

Criminal Procedure Counsel Issues

State v. Phillips, __ N.C. __, __ S.E.2d __ (June 16, 2011)

(<http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMS80OEEwOC0xLnBkZg==>). (1) Investigators did not violate the capital defendant's constitutional right to counsel by continuing to question him after an attorney who had been appointed as provisional counsel arrived at the sheriff's office and was denied access to the defendant. The interrogation began before the attorney arrived, the defendant waived his *Miranda* rights, and he never stated that he wanted the questioning to stop or that he wanted to speak with an attorney. (2) Office of Indigent Defense Services statutes and rules regarding an indigent's entitlement to counsel did not make the defendant's statement inadmissible. Although the relevant statutes create an entitlement to counsel and authorize provisional counsel to seek access to a potential capital defendant, they do not override a defendant's waiver of the right to counsel, which occurred in this case. (3) The trial court did not err by failing to inquire into defense counsel's alleged conflict of interest and by failing to obtain a waiver from the defendant of the right to conflict-free counsel. According to the defendant, the conflict arose when it became apparent that counsel might have to testify as a witness. The court rejected the defendant's argument that his claim should be assessed under the conflict of interest ineffective assistance of counsel standard rather than the standard two-prong *Strickland* analysis. It noted that the conflict of interest standard generally applies to conflicts that arise from multiple or successive representation and it deferred to defense counsel's conclusion that no conflict existed in the case at hand. Applying *Strickland*, the court rejected the defendant's claim, concluding that even if counsel's conduct fell below an objective standard of reasonableness, no prejudice occurred.

Motion to Suppress Procedure

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(<http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMS80OEEwOC0xLnBkZg==>). The court rejected the capital defendant's argument that the trial court's findings of fact as to whether he had consumed impairing substances before making an incriminating statement to the police were insufficient. The court reviewed the trial court's detailed findings and found them sufficient.

False Evidence Claims

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(<http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMS80OEEwOC0xLnBkZg==>). The court rejected the capital defendant's claim that the prosecution knowingly elicited or failed to correct false testimony. In victim Cooke's pretrial statements, she related that the defendant said that he had nothing to live for. When asked at trial whether the defendant made that statement, Cooke responded: "Not in those terms, no." The court concluded that it was not apparent that Cooke testified falsely or that her trial testimony materially conflicted with her pretrial statements. Moreover, it found that any inconsistency was addressed during cross-examination. Finally, the court concluded, even if Cooke perjured herself, there is no indication that the State knew her testimony was false.

Jury Argument

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(<http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMS80OEEwOC0xLnBkZg==>). (1) The court

rejected the capital defendant's argument that the trial court erred by failing to intervene ex mero motu at five separate points during the State's argument in the guilt-innocence phase. First, the defendant argued that the trial judge should have intervened when the prosecutor mischaracterized defense counsel's statements. Although the prosecutor overstated the extent of defense counsel's concessions, the statements constituted a lapsus linguae that were neither calculated to mislead nor prejudicial. Second, the defendant argued that the trial court should have intervened when the prosecutor remarked about the defendant's failure to introduce evidence supporting his diminished capacity defense. The court concluded that the State is free to point out the defendant's failure to produce evidence to refute the State's case. Furthermore, it rejected the defendant's contention that the prosecutor's statements misstated the law on diminished capacity. Third, the defendant argued that the trial court should have intervened when the prosecutor commented about a defense expert on diminished capacity. Although the court found the prosecutor's statement that the expert's testimony was "wholly unbelievable" to be error, that error was not so egregious as to warrant intervention on the court's own motion. Similarly, the prosecutor's comment about the "convenience" of the expert's testimony (she opined that the defendant suffered from diminished capacity for a portion of time that coincided with when the crime occurred), was not so grossly improper as to require intervention ex mero motu. Fourth, the defendant argued that the prosecutor's statement about diminished capacity misled the jury into believing that the defense was not established because the defense failed to prove remorse or efforts to help the victims. Any impropriety in this argument, the court concluded, was cured by the trial court's correct instructions on the defense. Fifth, the defendant argued that the prosecutor misstated the law as to the intent required for first-degree murder. However, the prosecutor's statement was not improper. In sum, the court concluded that the prosecutor's statements, both individually and cumulatively, were not so grossly improper as to have required the trial court to intervene ex mero motu. (2) The court rejected the defendant's argument that during the State's closing argument in the sentencing phase the prosecutor erroneously called upon the jury to disregard mercy altogether. The court found that the arguments in question, cautioning jurors against reaching a decision on the basis of their "feelings" or "hearts," did not foreclose considerations of mercy or sympathy; instead, the prosecutor asked the jury not to impose a sentence based on emotions divorced from the facts presented in the case.

Evidence

Hearsay

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(<http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMS80OEEwOC0xLnBkZg==>). Noting that it has not had occasion to consider whether statements by law enforcement officers acting as agents of the government and concerning a matter within the scope of their agency or employment constitute admissions of a party opponent under Rule 801(d) for the purpose of a criminal proceeding, the court declined to address the issue because even if error occurred, it did not constitute plain error.

Opinions

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(<http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMS80OEEwOC0xLnBkZg==>). In this capital case, the trial court did not commit plain error by admitting lay opinion testimony by an eyewitness. When the eyewitness was asked about the defendant's demeanor, she stated: "He was fine. I mean it was -- he had -- he knew what he was doing. He had it planned out. It was a -- he -- he knew before he ever got there what was going to happen." The defendant argued that the eyewitness had no personal

knowledge of any plans the defendant might have had. The court noted that a lay witness may provide testimony based upon inference or opinion if the testimony is rationally based on the witness's perception and helpful to a clear understanding of his or her testimony or the determination of a fact in issue. It further noted that this rule permits a witness to express "instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time. Such statements are usually referred to as shorthand statements of facts." Immediately before the testimony at issue, the witness testified that the defendant had said that "[h]e was in debt with somebody who he needed money for and that's why they came to [the] house," that the debt was "with a drug dealer and they were going to kill him, if he did not come up with their money," and that "his brother had been shot and he was dying and he had to get their money." In context, the witness's statements that the defendant "had it planned out" and "knew before he ever got there what was going to happen" were helpful to an understanding of her testimony and were rationally based on her perceptions upon seeing the defendant commit the multiple murders at issue.

Arrest, Search & Investigation

State v. Biber, __ N.C. __, __ S.E.2d __ (June 16, 2011)

(<http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMS80MjNBMTAtMS5wZGY=>). The court reversed a decision of the Court of Appeals and held that probable cause supported the defendant's arrest for drug possession. In the decision below, the Court of Appeals held that there was insufficient evidence that the defendant had constructive possession of the substance at issue, found in a motel room's bathroom light fixture while the defendant and two others were present. Although the case was before the Court of Appeals on an adverse ruling on a suppression motion, the court reached the issue of sufficiency of the evidence. The North Carolina Supreme Court concluded that the Court of Appeals applied the wrong analysis, conflating the sufficiency of the evidence standard with the standard that applies when assessing whether officers had probable cause to arrest. The court went on to conclude that unchallenged facts supported the trial court's conclusion that the officers had probable cause to arrest. Specifically, responding officers knew they were being dispatched to a motel to assist its manager in determining whether illegal drug use was occurring in Room 312, after a complain had been made. The officers' initial conversation with the manager confirmed the possibility of suspicious activities. When the door to the room was opened, they saw a woman with a crack pipe and drug paraphernalia next to her. The woman fled to the bathroom, ignoring instructions to open the door while she flushed the toilet. A search of the bathroom revealed a bag of what looked like narcotics in the light fixture. The defendant ignored instructions to remain still. When asked, the defendant claimed the room was his and that a bag containing clothing was his.

Criminal Offenses

Kidnapping

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(<http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMS80OEwOC0xLnBkZg==>). In a multiple homicide case in which the defendant also was charged with kidnapping a victim who was a minor, there was sufficient circumstantial evidence that the minor's parents did not consent to her kidnapping. Because the victim's parents did not testify, there was no direct evidence of lack of parental consent. However, the State presented evidence that, having shot and repeatedly stabbed the victim while she was at the murder scene, the defendant and his accomplices found her after she crawled outside and removed her from the yard for the stated purpose of killing her while she was incapable of escaping.

They loaded her into the bed of the defendant's truck and drove to a trash pile, only to abandon her there when they heard sirens.

Capital

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(<http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMS80OEEwOC0xLnBkZg==>). (1) The trial court did not err by submitting the (f)(1) mitigating circumstance (no significant history of prior criminal activity) to the jury. The defendant's prior record included: felony breaking and entering in 1999; felony larceny in 1998; driving under the influence in 1996; larceny in 1993; sale of marijuana in 1991; and sale of a narcotic or controlled substance in 1990. The court found it significant that the priors were somewhat remote in time and did not appear to involve violence against a person. (2) The trial court erred by submitting the (f)(4) mitigating circumstance (defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor) to the jury where it was not supported by substantial evidence. However, in the absence of "extraordinary facts," the court concluded that the error was harmless.