Criminal Procedure

Indictment Issues

State v. Carter, __ N.C. App. __, __ S.E.2d __ (June 21, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05NzQtMS5wZGY=). Sentencing factors that might lead to an aggravated sentence need not be alleged in the indictment.

State v. Speight, __ N.C. App. __, __ S.E.2d __ (June 21, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNDY3LTEucGRm). A burglary indictment alleging that the defendant intended to commit "unlawful sex acts" was not defective.

Discovery

State v. Martinez, __ N.C. App. __, __ S.E.2d __ (June 21, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC04ODUtMS5wZGY=). In a child sex case, the trial court erred by failing to require disclosure of material exculpatory information contained in privileged documents that were reviewed in camera by the trial court and pertained to the victim's allegations. The documents contained "sufficient exculpatory material to impeach the State's witnesses." The court instructed the trial judge to "review the material de novo to determine, in his or her discretion, what material should be made available to Defendant."

Motions

State v. Oates, __ N.C. App. __, __ S.E.2d __ (June 21, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC03MjUtMS5wZGY=). The State failed to give proper notice of appeal from the trial court's order granting the defendant's motion to suppress. The State filed written notice of appeal after the trial judge granted the defendant's motion in open court but before the trial court entered the written order. Although judgment occurs when the sentence is pronounced, entry of an order occurs when it is reduced to writing, signed by the trial court, and filed with the clerk. The State failed to file written notice of appeal within 14 days after entry of the court's order.

Jury Selection

State v. Carter, __ N.C. App. __, __ S.E.2d __ (June 21, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05NzQtMS5wZGY=). The trial court did not err by rejecting the defendant's *Batson* challenge as to two black jurors. The prosecutor's explanation with respect to both jurors included the fact that both had a close family member who was incarcerated and had not been "treated fairly." The court rejected the defendant's argument that the State accepted a white male juror whose father had been incarcerated, noting that the white juror indicated that he was not close to his father and that his father had been treated fairly. The court also rejected the defendant's argument that the State's peremptory challenges left the defendant, who was black, with an all-white jury, concluding that *Batson* requires purposeful discrimination; it is not enough that the effect of the challenge was to eliminate all or some African-American jurors.

Jury Argument

State v. Edmonds, __ N.C. App. __, __ S.E.2d __ (June 21, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC00NjQtMS5wZGY=). In a child sex case, the court rejected the defendant's argument that the trial court erred by ruling that the defendant could not argue that his nephew or someone else had assaulted the victim. It concluded: "Although defendant argues that he was improperly prevented from arguing that someone else raped the victim, defendant is unable to point to specific portions of his closing argument which were limited by the trial court's ruling, as closing arguments in this case were not recorded. Therefore, defendant has not met his burden of establishing the trial court's alleged error within the record on appeal. This court will not 'assume error by the trial judge when none appears on the record before [it].'"

Conduct of the Judge

State v. Herrin, __ N.C. App. __, __ S.E.2d __ (June 21, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNDQ2LTEucGRm). The trial court did not commit prejudicial error in violation of G.S. 15A-1222 (judge may not express an opinion) by laughing in the presence of the jury upon hearing a witness's testimony that defendant "ran like a bitch all the way, way down past his house." The court concluded that "[a]lthough the judge's outburst may have been ill-advised and did not exemplify an undisturbed atmosphere of judicial calm" (quotation omitted) any resulting error was harmless.

Jury Instructions

State v. Speight, __ N.C. App. __, __ S.E.2d __ (June 21, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNDY3LTEucGRm). In a burglary case, instructions which allowed the jury to find the defendant guilty if they found that he intended to commit a felony larceny, armed robbery, *or* sexual offense did not impermissibly allow for a non-unanimous verdict.

State v. Whetstone, __ N.C. App. __, __ S.E.2d __ (June 21, 2011) http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMDQ2LTEucGRm). The trial court committed plain error by charging the jury with a self-defense instruction that related to assaults not involving deadly force (N.C.P.I.—Crim. 308.40) when the defendant was charged with assault with a deadly weapon with intent to kill inflicting serious injury. The court explained: "in those cases where the weapon is not a deadly weapon per se, but . . . the trial judge concludes on the evidence . . . that the weapon used was a deadly weapon as a matter of law, the jury should be instructed that the assault would be excused as being in self-defense only if the circumstances at the time the defendant acted were such as would create in the mind of a person of ordinary firmness a reasonable belief that such action was necessary to protect himself from death or great bodily harm." The instruction given lessened the State's burden of proving that the defendant did not act in self-defense.

Sentencing

State v. Herrin, __ N.C. App. __, __ S.E.2d __ (June 21, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNDQ2LTEucGRm). The trial court exceeded its statutory authority by mandating that any later sentence imposed on the defendant must run consecutive to the sentence imposed in the case at hand. The court, however, declined to vacate the relevant portion of the judgment, concluding that because the defendant had not yet been ordered to serve a consecutive sentence, such an opinion would be advisory.

State v. Carter, __ N.C. App. __, __ S.E.2d __ (June 21, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05NzQtMS5wZGY=). There was sufficient evidence supporting the trial judge's submission of the G.S. 15A-1340.16(d)(6) aggravating factor (offense against a law enforcement officer, etc. while engaged in the performance of or because of the exercise of official duties.) to the jury. Subsection (d)(6)'s "engaged in" prong does not require the State to prove that the defendant knew or reasonably should have known that the victim was a member of the protected class engaged in the exercise of his or her official duties; rather, submission simply requires evidence sufficient to establish the "objective fact" that the victim was a member of the protected class — here, a law enforcement officer — engaged in the performance of his or her official duties. On the facts presented, the evidence was sufficient.

State v. Wright, __ N.C. App. __, __ S.E.2d __ (June 21, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMjUxLTEucGRm). (1) Excluding the defendant from an in-chambers conference held prior to the sentencing hearing was harmless beyond a reasonable doubt. The in-chambers conference was recorded, the defendant was represented by counsel and given an opportunity to be heard and to make objections at the sentencing hearing, and the trial court reported the class level for each offense and any aggravating or mitigating factors on the record in open court. (2) Evidence of two awards from the Crime Victim's Compensation Commission properly supported the trial court's restitution award. However, because restitution exceeded the amounts stated in these awards, the court remanded for the trial court to amend the order accordingly.

Evidence

Hearsay

State v. Speight, __ N.C. App. __, __ S.E.2d __ (June 21, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNDY3LTEucGRm). In the defendant's trial for sex offense, burglary, and other crimes, the trial court did not err by admitting the defendant's statement, made to an officer upon the defendant's arrest: "Man, I'm a B and E guy." Given the charges, the statement was a statement against penal interest pursuant to Rule 804(b)(3).

Opinions

State v. Martinez, __ N.C. App. __, __ S.E.2d __ (June 21, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC04ODUtMS5wZGY=). In a child sex case, the trial court erred by admitting a DSS social worker's testimony that she "substantiated" the victim's claim of sexual abuse by the defendant. This testimony was an impermissible expression of opinion as to the victim's credibility.

State v. Norton, __ N.C. App. __, __ S.E.2d __ (June 21, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNTQ0LTEucGRm). The trial judge did not commit plain error by allowing a witness accepted as an expert forensic toxicologist to testify about the effects of cocaine on the body. The defendant had argued that this testimony was outside of the witness's area of expertise. The court concluded that "[a]s a trained expert in forensic toxicology with degrees in biology and chemistry, the witness in this case was plainly in a better position to have an opinion on the physiological effects of cocaine than the jury."

Rape Shield Statute

State v. Edmonds, __ N.C. App. __, __ S.E.2d __ (June 21, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC00NjQtMS5wZGY=). (1) In a child sex case, the trial judge did not err by limiting the defendant's cross-examination of the prosecuting witness regarding inconsistent statements about her sexual history, made to the police and medical personnel. The evidence did not fit within any exception to Rule 412. The court went on to hold that any probative value of the evidence for impeachment purposes was outweighed by its prejudicial effect. (2) The trial court did not err by refusing to admit the victim's unredacted medical records containing statements regarding her prior sexual history, given that the records had little if any probative value.

Arrest, Search & Investigation

Miranda

State v. Carter, __ N.C. App. __, __ S.E.2d __ (June 21, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05NzQtMS5wZGY=). The defendant was not in custody when he made a statement to detectives. The defendant rode with the detectives to the police station voluntarily, without being frisked or handcuffed. He was told at least three times — once in the car, once while entering the police station, and once at the beginning of the interview — that he was not in custody and that he was free to leave at any time. He was not restrained during the interview and was left unattended in the unlocked interview room before the interview began. The defendant was not coerced or threatened. To the contrary, he was repeatedly asked if he wanted anything to eat or drink and was given food and a soda when he asked for it.

Stops

State v. Burke, __ N.C. App. __, __ S.E.2d __ (June 21, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMDg0LTEucGRm). Over a dissent, the court held that the trial judge erred by denying the defendant's motion to suppress when no reasonable suspicion supported a stop of the defendant's vehicle. The officer stopped the vehicle because the numbers on the 30-day tag looked low and that the "low" number led him to "wonder[] about the possibility of the tag being fictitious." The court noted that it has previously held that 30-day tags that were unreadable, concealed, obstructed, or illegible, justified stops of the vehicles involved. Here, although the officer testified that the 30-day tag was dirty and worn, he was able to read the tag without difficulty; the tag was not faded; the information was clearly visible; and the information was accurate and proper.

In re A.J.M-B, __ N.C. App. __, __ S.E.2d __ (June 21, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMzUwLTEucGRm). The trial court erred by denying the juvenile's motion to dismiss a charge of resisting a public officer when no reasonable suspicion supported a stop of the juvenile (the activity that the juvenile allegedly resisted). An anonymous caller reported to law enforcement "two juveniles in Charlie district . . . walking, supposedly with a shotgun or a rifle" in "an open field behind a residence." A dispatcher relayed the information to Officer Price, who proceeded to an open field behind the residence. Price saw two juveniles "pop their heads out of the wood line" and look at him. Neither was carrying firearms. When Price called out for them to stop, they ran around the residence and down the road.

Criminal Offenses

Homicide

State v. Carter, __ N.C. App. __, __ S.E.2d __ (June 21, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05NzQtMS5wZGY=). The trial court did not err by denying the defendant's motion to dismiss a charge of second-degree murder. The defendant, after being kicked in the face in a fight inside a nightclub, became angry about his injury, retrieved a 9mm semi-automatic pistol and loaded magazine from his car, and loaded the gun, exclaiming "Fuck it. Who wants some?" He then began firing toward the crowd, killing an officer. Evidence of the intentional use of a deadly weapon — here, a semi-automatic handgun — that proximately causes death triggers a presumption that the killing was done with malice. This presumption is sufficient to withstand a motion to dismiss a second-degree murder charge. The issue of whether the evidence is sufficient to rebut the presumption of malice in a homicide with a deadly weapon is then a jury question.

Robbery

State v. Speight, __ N.C. App. __, __ S.E.2d __ (June 21, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNDY3LTEucGRm). In an armed robbery case, there was sufficient evidence that the defendant took the victim's personal property by the use or threatened use of a knife. The victim awoke to find the defendant on top of her holding a knife to her throat. After struggling with him, she pleaded and negotiated with him for almost 90 minutes. The defendant acknowledged that he had already taken money from the victim's purse. However, when the defendant fled, he took a knife from her kitchen and the victim's sports bra and the victim never saw her purse again.

Assaults

State v. Wright, __ N.C. App. __, __ S.E.2d __ (June 21, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMjUxLTEucGRm). Citing *State v. Washington*, 141 N.C. App. 354 (2000), the court held that the defendant was properly charged and convicted of attempted murder and assault as to each victim, even though the offenses arose out of a single course of conduct involving multiple shots from a gun.

Resisting an Officer

In re A.J.M-B, __ N.C. App. __, __ S.E.2d __ (June 21, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMzUwLTEucGRm). The trial court erred by denying the juvenile's motion to dismiss a charge of resisting a public officer when no reasonable suspicion supported a stop of the juvenile (the activity that the juvenile allegedly resisted). An anonymous caller reported to law enforcement "two juveniles in Charlie district . . . walking, supposedly with a shotgun or a rifle" in "an open field behind a residence." A dispatcher relayed the information to Officer Price, who proceeded to an open field behind the residence. Price saw two juveniles "pop their heads out of the wood line" and look at him. Neither was carrying firearms. When Price called out for them to stop, they ran around the residence and down the road.

Impaired Driving

State v. Norton, __ N.C. App. __, __ S.E.2d __ (June 21, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNTQ0LTEucGRm). The evidence was sufficient to survive a motion to dismiss. Evidence of faulty driving, along with evidence of consumption

of alcohol and cocaine, is sufficient to show a violation of G.S. 20-138.1. Witnesses observed the defendant's behavior as he was driving, not sometime after. Multiple witnesses testified as to his faulty driving and other conduct, including that he "had a very wild look on his face" and appeared to be in a state of rage; drove recklessly without regard for human life; drove in circles on a busy street and on a golf course; twice collided with other motorists; drove on the highway at speeds varying between 45 and 100 mph; drove with the car door open and with his left leg and both hands hanging out; struck a patrol vehicle; and exhibited "superhuman" strength when officers attempted to apprehend him. Blood tests established the defendant's alcohol and cocaine use, and one witness testified that she smelled alcohol on the defendant.

Failing to Cause Attendance

State v. Jones, __ N.C. App. __, __ S.E.2d __ (June 21, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMjAyLTEucGRm). (1) The State's evidence was sufficient to survive a motion to dismiss charges of violating N.C.'s Compulsory Attendance Law. (2) The trial court did not err by failing to instruct the jury that it needed to determine whether the defendants had made a good faith effort to comply with the compulsory school attendance law.