

Criminal Procedure

Pleas

State v. Demaio, __ N.C. App. __, __ S.E.2d __ (Nov. 1, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS00MDctMS5wZGY=>). The defendant's plea agreement impermissibly sought to preserve the right to appeal adverse rulings on his motions to dismiss and in limine when no right to appeal those rulings in fact existed. The court remanded, instructing that the defendant may withdraw his guilty plea and proceed to trial or attempt to negotiate another plea agreement that does not violate the law.

Conduct of the Trial Judge

State v. Carter, __ N.C. App. __, __ S.E.2d __ (Nov. 1, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS0zNi0xLnBkZg==>). In a child sexual assault case, the trial court did not commit plain error by impermissibly expressing an opinion when it described the child as the "victim" in its jury instructions.

Jury Instructions

State v. Carter, __ N.C. App. __, __ S.E.2d __ (Nov. 1, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS0zNi0xLnBkZg==>). In a child sexual offense case, the trial court committed plain error by failing to instruct on attempted sexual offense where the evidence of penetration was conflicting.

Sentencing

Aggravating Factors

State v. Barrow, __ N.C. App. __, __ S.E.2d __ (Nov. 1, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMCO5NzgtMS5wZGY=>). In a case in which the defendant was charged with killing his infant son, the trial court erred by failing to instruct the jury, as provided in G.S. 15A-1340.16(d), that evidence necessary to prove an element of the offense may not be used to prove a factor in aggravation. After the jury found the defendant guilty of second-degree murder, the trial court submitted two aggravating factors to the jury: that the victim was young and physically infirm and that the defendant took advantage of a position of trust. The jury found both factors and the defendant was sentenced in the aggravated range. With respect to the first factor, the court noted that the State's theory relied almost exclusively on the fact that because of the vulnerability of the young victim, shaking him was a reckless act indicating a total disregard of human life (the showing necessary for malice). Because this theory of malice is virtually identical to the rationale underlying submission of the aggravating factor, there is a reasonable possibility that the jury relied on the victim's age in finding both malice and the aggravating factor. The court came to a different conclusion as to the other aggravating factor. One judge dissented on a different issue.

Sentence Impermissibly Based on Exercise of Rights

State v. Jones, __ N.C. App. __, __ S.E.2d __ (Nov. 1, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS0yMi0xLnBkZg==>). The defendant's sentence was impermissibly based on his exercise of his constitutional rights. At the sentencing hearing, the trial court noted more than once that the defendant "was given an opportunity to plead guilty[,]"

and that his failure to plead was one of the "factors that the Court considers when the Court fashions judgment." The trial court also admonished the defendant and defense counsel for "unnecessarily" protracting the trial for 6 days when it should have only taken 2 days.

Restitution

State v. Jones, __ N.C. App. __, __ S.E.2d __ (Nov. 1, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS0yMi0xLnBkZg==>). In a drug case, the trial court erred by ordering the defendant to pay \$1,200.00 as restitution for fees from a private lab (NarTest) that tested the controlled substances at issue. Under G.S. 7A-304(a)(7), the trial court "shall" order restitution in the amount of \$600.00 for analysis of a controlled substance by the SBI. G.S. 7A-304(a)(8) allows the same restitution if a "crime laboratory facility operated by a local government" performs such an analysis as long as the "work performed at the local government's laboratory is the equivalent of the same kind of work performed by the [SBI]." The statute does not authorize restitution for analysis performed by an unlicensed private lab such as NarTest.

State v. Sullivan, __ N.C. App. __, __ S.E.2d __ (Nov. 1, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS0yOTctMS5wZGY=>). The trial court erred by ordering restitution when the defendant did not stipulate to the amounts requested and no evidence was presented to support the restitution worksheet.

Sex Offenders

In re Borden, __ N.C. App. __, __ S.E.2d __ (Nov. 1, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS0zMDYtMS5wZGY=>). The trial court erred by terminating the petitioner's sex offender registration. G.S. 14-208.12A provides that 10 years "from the date of initial county registration," a person may petition to terminate registration. In this case the convictions triggering registration occurred in 1995 in Kentucky. In 2010, after having been registered in North Carolina for approximately 1½ years, the petitioner received notice from Kentucky that he was no longer required to register there. He then filed a petition in North Carolina to have his registration terminated. The court concluded that the term "initial county registration" means the date of initial county registration in North Carolina, not the initial county registration in any jurisdiction. Since the petitioner had not been registered in North Carolina for at least ten years, the trial court did not have authority under G.S. 14-208.12A to terminate his registration.

State v. Carter, __ N.C. App. __, __ S.E.2d __ (Nov. 1, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS0zNi0xLnBkZg==>). The trial court erroneously required the defendant to enroll in lifetime SBM on the basis that first-degree sexual offense was an aggravated offense. The court reiterated that first-degree sexual offense is not an aggravated offense. The court remanded for a risk assessment and a new SBM hearing.

State v. Stokes, __ N.C. App. __, __ S.E.2d __ (Nov. 1, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS0zNzMtMS5wZGY=>). The trial court erred by ordering lifetime SBM. The trial court concluded that the defendant was not a sexually violent predator or a recidivist and that although the offenses involved the physical, mental, or sexual abuse of a minor, he did not require the highest possible level of supervision and monitoring. The trial court's finding that the defendant did not require the highest possible level of supervision and monitoring did not support its order requiring lifetime SBM.

Evidence

Hearsay

State v. Carter, __ N.C. App. __, __ S.E.2d __ (Nov. 1, 2011)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS0zNi0xLnBkZg==>). (1) In a child sexual assault case, the trial court did not err by declining to admit defense-proffered evidence offered under the hearsay exception for statements made purposes of medical diagnosis and treatment. The evidence was the victim's statement to a social worker made during "play therapy" sessions. Nothing indicated that the victim understood that the sessions were for the purpose of providing medical diagnosis or treatment. They began more than two weeks after an initial examination and were conducted at a battered women's shelter in a "very colorful" room filled with "board games, art supplies, Play-Doh, dolls, blocks, cars, [and] all [other types] of things for . . . children to engage in" rather than in a medical environment. Although the social worker emphasized that the victim should tell the truth, there was no evidence that she told her that the sessions served a medical purpose or that the victim understood that her statements might be used for such a purpose. (2) The trial court did not err by declining to admit the same statement as an excited utterance. Because the record contained no description of the victim's behavior or mental state, the court could not discern whether she was excited, startled, or under the stress of excitement when the statement was made.

Opinions

State v. Jones, __ N.C. App. __, __ S.E.2d __ (Nov. 1, 2011)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS0yMi0xLnBkZg==>). (1) In a drug case, the court followed *State v. Meadows*, 201 N.C. App. 707 (2010), and held that the trial court erred by allowing an offer to testify as an expert concerning the use and reliability of a NarTest machine. (2) The trial court erred by admitting testimony by an expert in forensic chemistry regarding the reliability of a NarTest machine. Although the witness's professional background and comparison testing provided some indicia of reliability, other factors required the court to conclude that the expert's proffered method of proof was not sufficiently reliable. Among other things, the court noted that no case has recognized the NarTest as an accepted method of analysis or identification of controlled substances and that the expert had not conducted any independent research on the machine outside of his duties as a NarTest employee. (3) Because a lab that tested a controlled substance was neither licensed nor accredited, expert testimony regarding testing done at that lab on the substances at issue was inadmissible. (4) The trial court improperly allowed an officer to testify that a substance was cocaine based on a visual examination. (5) However, that same officer was properly allowed to testify that a substance was marijuana based on visual identification. (6) In a footnote, the court indicated that the defendant's statement that he bought what he believed to be cocaine was insufficient to identify the substance at issue.

State v. Carter, __ N.C. App. __, __ S.E.2d __ (Nov. 1, 2011)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS0zNi0xLnBkZg==>). In a child sexual offense case, the trial court did not err by excluding defense evidence consisting of testimony by a social worker that during therapy sessions the victim was "overly dramatic," "manipulative," and exhibited

“attention seeking behavior.” The testimony did not relate to an expert opinion which the witness was qualified to deliver and was inadmissible commentary on the victim’s credibility.

Criminal Offenses

Homicide

State v. Barrow, __ N.C. App. __, __ S.E.2d __ (Nov. 1, 2011)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05NzgtMS5wZGY=>). In a case in which the defendant was charged with first-degree murder of his son but convicted of second-degree murder, the court (over a dissent) rejected the defendant’s argument that the trial court erred by submitting second-degree murder to the jury. The trial court instructed the jury on first-degree murder under the felony murder rule (with felony child abuse as the underlying felony), second-degree murder and involuntary manslaughter. The court concluded that for the defendant to be guilty of felony murder (based on felonious child abuse) the jury was required to find that the defendant used a deadly weapon; since the evidence would have permitted the jury to find that the defendant did not use a deadly weapon (here, his hands) but still killed the child with malice, the jury instructions were proper.

Sexual Assaults

State v. Carter, __ N.C. App. __, __ S.E.2d __ (Nov. 1, 2011)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS0zNi0xLnBkZg==>). There was sufficient evidence of anal penetration to support a sexual offense charge. Although the evidence was conflicting, the child victim stated that the defendant’s penis penetrated her anus. Additionally, a sexual assault nurse examiner testified that the victim’s anal fissure could have resulted from trauma to the anal area.

Child Abuse

State v. Stokes, __ N.C. App. __, __ S.E.2d __ (Nov. 1, 2011)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS0zMzMtMS5wZGY=>). Digital penetration of the victim’s vagina can constitute a sexual act sufficient to support a charge of child abuse under G.S. 14-318.4(a2) (sexual act).

Larceny and Related Offenses

State v. Cannon, __ N.C. App. __, __ S.E.2d __ (Nov. 1, 2011)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS0zMjctMS5wZGY=>). In a possession of stolen goods case, the court held that the evidence was insufficient to establish that the defendant knew that the item at issue, a four-wheeler, was stolen. Distinguishing *State v. Lofton*, 66 N.C. App. 79 (1984), the court noted, among other things, that the cosmetic changes to the four-wheeler were minimal, the defendant openly drove the four-wheeler, and the defendant did not flee from police. Additionally, there was no evidence regarding how the defendant got possession of the four-wheeler.

Robbery

State v. Rivera, __ N.C. App. __, __ S.E.2d __ (Nov. 1, 2011)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS0yNjgtMS5wZGY=>). (1) The State presented sufficient evidence to establish that a stun gun was a dangerous weapon for purposes of armed robbery. The court concluded, in part, that although the victim did not die or come close to

death, she was seriously injured. Given that serious injury “a permissive inference existed sufficient to support a jury determination that the stun gun was a dangerous weapon.” (2) The State presented sufficient evidence that the stun gun was used in a way that endangered or threatened the victim’s life. The court noted that the victim was tased, suffered significant pain, fell, injured her rotator cuff, endured two surgeries and extensive physical therapy, and two years later still experienced pain and a limited range of motion in her arm.

Defenses

Duress

State v. Stokes, __ N.C. App. __, __ S.E.2d __ (Nov. 1, 2011)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS0zNzMtMS5wZGY=>). The court rejected the defendant’s argument that he could not be convicted of aiding and abetting a sexual offense and child abuse by sexual act on grounds that the person who committed the acts—his son—was under duress from the defendant. Even if the son was under duress, his acts were still criminal.

Post-Conviction

Motion for Appropriate Relief

State v. Sullivan, __ N.C. App. __, __ S.E.2d __ (Nov. 1, 2011)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS0yOTctMS5wZGY=>). The trial court did not abuse its discretion by denying the defendant’s motion for appropriate relief (MAR) made under G.S. 15A-1414 without first holding an evidentiary hearing. Given that the defendant’s MAR claims pertained only to mitigating sentencing factors and the defendant had been sentenced in the presumptive range, the trial judge could properly conclude that the MAR was without merit and that the defendant was not entitled to an evidentiary hearing.