

## **Criminal Procedure**

### **Charging Issues**

*State v. Lee*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Jan. 17, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS02MzctMS5wZGY=>). There was no fatal variance between an indictment charging assault with a deadly weapon with intent to kill inflicting serious injury and the evidence at trial. The indictment alleged the deadly weapon to be a handgun while the trial evidence showed it was an AK-47 rifle. The court reasoned: “both a handgun and an AK-47 rifle are a type of gun, are obviously dangerous weapons, and carry the same legal significance.” Moreover, the defendant failed to demonstrate that the variance caused prejudice.

*State v. Ballance*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Jan. 17, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS02MjAtMS5wZGY=>). For reasons discussed in the opinion, the court held that misdemeanor statements of charges alleging violations of G.S. 113-291.1 (manner of taking wild animals and wild birds) were not fatally defective where the charging instruments tracked the statutory language. The court rejected the argument that G.S. 113-291.1(b)(2) creates a separate offense for each and every type of bait listed.

### **Discovery**

*State v. Pender*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Jan. 17, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS02NDctMS5wZGY=>). (1) The trial court did not abuse its discretion by denying the defendant’s motion for a mistrial on grounds that the State failed to provide the defendant with additional discovery after a meeting with co-defendant William Brown gleaned new information. After recognizing potential discovery violations by the State, the trial court instructed defense counsel to uncover any discrepancies in Brown’s testimony through cross-examination. After doing so, the defense renewed its mistrial motion. Although the trial court denied that motion, it granted the defense a recess “to delve into that particular matter” and ordered the State to memorialize all future discussions with Brown. All of the trial court’s remedies were permissible and were not an abuse of discretion. Additionally, the trial court did not err by denying the defendant’s mistrial motion; that remedy is appropriate only where the improprieties make it impossible to attain a fair and impartial verdict. (2) The trial court did not err by denying the defendant’s request for a jury instruction on voluntary manslaughter based on imperfect self-defense where, among other things, the State filed a motion requesting that the defendant provide voluntary discovery outlining the defenses he intended to assert at trial but the defendant failed to provide the State with the defenses or the requisite notice required to assert a theory of self-defense under G.S. 15A-905(c)(1).

### **Speedy Trial Issues**

*State v. Lee*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Jan. 17, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS02MzctMS5wZGY=>). The trial court did not err by denying the defendant’s motion to dismiss the charges on grounds of a speedy trial violation. The time between arrest and trial was approximately twenty-two months. Although the defendant asserted that the State was responsible for the delay by not calendaring his competency hearing until nearly ten months after he completed a competency evaluation, the court could not determine what caused this scheduling delay. It noted that during this time the defendant filed numerous complaints with the State Bar concerning defense counsel and repeatedly asked the trial court to remove his counsel. Also, during this time one of the victims was out of the country receiving medical treatment for

his injuries and was unavailable. Although troubled by the delay, the court concluded that given the defendant's actions regarding appointed counsel and the availability of the victim, "we cannot say the delay was due to any willfulness or negligence on the part of the State, especially in light of the fact that defendant has made no showing of such on appeal." The court went on to note that although the defendant repeatedly attempted to assert his speedy trial right, he failed to show actual and substantial prejudice resulting from the delay.

### **Pleas and Plea Agreements**

*State v. Rico*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Jan. 17, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMCOxNTM2LTEucGRm>). Over a dissent, the court held that where there was a mistake in the plea agreement and where the defendant fully complied with the agreement, and the risk of any mistake in a plea agreement must be borne by the State. According to the court, both parties mistakenly believed that the aggravating factor of use of a firearm could enhance a sentence for voluntary manslaughter by use of that same firearm. The court determined that the State remains bound by the plea agreement and that the defendant must be resentenced on his guilty plea to voluntary manslaughter. The dissenting judge argued that the proper remedy was to set aside the plea arrangement and remand for disposition of the original charge (murder).

### **Jury Selection**

*State v. Hammonds*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Jan. 17, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0yNzEtMS5wZGY=>). The trial court committed reversible error by refusing to allow the defendant, after the jury was impanelled, to exercise a remaining peremptory challenge to excuse a juror who had lunch with a friend who was a lawyer in the district attorney's office. Citing *State v. Holden*, 346 N.C. 404 (1997), and *State v. Thomas*, 195 N.C. App. 593 (2009), the court held that because the trial court reopened voir dire and because the defendant had not exhausted all of his peremptory challenges, the trial court was required to allow the defendant to exercise a peremptory challenge to excuse the juror. After a lunch break at trial, defense counsel reported that he had seen juror number 8 having lunch with a lawyer from the district attorney's office. Counsel said that if he had known of the juror's connection with that office, he "probably would have used one of [his] strikes against them." The jurors were returned to the courtroom and asked whether any of them had lunch with a member of the district attorney's office. Juror number 8 indicated that he had done so, but that they had not discussed the case. After removing the other jurors, the trial judge allowed both sides to question juror number 8. Thereafter defense counsel asked that the juror be removed, noting that he had two strikes left. The trial court denied the motion. The court noted that after a jury has been impaneled, further challenge of a juror is a matter within the trial court's discretion. However, when the trial court reopens voir dire, each party has the absolute right to exercise any remaining peremptory challenges. In this case, because the trial court reopened voir dire, the defendant had an absolute right to exercise his remaining challenges.

*State v. Pender*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Jan. 17, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS02NDctMS5wZGY=>). (1) The trial court did not abuse its discretion by denying the defendant's motion to strike a juror for cause or his request for an additional peremptory challenge. The defendant argued that a juror should have been excused for cause based on his comments during voir dire that he knew "things that [he] probably shouldn't know, knowing some of the details." Asked to elaborate, he indicated that he had read about the case in

the newspaper. The trial court and the defendant then inquired further as to whether the juror could follow the law and be impartial. The juror indicated that he could put aside what he had read and make a decision based on the evidence. The court noted that the trial court was very careful to give considerable attention to its determination of whether the juror's prior knowledge of the case would impair his ability to fairly evaluate the evidence and in accordance with trial court's instructions. (2) The court rejected the defendant's argument that the State used six of its peremptory challenges to excuse prospective African-American jurors in violation of *Batson*. At a *Batson* hearing, the State offered race-neutral explanations as to why it excused each juror, including unresponsiveness, deceit, failure to make eye contact, alleged acquaintance with the defendant's former girlfriend, an extensive history of purchasing pawn tickets, and prior employment at the store where the crime occurred. After weighing these race-neutral explanations, the trial court found that the defendant had not demonstrated purposeful discrimination. The court concluded that "[a]fter careful review, we cannot find error that would justify overturning the trial court's ruling."

### **Restraint of the Defendant During Trial**

*State v. Lee*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Jan. 17, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS02MzctMS5wZGY=>). Although the trial court abused its discretion by requiring the defendant to remain shackled during his trial, the error was harmless in light of the trial court's curative instruction and the overwhelming evidence of guilt. The court "strongly caution[ed] trial courts to adhere to the proper procedures regarding shackling of a defendant" [*Author's note*: For the section of the superior court judge's benchbook outlining the law on this issue, see:

<http://www.sog.unc.edu/sites/www.sog.unc.edu/files/Physically%20Restraining%20the%20Defendant%20During%20Trial.pdf>].

### **Mistrial**

*State v. Sistler*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Jan. 17, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMDM1LTEucGRm>). The trial court did not abuse its discretion in this murder case by denying the defendant's motion for a mistrial made in response to a statement by the prosecutor during the State's direct examination of a witness that "[t]here was testimony in this case that a shot was fired from a shotgun in the hallway of the residence." The court agreed with the defendant that the statement was misleading given that no witness had testified that the shotgun was fired in the hallway. However, trial court took steps to mitigate the impact of the statement by sustaining the defendant's objection to it and instructing the jury to disregard the statement. The court also rejected the defendant's argument that his mistrial motion should have been granted because the prosecutor's statement violated an earlier suppression order. The suppression order prohibited the State from introducing testimony relating to SBI ballistics testing regarding the shotgun. The prosecutor's statement did not refer to the SBI testing and thus did not violate the prior order.

### **Final Argument**

*State v. Hogan*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Jan. 17, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS01ODAtMS5wZGY=>). The trial court committed reversible error by denying the defendant the right to the final argument based on its ruling that he had "introduced" evidence within the meaning of Rule 10 of the General Rules of Practice for the

Superior and District Courts during his cross-examination of the victim. During that cross defense counsel read aloud several portions of the victim's earlier statement to an officer, in what appears to have been an attempt to point out inconsistencies between the victim's trial testimony and his prior statement; defense counsel also and asked the victim questions, including whether he had told the officer everything that happened when he provided his statement. The statements read and referenced by defense counsel directly related to the victim's testimony on direct examination. Furthermore, defense counsel never formally introduced the statement into evidence. Thus, the defendant never "introduced" evidence within the meaning of Rule 10.

*State v. Matthews*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Jan. 17, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0zNTYtMS5wZGY=>). Because the defendant did not present any evidence at trial, the trial court committed reversible error by denying the defendant final closing argument. Defense counsel cross-examined an officer who responded to a call about the break-in and identified defense Exhibit 2, a report made by that officer following his investigation. During cross defense counsel elicited the officer's confirmation that, after viewing video surveillance footage, a man named Basil King was identified as a possible suspect. The trial court denied the defendant's motion to make the final closing argument because it believed this cross-examination constituted the introduction of evidence pursuant to Rule 10 of the General Rules of Practice for the Superior and District Courts. Although the defendant introduced for the first time evidence in the officer's report that Basil King was a suspect, the defendant did not introduce the officer's actual report into evidence, nor did he have the officer read the report to the jury. Furthermore, this evidence was relevant to the investigation and was contained in the officer's own report. It was the State, the court noted, that first introduced testimony by the officer and other witnesses concerning the investigation and the evidence leading the police to identify the defendant as a suspect. If concluded: "We cannot say that the identification of other suspects by the police constituted new evidence that was not relevant to any issue in the case." (quotation omitted). Therefore, this testimony cannot be considered the introduction of evidence pursuant to Rule 10.

### **Jury Instructions**

*State v. Surratt*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Jan. 17, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0yMzktMi5wZGY=>). No plain error occurred when the trial judge referred to the complainant as the victim several times in the jury instructions.

### **Jury Deliberations**

*State v. Lee*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Jan. 17, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS02MzctMS5wZGY=>). The court rejected the defendant's argument that the trial court's instructions to the jury coerced a verdict. The jury retired to begin deliberations at 3:38 p.m. At 5:51 p.m., the trial judge brought the jury into the courtroom to inquire about its progress. The jury indicated that it had reached unanimous verdicts on two of the four charges. The trial judge then allowed a twenty-minute recess, giving the following challenged instruction:

What I am going to do at this point is allow you to take a recess for about 20 minutes[.]  
If anyone needs during this 15 or 20 minute recess to call someone, a family member, to let them know that you are going to be delayed – but we are going to stay here this evening with a view towards reaching a unanimous verdict on the other two. That's

where we are. I want everyone to know that. If you need to call someone to let them know you will be delayed, that's fine.

After the recess, the jury resumed its deliberations. Eleven minutes later the jury returned unanimous verdicts in all four cases. Considering the totality of the circumstances, the instructions were not coercive.

### **Sentencing**

*State v. Rico*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Jan. 17, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMC0xNTM2LTEucGRm>). (1) Even though the defendant pleaded guilty to a crime and admitted an aggravating factor pursuant to a plea agreement, the trial judge still was required to find that an aggravating factor existed and that an aggravated sentence was appropriate. Failure to do so rendered the sentence invalid. (2) The court vacated a restitution award that was not supported by competent evidence. (3) Where, as a here, the use of a deadly weapon was necessary to prove the unlawful killing element of the pleaded-to offense of voluntary manslaughter, use of a deadly weapon could not also be used as an aggravating factor.

*State v. Watkins*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Jan. 17, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS03NzAtMS5wZGY=>). The evidence supports the trial court's restitution award for the value of a Honda Accord automobile. The prosecutor introduced documentation that the car was titled in the name of Moses Blunt and that the robbery victim paid \$3,790 to Blunt to purchase the car. The prosecutor submitted both the title registration of the car, as well as a copy of the purchase receipt. Additionally, the victim testified at trial that he had paid \$3,790 for the car but due to insurance issues, the car was still titled in his roommate's name. Although the victim did not identify his roommate, the prosecutor's introduction of the actual title registration supports the fact that Blunt was the title owner and that the car was worth \$3,790 at the time of the transaction, which occurred shortly before the robbery.

### **Evidence**

#### **Authentication**

*State v. Cook*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Jan. 17, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS03NjctMS5wZGY=>). For reasons discussed in the opinion, the court held that footage from a surveillance video was properly authenticated.

#### **404(b) Evidence**

*State v. Matthews*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Jan. 17, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0zNTYtMS5wZGY=>). Evidence of a break-in by the defendant, occurring after the break-in in question, was properly admitted under Rule 404(b). DNA evidence sufficiently linked the defendant to the break-in and the evidence was probative of intent, identity, modus operandi, and common scheme or plan.

#### **Miscellaneous Evidence Cases**

*State v. Matthews*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Jan. 17, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0zNTYtMS5wZGY=>). The trial court did

not err by denying the defendant's motion to exclude DNA evidence. The alleged crime occurred at a convenience store. An officer collected blood samples from the scene, including blood from cigarette cartons. The defendant argued that the cigarette cartons from which samples were taken should have been preserved. The court noted that the defendant did not argue any bad faith on the part of law enforcement officers, nor did he identify any irregularities in the collection or analysis of the samples that would call into question the results of the analysis. Therefore, the court concluded, the defendant failed to demonstrate any exculpatory value attached to the cigarette cartons from which the blood samples were collected.

## **Arrest, Search & Investigation**

### **Searches**

*State v. Ballance*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Jan. 17, 2012) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS02MjAtMS5wZGY=>). The trial court did not err by rejecting the defendant's motion to suppress evidence obtained by officers when they entered the property in question. The court concluded that the property constituted an "open field," so that the investigating officers' entry onto the property and the observations made there did not constitute a "search" for Fourth Amendment purposes. The property consisted of 119 acres of wooded land used for hunting and containing no buildings or residences.

### **Identification**

*State v. Watkins*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Jan. 17, 2012) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS03NzAtMS5wZGY=>). A pretrial show-up was not impermissibly suggestive. The robbery victim had ample opportunity to view the defendant at the time of the crime and there was no suggestion that the description of the perpetrator given by the victim to the police officer was inaccurate. During the show-up, the victim stood in close proximity to the defendant, and the defendant was illuminated by spotlights and a flashlight. The victim stated that he was "sure" that the defendant was the perpetrator, both at the scene and in court. Also, the time interval between the crime and the show-up was relatively short.

## **Criminal Offenses**

### **Homicide**

*State v. Sistler*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Jan. 17, 2012) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMDM1LTEucGRm=>). The trial court did not err by denying the defendant's motion to dismiss a murder charge. Viewing the evidence in the light most favorable to the State, the defendant drove to Ms. Brown's residence, uninvited, after sending threatening text messages to Brown expressing anger towards her and her relationship with the victim, Mr. Charlton. When defendant saw Charlton's vehicle in the driveway he grabbed his loaded, sawed off shotgun. He entered Brown's home and opened fire in Charlton's direction, killing Charlton with a wound to his chest. Charlton was able to fire off several rounds before succumbing to his injuries. This is substantial evidence from which a jury could find that the defendant acted with premeditation, deliberation, and malice and that the defendant did not act in self-defense.

### **Assaults**

*State v. Spencer*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Jan. 17, 2012) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS04NzMtMS5wZGY=>). Based on the manner of its use, a car was a deadly weapon as a matter of law. The court based its conclusion on the vehicle's high rate of speed and the fact that the officer had to engage in affirmative action to avoid harm.

### **Robbery**

*State v. Watkins*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Jan. 17, 2012) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS03NzAtMS5wZGY=>). The evidence was sufficient to establish that the defendant took the victim's car when the defendant forced the victim at gunpoint to take the defendant as a passenger in the vehicle. The fact that the victim was "still physically present in the car cannot negate the reasonable inference that defendant's actions were sufficient to bring the car under his sole control."

### **Burglary**

*State v. Watkins*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Jan. 17, 2012) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS03NzAtMS5wZGY=>). An entering did not occur for purposes of burglary when the defendant used a shotgun to break a window, causing the end of the shotgun to enter the premises. The court reiterated that to constitute an entry some part of the defendant's body must enter the premises or the defendant must insert into the premises some tool that is intended to be used to commit the felony or larceny therein (such as a hook to grab an item).

### **Wildlife Offenses**

*State v. Ballance*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Jan. 17, 2012) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS02MjAtMS5wZGY=>). The evidence was sufficient to establish the offense of taking bear with bait.

### **Error Correction**

*State v. Rico*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Jan. 17, 2012) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMCOxNTM2LTFucGRm>). Where the trial judge erroneously sentenced the defendant to an aggravated term without finding that an aggravating factor existed and that an aggravated sentence was appropriate, a second judge erroneously treated this as a clerical that could be corrected simply by amending the judgment.

### **Ineffective Assistance of Counsel**

*State v. Spencer*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Jan. 17, 2012) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS04NzMtMS5wZGY=>). Although concluding that counsel admitted the defendant's guilt to the jury, the court dismissed the defendant's *Harbison* claim without prejudice to his right to file a motion for appropriate relief on that basis in the trial court. Counsel conceded guilt to resisting a public officer and eluding arrest when he stated, among other things, that the defendant "chose to get behind the wheel after drinking, and he chose to run from the police[,] and "[the officer] was already out of the way and he just kept on going, kept running

from the police.” However, the record did not indicate whether the defendant had consented to these admissions.