Criminal Procedure

Counsel Issues

State v. Brunson, __ N.C. App. __, __ S.E. 2d __ (July 17, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi04NS0xLnBkZg==). When a defendant discharges counsel and proceeds pro se, he or she may not assert a claim of ineffective assistance of counsel with regard to his or her own representation.

State v. Hunt, __ N.C. App. __, __ S.E. 2d __ (July 17, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMC02NjYtMi5wZGY=). (1) Although counsel provided deficient performance in this sexual assault case, the defendant was not prejudiced by this conduct and thus the defendant's claim of ineffective assistance of counsel must fail. The defendant argued that counsel was ineffective when he asked the defendant on direct examination if he had "ever done such a thing before," despite knowing that other sexual offense charges were pending against the defendant. When the defendant responded in the negative, this opened the door to the State calling another witness to testify about the defendant's alleged sexual abuse of her. Counsel's performance fell below an objective standard of reasonableness because there was no strategic benefit in opening the door to this testimony. However, because the evidence about the other pending charges did not likely affect the verdict, no prejudice resulted. (2) Over a dissent, the court held that the trial court did not err by conducting a voir dire when an issue of attorney conflict of interest arose and denying the defendant's mistrial motion. A dissenting judge believed that the trial court erred by failing to conduct an evidentiary hearing to determine whether defense counsel's conflict of interest required a mistrial.

State v. Kelly, __ N.C. App. __, __ S.E. 2d __ (July 17, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi00OS0xLnBkZg==). The court admonished defense counsel for exceeding the bounds of zealous advocacy. In attacking the professionalism and ethics of the prosecutors, counsel said that the prosecutor "failed to investigate the truth"; "distort[ed] the truth"; "misled and misrepresented facts"; "subverted the truth by presenting false evidence in the form of [defendant's] confession"; "suppressed the truth by failing to disclose potentially truth-enhancing evidence"; and "dominated the fact-finding process all led directly to [defendant's] conviction for a crime she did not commit." Counsel asserted that "[a] prosecutor should be professionally disciplined for proceeding with prosecution if a fair-minded person could not reasonably conclude, on the facts known to the prosecutor, that the accused is guilty beyond a reasonable doubt." These comments were unsupported by the record and "highly inappropriate." The court "urge[d] counsel to refrain from making such comments in the future."

Capacity

State v. Robinson, __ N.C. App. __, __ S.E. 2d __ (July 17, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xNTg0LTEucGRm). The trial court abused its discretion by denying defense counsel's motion requesting that the defendant be evaluated by a mental health professional to determine competency. At the call of the case for trial, defense

counsel made a motion, supported by an affidavit by defense counsel and prior mental health evaluation reports, questioning the defendant's capacity to proceed and seeking an assessment of his competency by a mental health professional. After conducting a hearing on the motion and considering the documentary evidence and arguments presented, the trial court denied the motion. Reviewing those materials, the court concluded that "[t]he entirety of the evidence presented . . . indicated a 'significant possibility' that defendant may have been incompetent . . . , necessitating the trial court to appoint an expert or experts to inquire into defendant's mental health". The court noted that when the a trial court conducts a proper competency hearing but abuses its discretion in proceeding to trial in light of the evidence indicating the defendant's incompetency to proceed, the proper remedy is to vacate the judgment and remand the case for a new trial if and when the defendant is properly determined competent to proceed with trial. However, in this case a defense witness, Dr. Corvin, testified on direct examination that "there has been a time during my evaluation where I was somewhat concerned about [defendant's current competency to stand trial], although not currently." The court noted that defense counsel did not question Dr. Corvin on the issue of competency. It concluded: "Given Dr. Corvin's presence at trial and his testimony that he was not currently concerned with defendant's competency to stand trial, we fail to see how the trial court's error prejudiced defendant."

Probable Cause Hearing

State v. Brunson, __ N.C. App. __, __ S.E. 2d __ (July 17, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi04NS0xLnBkZg==). The court rejected the defendant's argument that denying him a probable cause hearing violated his constitutional rights by depriving him of discovery and impeachment evidence. Relying on *State v. Hudson,* 295 N.C. 427 (1978) (the defendant failed to show that he was prejudiced by a lack of a hearing), the court noted that in this case, probable cause was twice established: when the warrant was issued and when the grand jury returned the indictments. The defendant's speculations about discovery and impeachment evidence failed to establish a reasonable possibility that a different result would have been reached at trial had he been given a preliminary hearing.

Indictment/Charging Instrument Issues

State v. Collins, __ N.C. App. __, __ S.E. 2d __ (July 17, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0xOS0xLnBkZg==). There was no fatal defect in an indictment for felony assault on a handicapped person. The indictment alleged, in part, that the defendant unlawfully, willfully, and feloniously assaulted and struck "a handicapped person by throwing Carol Bradley Collins across a room and onto the floor and by striking her with a crutch on the arm. In the course of the assault the defendant used a deadly weapon, a crutch. This act was in violation of North Carolina General Statutes section 14-17." The court rejected the argument that the indictment was defective for failing to allege the specific nature of the victim's handicap. The court also rejected the defendant's argument that the indictment was defective by failing to allege that he knew or reasonably should have known of the victim's handicap. Citing *State v. Thomas*, 153 N.C. App. 326 (2002) (assault with a firearm on a law enforcement officer case), the court concluded that although the indictment did

not specifically allege this element, its allegation that he "willfully" assaulted a handicapped person indicated that he knew that the victim was handicapped. Finally, the court determined that the indictment was not defective because of failure to cite the statute violated. Although the indictment incorrectly cited G.S. 14-17, the statute on murder, the failure to reference the correct statute was not, by itself, a fatal defect.

State v. Mather, __ N.C. App. __, __ S.E. 2d __ (July 17, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMzkzLTEucGRm). When charging carrying a concealed gun under G.S. 14-269, the exception in G.S. 14-269(a1)(2) (having a permit) is a defense not an essential element and need not be alleged in the indictment.

Pleas

State v. Collins, __ N.C. App. __, __ S.E. 2d __ (July 17, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0xOS0xLnBkZg==). (1) The prosecutor's summary of facts and the defendant's stipulations were sufficient to establish a factual basis for the plea. (2) Based on the trial court's colloquy with the defendant, the court rejected the defendant's challenge to the knowing and voluntary nature of his plea. The defendant had argued that the trial court did not adequately explain that judgment may be entered on his plea to assault on a handicapped person if he did not successfully complete probation on other charges.

Attendance of Witnesses

State v. Brunson, __ N.C. App. __, __ S.E. 2d __ (July 17, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi04NS0xLnBkZg==). In a sexual assault case involving the defendant's stepdaughter, the trial court did not err by quashing a subpoena that would have required a district court judge to testify regarding statements made by the victim's mother to the judge in a DVPO proceeding. At trial the defense questioned the mother about whether she told the district court judge that the defendant committed first-degree rape and first-degree sex offense. The mother denied doing this. The defendant wanted to use the district court judge to impeach this testimony. The district court judge filed an affidavit indicating that he had no independent recollection of the case. Even if the district court judge were to have testified as indicated, his testimony would have had no impact on the case; at most it would have established a lay person's confusion with legal terms rather than an attempt to convey false information. Also, most of the evidence supporting the conviction came from the victim herself.

Jury Argument

State v. Harris, __ N.C. App. __, __ S.E. 2d __ (July 17, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS04MjktMS5wZGY=). In this sexual assault trial, the prosecutor's comment during closing argument was not a comment on the defendant's failure to testify. The prosecutor stated: "There are only two people in this courtroom as we sit here

today that actually know what happened between the two people, and that's [the victim] and the defendant." The comment was made in the context of an acknowledgement that while the SANE nurse who examined the victim testified to abrasions and tears indicative of vaginal penetration, the nurse could not tell if the victim's vagina was penetrated by a penis. The prosecutor went on to recount evidence that semen containing the defendant's DNA was found on the victim's vaginal swabs and on cuttings from her panties. The comment emphasized the limitations of the physical evidence and was not a comment on the defendant's decision not to testify.

Jury Instructions

State v. Kelly, __ N.C. App. __, __ S.E. 2d __ (July 17, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi00OS0xLnBkZg==). The trial court did not err by refusing to instruct the jury on jury nullification.

Sentencing

Probation

State v. Askew, __ N.C. App. __, __ S.E. 2d __ (July 17, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xNTk4LTEucGRm). The trial court erred by finding that the defendant willfully violated probation by failing to have an approved residence plan. The defendant was placed on supervised probation to begin when he was released from incarceration on separate charges. On the day that the defendant was scheduled to be released, a probation officer filed a violation report. The defendant demonstrated that he was unable to obtain suitable housing before his release from incarceration because of circumstances beyond his control; the trial court abused its discretion by finding otherwise.

State v. Talbert, __ N.C. App. __, __ S.E. 2d __ (July 17, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0yNDAtMS5wZGY=). The trial court erred by revoking the defendant's probation on grounds that he willfully violated the condition that he reside at a residence approved by the supervising officer. The defendant was violated on the day he was released from prison, before he even "touched outside." Prior to his release the defendant, who was a registered sex offender and indigent, had tried unsuccessfully to work with his case worker to secure a residence. At the revocation hearing, the trial judge rejected defense counsel's plea for a period of 1-2 days for the defendant to secure a residence. The court concluded that the defendant's violation was not willful and that probation was "revoked because of circumstances beyond his control."

Evidence

***Crawford* and Confrontation Issues**

State v. Harris, __ N.C. App. __, __ S.E. 2d __ (July 17, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS04MjktMS5wZGY=). (1) The defendant's confrontation rights were not violated when the State's expert testified about DNA testing

on the victim's rape kit done by a non-testifying trainee. The trainee worked under the testifying expert's direct observation and supervision and the findings were his own. (2) The court rejected the defendant's argument that his constitutional rights were violated when a second DNA expert testified that she matched a DNA extract on a specimen taken from the defendant to the profile obtained from the rape kit. Having found that the first expert properly testified about the rape kit profile, the court rejected this argument. (3) No violation of the defendant's confrontation clause rights occurred when the second expert testified that the probability of an unrelated, randomly chosen person who could not be excluded from the DNA mixture taken from the rape kit was extremely low. The defendant argued that the population geneticists who made the probability determination were unavailable for cross-examination about the reliability of their statistical methodology. The court concluded that admission of the statistical information was not error where the second expert was available for cross-examination and gave her opinion that the DNA profile from the rape kit matched the defendant's DNA profile and the statistical information on which she relied was of a type reasonably relied upon by experts in the field. Even assuming that unavailability of the purported population geneticists who prepared the statistical data violated the defendant's rights, the error did not rise to the level of plain error.

Arrest, Search & Investigation

Consent Search

State v. Bell, __ N.C. App. __, __ S.E. 2d __ (July 17, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS04NjQtMS5wZGY=). The trial court did not err by finding that the defendant consented to a search of his residence. The court rejected the defendant's argument that the trial court must make specific findings regarding the voluntariness of consent even when there is no conflict in the evidence on the issue. Here, there was a conflict regarding whether the defendant gave consent, not whether if given it was voluntary.

***Miranda* Issues**

State v. Robinson, __ N.C. App. __, __ S.E. 2d __ (July 17, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xNTg0LTEucGRm). The defendant's waiver of *Miranda* rights was knowing, voluntary, and intelligent. Among other things, the defendant was familiar with the criminal justice system, no threats or promises were made to him before he agreed to talk, and the defendant was not deprived of any necessaries. Although there was evidence documenting the defendant's limited mental capacity, the record in no way indicated that the defendant was confused during the interrogation, that he did not understand any of the rights as they were read to him, or that he was unable to comprehend the ramifications of his statements.

Criminal Offenses

Assaults

State v. Collins, __ N.C. App. __, __ S.E. 2d __ (July 17, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0xOS0xLnBkZg==). There was a

sufficient factual basis to support a plea to assault on a handicapped person where the prosecutor's summary of the facts indicated that the victim was 80 years old, crippled in her knees with arthritis, and required a crutch to walk; the defendant told the victim that he would kill her and cut her heart out, grabbed her, twice slung her across the room, and hit her with her crutch.

Sexual Assaults

State v. Hunt, __ N.C. App. __, __ S.E. 2d __ (July 17, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMC02NjYtMi5wZGY=). The defendant could not be convicted of second-degree sexual offense (mentally disabled victim) and crime against nature (where lack of consent was based on the fact that the victim was mentally disabled, incapacitated or physically helpless) based on the same conduct (fellatio). The court found that "on the particular facts of Defendant's case, crime against nature was a lesser included offense of second-degree sexual offense, and entry of judgment on both convictions subjected Defendant to unconstitutional double jeopardy." [Author's note: The N.C. Supreme Court has previously held that crime against nature is not a lesser-included offense of forcible rape or sexual offense, State v. Etheridge, 319 N.C. 34, 50–51 (1987); State v. Warren, 309 N.C. 224 (1983), and that a definitional test applies when determining whether offenses are lesser-included offenses, State v. Nickerson, 316 N.C. 279 (2011).].

Kidnapping

State v. Bell, __ N.C. App. __, __ S.E. 2d __ (July 17, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS04NjQtMS5wZGY=). (1) The defendant's confinement of the victims was not inherent in related charges of armed robbery and sexual offense and thus could support the kidnapping charges. The defendant robbed the victims of a camera and forced them to perform sexual acts. He then continued to hold them at gunpoint while he talked to them about what had happened to him, grilled one about Bible verses, and made them pray with him. The additional confinement after the robbery and sex offenses were finished was sufficient evidence of kidnapping separate from the other offenses. (2) With respect to a charge of kidnapping a child under 16, there was sufficient evidence that the defendant confined the child. While threatening the child and his mother with a gun, the defendant told the mother to put her son in his room and she complied. After that, whenever her son called out, the victim called back to keep him in his bedroom.

Weapons

State v. Mather, __ N.C. App. __, __ S.E. 2d __ (July 17, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMzkzLTEucGRm). In this carrying a concealed gun case, the court addressed the issue of whether the provisions in G.S. 14-269(a1) were elements or defenses. Following *State v. Trimble*, 44 N.C. App. 659 (1980) (dealing with the statute on poisonous foodstuffs in public places), it explained:

The State has no initial burden of producing evidence to show that Defendant's action of carrying a concealed weapon does not fall within an exception to N.C. Gen. Stat. § 14-269(a1); however, once Defendant puts forth evidence to show that his conduct is within an exception – that he had a concealed handgun permit [under G.S. 14-269(a1)(2) for example] – the burden of persuading the trier of fact that Defendant's action was outside the scope of the exception falls upon the State. Based on the Court's holding in *Trimble*, we conclude that the exception in N.C. Gen. Stat. § 14-269(a1)(2) is a defense, not an essential element of the crime of carrying a concealed weapon . . . .