Criminal Procedure

Motions to suppress

State v. Neal, __ N.C. App. __, __ S.E.2d __ (April 5, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0yMTAtMS5wZGY=). By orally denying the defendant's motion to suppress, the trial court failed to comply with G.S. 15A-977(f)'s requirement that it enter a written order with findings of fact resolving material conflicts in the evidence. The statute mandates a written order unless the trial court provides its rationale from the bench and there are no material conflicts in the evidence. Although the trial court provided its rationale from the bench, there were material conflicts in the evidence as to whether the defendant's consent to search was voluntary. The court remanded for the trial court to make the necessary findings of fact and for reconsideration of its conclusions of law in light of those findings.

Jury trial

Contact with jurors

State v. Oliver, __ N.C. App. __, __ S.E.2d __ (April 5, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC00MzEtMS5wZGY=). The trial court did not abuse its discretion by denying the defendant's mistrial motion. During a recess at trial, a juror was approached by a man who said, "Just quit, and I'll let you go home." Upon return to the courtroom, the trial court inquired and determined that six jurors witnessed the incident. The trial court examined each juror individually and each indicated that the incident would not affect his or her ability to follow the trial court's instructions or review of the evidence. Given the trial court's response and the lack of evidence showing that the jurors were incapable of impartially rendering their verdict, the trial court did not abuse its discretion by denying the motion.

Jury instructions

State v. Wright, __ N.C. App. __, __ S.E.2d __ (April 5, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC03OTQtMS5wZGY=). Although the trial court erred by failing to give the final not guilty mandate, under the circumstances presented the error did not rise to the level of plain error.

Sex offenders

State v. Oliver, __ N.C. App. __, __ S.E.2d __ (April 5, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC00MzEtMS5wZGY=). First-degree sexual offense under G.S. 14-27.4(a)(1) and indecent liberties with a minor under G.S. 14-202.1 are not aggravated offenses as defined by G.S. 14-208.6(1a) requiring lifetime satellite-based monitoring.

Evidence

404(b)

State v. Gray, __ N.C. App. __, __ S.E.2d __ (April 5, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zMDctMS5wZGY=). In a case in which the defendant was charged with committing a sexual offense and indecent liberties against a five-year-old female victim, the trial court committed prejudicial error by admitting evidence that the defendant had anal intercourse with a four-year-old male 18 years earlier. The evidence was admitted to show

identity, intent, and common scheme or plan. Noting confusion in the N.C. cases, the court concluded that temporal proximity continues to be relevant to the issue of admissibility of 404(b) evidence; the court rejected the notion that temporal proximity goes only to weight of the evidence. Turning to admission of the evidence for purposes of identity, the court found the 18-year gap between the incidents significant. It rejected the State's argument that the time period should be tolled during the defendant's incarceration on grounds that the State failed to offer competent evidence as to the length of his incarceration. Although the incidents both involved very young children and occurred at a caretaker's house where the defendant was a frequent visitor, the nature of the alleged assaults was very different. In light of these differences and "the great length of time" between them, the State failed to show sufficient unusual facts present in both or particularly similar acts which would indicate that the same person committed both crimes. The court went on to reach similar conclusions as to admissibility for the purposes of intent and prior scheme or plan.

State v. Oliver, __ N.C. App. __, __ S.E.2d __ (April 5, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC00MzEtMS5wZGY=). (1) In a case in which the defendant was charged with sexual offense, indecent liberties and crime against nature against a ten-year-old female victim, no plain error occurred when the trial court admitted evidence of the defendant's prior bad acts against two other teenaged females. The evidence was introduced to show common scheme or plan, identity, lack of mistake, motive and intent. The defendant's acts with respect to the victim and the first female were similar: the defendant had a strong personal relationship with one of their parents, used the threat of parental disbelief and disapproval to coerce submission and silence, initiated sexual conduct after wrestling or roughhousing, digitally penetrated her vagina, and forced her to masturbate him. Only two years separated the incidents and both involved a similar escalation of sexual acts. As to the evidence of the prior bad acts with the second female — that the defendant kissed her when she was thirteen — the court held that admission of that testimony was not plain error. (2) No plain error occurred when the trial court instructed the jury on the 404(b) evidence using N.C. Pattern Jury Instruction – Crim. 104.15 but declined to instruct that the evidence could not be used to prove defendant's character or that he acted in conformity therewith.

State v. Woodard, __ N.C. App. __, __ S.E.2d __ (April 5, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTcyLTEucGRm). In a case involving charges arising out of a drug store break-in in which controlled substances were stolen, the trial court did not abuse its discretion by admitting 404(b) testimony from an accomplice that a few days before the break-in at issue, the same perpetrators broke into a different pharmacy but did not obtain any narcotics. The incidents were sufficiently similar, occurred only a few days apart, and involved the same accomplices.

Relevancy & its limits

State v. Oliver, __ N.C. App. __, __ S.E.2d __ (April 5, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC00MzEtMS5wZGY=). The trial court did not commit plain error by allowing the State to question two witnesses on rebuttal about whether they received money from the victim in exchange for making up statements when the defendant raised the issue of the victim's veracity on his cross examination.

Identification of an item as a controlled substance

State v. Woodard, __ N.C. App. __, __ S.E.2d __ (April 5, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTcyLTEucGRm). In a case arising from a pharmacy break-in, the court rejected the defendant's argument that the trial court erred by failing to dismiss trafficking in opium charges because the State did not present a chemical analysis of the pills. Citing *State v. Ward*, 364 N.C. 133 (2010), and *State v. Llamas-Hernandez*, 363 N.C. 8 (2009), the court determined that State is not required to conduct a chemical analysis on a controlled substance in order to sustain a conviction under G.S. 90-95(h)(4), provided it has established the identity of the controlled substance beyond a reasonable doubt by another method of identification. In the case at hand, the State's evidence did that. The drug store's pharmacist manager testified that 2,691 tablets of hydrocodone acetaminophen, an opium derivative, were stolen from the pharmacy. He testified that he kept "a perpetual inventory" of all drug items. Using that inventory, he could account for the type and quantity of every item in inventory throughout the day, every day. Accordingly, he was able to identify which pill bottles were stolen from the pharmacy by examining his inventory against the remaining bottles, because each bottle was labeled with a sticker identifying the item, the date it was purchased and a partial of the pharmacy's account number. These stickers, which were on every pill bottle delivered to the pharmacy, aided the pharmacist in determining that 2,691 tablets of hydrocodone acetaminophen were stolen. He further testified, based on his experience and knowledge as a pharmacist, that the weight of the stolen 2,691 pill tablets was approximately 1,472 grams. Based on his 35 years of experience dispensing the same drugs that were stolen and his unchallenged and uncontroverted testimony regarding his detailed pharmacy inventory tracking process, the pharmacist's identification of the stolen drugs as more than 28 grams of opium derivative hydrocodone acetaminophen was sufficient evidence to establish the identity and weight of the stolen drugs and was not analogous to the visual identifications found to be insufficient in *Ward* and *Llamas–Hernandez*.

Hearsay

State v. Sneed, __ N.C. App. __, __ S.E.2d __ (April 5, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xODktMS5wZGY=). In a case in which the defendant was charged with, among other things, armed robbery and possession of a stolen handgun, no plain error occurred when the trial court admitted, under Rule 803(6) (records of regularly conducted activity) testimony that the National Crime Information Center ("NCIC") database indicated a gun with the same serial number as the one possessed by the defendant had been reported stolen in South Miami, Florida. The court rejected the defendant's argument that the State failed to lay the necessary foundation for admission of the evidence. The defendant had argued that the State was required to present testimony from a custodian of records for NCIC that the information was regularly kept in the course of NCIC's business and that NCIC routinely makes such records in the course of conducting its business. The proper foundation was laid through the testimony of a local police officer who used the database in his regular course of business.

Defenses

State v. Wright, __ N.C. App. __, __ S.E.2d __ (April 5, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC03OTQtMS5wZGY=). The trial court did not err by denying the defendant's request to instruct the jury on the defense of withdrawal where the evidence showed that the defendant completed his assigned task in the home invasion (kicking in the door) and failed to renounce the common purpose or indicate that he did not intend to participate in the crime any further.