Criminal Procedure

Counsel Issues

State v. Anderson, __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNTczLTEucGRm). Over a dissent, the court held that the trial court erred by allowing the defendant to waive counsel after accepting a waiver of counsel form but without complying with G.S. 15A-1242. Among other things, the trial court failed to clarify the specific charges or inform the defendant of the potential punishments or that he could request court-appointed counsel.

State v. Seymore, __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNTc4LTEucGRm). The trial court erred by allowing the defendant to waive counsel after accepting a waiver of counsel form but without complying with G.S. 15A-1242. Significantly, on the waiver form the defendant checked the box waiving his right to assigned counsel, not the box waiving his right to all assistance of counsel. Citing *State v. Callahan*, 83 N.C. App. 323, 324 (1986), the court noted that "[t]he record must affirmatively show that the inquiry was made and that the defendant, by his answers, was literate, competent, understood the consequences of his waiver, and voluntarily exercised his own free will." It continued, quoting *Callahan* and stating: "In cases where 'the record is silent as to what questions were asked of defendant and what his responses were' this Court has held, '[we] cannot presume that [the] defendant knowingly and intelligently waived his right to counsel[.]' When there is no 'transcription of those proceedings,' the defendant "is entitled to a new trial."

Indictment Issues

In re D.B., __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNDc2LTEucGRm). A juvenile petition alleging felony larceny was fatally defective because it contained no allegation that the alleged victim, the Crossings Golf Club, was a legal entity capable of owning property.

State v. Khouri, __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMDMwLTEucGRm). In sexual assault case involving a child victim, there was a fatal variance between the indictment, that alleged an offense date of March 30, 2000 – December 31, 2000, and the evidence, which showed that the conduct occurred in the Spring of 2001. The State never moved to amend the indictment.

Jury Argument and Deliberations

State v. Johnson, __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNDEwLTEucGRm). The trial court did not abuse its discretion by allowing the State to display an enhanced version (frame-by-frame presentation) of a video recording during closing argument and jury deliberations. The trial court correctly determined that the enhanced version was not new evidence since the original video had been presented in the State's case.

Verdicts

State v. Johnson, __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNDEwLTEucGRm). Guilty verdicts of trafficking in opium and selling and possessing with intent to sell and deliver a schedule III preparation of an opium derivative are not mutually exclusive. There is no support for the defendant's argument that a schedule III preparation of an opium derivative does not qualify as a "derivative . . . or preparation of opium" for purposes of trafficking.

Sentencing

State v. Arrington, __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTM0LTEucGRm). The defendant's right to be present when sentence is pronounced was not violated when the trial judge included in the judgment court costs and fees for community service that had not been mentioned in open court. The change in the judgment was not substantive. "[E]ach of the conditions imposed . . . was a non-discretionary byproduct of the sentence that was imposed in open court." Further, the court noted, payment of costs does not constitute punishment and, therefore, the imposition of costs on the defendant outside of his presence did not infringe upon his right to be present when sentence is pronounced.

Re-Sentencing

State v. Skipper, __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMjI1LTEucGRm). No violation of G.S. 15A-1335 occurred on resentencing. A jury found the defendant guilty of felonious breaking and entering, felonious larceny, felonious possession of stolen goods, and for being a habitual felon. The trial court consolidated the offenses for judgment and sentenced the defendant to 125-159 months of imprisonment. The appellate court subsequently vacated the felony larceny conviction and remanded for resentencing. At resentencing the trial court consolidated the offenses and again sentenced the defendant to 125-150 months. The defendant argued that because he received the same sentence even though one of the convictions had been vacated, the new sentence violated G.S. 15A-1335. The court disagreed, concluding that the pursuant to G.S. 15A-1340.15(b), having consolidated the sentences, the trial court was required to sentenced the defendant for the most serious offense, which it did at the initial sentencing and the resentencing.

Evidence

404(b) Evidence

State v. Flaugher, __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMDQ0LTEucGRm). In a maiming case in which the defendant was accused of attacking the victim with a pickaxe and almost severing his finger, no plain error occurred when the trial judge admitted 404(b) evidence that the defendant had previously attacked the victim with a fork and stabbed his finger. The 404(b) evidence was admitted to show absence of accident or mistake. Although the defendant argued that she never intended to purposefully strike the victim's finger with the pickaxe, the defendant knew from the fork incident that she could end up stabbing the victim's hand or fingers if she swung at him with a weapon and he attempted to defend himself. The evidence was thus relevant to whether the defendant intended to disable the victim or whether she accidentally struck his finger and did not intend to maim it. The court also rejected the defendant's argument that the 404(b) evidence was inadmissible because the State

had previously dismissed charges arising from the fork incident, distinguishing cases in which the defendants had been tried and acquitted of the 404(b) conduct.

State v. Khouri, __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMDMwLTEucGRm). In sexual assault case involving a child victim, no error occurred when the trial court admitted 404(b) evidence that the defendant engaged in sexual contact with another child to show common plan or scheme. The court rejected the defendant's argument that the acts were not sufficiently similar, concluding that both incidents occurred while the victims were in the care of the defendant, their grandfather; the victims were around the same age when the conduct began; for both victims, the conduct occurred more than once; and with both victim's, the defendant initiated the conduct by talking to them about whether they were old enough for him to touch their private parts. The court also determined that the acts met the temporal proximity requirement.

Confrontation Issues

State v. Castaneda, __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS03LTEucGRm). Because the statements at issue were not admitted for the truth of the matter asserted and therefore were not hearsay, their admission did not implicate the confrontation clause.

Hearsay

State v. Castaneda, __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS03LTEucGRm). The trial court did not err by denying the defendant's request to redact certain statements from a transcript of the defendant's interview with the police. In the statements at issue, an officer said that witnesses saw the defendant pick up a knife and stab the victim. The statements were not hearsay because they were not admitted for the truth of the matter asserted but rather to provide context for the defendants' answers and to explain the detectives' interviewing techniques. The court also noted that the trial court gave an appropriate limiting instruction.

Opinions

State v. Castaneda, __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS03LTEucGRm). The trial court did not err by denying the defendant's motion to redact an officer's statements in a transcript of an interview of the defendant in which the officer accused the defendant of telling a "lie" and giving an account of the events that was "bullshit" and like "the shit you see in the movies." The defendant argued that these statements were inadmissible opinion evidence about the defendant's credibility. The court noted that issue of the admissibility of an interrogator's statements during an interview that the suspect is being untruthful has not been decided by North Carolina's appellate courts. It concluded that because the officer's statements were part of an interrogation technique designed to show the defendant that the detectives were aware of the holes and discrepancies in his story and were not made for the purpose of expressing an opinion as to the defendant's credibility or veracity at trial, the trial court properly admitted the evidence. The court went on to note that investigators' comments reflecting on the suspect's truthfulness are not, however, always admissible. It explained that an interrogator's comments that he or she believes the suspect is lying are admissible only to the extent that they provide context to

a relevant answer by the suspect. Here, the officer's statements that he believed the defendant to be lying were admissible because they provided context for the defendant's inculpatory responses. For similar reasons the court rejected the defendant's argument that admission of these statements violated Rule 403.

State v. Khouri, __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMDMwLTEucGRm). In a child sexual abuse case, no plain error occurred when the trial court allowed the State's expert to testify that the victim exhibited some classic signs of a sexually abused child. The expert did not testify that the victim was in fact sexually abused.

Rape Shield

State v. Khouri, __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMDMwLTEucGRm). The trial court did not err by sustaining the State's objection under the Rape Shield Statute. After the victim had already testified that she was unsure whether her aborted child was fathered by the defendant or her boyfriend, the defense questioned a witness in order to show that the victim had sexual relations with a third man. Introducing such evidence would not have shown that the alleged acts were not committed by defendant given evidence that already had been admitted. Additional evidence would have only unnecessarily humiliated and embarrassed the victim while having little probative value.

Arrest, Search & Investigation

Stops

State v. White, __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTQzLTEucGRm). The trial court erred denying the defendant's motion to suppress. Officers responded to a complaint of loud music in a location they regarded as a high crime area. The officers did not see the defendant engaged in any suspicious activity and did not see any device capable of producing loud music. Rather, the defendant was merely standing outside at night, with two or three other men. These facts do not provide reasonable suspicion to justify an investigatory stop of the defendant. That being the case, the officer's encounter with the defendant was entirely consensual, which the defendant was free to and did ignore by running away. Once the officer caught up with the defendant and handcuffed him for resisting arrest, a seizure occurred. However, because the defendant's flight from the consensual encounter did not constitute resisting, the arrest was improper.

State v. Heien, __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS01Mi0xLnBkZg==). An officer improperly stopped a vehicle on the basis of a non-functioning brake light. The evidence indicated that although the left brake light was operating, the right light was not. There was no violation under G.S. 20-129(g) because that statute only requires one brake light to be operational. Nor was a stop proper for a violation of G.S. 20-129(d) because that statute deals with rear lamps, not brake lights. For similar reasons, the court also concluded that there was no violation of G.S. 20-183.3 (violation of safety inspection requirements).

State v. Salinas, __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNTYzLTEucGRm). Because the trial

court incorrectly applied a probable cause standard instead of a reasonable suspicion standard when determining whether a vehicle stop was unconstitutional, the court reversed the trial court's ruling suppressing evidence and remanded for a new determination under the correct standard. The State argued that the court should go on to make a determination, based upon the evidence presented at the suppression hearing, that a reasonable suspicion justifying the stop existed as a matter of law. The court declined to do so. Concurring with the court's ruling reversing the trial court's order, one judge dissented to the court's decision to remand, concluding that the court should make the relevant determination itself.

State v. Williams, __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC03MzgtMS5wZGY=). Over a dissent, the court held that the totality of the circumstances gave rise to a reasonable articulable suspicion that criminal activity was afoot justifying an extended detention of the defendant after the officer dealt with the initial purpose of the traffic stop. The officer stopped the vehicle in which the defendant was a passenger for having illegally tinted windows and issued a citation. The officer then asked for and was denied consent to search the vehicle. Thereafter he called for a canine trained in drug detection; when the dog arrived it alerted on the car and drugs were found. Based on uncertainties in and inconsistencies between the driver and the defendant's stories, the duration of the stop was justified. Specifically, the driver did not know the name of the city from which the pair travelled nor any details about their destination; the vehicle was travelling on I-77 purportedly from Louisville, KY to Myrtle Beach, SC which is an indirect route; the defendant initially stated that the driver was her cousin, but later stated she and the driver simply called each other cousins based on their close and long term relationship; and while the driver told the officer that the defendant owned the vehicle, the defendant stated that a friend of hers was the owner, but that she intended to purchase it.

Frisks

In re D.B., __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNDc2LTEucGRm). The trial court erred by admitting evidence obtained by an officer who exceeded the proper scope of a *Terry* frisk. After the officer stopped the juvenile, he did a weapons frisk and found nothing. When the officer asked the juvenile to identify himself, the juvenile did not respond. Because the officer thought he felt an identification card in the juvenile's pocket during the frisk, he retrieved it. It turned out to be a stolen credit card, which was admitted into evidence. Although officers who lawfully stop a person may ask a moderate number of questions to determine his or her identity and to gain information confirming or dispelling the officers' suspicions that prompted the stop, no authority suggests that an officer may physically search a person for evidence of his identity in connection with a *Terry* stop.

Criminal Offenses

Larceny

State v. Louali, __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNTkwLTEucGRm). The evidence was sufficient to sustain a conviction for receiving goods explicitly represented as stolen by a law enforcement officer. No specific words are required to be spoken to fulfill the "explicitly represented" element of the offense. Rather the statute "merely requires that a person knowingly receives or possesses property that was clearly expressed, either by words or conduct, as constituting stolen property." Here, the officer said that he was told that the business bought "stolen property, stolen

laptops" and twice reminded the defendant that "this stupid guy kept leaving the door open, [and] I kept running in the back of it and taking laptops." After the exchange of money for the laptops, the officer told the defendant that he could get more laptops.

Robbery

State v. Flaugher, __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMDQ0LTEucGRm). Where the evidence showed that the defendant's attack on the victim and the taking of his wallets constituted a single, continuous transaction, the evidence was sufficient to support an armed robbery charge. The court rejected the defendant's argument that she took the victim's wallets only as an afterthought. The court also rejected the defendant's argument that the evidence was insufficient because it was not positive that she possessed the weapon when she demanded the victim's money. The court noted that the defendant held the pickaxe when she assaulted the victim and had already overcome and injured him when she demanded his wallets and took his money; the pickaxe had already served its purpose in subduing the victim.

Assaults

State v. Flaugher, __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMDQ0LTEucGRm). The trial court did not err by instructing the jury that a pickaxe was a deadly weapon. The pickaxe handle was about 3 feet long, and the pickaxe weighed 9-10 pounds. The defendant swung the pickaxe approximately 8 times, causing cuts to the victim's head that required 53 staples. She also slashed his middle finger, leaving it hanging only by a piece of skin.

Maiming

State v. Flaugher, __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMDQ0LTEucGRm). In a maiming without malice case, the evidence was sufficient to show that the defendant intended to strike the victim's finger with the intent to disable him. The intent to maim or disfigure may be inferred from an act which does in fact disfigure the victim, unless the presumption is rebutted by evidence to the contrary. Here, the near severing of the victim's finger triggered that presumption, which was not rebutted.

Motor Vehicle Offenses

State v. Arrington, __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTM0LTEucGRm). The evidence was sufficient to sustain the defendant's conviction for impaired driving when there was evidence of two .08 readings. The court rejected the defendant's argument that since the blood alcohol reading was the lowest for which he could be convicted under the statute, the margin of error of the Intoxilyzer should be taken into account to undermine the State's case against him.

Resisting Arrest

State v. White, __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTQzLTEucGRm). The defendant's flight from a consensual encounter with the police did not constitute probable cause to arrest him for resisting an officer.

Defenses

Voluntary Intoxication

State v. Flaugher, __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMDQ0LTEucGRm). The trial court did not err by refusing to instruct on voluntary intoxication. Some evidence showed that the defendant had drunk two beers and "could feel it," had taken Xanax, and may have smoked crack cocaine. However, the defendant herself said she was not drunk and had not smoked crack. The defendant did not produce sufficient evidence to show that her mind was so completely intoxicated that she was utterly incapable of forming the necessary intent.