Criminal Procedure

Counsel Issues

State v. Reid, __ N.C. App. __, __ S.E.2d __ (Dec. 4, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0zNDAtMS5wZGY=). The trial court did not err when taking the defendant's waiver of counsel. The trial court complied with the statute and asked the standard waiver questions in the judges' bench book. The court rejected the defendant's argument that the waiver was invalid because the trial judge did not inform him of his right to hire a private lawyer.

Motion to Continue

State v. Burton, __ N.C. App. __, __ S.E.2d __ (Dec. 4, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0zNTQtMS5wZGY=). The trial court did not err by denying the defendant's motion to continue trial so that he could locate two alibi witnesses. Both alibi witnesses were served months prior and the trial had already been continued for this purpose.

Motion to Dismiss

State v. Hoff, __ N.C. App. __, __ S.E.2d __ (Dec. 4, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi03NzEtMS5wZGY=). Where a burglary victim identified the defendant as the perpetrator in court, the rule of *State v. Irick,* 291 N.C. 480 (1977) (fingerprint evidence can withstand a motion for nonsuit only if there is substantial evidence that they were impressed at the time of the crime), did not require dismissal. Although the identification was not clear and unequivocal, it was not inherently incredible.

Habitual Felon

State v. Shaw, __ N.C. App. __, __ S.E.2d __ (Dec. 4, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi01NDUtMS5wZGY=). Habitual misdemeanor assault cannot serve as a prior felony for purposes of habitual felon.

Jury Instructions

State v. Boyett, __ N.C. App. __, __ S.E.2d __ (Dec. 4, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0yMjItMS5wZGY=). In a sexual assault case, the trial court did not err by using the word "victim" in the jury instructions. Use of this word did not constitute an opinion by the trial court regarding guilt and caused no prejudice.

State v. Golden, __ N.C. App. __, __ S.E.2d __ (Dec. 4, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0yNjUtMS5wZGY=). The trial court erred by instructing on flight. The defendant fled from an officer responding to a 911 call regarding violation of

a domestic violence protective order. After being arrested the defendant's vehicle was searched and he was charged with perpetrating a hoax on law enforcement officers by use of a false bomb on the basis of a device found in his vehicle. The defendant's initial flight cannot be considered as evidence of his guilt of the hoax offense. However, the error did not prejudice the defendant.

Sentencing

State v. Corkum, __ N.C. App. __, __ S.E.2d __ (Dec. 4, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi01MjYtMS5wZGY=). The trial court erred by denying credit for the time the defendant was incarcerated pending a revocation hearing on his first violation of post-release supervision. Under 15-196.1, the trial court was required to credit the defendant with eight days he spent in custody awaiting a revocation hearing for his first violation of post-release supervision when the defendant's sentence later was activated upon the revocation of his post-release supervision following his second violation.

Sex Offenders

State v. Boyett, __ N.C. App. __, __ S.E.2d __ (Dec. 4, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0yMjItMS5wZGY=). (1) The trial court erred by ordering the defendant to enroll in lifetime satellite-based monitoring based on its determination that second-degree sexual offense was an aggravating offense. Considering the elements of the offense, second-degree sexual offense is not an "aggravated offense." (2) The trial court erred by requiring lifetime sex offender registration based on second-degree sexual offense convictions. Although the convictions qualify as reportable offenses requiring registration for 30 years, they do not constitute an aggravated offense requiring lifetime registration.

Evidence

404(b) Evidence

State v. Golden, __ N.C. App. __, __ S.E.2d __ (Dec. 4, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0yNjUtMS5wZGY=). In a case in which the defendant was convicted of perpetrating a hoax on law enforcement officers by use of a false bomb, the trial court did not err by admitting evidence of the defendant's prior acts against his estranged wife. The defendant's wife had a domestic violence protective order against him. When she saw the defendant at her house, she called 911. After arresting the defendant, officers found weapons on his person and the device and other weapons in his vehicle. At trial his wife testified to her prior interactions with the defendant, including those where he threatened her. The evidence of the prior incidents showed the defendant's intent to perpetrate a hoax by use of a false bomb in that they showed his ongoing objective of scaring his wife with suggestions that he would physically harm her and other around her. Also, the prior acts were part of the chain of events leading up to the crime and thus completed the story of the crime for the jury. The court rejected the defendant's argument that the prior acts were not sufficiently similar to the act charged on grounds that similarity was not pertinent to

the 404(b) purpose for which the evidence was admitted. The court also concluded that the trial court did not abuse its discretion by admitting the evidence under Rule 403.

Opinions

State v. James, __ N.C. App. __, __ S.E.2d __ (Dec. 4, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi01NDAtMS5wZGY=). In a assault with a deadly weapon on a law enforcement officer case, the trial court did not err by allowing the officer to give lay opinion regarding the weight of a kitchen chair (the alleged deadly weapon) that the defendant threw at him. The officer's observation of the chair and of the defendant use of it was sufficient to support his opinion as to its weight. Also, this testimony was helpful to the jury.

State v. Mitchell, __ N.C. App. __, __ S.E.2d __ (Dec. 4, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi00OTktMS5wZGY=). In a drug case, an officer properly was allowed to identify the substance at issue as marijuana based on his "visual and olfactory assessment" and a chemical analysis of marijuana was not required.

Arrest, Search & Investigation

Warrantless Search

State v. Mitchell, __ N.C. App. __, __ S.E.2d __ (Dec. 4, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi00OTktMS5wZGY=). The discovery of marijuana on a passenger provided probable cause to search a vehicle. After stopping the defendant and determining that the defendant had a revoked license, the officer told the defendant that the officer's K-9 dog would walk around the vehicle. At that point, the defendant indicated that his passenger had a marijuana cigarette, which she removed from her pants. The officer then searched the car and found marijuana in the trunk.

Stops

State v. Reid, __ N.C. App. __, __ S.E.2d __ (Dec. 4, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0zNDAtMS5wZGY=). In a drug case, the trial court did not commit plain error by concluding that an officer had reasonable suspicion to conduct a warrantless stop. The officer received information from two informants who had previously provided him with reliable information leading to several arrests; the informants provided information about the defendant's criminal activity, location, and appearance. The officer corroborates some of this information and on the day in question an informant saw the defendant with the contraband. Also, when the officer approached the defendant, the defendant exuded a strong odor of marijuana.

Plain Feel

State v. Reid, __ N.C. App. __, __ S.E.2d __ (Dec. 4, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0zNDAtMS5wZGY=). An officer's search of the defendant created probable cause for seizure of the cocaine under the "plain feel" doctrine. While searching the defendant, the officer "felt a large bulge" in his pocket and "knew exactly what it was once [he] felt it. . . . It was packaged like narcotics would be packaged."

Criminal Offenses

Larceny & Frauds

State v. Grier, __ N.C. App. __, __ S.E.2d __ (Dec. 4, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi00NDgtMS5wZGY=). (1) Forgery and larceny of a chose in action are not mutually exclusive offenses. The defendant argued that both forgery and uttering a forged check require a counterfeit instrument while the larceny of a chose in action requires a showing that the defendant "stole a valid instrument." The court concluded that larceny of a chose in action does not require that the bank note, check or other order for payment be valid. (2) For purposes of the offense of larceny of a chose in action, a blank check is not a chose in action.

Assaults

State v. James, __ N.C. App. __, __ S.E.2d __ (Dec. 4, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi01NDAtMS5wZGY=). Given the manner of its use, there was sufficient evidence that a kitchen table chair was a deadly weapon.

Sexual Assaults

State v. Boyett, __ N.C. App. __, __ S.E.2d __ (Dec. 4, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0yMjItMS5wZGY=). The trial court committed plain error by failing to instruct on attempted rape and attempted incest where the evidence regarding penetration was conflicting. The defendant denied penetration and the victim's statements conflicted on the issue.

Arson

State v. Burton, __ N.C. App. __, __ S.E.2d __ (Dec. 4, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0zNTQtMS5wZGY=). The evidence was sufficient to establish malice in an arson case and survive the defendant's motion to dismiss. Among other things, the defendant was enraged at the owner for being evicted.

Weapons Offenses

State v. Mitchell, __ N.C. App. __, __ S.E.2d __ (Dec. 4, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi00OTktMS5wZGY=). In a felon in

possession case, there was sufficient evidence that the defendant had constructive possession of the firearm in question. The defendant was driving a rental vehicle and had a female passenger. The gun was found in a purse in the glove container of the car. The defendant was driving the car and his interactions with the police showed that he was aware of the contents of the vehicle. Specifically, he told the officer that the passenger had a marijuana cigarette and that there was a gun in the glove container.

Terrorism and Related Offenses

State v. Golden, __ N.C. App. __, __ S.E.2d __ (Dec. 4, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0yNjUtMS5wZGY=). There was sufficient evidence in a case where the defendant was convicted of perpetrating a hoax on law enforcement officers by use of a false bomb or other device in violation of G.S. 14-69.2(a). Specifically, there was sufficient evidence to establish that the defendant concealed, placed or displayed the fake bomb in his vehicle of his intent to perpetrate a hoax.

Defenses

Entrapment

State v. Reid, __ N.C. App. __, __ S.E.2d __ (Dec. 4, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0zNDAtMS5wZGY=). The trial court did not err by denying the defendant's request for an instruction on entrapment where no credible evidence suggested that he would not have committed the crime except for law enforcement's persuasion, trickery or fraud; or that the crime was the creative production of law enforcement authorities.

Post-Conviction

MAR Procedure

State v. Rollins, __ N.C. App. __, __ S.E.2d __ (Dec. 4, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0yNTktMS5wZGY=). Over a dissent the court held that the trial court did not abuse its discretion by denying the defendant's MAR without an evidentiary hearing. The defendant's MAR asserted that he "did not receive a fair trial as a result of a juror watching irrelevant and prejudicial television publicity during the course of the trial, failing to bring this fact to the attention of the parties or the Court, and arguing vehemently for conviction during jury deliberations." Although the MAR was supported by an affidavit from one of the jurors, the court determined that the affidavit "merely contained general allegations and speculation." The court noted that the defendant's MAR failed to specify: which news broadcast the juror in question had seen; the degree of attention the juror in question had paid to the broadcast; the extent to which the juror in question received or remembered the broadcast; whether the juror in question had shared the contents of the news broadcast with other jurors; and the prejudicial effect, if any, of the alleged juror misconduct.

Ineffective Assistance

State v. Hoff, __ N.C. App. __, __ S.E.2d __ (Dec. 4, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi03NzEtMS5wZGY=). In a burglary case, trial counsel was not ineffective by failing to move to exclude fingerprint evidence, in part because of the North Carolina Supreme Court's "long-standing acceptance of the reliability of fingerprint evidence."

Judicial Administration