

Criminal Procedure

Counsel Issues

State v. Ramirez, __ N.C. App. __, __ S.E.2d __ (April 17, 2012) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMzMxLTEucGRm>). The trial court committed reversible error by requiring the defendant to proceed pro se in a probation revocation hearing when the defendant had waived only the right to assigned counsel not the right to all assistance of counsel.

Motions to Dismiss

State v. Barnhart, __ N.C. App. __, __ S.E.2d __ (April 17, 2012) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS02MjMtMS5wZGY=>). There was sufficient evidence that the defendant was the perpetrator of the charged offenses so that the trial court did not err by denying the defendant's motion to dismiss. The crimes occurred at approximately 1:00 am at the victim's home. The intruder took a fifty-dollar bill, a change purse, a cell phone, and jewelry. The victim's description of the perpetrator was not inconsistent with the defendant's appearance. An eyewitness observed the defendant enter a laundromat near the victim's home at approximately 2:00 am the same morning. The stolen change purse, cell phone, and jewelry were found in the laundromat. No one other than the defendant entered the laundromat from midnight that evening until when the police arrived. The defendant admitted using a fifty-dollar bill to purchase items that morning and gave conflicting stories about how he obtained the bill.

State v. Foye, __ N.C. App. __, __ S.E.2d __ (April 17, 2012) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMjgxLTEucGRm>). In an impaired driving and driving while license revoked case there was sufficient evidence other than the defendant's extrajudicial confession to establish that the defendant was driving the vehicle. Among other things, the vehicle was registered to the defendant and the defendant was found walking on a road near the scene, he had injuries suggesting that he was driving, and he admitting being impaired.

Jury Argument

State v. Foust, __ N.C. App. __, __ S.E.2d __ (April 17, 2012) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMDY3LTEucGRm>). (1) In a rape case, the trial court was not required to intervene ex mero motu when the State asserted in closing: "What happened . . . is no different than a hunter in the field, a beast in the field sitting [sic] a prey, stalking the prey, learning the prey, and at some point in time, eventually taking what he wants, and that's what happened here." (2) The prosecutor did not improperly refer to the defendant's failure to testify but rather properly commented on the defendant's failure contradict or challenge the State's evidence.

Jury Instructions

State v. Foye, __ N.C. App. __, __ S.E.2d __ (April 17, 2012) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMjgxLTEucGRm>). The trial court did not commit plain error in its jury instruction on reasonable doubt. When reinstructing on this issue, the trial court gave the pattern instruction and added: “[r]emember, nothing can be proved 100 percent basically, but beyond a reasonable doubt. So you have to decide for yourself what is reasonable, what makes sense.” The court also held that this additional instruction did not violate the trial court’s duty of impartiality or coerce a verdict.

Sentencing Probation

State v. Long, __ N.C. App. __, __ S.E.2d __ (April 17, 2012) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS05NjltMS5wZGY=>). On appeal from judgment revoking probation, the defendant could not challenge the trial court’s jurisdiction to enter the original judgment as this constituted an impermissible collateral attack on the original judgment.

Evidence Crawford Issues

State v. Glenn, __ N.C. App. __, __ S.E.2d __ (April 17, 2012) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS04OTctMS5wZGY=>). A non-testifying victim’s statement to a law enforcement officer was testimonial. In the defendant’s trial for kidnapping and other charges, the State introduced statements from a different victim (“the declarant”) who was deceased at the time of trial. The facts surrounding the declarant’s statements were as follows: An officer responding to a 911 call concerning a possible sexual assault at a Waffle House restaurant found the declarant crying and visibly upset. The declarant reported that while she was at a bus stop, a driver asked her for directions. When she leaned in to give directions, the driver grabbed her shirt and told her to get in the vehicle. The driver, who had a knife, drove to a parking lot where he raped and then released her. The declarant then got dressed and walked to the Waffle House. The trial court determined that because the purpose of the interrogation was to resolve an ongoing emergency, the declarant’s statements were nontestimonial. Distinguishing the U.S. Supreme Court’s decision in *Michigan v. Bryant*, the court of appeals disagreed. The court noted that when the officer arrived “there was no ongoing assault, the declarant had no signs of trauma, no suspect was present, and the officer did not search the area for the perpetrator or secure the scene. The officer asked the declarant if she wanted medical attention (she refused) and what happened. Thus, the court concluded, the officer “assessed the situation, determined there was no immediate threat and then gathered the information.” Furthermore, the declarant told the officer that the perpetrator voluntarily released her. The court concluded that even if the officer believed there was an ongoing emergency when he first arrived, he determined that no ongoing emergency existed when he took the statement. The court also determined that there was no ongoing threat to the victim, law enforcement or the public. It noted that the defendant voluntarily released the declarant and drove away and there was no indication that he would return to harm her further. As for danger to the officer, the court found no evidence that the

defendant was ever in the Waffle House parking lot or close enough to harm the officer with his weapon, which was a knife not a gun. The court also concluded that because “the evidence suggested defendant’s motive was sexual and did not rise to the level of endangering the public at large.” Regarding the overall circumstances of the encounter, the court noted that because there was only one officer, “the circumstances of the questioning were more like an interview,” in which the officer asked what happened and the declarant narrated the events. It continued, noting that since the declarant “had no obvious injuries, and initially refused medical attention, the primary purpose of her statement could not have been to obtain medical attention.” Furthermore, she “seemed to have no difficulty in recalling the events, and gave [the officer] a detailed description of the events, implying that her primary purpose was to provide information necessary for defendant’s prosecution.” In fact, the court noted, she told the officer that she wanted to prosecute the suspect. The court concluded that the statement was “clearly” testimonial:

[T]here was no impending danger, because the driver released [the declarant] and [the declarant] was waiting at a restaurant in a presumably safe environment. In addition, [the officer] questioned her with the requisite degree of formality because the questioning was part of an investigation, outside the defendant’s presence. [The officer] wanted to determine “what happened” rather than “what is happening.” Furthermore, [the declarant’s] statement deliberately recounted how potentially criminal events from the past had progressed and the interrogation occurred after the described events ended. Finally, [the declarant] gave the officer a physical description of the driver, how he was dressed, his approximate age, and the type of vehicle he was driving. For a criminal case, this information would be “potentially relevant to later criminal prosecution.” (citations omitted).

Character Evidence

State v. Williams, __ N.C. App. __, __ S.E.2d __ (April 17, 2012) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xNDk2LTEucGRm>). In a murder case where a defense witness testified that the defendant was not a violent person, thereby placing a pertinent character trait at issue, no plain error occurred when the State cross-examined the witness about whether she knew of the defendant’s prior convictions or his pistol whipping of a person.

404(b) Evidence

State v. Glenn, __ N.C. App. __, __ S.E.2d __ (April 17, 2012) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS04OTctMS5wZGY=>). In a kidnapping, assault and indecent exposure case, the trial court erred by admitting testimony from a witness about a sexual encounter with the defendant to show identity, modus operandi, intent, plan, scheme, system, or design. The encounter occurred nine years earlier. The witness testified that the partially clothed defendant approached her on foot while she was walking. He exposed his penis to her and grabbed at her breasts and buttocks. Although he followed her up a driveway, he did not try to restrain her. In the case at hand, however, the victim got in a man’s vehicle and discovered that he was partially clothed.

The man called her a bitch and grabbed her hair and shirt as she attempted to exit the vehicle, but there was no evidence of a sexual touching. The court concluded: "Given the differences in the two instances, as well as the remoteness in time of the incident . . . admission of the evidence was error.

State v. Foust, __ N.C. App. __, __ S.E.2d __ (April 17, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMDY3LTEucGRm>). In a rape case, the trial court did not err by admitting evidence that the defendant assaulted a male visiting the victim's home and called the victim a whore and slut upon arriving at her house and finding a male visitor. Rejecting the defendant's argument that these incidents bore no similarity to the rape at issue, the court noted that the victim was present for both incidents and that her state of mind was relevant to why she did not immediately report the rape.

State v. Conley, __ N.C. App. __, __ S.E.2d __ (April 17, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMjUxLTEucGRm>). In a case involving convictions for uttering a forged instrument and attempting to obtain property by false pretenses in connection with a fraudulent check, the trial court did not err by admitting evidence of a second fraudulent check. The second check was virtually identical to the first one, except that it was drawn on a different bank. The fact that the defendant possessed the second check undermined the defendant's explanation for how he came into possession of the first check and proved intent to commit the charged crimes. Also, the evidence passed the Rule 403 balancing test.

Arrest, Search & Investigation

Search Warrants

In Re Baker, __ N.C. App. __, __ S.E.2d __ (April 17, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0zMTMtMS5wZGY=>). Where search warrants were unsealed in accordance with procedures set forth in a Senior Resident Superior Court Judge's administrative order and where the State failed to make a timely motion to extend the period for which the documents were sealed, the trial judge did not err by unsealing the documents. At least 13 search warrants were issued in an investigation. As each was issued, the State moved to have the warrant and return sealed. Various judges granted these motions, ordering the warrants and returns sealed "until further order of the Court." However, an administrative order in place at the time provided that an order directing that a warrant or other document be sealed "shall expire in 30 days unless a different expiration date is specified in the order." Subsequently, media organizations made a public records request for search warrants more than thirty days old and the State filed motions to extend the orders sealing the documents. A trial judge ordered that search warrants sealed for more than thirty days at the time of the request be unsealed. The State appealed. The court began by rejecting the State's argument that the trial court erred by failing to give effect to the language in the original orders that the records remain sealed "until further order of the Court." The court noted the validity of the administrative order and the fact that the trial judge acted in compliance with it. The court also rejected the State's argument that the trial judge erred by having the previously sealed documents delivered without any motion, hearing, or notice to the State and without findings of fact.

The court noted that the administrative order afforded an opportunity and corresponding procedure for the trial court to balance the right of access to records against the governmental interests sought to be protected by the prior orders. Specifically, the State could make a motion to extend the orders. Here, however, the State failed to make a timely motion to extend the orders. Therefore, the court concluded, the administrative order did not require the trial court to balance the right to access against the governmental interests in protecting against premature release. The court further found that the State had sufficient notice given that all relevant officials were aware of the administrative order.

Criminal Offenses

Embezzlement

State v. Smalley, __ N.C. App. __, __ S.E.2d __ (April 17, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS05MTgtMS5wZGY=>). (1) In an embezzlement case in which the defendant was alleged to have improperly written company checks to herself, there was sufficient evidence that the defendant was an agent of the company and not an independent contractor. Two essential elements of an agency relationship are the authority of the agent to act on behalf of the principal and the principal's control over the agent. Here, the defendant had authority to act on behalf of the corporation because she had full access to the company's checking accounts, could write checks on her own, and delegated the company's funds. Evidence of the company's control over the defendant included that she was expected to meet several responsibilities and that a member of the company communicated with her several times a week. (2) There was sufficient evidence that the defendant had constructive possession of the corporation's money when she was given complete access to the corporation's accounts and was able to write checks on behalf of the corporation and to delegate where the corporation's money went.

Frauds

State v. Conley, __ N.C. App. __, __ S.E.2d __ (April 17, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMjUxLTEucGRm>). The evidence was sufficient to sustain the defendant's convictions for uttering a forged instrument and attempting to obtain property by false pretenses. Both offenses involved a fraudulent check. The court rejected the defendant's argument that there was insufficient evidence to establish that the check was falsely made. An employee of the company that allegedly issued the check testified that she had in her possession a genuine check bearing the relevant check number at the time the defendant presented another check bearing the same number. The employee testified the defendant's check bore a font that was "way off" and "really different" from the font used by the company in printing checks. She identified the company name on the defendant's check but stated "it's not our check."

Post-Conviction

DNA Testing

State v. Hewson, __ N.C. App. __, __ S.E.2d __ (April 17, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMjA4LTEucGRm>). The trial court did not err by denying the defendant's motion for post-conviction independent DNA testing. The defendant was convicted of first-degree murder (based on premeditation and deliberation and felony-murder predicated upon discharge of a weapon into occupied property), discharge of a weapon into occupied property, and misdemeanor violation of a domestic violence protective order. The defendant argued that the trial court erred by concluding that DNA testing was not material to the defense. Specifically, he asserted that the State's theory of the case indicated that the victim was inside the home and the defendant was outside when he discharged his handgun. The defendant further argued that blood on his pants was never tested. He asserted that if DNA evidence indicates the blood belonged to the victim, the defendant could argue that he was in close proximity to the victim, that he did not shoot from outside the residence, and that he would have the basis for a heat-of-passion defense to first-degree murder. The court rejected this argument, concluding that the evidence submitted by defendant in support of his motion supported the jury's verdict and did not support a jury instruction on the heat-of-passion defense. It noted: "Defendant's contention that he was in close proximity to the victim at some point, even if supported by DNA evidence, does not minimize the significance of or otherwise refute the substantial evidence that defendant fired a gun into occupied property and that the victim suffered fatal gunshot wounds as a result."

Motions for Appropriate Relief

State v. Jackson, __ N.C. App. __, __ S.E.2d __ (April 17, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS04NzYtMS5wZGY=>). The trial court erred by summarily denying the defendant's motion for appropriate relief (MAR) and accompanying discovery motion. In the original proceeding, the trial court denied the defendant's motion to suppress in part because it was not filed with the required affidavit. After he was convicted, the defendant filed a MAR asserting that trial counsel was ineffective in failing to file the required affidavit. The trial court denied the MAR and the court of appeals granted certiorari. (1) The court rejected the State's argument that because the defendant failed to raise the ineffectiveness claim on direct appeal, he was procedurally defaulted from raising it in the MAR. The court reasoned that the record did not provide appellate counsel with sufficient information to establish the prejudice prong of the ineffectiveness test. Specifically, proof of this prong would have required appellate counsel to show that the defendant had standing to challenge the search at issue. (2) The court held that the trial court erred by summarily denying the MAR. Because the State did not contest that trial counsel's failure to attach the requisite affidavit constituted deficient representation, the focus of the court's inquiry was on whether the defendant's MAR forecast adequate evidence of prejudice. On this issue, it concluded that the MAR adequately forecast evidence on each issue relevant to the prejudice analysis: that the defendant had standing to challenge the search and that the affidavit supporting the warrant contained false statements.