

Criminal Procedure

Counsel Issues

State v. Frederick, __ N.C. App. __, __ S.E.2d __ (Aug. 21, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi03Ni0xLnBkZg==>). The defendant was denied his right to counsel at a suppression hearing. The suppression hearing was a critical stage. Although the trial court recorded waivers of counsel prior to the hearing, the waivers were not valid because the trial court failed to inform the defendant of the maximum possible sentence, as required by G.S. 15A-1242. The trial court advised the defendant that he could “go to prison for a long, long time[,]” and if convicted “the law requires you get a mandatory active prison sentence[.]” These statements do not meet the statutory requirements for a valid waiver. The court reiterated that a waiver will not be presumed from a silent record and that a completed waiver of counsel form is no substitute for compliance with the statute. [Author’s note: For the recommended procedure (including proposed colloquy) for taking a waiver of counsel, see my chapter in the N.C. Superior Court Judges’ Bench Book here: <http://www.sog.unc.edu/node/2101>]

Motions to Dismiss

State v. Miles, __ N.C. App. __, __ S.E.2d __ (Aug. 21, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMzgZLTEucGRm>). In a murder case the court held, over a dissent, that the trial court did not err by denying the defendant’s motion to dismiss. The court held that there was sufficient evidence that the defendant was the perpetrator of the offense and that the defendant possessed the motive, means, and opportunity to murder the victim. The victim owed the defendant approximately \$40,000. The defendant persistently contacted the victim demanding his money; in the month immediately before the murder, he called the victim at least 94 times. A witness testified that the defendant, his business, and his family were experiencing financial troubles, thus creating a financial motive for the crime. On the morning of the murder the defendant left the victim an angry voicemail stating that he was going to retain a lawyer, but not to collect his money, and threatening that he would ultimately get “a hold of” the victim; a rational juror could reasonably infer from this that the defendant intentionally threatened the victim’s life. Another witness testified that on the day of the murder, the defendant confided that if he did not get his money soon, he would kill the victim, and that he was going to the victim to either collect his money or kill the victim; this was evidence of the defendant’s motive and intention to murder the victim. The victim’s wife and neighbor saw the defendant at the victim’s house on two separate occasions in the month prior to the crime. On the day of the murder, the victim’s wife and daughter observed a vehicle similar one owned by the defendant’s wife at their home. The defendant’s phone records pinpointed his location in the vicinity of the crime scene at the relevant time. Finally, the defendant’s false alibi was contradicted by evidence putting him at the crime scene.

Jury Instructions

State v. Miles, __ N.C. App. __, __ S.E.2d __ (Aug. 21, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMzgZLTEucGRm>). In a case in which the defendant was convicted of first-degree murder, the trial court did not err by failing to instruct the jury on second-degree murder. The court found that the record supported the inference that the defendant

murdered the victim after premeditation and deliberation. The defendant harassed the victim over the telephone at least 94 times and visited the victim's home at least twice; the defendant threatened the victim's life by voicemail on the day of the murder; the defendant stated his intention to murder the victim to a confidant; the defendant and the victim had a heated relationship and argued over money; the defendant anticipated a confrontation whereby he would use deadly force; the defendant crafted a false alibi; the defendant fled the scene leaving the victim to die; and the defendant sold his wife's R.V., which the jury could infer was the vehicle the defendant drove on the night of the murder, less than two months after the crime. "Most notably," the victim died as a result of a gunshot wound to the center back of the head, discharged at close range, indicating that the defendant not only inflicted a brutal, fatal wound with a deadly weapon, but that even if the defendant and the victim were fighting at the time, the victim's back was to defendant and the victim was fleeing or turning away at the time of his death. The court rejected the defendant's argument that certain facts suggested that a fight precipitated the murder and thus warranted an instruction on the lesser offense. It noted that even evidence of an argument, "without more, is insufficient to show that defendant's anger was strong enough to disturb his ability to reason and hinder his ability to premeditate and deliberate the killing."

Evidence

Relevancy—Guilt of Another

State v. Miles, __ N.C. App. __, __ S.E.2d __ (Aug. 21, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMzgZLTUucGRm>). In a murder case, the trial court did not err by excluding evidence suggesting that the victim's wife committed the crime. Distinguishing cases where alternate perpetrators were positively identified and both direct and circumstantial evidence demonstrated the third parties' opportunity and means to murder, the defendant offered "merely conjecture" as to the defendant's wife's possible actions. Additionally, the State contradicted these "speculations" with testimony by the couple's daughters that they were with their mother on the night in question. [Author's note: For a discussion of the relevancy of guilt of another evidence, see my chapter in the N.C. Superior Court Judges' Bench Book here:

<http://www.sog.unc.edu/node/2192>]

404(b) Evidence

State v. Davis, __ N.C. App. __, __ S.E.2d __ (Aug. 21, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS01OTEtMS5wZGY=>). In a child sexual assault case in which the defendant was charged with assaulting his son, the trial court erred by admitting under Rule 404(b) evidence of the defendant's writings in a composition book about forcible, non-consensual anal sex with an adult female acquaintance. The defendant contended that the composition book was fiction; the State argued that the described events were real. The trial court admitted the composition book on the grounds that it showed "a pattern." On appeal the court assumed the trial court meant that the book showed a common scheme or plan; the court noted that the trial court must have assumed that the entry described an actual event. The court found that the events described in the book were not sufficiently similar to the case at bar, finding the only overlapping fact to be anal intercourse. The court also noted that the actual force described in the book was "not analogous" to the constructive force that applies with sexual conduct between a parent and child. It added that aside from anal

intercourse, “the acts bore no resemblance to each other, involving different genders, radically different ages, different relationships between the parties, and different types of force.” It concluded:

[T]he charged crime involves defendant's very young son, while the 404(b) evidence involved a grown woman friend. There was no evidence that the locations of the crimes were similar. Further, there was no similarity in how the crime came to occur other than that it involved anal intercourse. Even though the State argues that both crimes involved force, the State has not shown that defendant's writings about physically forcible, non-consensual anal sex with an adult woman friend give rise to any inference that defendant would be desirous of or obtain sexual gratification from anal intercourse with his four-year-old or six-year-old son. The 404(b) evidence simply does not "share 'some unusual facts' that go to a purpose other than propensity"

Cross-examination

State v. Davis, __ N.C. App. __, __ S.E.2d __ (Aug. 21, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS01OTEtMS5wZGY=>). In a child sexual assault case in which the defendant was charged with committing acts on his son, the trial court erred by allowing the State to cross-examine the defendant with questions summarizing the results of a psychological evaluation, not admitted into evidence, that described the defendant as a psychopathic deviant. The evaluation was done by Milton Kraft, apparently in connection with an investigation and custody case relating to the son. Kraft did not testify at trial and his report was not admitted into evidence. The court rejected the State’s argument that the defendant opened the door to the questioning. The noted testimony occurred on redirect and thus could not open the door to cross-examination. Through cross-examination the State placed before the jury expert evidence that was not otherwise admissible.

Arrest, Search & Investigation

Vehicle Stops

State v. Osterhoudt, __ N.C. App. __, __ S.E.2d __ (Aug. 21, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xNDI4LTEucGRm>). (1) The trial court erred in connection with its ruling on a suppression motion in an impaired driving case. The trial court failed to look beyond whether the defendant’s driving was normal in assessing whether the officer had reasonable suspicion to stop the defendant’s vehicle. (2) The officer had a reasonable, articulable suspicion to stop the defendant’s vehicle based on observed traffic violations notwithstanding the officer’s mistaken belief that the defendant also had violated G.S. 20-146(a). The officer’s testimony that he initiated the stop after observing the defendant drive over the double yellow line was sufficient to establish a violation of G.S. 20-146(d)(3-4), 20-146(d)(1), and 20-153; therefore regardless of his subjective belief that the defendant violated G.S. 20-146(a), the officer’s testimony establishes objective criteria justifying the stop. The stop was reasonable and the superior court erred in holding otherwise. The court noted that because the officer’s reason for the stop was not based solely on his mistaken belief that the defendant violated G.S. 20-146(a) but also because the defendant crossed the double yellow line, the case was distinguishable from others holding that an officer’s mistaken belief that a defendant has committed a traffic violation is not an objectively reasonable basis for a stop.

Criminal Offenses

Robbery

State v. Harris, __ N.C. App. __, __ S.E.2d __ (Aug. 21, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xNDQ5LTEucGRm>). In an armed robbery case, the trial court did not commit plain error by failing to instruct the jury on a lesser-included offense of “aggravated common law robbery.” The court rejected the defendant’s argument that *Apprendi* and *Blakely* created a North Carolina crime of aggravated common law robbery.