Criminal Procedure

Appeal

State v. Towe, __ N.C. __, __ S.E.2d __ (June 14, 2012) (http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMi8xMjFQQTExLTEucGRm). The court modified and affirmed *State v. Towe*, __ N.C. App. __, 707 S.E.2d 770 (Mar. 15, 2011) (plain error to allow the State's medical expert to testify that the child victim was sexually abused when no physical findings supported this conclusion). The court agreed that the expert's testimony was improper but held that the court of appeals mischaracterized the plain error test. The court of appeals applied a "highly plausible that the jury could have reached a different result" standard. The correct standard, however, is whether a fundamental error occurred that "had a probable impact on the jury's finding that the defendant was guilty." Applying that standard, the court found it satisfied.

State v. Beckelheimer, __ N.C. __, __ S.E.2d __ (June 14, 2012) (http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMi8xNzVQQTExLTEucGRm). In this child sexual abuse case, the court clarified that when analyzing Rule 404(b) and 403 rulings, it "conduct[s] distinct inquiries with different standards of review." It stated:

> When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling . . . we look to whether the evidence supports the findings and whether the findings support the conclusions. We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion.

Motions to Dismiss—Corpus Delicti

State v. Sweat, __ N.C. __, __ S.E.2d __ (June 14, 2012) (http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMi80NzJBMTEtMS5wZGY=). The court affirmed the holding of *State v. Sweat,* __ N.C. App. __, 718 S.E.2d 655 (Oct. 18, 2011), that there was sufficient evidence of fellatio under the corpus delicti rule to support sex offense charges. The court clarified that the rule imposes different burdens on the State:

> If there is independent proof of loss or injury, the State must show that the accused's confession is supported by substantial independent evidence tending to establish its trustworthiness, including facts that tend to show the defendant had the opportunity to commit the crime. However, if there is no independent proof of loss or injury, there must be strong corroboration of essential facts and circumstances embraced in the defendant's confession. Corroboration of insignificant facts or those unrelated to the commission of the crime will not suffice.

(quotations omitted). Here, because the substantive evidence of fellatio was defendant's confession to four such acts, the Sate was required to strongly corroborate essential facts and circumstances embraced in the confession. Under the totality of the circumstances, the State made the requisite showing based on: the defendant's opportunity to engage in the acts; the fact that the confession evidenced familiarity with corroborated details (such as the specific acts that occurred) likely to be

known only by the perpetrator; the fact that the confession fit within the defendant's pattern of sexual misconduct; and the victim's extrajudicial statements to an investigator and a nurse. The court rejected the defendant's argument that the victim's extrajudicial statements introduced to corroborate her testimony could not be used to corroborate his confession.

Motions to Suppress

State v. Salinas __ N.C. __, __ S.E.2d __ (June 14, 2012) (http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMi80MDFBMTEtMS5wZGY=). Modifying and affirming *State v. Salinas,* __ N.C. App. __, 715 S.E.2d 262 (Aug. 16, 2011) (trial court incorrectly applied a probable cause standard instead of a reasonable suspicion standard to a vehicle stop), the court held that the trial court may not rely on allegations contained in a defendant's G.S. 15A-977(a) affidavit when making findings of fact in connection with a motion to suppress.

Use of Defendant's Silence at Trial

State v. Moore, __ N.C. __, __ S.E.2d __ (June 14, 2012) (http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMi81MjRQQTExLTEucGRm). Affirming an unpublished court of appeals' decision, the court held that no plain error occurred when a State's witness testified that the defendant exercised his right to remain silent. On direct examination an officer testified that after he read the defendant his *Miranda* rights, the defendant "refused to talk about the case." Because this testimony referred to the defendant's exercise of his right to silence, its admission was error. The court rejected the State's argument that no error occurred because the comments were neither made by the prosecutor nor the result of a question by the prosecutor designed to elicit a comment on the defendant's exercise of his right to silence. It stated: "An improper adverse inference of guilt from a defendant's exercise of his right to remain silent cannot be made, regardless of who comments on it." The court went on to conclude that the error did not rise to the level of plain error. Finally, the court rejected the defendant's argument that other testimony by the officer referred to the defendant's pre-arrest silence.

Evidence

Rule 403

State v. King, __ N.C. __, __ S.E.2d __ (June 14, 2012) (http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMi8zODVBMTEtMS5wZGY=. The court affirmed *State v. King,* __ N.C. App. __, 713 S.E.2d 772 (Aug. 2, 2011) (holding that the trial court did not abuse its discretion by excluding the State's expert testimony regarding repressed memory under Rule 403). The trial court had concluded that although the expert's testimony was "technically" admissible under *Howerton* and was relevant, it was inadmissible under Rule 403 because recovered memories are of "uncertain authenticity" and susceptible to alternative possible explanations. The trial court found that "the prejudicial effect [of the evidence] increases tremendously because of its likely potential to confuse

or mislead the jury." The supreme court held that the trial court did not abuse its discretion by excluding the repressed memory evidence under Rule 403. The court noted that its holding was case specific:

> We promulgate here no general rule regarding the admissibility or reliability of repressed memory evidence under either Rule 403 or Rule 702. As the trial judge himself noted, scientific progress is "rapid and fluid." Advances in the area of repressed memory are possible, if not likely, and even . . . [the] defendant's expert, acknowledged that the theory of repressed memory could become established and that he would consider changing his position if confronted with a study conducted using reliable methodology that yielded evidence supporting the theory. Trial courts are fully capable of handling cases involving claims of repressed memory should new or different scientific evidence be presented.

Rule 404(b) Evidence

State v. Beckelheimer, __ N.C. __, __ S.E.2d __ (June 14, 2012) (http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMi8xNzVQQTExLTEucGRm). Reversing *State v. Beckelheimer,* __ N.C. App.__, 712 S.E.2d 216 (April 19, 2011), the court held that the trial judge did not err by admitting 404(b) evidence. The defendant was charged with sexual offense and indecent liberties. At the time of the alleged offense the defendant was 27. The victim was the defendant's 11-year-old male cousin. The victim testified that after inviting him to the defendant's bedroom to play video games, the defendant climbed on top of the victim and pretended to be asleep. He placed his hands in the victim's pants, unzipped the victim's pants, and performed oral sex on the victim while holding him down. The victim testified that on at least two prior occasions the defendant placed his hands on the victim's genital area outside of his clothes while pretending to be asleep. At trial, witness Branson testified about sexual activity between himself and the defendant. Branson, then 24 years old, testified that when he was younger than 13 years old, the defendant, who was 4½ years older, performed various sexual acts on him. Branson and the defendant would play video games together and spend time in the defendant's bedroom. Branson described a series of incidents during which the defendant first touched Branson's genital area outside of his clothes while pretending to be asleep and then reached inside his pants to touch his genitals and performed oral sex on him. Branson also related an incident in which he performed oral sex on the defendant in an effort to stop the defendant from digital anal penetration. The court found that Branson's testimony was properly admitted to show modus operandi. The conduct was sufficiently similar to the acts at issue given the victim's ages, where they occurred, and how they were brought about. The court of appeals improperly focused on the differences between the acts rather than their similarities (among other things, the court of appeals viewed the acts with Branson as consensual and those with the victim as non-consensual and relied on the fact that the defendant was only 4½ years older than Branson but 16 years older than the victim). The court went on to conclude that given the similarities between the incidents, the remoteness in time was not so significant as to render the prior acts irrelevant and that the temporal proximity of the acts was a question of evidentiary weight. Finally, the court held that the trial court did not abuse its discretion by admitting the evidence under Rule 403.

Opinions

State v. Towe, __ N.C. __, __ S.E.2d __ (June 14, 2012) (http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMi8xMjFQQTExLTEucGRm). The court modified and affirmed *State v. Towe*, __ N.C. App. __, 707 S.E.2d 770 (Mar. 15, 2011). The court of appeals held that the trial court committed plain error by allowing the State's medical expert to testify that the child victim was sexually abused when no physical findings supported this conclusion. On direct examination, the expert stated that 70-75% of sexually abused children show no clear physical signs of abuse. When asked whether she would put the victim in that group, the expert responded, "Yes, correct." The court of appeals concluded that this amounted to impermissible testimony that the victim was sexually abused. The supreme court agreed that it was improper for the expert to testify that the victim fell into the category of children who had been sexually abused when she showed no physical symptoms of such abuse. The supreme court modified the opinion below with respect to its application of the plain error standard, but like the lower court agreed that plain error occurred in this case.

State v. King, __ N.C. __, __ S.E.2d __ (June 14, 2012) (http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMi8zODVBMTEtMS5wZGY=. Affirming *State v. King,* __ N.C. App. __, 713 S.E.2d 772 (Aug. 2, 2011) (trial court did not abuse its discretion by excluding the State's expert testimony regarding repressed memory under Rule 403), the court disavowed that part of the opinion below that relied on *Barrett v. Hyldburg*, 127 N.C. App. 95 (1997), to conclude that all testimony based on recovered memory must be excluded unless it is accompanied by expert testimony. The court agreed with the holding in *Barrett* that a witness may not express the opinion that he or she personally has experienced repressed memory. It reasoned that psychiatric theories of repressed and recovered memories may not be presented without accompanying expert testimony to prevent juror confusion and to assist juror comprehension. However, *Barrett* "went too far" when it added that even if the adult witness in that case were to avoid use of the term "repressed memory" and simply testified that she suddenly in remembered traumatic incidents from her childhood, such testimony must be accompanied by expert testimony. The court continued: "unless qualified as an expert or supported by admissible expert testimony, the witness may testify only to the effect that, for some time period, he or she did not recall, had no memory of, or had forgotten the incident, and may not testify that the memories were repressed or recovered."

Arrest, Search & Investigation

Stops

State v. Otto, __ N.C. __, __ S.E.2d __ (June 14, 2012) (http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMi81MjNBMTEtMS5wZGY=). Reversing *State v. Otto,* __ N.C. App. __, 718 S.E.2d 181 (Nov. 15, 2011), the court held that there was reasonable suspicion for the stop. Around 11 pm, an officer observed a vehicle drive past. The officer was about a half mile from Rock Springs Equestrian Center, and the vehicle was coming from the direction of Rock Springs. However, because the road was a busy one, the officer did not know exactly where the vehicle was coming from. He did know that Rock Springs was hosting a banquet that night, and he had heard that

Rock Springs sometimes served alcohol. The officer turned behind the vehicle and immediately noticed that it was weaving within its own lane. The vehicle never left its lane, but was "constantly weaving from the center line to the fog line." The vehicle appeared to be traveling at the posted speed limit. After watching the vehicle weave in its own lane for about ¾ of a mile, the officer stopped the vehicle. The defendant was issued a citation for impaired driving and was convicted. The court of appeals determined that the traffic stop was unreasonable because it was supported solely by the defendant's weaving within her own lane. The supreme court disagreed, concluding that under the totality of the circumstances, there was reasonable suspicion for the traffic stop. The court noted that unlike other cases in which weaving within a lane was held insufficient to support reasonable suspicion, the weaving here was "constant and continual" over ¾ of a mile. Additionally, the defendant was stopped around 11:00 pm on a Friday night.

State v. Williams, __ N.C. __, __ S.E.2d __ (June 14, 2012) (http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMi8zODRBMTEtMS5wZGY=). The court affirmed *State v. Williams*, __ N.C. App. __, 714 S.E.2d 835 (Aug. 16, 2011) (reasonable articulable suspicion justified extending 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. Several factors supported the trial court's determination that reasonable suspicion supported extending the stop. First, the driver told the officer that she and the defendant were coming from Houston, Texas, which was illogical given their direction of travel. Second, the defendant's inconsistent statement that they were coming from Kentucky and were traveling to Myrtle Beach "raises a suspicion as to the truthfulness of the statements." Third, the driver's inability to tell the officer where they were going, along with her illogical answer about driving from Houston, permitted an inference that she "was being deliberately evasive, that she had been hired as a driver and intentionally kept uninformed, or that she had been coached as to her response if stopped." Fourth, the fact that the defendant initially suggested the two were cousins but then admitted that they just called each other cousins based on their long-term relationship "could raise a suspicion that the alleged familial relationship was a prearranged fabrication." Finally, the vehicle, which had illegally tinted windows, was owned by a third person. The court concluded:

> Viewed individually and in isolation, any of these facts might not support a reasonable suspicion of criminal activity. But viewed as a whole by a trained law enforcement officer who is familiar with drug trafficking and illegal activity on interstate highways, the responses were sufficient to provoke a reasonable articulable suspicion that criminal activity was afoot and to justify extending the detention until a canine unit arrived.

State v. Salinas __ N.C. __, __ S.E.2d __ (June 14, 2012) (http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMi80MDFBMTEtMS5wZGY=). The court modified and affirmed *State v. Salinas,* __ N.C. App. __, 715 S.E.2d 262 (Aug. 16, 2011) (trial court incorrectly applied a probable cause standard instead of a reasonable suspicion standard when determining whether a vehicle stop was unconstitutional). The supreme court agreed that the trial judge applied the wrong standard when evaluating the legality of the stop. The court further held that because

the trial court did not resolve the issues of fact that arose during the suppression hearing, but rather simply restated the officers' testimony, its order did not contain sufficient findings of fact to which the court could apply the reasonable suspicion standard. It thus remanded for the trial court to reconsider the evidence pursuant to the reasonable suspicion standard.

Criminal Offenses

Constructive Possession

State v. Bradshaw, __ N.C. __, __ S.E.2d __ (June 14, 2012) (http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMi80NTZBMTEtMS5wZGY=). Affirming an unpublished opinion below, the court held that the trial court properly denied the defendant's motion to dismiss charges of trafficking by possession and possession of a firearm by a felon. The State presented sufficient evidence to support the jury's determination that the defendant constructively possessed drugs and a rifle found in a bedroom that was not under the defendant's exclusive control. Among other things, photographs, a Father's Day card, a cable bill, a cable installation receipt, and a pay stub were found in the bedroom and all linked the defendant to the contraband. Some of the evidence placed the defendant in the bedroom within two days of when the contraband was found.

Homicide

State v. Barrow, __ N.C. __, __ S.E.2d __ (June 14, 2012) (http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMi81MDVBMTEtMS5wZGY=). In a summary per curiam opinion in a murder case the court affirmed "[a]s to the issue on direct appeal." In the opinion below there was a dissent to the holding that the trial court did not err by instructing the jury on the lesser-included offense of second-degree murder.

Sexual Assaults

State v. Sweat, __ N.C. __, __ S.E.2d __ (June 14, 2012) (http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMi80NzJBMTEtMS5wZGY=). Reversing in part *State v. Sweat,* __ N.C. App. __, 718 S.E.2d 655 (Oct. 18, 2011), the court held that where the State presented evidence of four instances of fellatio, the jury was properly instructed on four counts of sexual offense. The trial judge instructed the jury that for it to find the defendant guilty of the four sexual offense charges, it must find that he engaged in "either anal intercourse and/or fellatio." The court of appeals determined that for the judge to use the disjunctive instruction for all four sexual offense charges, the State must have presented evidence of four instances of fellatio. Because the majority below held that the State presented evidence of only two instances of fellatio, it concluded that the defendant was prejudiced by the disjunctive jury instruction. The supreme court however concluded that there was evidence of four separate acts.