Criminal Procedure

Counsel Issues

State v. Cureton, __ N.C. App. __, __ S.E.2d __ (Nov. 6, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0xNDctMS5wZGY=). (1) No violation of the defendant's Sixth Amendment right to counsel occurred when the trial court found that the defendant forfeited his right to counsel because of serious misconduct and required him to proceed pro se. The court rejected the defendant's argument that *Indiana v. Edwards* prohibits a finding of forfeiture by a "gray area" defendant who has engaged in serious misconduct. (2) The trial court did not err by finding that the defendant forfeited his right to counsel because of serious misconduct. The court rejected the defendant's argument that the misconduct must occur in open court. The defendant was appointed three separate lawyers and each moved to withdraw because of his behavior. His misconduct went beyond being uncooperative and noncompliant and included physically and verbally threatening his attorneys. He consistently shouted at his attorneys, insulted and abused them, and spat on and threatened to kill one of them. The court also rejected the defendant's argument *State v. Wray*, 206 N.C. App. 354 (2010), required reversal of the forfeiture ruling.

DWI Procedure

State v. Buckheit, __ N.C. App. __, __ S.E.2d __ (Nov. 6, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi00NjUtMS5wZGY=). The trial court erred by denying the defendant's motion to suppress intoxilyzer results. After arrest, the defendant was informed of his rights under G.S. 20-16.2(a) and elected to have a witness present. The defendant contacted his witness by phone and asked her to witness the intoxilyzer test. Shortly thereafter his witness arrived in the lobby of the County Public Safety Center; when she informed the front desk officer why she was there, she was told to wait in the lobby. The witness asked the front desk officer multiple times if she needed to do anything further. When the intoxilyzer test was administered, the witness was waiting in the lobby. Finding the case indistinguishable from *State v. Hatley*, 190 N.C. App. 639 (2008), the court held that after her timely arrival, the defendant's witness made reasonable efforts to gain access to the defendant but was prevented from doing so and that therefore the intoxilyzer results should have been suppressed.

Indictment Issues

State v. Davis, __ N.C. App. __, __ S.E.2d __ (Nov. 6, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xNTI2LTEucGRm). In a trafficking case, there was no fatal variance between the indictment, alleging that the defendant trafficked in opium, and the evidence at trial, showing that the substance was an opium derivative. G.S. 90-95(h)(4) does not create a separate crime of possession or transportation of an opium derivative, but rather specifies that possession or transportation of an opium derivative is trafficking in opium, as alleged in the indictment.

State v. Land, __ N.C. App. __, __ S.E.2d __ (Nov. 6, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xNDg0LTEucGRm). Over a dissent, the court held that when a defendant is charged with delivering marijuana and the amount involved is less than five grams, the indictment need not allege that the delivery was for no remuneration. Relying on G.S. 90-95(b)(2) (transfer of less than five grams of marijuana for no remuneration does not constitute a delivery in violation of G.S. 90-95(a)(1)), the defendant argued that the statute creates an additional element for the offense of delivering less than five grams of marijuana -- that the defendant receive remuneration -- and that this additional element must be alleged. Relying on *State v. Pevia*, 56 N.C. App. 384, 387 (1982), the court held that an indictment is valid under G.S. 90-95 even without that allegation.

Sentencing

State v. Minton, __ N.C. App. __, __ S.E.2d __ (Nov. 6, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0yNDMtMS5wZGY=). The trial court did not err by requiring the defendant to pay $5,000 in restitution where trial evidence supported the restitution award and the trial court properly considered the defendant's resources.

Evidence

Opinions

Child Abuse Cases

State v. Ryan, __ N.C. App. __, __ S.E.2d __ (Nov. 6, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0yMjgtMS5wZGY=). Improper testimony by an expert pediatrician in a child sexual abuse case required a new trial. After the alleged abuse, the child was seen by Dr. Gutman, a pediatrician, who reviewed her history and performed a physical exam. Gutman observed a deep notch in the child's hymen, which was highly suggestive of vaginal penetration. Gutman found the child's anus to be normal but testified that physical findings of anal abuse are uncommon. Gutman also tested the child for sexually transmitted diseases. The tests were negative, except that the child was diagnosed with bacterial vaginosis. Gutman testified that the presence of bacterial vaginosis can be indicative of a vaginal injury, although it is the most common genital infection in women and can have many causes. The child's mother had indicated the child had symptoms of vaginosis as early as 2006, which predated the alleged abuse. Gutman testified to her opinion that the child had been sexually abused, that she had no indication the child's story was fictitious or that the child had been coached, and that defendant was the perpetrator. (1) Gutman was properly allowed to testify that the child had been sexually abused given the physical evidence of the unusual hymenal notch and bacterial vaginosis. The court noted that Gutman did not state which acts of alleged sexual abuse had occurred. It continued, noting that if Gutman had testified that the child had been the victim of both vaginal and anal sexual abuse, that would have been error given the lack of physical evidence of anal penetration. (2) Gutman's testimony that she was not concerned that the child was "giving a fictitious story" was essentially an opinion that the child was not lying about the sexual abuse and thus was improper. The court rejected the State's argument that the defendant opened the door to this testimony. (3) Citing *State v. Baymon*, 336 N.C. 748 (1994), the court held that Gutman's testimony that

the child had not been coached was admissible. (4) It was error to allow Gutman to testify that "there was no evidence that there was a different perpetrator" other than defendant where Gutman based her conclusion on her interview with the child and it did not relate to a diagnosis derived from Gutman's examination of the child.

Drug Cases

State v. Davis, __ N.C. App. __, __ S.E.2d __ (Nov. 6, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xNTI2LTEucGRm). In a trafficking in opium case, the State's forensic expert properly testified that the substance at issue was an opium derivative where the expert relied on a chemical analysis, not a visual identification.

Arrest, Search & Investigation

Vehicle Stops

State v. Kochuk, __ N.C. App. __, __ S.E.2d __ (Nov. 6, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi01MjUtMS5wZGY=). Over a dissent, the court affirmed the trial court's order granting the defendant's motion to suppress all evidence obtained as a result of a vehicle stop. Relying on *State v. Fields,* 195 N.C. App. 740 (2009) (weaving alone is insufficient to support a reasonable suspicion that the defendant was driving while impaired), the trial court had determined that the officer lacked reasonable suspicion for the stop. The officer saw the defendant's vehicle cross over the dotted white line causing both passenger side wheels to enter the right lane for three to four seconds. He also observed the defendant's vehicle drift to the right side of the right lane "where its wheels were riding on top of the white line . . . twice for a period of three to four seconds each time." The court found these movements were "nothing more than weaving" and thus under *Fields,* the stop was improper.

Interrogation

State v. Cureton, __ N.C. App. __, __ S.E.2d __ (Nov. 6, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0xNDctMS5wZGY=). (1) After being read his *Miranda* rights, the defendant knowingly and intelligently waived his right to counsel. The court rejected the defendant's argument that the fact that he never signed the waiver of rights form established that that no waiver occurred. The court also rejected the defendant's argument that he was incapable of knowingly and intelligently waiving his rights because his borderline mental capacity prevented him from fully understanding those rights. In this regard, the court relied in part on a later psychological evaluation diagnosing the defendant as malingering and finding him competent to stand trial. (2) After waiving his right to counsel the defendant did not unambiguously ask to speak a lawyer. The court rejected the defendant's argument that he made a clear request for counsel. It concluded: "Defendant never expressed a clear desire to speak with an attorney. Rather, he appears to have been seeking clarification regarding whether he had a right to speak with an attorney before answering any of the detective's questions." The court added: "There is a distinct difference between inquiring whether

one has the right to counsel and actually requesting counsel. Once defendant was informed that it was his decision whether to invoke the right to counsel, he opted not to exercise that right." (3) The defendant's confession was voluntary. The court rejected the defendant's argument that he "was cajoled and harassed by the officers into making statements that were not voluntary," that the detectives "put words in his mouth on occasion," and "bamboozled [him] into speaking against his interest."

Criminal Offenses

Frauds

State v. Minton, __ N.C. App. __, __ S.E.2d __ (Nov. 6, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0yNDMtMS5wZGY=). There was sufficient evidence to establish the offense of conversion of property by a bailee in violation of G.S. 14-168.1. The court rejected the defendant's argument that because "[e]vidence of nonfulfillment of a contract obligation" is not enough to establish intent for obtaining property by false pretenses under G.S. 14-100(b), this evidence should not be sufficient to establish the intent to defraud for conversion. The court also rejected the defendant's argument that there was insufficient evidence of an intent to defraud where the underlying contract between himself and the victim was unenforceable; the court found no prohibition on using unenforceable contracts to support a conversion charge.

State v. Sexton, __ N.C. App. __, __ S.E.2d __ (Nov. 6, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi00NDUtMS5wZGY=). In an identity theft case, the evidence was sufficient to establish that the defendant "used" or "possessed" another person's social security number to avoid legal consequences. After being detained and questioned for shoplifting, the defendant falsely gave the officer his name as Roy Lamar Ward and provided the officer with the name of an employer, date of birth, and possible address. The officer then obtained Ward's social security number, wrote it on the citation, and issued the citation to the defendant. The defendant neither signed the citation nor confirmed the listed social security number.

Drug Crimes

State v. Land, __ N.C. App. __, __ S.E.2d __ (Nov. 6, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xNDg0LTEucGRm). (1) In a delivery of marijuana case, the evidence was sufficient to survive a motion to dismiss where it established that the defendant transferred less than five grams of marijuana for remuneration. The State need not show that the defendant personally received the compensation. (2) Where the evidence showed that the defendant transferred less than five grams of marijuana, the trial court erred by not instructing the jury that in order to prove delivery, the State was required to prove that the defendant transferred the marijuana for remuneration. The error, however, did not rise to the level of plain error.

Weapons

Kelly v. Riley, __ N.C. App. __, __ S.E.2d __ (Nov. 6, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0yNzMtMS5wZGY=). (1) G.S. 14-415.12 (criteria to qualify for a concealed handgun permit) was not unconstitutional as applied to the petitioner. Relying on case law from the federal circuit courts, the court adopted a two-part analysis to address Second Amendment challenges. First, the court asks whether the challenged law applies to conduct protected by the Second Amendment. If not, the law is valid and the inquiry is complete. If the law applies to protected conduct, it then must be evaluated under the appropriate form of "means-end scrutiny." Applying this analysis, the court held that the petitioner's right to carry a concealed handgun did not fall within the scope of the Second Amendment. Having determined that G.S. 14-415.12 does not impose a burden on conduct protected by the Second Amendment, the court found no need to engage in the second step of the analysis. (2) The sheriff properly denied the petitioner's application to renew his concealed handgun permit where the petitioner did not meet the requirements of G.S. 14-415.12. The court rejected the petitioner's argument that G.S. 14-415.18 (revocation or suspension of permit) applied.