Criminal Procedure

Appeal Issues

State v. Gamez, __ N.C. App. __, __ S.E.2d __ (July 16, 2013). Where the State's witness testified regarding statements made to the victim by the victim's brother and the defendant failed to move to strike the testimony, the defendant failed to preserve the issue for appellate review.

Indictment Issues

State v. Stevens, __ N.C. App. __, __ S.E.2d __ (July 16, 2013). (1) An indictment for contributing to the delinquency/neglect of a minor was not defective. The indictment tracked the statutory language but did not specify the specific acts at issue. An indictment for a statutory offense is sufficient if the offense is charged in the words of the statutes, or equivalent words. Any error in the caption of the indictment was immaterial. (2) With respect to assault on a child under 12, the trial court erred by permitting the jury to convict on a criminal negligence theory of intent, which was not alleged in the indictment.

Clerical Errors

State v. Lee, __ N.C. App. __, __ S.E.2d __ (July 16, 2013). Where the trial court determined that the defendant had 16 prior record points and was a prior record level V but the judgment indicated that he had 5 prior record points and was a prior record level III, the entries on the judgment were clerical errors.

Sentencing

Applicable Law

State v. Lee, __ N.C. App. __, __ S.E.2d __ (July 16, 2013). The trial court erred by granting the defendant's MAR and retroactively applying 2009 amendments to the Structured Sentencing Act (SSA) to the defendant's 2005 offenses. The court reasoned that the Session Law amending the SSA stated that "[t]his act becomes effective December 1, 2009, and applies to offenses committed on or after that date." Thus, it concluded, it is clear that the legislature did not intend for the 2009 grid to apply retroactively to offenses committed prior to December 1, 2009.

Probation

State v. Kornegay, __ N.C. App. __, __ S.E.2d __ (July 16, 2013). The trial court lacked jurisdiction to revoke the defendant's probation and activate his sentence. Although the trial court revoked on grounds that the defendant had committed a subsequent criminal offense, such a violation was not alleged in the violation report. Thus, the defendant did not receive proper notice of the violation. Because the defendant did not waive notice, the trial court lacked jurisdiction to revoke.

State v. Romero, __ N.C. App. __, __ S.E.2d __ (July 16, 2013). Defendant had no right to appeal from the trial court's orders modifying the terms of his probation and imposing Confinement in Response to Violation. For a discussion of this case, see my colleague's blog post here.

Motion for Appropriate Relief

State v. Peterson, __ N.C. App. __, __ S.E.2d __ (July 16, 2013). (1) Under G.S. 15A-1445, the State could appeal the trial court's order granting the defendant's MAR on the basis of newly discovered evidence. (2) In this murder case, the trial court properly granted the defendant a new trial on the basis of newly discovered evidence. At trial one of the State's most important expert witnesses was SBI Agent Duane Deaver, who testified as an expert in bloodstain pattern analysis. Deaver testified that the victim was struck a minimum of four times before falling down stairs. Deaver stated that, based on his bloodstain analysis, the defendant attempted to clean up the scene, including his pants, prior to police arriving and that defendant was in close proximity to the victim when she was injured. The court held that Deaver's misrepresentations regarding his qualifications (discussed in the opinion) constituted newly discovered evidence entitling the defendant to a new trial. (3) At the MAR hearing, the trial court properly excluded the State's expert witness, who did not testify at the original trial. The court viewed the State's position as "trying to collaterally establish that the jury would have reached the same verdict based on evidence not introduced at trial." It concluded that the trial court properly excluded this evidence:

> Defendant's newly discovered evidence concerned Agent Deaver, arguably, the State's most important expert witness. Thus, the State could have offered its own evidence regarding Agent Deaver's qualifications, lack of bias, or the validity of his experiments and conclusions. Furthermore, the State was properly allowed to argue that the evidence at trial was so overwhelming that the newly discovered evidence would have no probable impact on the jury's verdict. However, the State may not try to minimize the impact of this newly discovered evidence by introducing evidence not available to the jury at the time of trial. Thus, the trial court did not err in prohibiting the introduction of this evidence at the MAR hearing

State v. Lee, __ N.C. App. __, __ S.E.2d __ (July 16, 2013). State could appeal an amended judgment entered after the trial court granted the defendant's MAR. The trial court entered the amended judgment after concluding (erroneously) that the 2009 amendments to the SSA applied to the defendant's 2005 offenses.

Evidence

404(b) Evidence

State v. Gordon, __ N.C. App. __, __ S.E.2d __ (July 16, 2013). In a robbery case involving a purse snatching, a purse-snatching by the defendant 6 weeks prior was properly admitted under Rule 404(b). The court found that the incidents were sufficiently in that they both occurred in Wal-Mart parking lots and involved a purse-snatching from a female victim who was alone. Also, the requirement of temporal proximity was satisfied.

Opinions

State v. Gamez, __ N.C. App. __, __ S.E.2d __ (July 16, 2013). (1) In criminal cases, the amendment to N.C.Evid. R. 702, which is "effective October 1, 2011, and applies to actions commenced on or after that date" applies to cases where the indictment is filed on or after that date. The court noted that it had suggested in a footnote in a prior unpublished opinion that the trigger date for applying the amended Rule is the start of the trial but held that the proper date is the date the indictment is filed. Here, the defendant was initially indicted on 17 May 2010, before the 1 October 2011 effective date. Although a second bill of indictment was filed on 12 December 2011 and subsequently joined for trial, the court held that the criminal proceeding commenced with the filing of the first indictment and that therefore amended Rule 702 did not apply. (2) In a child sex case decided under pre-amended R. 702, the trial court did not abuse its discretion by admitting expert opinion that the victim suffered from post-traumatic stress disorder when a licensed clinical social worker was tendered as an expert in social work and routinely made mental health diagnoses of sexual assault victims. The court went on to note that when an expert testifies the victim is suffering from PTSD, the testimony must be limited to corroboration and may not be admitted as substantive evidence.

Criminal Offenses

State v. Stevens, __ N.C. App. __, __ S.E.2d __ (July 16, 2013). The evidence was sufficient to show that the defendant committed the offense of contributing to the delinquency/neglect of a minor. The court rejected the defendant's argument that the State presented no evidence that the defendant was the minor's parent, guardian, custodian, or caretaker, concluding that was not an element of the offense. The court further found that the State presented sufficient evidence that the defendant put the juvenile in a place or condition whereby the juvenile could be adjudicated neglected. Specifically, he took the juvenile away from the area near the juvenile's home, ignored the juvenile after he was injured, and then abandoned the sleeping juvenile in a parking lot. The court concluded: "Defendant put the juvenile in a place or condition where the juvenile could be adjudicated neglected because he could not receive proper supervision from his parent."