail in a motion to dismiss on an as applied challenge to the statute, the defense must present evidence allowing the trial court to make findings of fact regarding the type of felony convictions and whether they involved violence or threat of violence; the remoteness of the convictions; the felon's history of law abiding conduct since the crime; the felon's history of responsible, lawful firearm possession during a period when possession was not prohibited; and the felon's assiduous and proactive compliance with amendments to the statute.

State v. Banks, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xMTUwLTEucGRm). The evidence was sufficient to establish that the defendant perpetrated the murder. The defendant was jealous of the victim and made numerous threats toward him; four spent casings found in his bedroom were fired from the murder weapon; on the day of the murder, the victim got into a vehicle that matched a description of the defendant's vehicle; and a fiber consistent with the victim's jacket was recovered from the defendant's vehicle.

State v. Hill, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zOTktMS5wZGY). Over a dissent, the court held that the evidence was sufficient to establish that the defendant acted in concert with another to commit robbery. After robbing Mr. Jones at an ATM, the robber ran to a two-toned maroon and silver or purple and white GMC pickup truck driven by another person. After robbing Mr. Cole four hours later at an ATM, the robber ran towards a parking lot where Cole found a maroon and silver GMC truck. Mr. Cole asked the driver if he had seen a man running from the ATM. The driver gave inconsistent responses and told Cole that he had an appointment at 10:40 p.m. Cole obtained the truck's license plate number and the defendant was found driving the vehicle near where Cole was robbed. The vehicle was owned by Mr. Webb, a suspect in the Jones robbery. This is substantial evidence that the defendant was waiting for an accomplice and that the two acted in concert to commit the robberies.

State v. McNeill, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC00NTYtMS5wZGY). The State

presented sufficient evidence that the defendant perpetrated a breaking and entering. The resident saw the defendant break into her home, the getaway vehicle was registered to the defendant, the resident knew the defendant from prior interactions, a gun was taken from the home, and the defendant knew that the resident possessed the gun.

Trial in the Defendant's Absence

State v. McNeill, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC00NTYtMS5wZGY). The trial court did not err when, after the defendant failed to appear during trial, he explained to the jury that the trial would proceed in the defendant's absence. The trial judge instructed the jury that the defendant's absence was of no concern with regard to its job of hearing the evidence and rendering a fair and impartial verdict.

Jury Argument

State v. Wright, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC04NTQtMS5wZGY). The court rejected the defendant's argument that plain error occurred when the prosecutor misrepresented the results of the SBI Crime Lab phenolphthalein blood tests. At trial, a SBI agent explained that a positive test result would provide an indication that blood could be present. On cross-examination, he noted that certain plant and commercially produced chemicals may give a positive result. The defendant argued that the prosecutor misrepresented the results of the phenolphthalein blood tests during closing argument by stating that the agent tested the clothes and they tested positive for blood. Based on the agent's testimony, this argument was proper.

Jury Instructions

State v. Wiggins, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC00NTAtMS5wZGY). In a murder case, the trial court did not commit plain error by failing to instruct the jury on the lesser-included offense of second-degree murder. For reasons discussed in the opinion, the evidence showed that the defendant acted with premeditation and deliberation.

State v. Lawrence, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zNDgtMS5wZGY). The evidence was sufficient to warrant an instruction on flight. During the first robbery attempt, the defendant and a co-conspirator fled from a deputy sheriff. During the second attempt, the defendant fled from an armed neighbor. After learning of the defendant's name and address, an officer canvassed the neighborhood, looking for the defendant. The defendant was later arrested in another state.

Habitual Felon

State v. Eaton, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xNTg2LTEucGRm). A defendant may be sentenced as a habitual felon for an underlying felony of drug trafficking.

Sentencing

Aggravated Sentence

State v. Gillespie, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC03OTgtMS5wZGY). Where the trial court determined that one aggravating factor (heinous, atrocious or cruel) outweighed multiple mitigating factors, it acted within its discretion in sentencing the defendant in the aggravated range.

Prior Record Level

State v. Wright, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC04NTQtMS5wZGY). Since the State failed to demonstrate the substantial similarity of out-of-state New York and Connecticut convictions to North Carolina crimes and the trial court failed to determine whether the out-of-state convictions were substantially similar to North Carolina offenses, a resentencing was required. The State neither provided copies of the applicable Connecticut and New York statutes, nor provided a comparison of their provisions to the criminal laws of North Carolina. Also, the trial court did not analyze or determine whether the out-of-state convictions were substantially similar to North Carolina offenses.

Restitution

State v. Elkins, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05MTYtMS5wZGY). The restitution order was not supported by evidence presented at trial or sentencing. The prosecutor's unsworn statement regarding the amount of restitution was insufficient to support the order.

State v. McNeil, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC00NTYtMS5wZGY). The trial court committed reversible error by ordering the defendant to pay restitution when the State presented no evidence to support the award. Although there was evidence that the victim's home was damaged during the breaking and entering, there was no evidence as to the cost of the damage.

DWI Sentencing

State v. Green, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC04NC0xLnBkZg0). No *Blakely* error occurred in the defendant's sentence for impaired driving. The trial court found two aggravating factors, two factors in mitigation, and imposed a level four punishment. The level four punishment was tantamount to a sentence within the presumptive range, so that the trial court did not enhance defendant's sentence even after finding aggravating factors. Therefore, *Blakely* is not implicated.

Evidence

Objections

State v. Carter, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC02NDgtMS5wZGY). When the defendant failed to object to a question until after the witness responded, the objection was waived by the defendant's failure to move to strike the answer.

Cross-Examination and Impeachment

State v. Banks, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xMTUwLTEucGRm). Because the witness admitted having made a prior statement to the police, it was not error to allow the State to impeach her with the prior inconsistent statement when she claimed not to remember what she had said and the trial court gave a limiting instruction. The court distinguished the case from one in which the witness denies having made the prior statement. Even if use of the prior inconsistent statement was error, no prejudice resulted.

State v. Carter, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC02NDgtMS5wZGY). Any error in connection with the admission of statements elicited from a witness on cross-examination was invited. The defendant, having invited error, waived all right to appellate review, including plain error review.

Corroboration

State v. Johnson, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0yNi0xLnBkZg). A witness's written statement, admitted to corroborate his trial testimony, was not hearsay. The statement was generally consistent with the witness's trial testimony. Any points of difference were slight, only affecting credibility, or permissible because they added new or additional information that strengthened and added credibility to the witness's testimony.

Personal Knowledge

State v. Elkins, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05MTYtMS5wZGY). In an armed robbery case, a store clerk's testimony that he thought the defendant had a gun was not inadmissible speculation or conjecture. Based on his observations, the clerk believed that the defendant had a gun because the defendant was hiding his arm under his jacket. The clerk's perception was rationally based on his firsthand observation of the defendant and was more than mere speculation or conjecture.

Competency to Testify

State v. Carter, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC02NDgtMS5wZGY). The trial court did not abuse its discretion in determining that a four-year-old child sexual assault victim was competent to testify. The child was 2½ years old at the time the incident occurred. At trial, the child was non-responsive to some questions and gave contradictory responses to others.

Relevancy

State v. Hill, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zOTktMS5wZGY). In a robbery case in which there was a dissenting option, the court held that 404(b) evidence of a similar robbery that occurred several hours earlier was relevant, given the connection between the incidents.

Hearsay

State v. Banks, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xMTUwLTEucGRm). An officer's testimony as to a witness' response when asked if she knew what had happened to the murder weapon was not hearsay. The statement was not offered for the truth of the matter asserted but rather to explain what actions the officer took next (contacting his supervisor and locating the gun). Although other hearsay evidence was erroneously admitted, no prejudice resulted.

State v. Elkins, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05MTYtMS5wZGY). Statements offered to explain a witness's subsequent actions were not offered for the truth of the matter asserted and not hearsay.

State v. Johnson, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0yNi0xLnBkZg). A witness's written statement, admitted to corroborate his trial testimony, was not hearsay. The statement was generally consistent with the witness's trial testimony. Any points of difference were slight, only affecting credibility, or were permissible because they added new or additional information that strengthened and added credibility to the witness's testimony.

Authentication

State v. Elkins, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05MTYtMS5wZGY). The trial court erred by allowing the State to introduce three photographs, which were part of a surveillance video, when the photographs were not properly authenticated. However, given the evidence of guilt, no plain error occurred.

Opinions

Lay Opinions

State v. Elkins, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05MTYtMS5wZGY). Although Rule 704 allows admission of lay opinion evidence on ultimate issues, the lay opinion offered was inadmissible under Rule 701 because it was not helpful to the jury. In this case, a detective was asked: After you received this information from the hospital, what were your next steps? Were you building a case at this point? He answered: "I felt like I was building a solid case. [The defendant] was, indeed, the offender in this case." However, the error did not constitute plain error.

Expert Opinions

State v. Green, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC04NC0xLnBkZg0). (1) In an impaired driving case, the trial court did not abuse its discretion by allowing the State's witness to testify as an expert in pharmacology and physiology. Based on his knowledge, skill, experience, training, and education, the witness was better informed than the jury about the subject of alcohol as it relates to human physiology and pharmacology. (2) The court rejected the defendant's argument that the trial

court erred by allowing the expert to give opinion testimony regarding the defendant's post-driving consumption of alcohol on grounds that such testimony was an opinion about the truthfulness of the defendant's statement that he consumed wine after returning home. The court concluded that because the expert's testimony was not opinion testimony concerning credibility, the trial court did not err by allowing the expert to testify as to how the defendant's calculated blood alcohol content would have been altered by the defendant's stated post-driving consumption; the expert's statements assisted the jury in determining whether the defendant's blood alcohol content at the time of the accident was in excess of the legal limit. (3) The trial court did abuse its discretion by admitting the expert's opinion testimony regarding retrograde extrapolation in a case where the defendant asserted that he consumed alcohol after driving. The defendant's assertions of post-driving alcohol consumption went to the weight of the expert's testimony, not its admissibility.

Miscellaneous Evidence Issues

State v. Wright, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC04NTQtMS5wZGY). The court rejected the defendant's argument that plain error occurred when an SBI agent overstated the results of the SBI Crime Lab phenolphthalein blood tests. The defendant argued that the agent's testimony was improper because he stated that the defendant's clothes tested positive for blood, rather than stating that a positive phenolphthalein test result means "chemical indications for the presence of blood." The agent explained that a positive result would provide an indication that blood could be present. On cross-examination, he noted that certain plant and commercially produced chemicals may give a positive result. As such, the testimony was proper.

Arrest, Search & Investigation

Jurisdiction

State v. Scruggs, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05MjEtMS5wZGY). Even if a stop and arrest of the defendant by campus police officers while off campus violated G.S. 15A-402(f), the violation was not substantial. The stop and arrest were constitutional and the officers were acting within the scope of their mutual aid agreement with the relevant municipality.

When a Seizure Occurs

State v. Eaton, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xNTg2LTEucGRm). Citing *California v. Hodari D*, 499 U.S. 621 (1991), the court held that the defendant was not seized when he dropped a plastic baggie containing controlled substances. An officer was patrolling at night in an area where illegal drugs were often sold, used, and maintained. When the officer observed five people standing in the middle of an intersection, he turned on his blue lights, and the five people dispersed in different directions. When the officer asked them to come back, all but the defendant complied. When the officer repeated his request to the defendant, the defendant stopped, turned, and discarded the baggie before complying with the officer's show of authority by submitting to the officer's request.

Abandoned Property

State v. Eaton, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xNTg2LTEucGRm). Because the defendant had not been seized when he discarded a plastic baggie beside a public road, the baggie was abandoned property in which the defendant no longer retained a reasonable expectation of privacy. As such, no Fourth Amendment violation occurred when an officer obtained the baggie.

Criminal Offenses

Acting in Concert

State v. Hill, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zOTktMS5wZGY). In a case in which there was a dissenting opinion, the court held that there was sufficient evidence that the defendant acted in concert with another to commit a robbery. The evidence showed that he was not present at the ATM where the money was taken, but was parked nearby in a getaway vehicle.

General Crimes

Attempt

State v. Lawrence, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zNDgtMS5wZGY). (1) The evidence was sufficient to prove attempted kidnapping. To prove an overt act for that crime, the State need not prove that the defendant was in the presence of his intended victim. In this case, the defendant and his accomplices stole get-away cars and acquired cell phones, jump suits, masks, zip ties, gasoline, and guns. Additionally, the defendant hid in the woods behind the home of his intended victim, waiting for her to appear, fleeing only upon the arrival of officers and armed neighbors. (2) The court rejected the defendant's argument that the evidence of attempted kidnapping was insufficient because the restraint he intended to use on his victim was inherent to his intended robbery of her. The defendant planned to intercept the victim outside of her home and force her back into the house at gunpoint, bind her hands so that she could not move, and threaten to douse her with gasoline if she did not cooperate. These additional acts of restraint by force and threat provided substantial evidence that the defendant's intended actions would have exposed the victim to greater danger than that inherent in the armed robbery itself. (3) The court rejected the defendant's argument that to prove an overt act for attempted robbery the State had to prove that the defendant was in the presence of his intended victim. For the reasons stated in (1), above, the court found that there was sufficient evidence of an overt act. (4) The court rejected the defendant's argument that because the evidence failed to show that he and his co-conspirators entered the property in question, they could not have attempted to enter her residence.

Conspiracy

State v. Lawrence, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zNDgtMS5wZGY). (1) The evidence was insufficient to support two charges of conspiracy to commit armed robbery. Having failed to achieve the objective of the conspiracy on their first attempt, the defendant and his co-conspirators returned the next day to try again. When the State charges separate conspiracies, it must prove not only the existence of at least two agreements, but also that they were separate. There is no bright-line test for whether multiple conspiracies exist. The essential question is the nature of the agreement(s), but factors such as time intervals, participants, objectives, and number of meetings must be considered. Applying this analysis, the court concluded that only one agreement existed. In both attempts, the intended

victim and participants were the same; the time interval between the two attempts was approximately 36 hours; on the second attempt the group did not agree to a new plan; and while the co-conspirators considered robbing a different victim, that only was a back-up plan. The court rejected the State's argument that because the co-conspirators met after the first attempt, acquired additional materials, made slight modifications on how to execute their plan, and briefly considered robbing a different victim, they abandoned their first conspiracy and formed a second one. (2) The trial judge committed plain error by failing to instruct the jury on all elements of conspiracy to commit armed robbery. The judge instructed the jury that armed robbery involved a taking from the person or presence of another while using or in the possession of a firearm. The judge failed to instruct on the element of use of the weapon to threaten or endanger the life of the victim.

Assaults

State v. Wright, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC04NTQtMS5wZGY). (1) The evidence was insufficient to establish that a secret assault occurred. In the middle of the night, the victim heard a noise and looked up to see someone standing in the bedroom doorway. The victim jumped on the person and hit him with a chair. The victim was aware of the defendant's presence and purpose before the assault began. In fact, he started defending himself before the defendant's assault was initiated. (2) The trial court did not err by failing to instruct the jury on the lesser-included offense of assault with a deadly weapon inflicting serious injury to the charge of assault with a deadly weapon with intent to kill inflicting serious injury. The defendant broke into a trailer in the middle of the night and used an iron pipe to repeatedly beat in the head an unarmed, naked victim, who had just woken up. (3) The trial court did not err by failing to instruct on the lesser-included offense of assault with a deadly weapon to the charge on assault with a deadly weapon inflicting serious injury. After a beating by the defendant, the victim received hospital treatment, had contusions and bruises on her knee, could not walk for about a week and a half, and her knee still hurt at the time of trial.

Indecent Liberties

State v. Carter, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC02NDgtMS5wZGY). The evidence was sufficient to establish indecent liberties. The child reported being touched in her genital and rectal area by a male. The victim's mother testified that she found the victim alone with the defendant on several occasions, and the victim's testimony was corroborated by her consistent statements to others.

Robbery

State v. Elkins, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05MTYtMS5wZGY). The evidence was sufficient to establish that the defendant took money from a store clerk by means of violence or fear. The defendant hid his arm underneath his jacket in a manner suggesting that he had a gun; the clerk knew the defendant was "serious" because his eyes were "evil looking"; and the clerk was afraid and therefore gave the defendant the money. The court distinguished *State v. Parker*, 322 N.C. 559 (1988), on grounds that in that case, there was no weapon in sight and the victim was not afraid. Instead, the court found the case analogous to *State v. White*, 142 N.C. App. 201 (2001), which concluded that there was sufficient evidence of violence or fear when the defendant handed a threatening note to the store clerks implying the he had a gun, even though none of them saw a firearm in his possession.

Felon in Possession of a Firearm

State v. Wiggins, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC00NTAtMS5wZGY). The felon in possession statute does not authorize multiple convictions and sentences for possession of a firearm by a convicted felon predicated on evidence that the defendant simultaneously obtained and possessed one or more firearms, which he or she used during the commission of multiple substantive criminal offenses during the course of the same transaction or series of transactions. The court clarified that the extent to which a defendant is guilty of single or multiple offenses hinges upon the extent to which the weapons in question were acquired and possessed at different times. In the case at hand, the weapons came into the defendant's possession simultaneously and were used over a two-hour period within a relatively limited part of town in connection with the commission of a series of similar offenses. Based on these facts, only one felon in possession conviction could stand.

State v. McNeill, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC00NTYtMS5wZGY). There was sufficient evidence that the defendant constructively possessed the firearm. The defendant was identified as having broken into a house from which a gun was stolen. The gun was found in a clothes hamper at the home of the defendant's ex-girlfriend's mother. The defendant had arrived at the home shortly after the breaking and entering, entering through the back door and walking past the hamper. When the defendant was told that police were "around the house," he fled to the front porch, where officers found him. A vehicle matching the description of the getaway car was parked outside.

State v. Buddington, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0yODYtMS5wZGY). The trial court erred by granting the defendant's motion to dismiss an indictment charging felon in possession of a firearm on grounds that the statute was unconstitutional as applied to him. The defendant's motion was unverified, trial court heard no evidence, and there were no clear stipulations to the facts. To prevail in a motion to dismiss on an as applied challenge to the statute, the defense must present evidence that would allow the trial court to make findings of fact regarding the type of felony convictions and whether they involved violence or threat of violence; the remoteness of the convictions; the felon's history of law abiding conduct since the crime; the felon's history of responsible, lawful firearm possession during a period when possession was not prohibited; and the felon's assiduous and proactive compliance with amendments to the statute.

Ineffective Assistance of Counsel

State v. Carter, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC02NDgtMS5wZGY). In a child sexual assault case, defense counsel's failure to move to strike testimony of a forensic interviewer that the fact that a young child had extensive sexual knowledge suggested that "something happened," did not constitute deficient performance.

State v. Banks, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xMTUwLTEucGRm). (1) In a case in which the defendant asserted that his attorney was ineffective by failing to object to the State's cross-examination of defense witnesses, the defendant failed to show prejudice. The same evidence was

received into evidence, without objection, through the defendant's own, more extensive testimony on the issue. (2) The trial court's denial of a motion to continue in a murder case did not violate the defendant's right to effective assistance of counsel. The defendant asserted that he did not realize that certain items of physical evidence were shell casings found in defendant's room until the eve of trial and thus was unable to procure independent testing of the casings and the murder weapon. Even though the relevant forensic report was delivered to the defendant in 2008, the defendant did not file additional discovery requests until February 3, 2009, followed by *Brady* and *Kyles* motions on February 11, 2009. The trial court afforded the defendant an opportunity to have a forensic examination done during trial but the defendant declined to do so. The defendant was not entitled to a presumption of prejudice on grounds that denial of the motion created made it so that no lawyer could provide effective assistance. The defendant's argument that had he been given additional time, an independent examination *might* have shown that the casings were not fired by the murder weapon was insufficient to establish the requisite prejudice.

Clerical Errors

State v. Eaton, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xNTg2LTEucGRm). In a case in which the defendant was sentenced as a Class C habitual felon, the court remanded for correction of a clerical error regarding the felony class of the underlying felony.