Criminal Procedure

Indictment Issues

State v. Braswell, __ N.C. App. __, __ S.E.2d __ (June 19, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMzY2LTEucGRm). Where a defendant pleaded guilty in district court pursuant to a plea agreement under which the State dismissed a charge of leaving the scene of an accident and the defendant appealed for trial de novo in superior court, the defendant's superior court conviction for leaving the scene could not stand because the State failed to obtain an indictment on this charge after the de novo appeal.

State v. Whittington, __ N.C. App. __, __ S.E.2d __ (June 19, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMTk3LTEucGRm). (1) The State conceded and the court held that an indictment for trafficking in opium by sale was fatally defective because it failed to name the person to whom the defendant allegedly sold or delivered the controlled substance. The indictment stated that the sale was "to a confidential informant[.]" It was undisputed that the name of the confidential informant was known. (2) An indictment for trafficking by delivery was defective for the same reason.

Motion to Suppress

In re N.J., __ N.C. App. __, __ S.E.2d __ (June 19, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMzY5LTEucGRm). The district court erred by failing to make findings of fact or conclusions of law in connection with its ruling on the juvenile's motion to suppress in violation of G.S. 15A-977, where the trial court failed to provide its rationale for denying the motion.

State v. Braswell, __ N.C. App. __, __ S.E.2d __ (June 19, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMzY2LTEucGRm). The trial court was not required to make written findings of fact to support its denial of a motion to suppress where it gave its rationale from the bench and there was no material conflict in the evidence.

Jury Instructions

State v. Brown, __ N.C. App. __, __ S.E.2d __ (June 19, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMzQwLTEucGRm). In a burglary case, the trial court did not err by failing to reiterate an instruction on the doctrine of recent possession when instructing the jury on the lesser-included offense of felonious breaking or entering. The trial court properly instructed the jury on felonious breaking and entering by describing how the elements of that offense differed from first-degree burglary, an offense for which they had already received instructions. By describing the differences in charges the trial court left the recent possession instruction intact and applicable to the lesser charge of felonious breaking and entering.

Sentencing

Restitution

State v. Mills, __ N.C. App. __, __ S.E.2d __ (June 19, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0zLTEucGRm). There was sufficient evidence to support a restitution order for $730. The victim testified that before being robbed he had "two sets of keys, snuff, a pocket knife, a bandana, [his] money clip," and approximately $680 in cash. He later confirmed that $730 represented the money and the items taken during the crime.

Probation

State v. Gorman, __ N.C. App. __, __ S.E.2d __ (June 19, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS04NDAtMS5wZGY=). No statutory authority supported the trial court's orders extending the defendant's probation beyond the original 60-month period and they were thus void. The orders extending probation were not made within the last 6 months of probation and the defendant did not consent to the extension. The orders also resulted in an 8-year period of probation, a term longer that the statutory maximum. Turning to the issue of whether the original 60-month probation was tolled pending resolution of New Jersey criminal charges, the court found the record insufficient and remanded for further proceedings.

Evidence

Judicial Notice

State v. Brown, __ N.C. App. __, __ S.E.2d __ (June 19, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMzQwLTEucGRm). For purposes of determining whether there was sufficient evidence that a burglary occurred at nighttime, the court took judicial notice of the time of civil twilight and the driving distance between the victim's residence and an apartment where the defendant appeared at 6 am after having been out all night.

Direct and Cross-Examination

State v. Davis, __ N.C. App. __, __ S.E.2d __ (June 19, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS01OTEtMS5wZGY=). In a child sex case, the trial court erred by overruling the defendant's objections to the State's cross-examination of the defendant. The State improperly placed before the jury expert evidence that was not otherwise admissible by asking the defendant questions about a report done by one Milton Kraft in connection with a custody battle between the defendant and his wife. The questions suggested that Kraft's evaluation indicated that the defendant was a psychopathic deviant. The court rejected the State's argument that the defendant opened the door to the evidence. The cumulative effect of this error and another that occurred required a new trial.

***Crawford* Issues**

State v. Whittington, __ N.C. App. __, __ S.E.2d __ (June 19, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMTk3LTEucGRm). In a drug case the State failed to give proper notice under the G.S. 90-95(g) notice and demand statute when it failed to prove that it provided the defendant with a copy of the lab report in question. The court rejected the notion that the State's discovery materials indicating that a copy of the report "will be delivered upon request" satisfied the notice and demand statute. It stated: "the State may not shift the burden to Defendant by requiring Defendant to request a lab report that the State intends to introduce at trial." The court also rejected the State's argument that the defendant bore the burden of showing that the State did not send the report; the burden of proving that the defendant received the report, the court determined, rests with the State. It concluded:

> It is the State's burden to show that it has complied with the requirements of N.C.G.S. § 90-95(g)(1), and that a defendant has waived his constitutional right to confront a witness against him. This burden includes insuring the record on appeal contains sufficient evidence demonstrating full compliance with N.C.G.S. § 90-95(g)(1). Proper appellate review will be greatly facilitated if . . . the trial court conducts a hearing to determine whether waiver pursuant to N.C.G.S. § 90-95(g)(1) has actually occurred.

404(b) Evidence

State v. Davis, __ N.C. App. __, __ S.E.2d __ (June 19, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS01OTEtMS5wZGY=). In a child sex case in which the defendant was charged with engaging in anal intercourse and fellatio with his son, the trial court erred by admitting evidence of a writing in the defendant's composition book that included a description of the defendant's forced anal intercourse with an adult female known to the defendant. The 404(b) was evidence not sufficiently similar to the acts charged. Although both acts included anal intercourse, the 404(b) evidence involved an adult female who was unrelated to the defendant while the acts in question involved the defendant's minor male child. Also the nature of the force was different in that the 404(b) evidence described actual force and the events in question involved constructive force. The cumulative effect of this error and another that occurred required a new trial. [Author's note, in support it its ruling the court cited *State v. Beckelheimer*, ___ N.C. App. ___, 712 S.E.2d 216 (2011), a decision that was reversed by the N.C. Supreme Court on June 14, 2012].

State v. Flood, __ N.C. App. __, __ S.E.2d __ (June 19, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS04NTYtMS5wZGY=). In a case involving a drug-related murder that occurred in 2007, the trial court committed reversible error by admitting evidence that the defendant was involved in a 1994 homicide in which he broke into an apartment, found his girlfriend in bed with the victim, and shot the victim. The facts of the 1994 shooting were not admissible to show intent or knowledge. The State argued that the 404(b) evidence showed that the defendant had knew that the weapon was lethal and intent to kill. Because the victim in this case was killed by a gunshot to the back of his head, the person who committed that act clearly knew it was lethal and intended to kill. The court found that whatever slight relevance the 1994 shooting might have on

these issues was outweighed by undue prejudice. Regarding the 404(b) purpose of identity, the court found that the acts were not sufficiently similar. The court discounted similarities noted by the trial court, such as the fact that both crime occurred with a gun.

Opinions

State v. Mills, __ N.C. App. __, __ S.E.2d __ (June 19, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0zLTEucGRm). The trial court did not err by permitting detectives to offer lay opinions that a substance found on a lawn chair used to beat the victim was blood. One detective testified that there was blood in the driveway and that a lawn chair close by had blood on it. He based this conclusion on his 7 years of experience as an officer, during which he saw blood on objects other than a person several times and found that blood has a distinct smell and appearance. A second detective opined that there was blood on the lawn chair based on the "hundreds and maybe thousands" of times that he had seen blood in his life, both in the capacity as an officer and otherwise.

Arrest, Search & Investigation

Pat Downs

State v. Robinson, __ N.C. App. __, __ S.E.2d __ (June 19, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMTYzLTEucGRm). The court rejected the defendant's argument that an officer's discovery of drugs in his buttocks occurred during a separate, second search after a pat down was completed. The drugs were found during a valid pat down for weapons.

Strip Search

State v. Robinson, __ N.C. App. __, __ S.E.2d __ (June 19, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMTYzLTEucGRm). Over a dissent, the court held that the trial court did not err by denying the defendant's motion to suppress evidence found as a result of a strip search. The court found that the officer had, based on the facts presented, ample basis for believing that the defendant had contraband beneath his underwear and that reasonable steps were taken to protect his privacy.

Arrest

State v. Robinson, __ N.C. App. __, __ S.E.2d __ (June 19, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMTYzLTEucGRm). An officer had probable cause to arrest the defendant after he felt something hard between the defendant's buttocks during a weapons pat down. Based on his training and experience the officer inferred that the defendant may have been hiding drugs in his buttocks. The court noted that the location of the item was significant, since the buttocks is an unlikely place for carrying legal substances. Additionally, the officer

knew that the defendant was sitting in a car parked in a high crime area; a large machete was observed in the car; a passenger possessed what appeared to be cocaine; when officers began speaking with the vehicle's occupants the defendant dropped a large sum of cash onto the floor; and after dropping the money on the floor, the defendant made a quick movement behind his back.

Miranda

State v. Braswell, __ N.C. App. __, __ S.E.2d __ (June 19, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMzY2LTEucGRm). The court rejected the defendant's argument that he was in custody for purposes of *Miranda* during a routine traffic stop.

State v. Yancey, __ N.C. App. __, __ S.E.2d __ (June 19, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xNDA5LTEucGRm). The juvenile defendant was not in custody for purposes of *Miranda.* After the defendant had been identified as a possible suspect in several breaking or entering cases, two detectives dressed in plain clothes and driving an unmarked vehicle went to the defendant's home and asked to speak with him. Because the defendant had friends visiting his home, the detectives asked the defendant to ride in their car with them. The detectives told the defendant he was free to leave at any time, and they did not touch him. The defendant sat in the front seat of the vehicle while it was driven approximately 2 miles from his home. When the vehicle stopped, one of the detectives showed the defendant reports of the break-ins. The detectives told the defendant that if he was cooperative, they would not arrest him that day. The defendant admitted to committing the break-ins. The juvenile was 17 years and 10 months old at the time. Considering the totality of the circumstances—including the defendant's age—the court concluded that the defendant was not in custody. The court rejected the argument that *J.D.B. v. North Carolina*, ___ U.S. ___, ___, 180 L. Ed. 2d 310 (2011), required a different conclusion.

Criminal Offenses

Assault

State v. Mills, __ N.C. App. __, __ S.E.2d __ (June 19, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0zLTEucGRm). There was sufficient evidence that a lawn chair was a deadly weapon for purposes of assault. The victim was knocked unconscious and suffered multiple facial fractures and injuries which required surgery; after surgery his jaw was wired shut for weeks and he missed 2-3 weeks of work; and at trial the victim testified that he still suffered from vision problems. Because the State presented evidence that the defendant assaulted the victim with the lawn chair and not his fists alone, it was not required to present evidence as to the parties' size or condition.

Robbery

State v. Mills, __ N.C. App. __, __ S.E.2d __ (June 19, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0zLTEucGRm). There was sufficient

evidence that a lawn chair was a dangerous weapon for purposes of armed robbery. The victim was knocked unconscious and suffered multiple facial fractures and injuries which required surgery; after surgery his jaw was wired shut for weeks and he missed 2-3 weeks of work; and at trial the victim testified that he still suffered from vision problems.

Burglary

State v. Brown, __ N.C. App. __, __ S.E.2d __ (June 19, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMzQwLTEucGRm). (1) There was sufficient evidence that a burglary occurred at nighttime. The defendant left his girlfriend's apartment after 10 pm and did not return until 6 am the next day. The burglary occurred during that time period. After taking judicial notice of the time of civil twilight (5:47 am) and the driving distance between the victim's residence and the apartment, the court concluded that it would have been impossible for the defendant to commit the crime after 5:47 am and be back at the apartment by 6 am. (2) When the victim's laptop and other items were found in the defendant's possession hours after the burglary, the doctrine of recent possession provided sufficient evidence that the defendant was the perpetrator.

Defenses

Diminished Capacity

State v. Shareef, __ N.C. App. __, __ S.E.2d __ (June 19, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS04MjItMS5wZGY=). Although the defendant met his burden of production with respect to diminished capacity in this murder and assault case in which the defendant stuck various persons with a vehicle, the State introduced sufficient evidence of specific intent to kill. The State did not present expert witnesses. Rather, the State's evidence focused on the defendant's acts before, during, and after the crime as showing that he had the specific intent to kill necessary for first-degree murder based on premeditation and deliberation and the other felony assaults. The State's evidence showed for example that the defendant specifically targeted the victims and that he did not just hit them and drive on but rather continued to injure them further after the first impact.