Recent Cases Affecting Criminal Law and Procedure
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North Carolina Supreme Court

Criminal Law and Procedure

(1) Trial Judge Did Not Violate Ruling in Blakely v. Washington, 542 U.S. 296 (2004), When Judge Found Aggravating Factor But Imposed Sentence in Presumptive Range—Ruling of Court of Appeals Is Reversed
(2) Court States That *Blakely* Error Is Not Structural Error, Based on United States Supreme Court Ruling in *Washington v. Recuenco*, and Reversal of a Sentence Is Not Required If Error Is Harmless Beyond a Reasonable Doubt

State v. Norris, 360 N.C. 507, 630 S.E.2d 915 (30 June 2006), *reversing*, 172 N.C. App. 722, 617 S.E.2d 298 (16 August 2005). (1) The trial judge found an aggravating factor and multiple mitigating factors and sentenced the defendant in the presumptive range. The court ruled, reversing the ruling of the Court of Appeals, that the trial judge did not violate the ruling in Blakely v. Washington, 542 U.S. 296 (2004), because the sentence was in the presumptive range. The court also noted that while a judge is required to consider evidence of aggravating and mitigating factors in each case, a judge is required to make findings of such factors only if the judge does not sentence a defendant in the presumptive range. (2) The court stated in footnote two that *Blakely* error is not structural error, based on the United States Supreme Court ruling in *Washington v. Recuenco*, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006), and reversal of a sentence is not required if the error is harmless beyond a reasonable doubt. The court recognized that its prior ruling in State v. Allen, 359 N.C. 425, 615 S.E.2d 256 (2005) (*Blakely* error is structural error automatically requiring reversal of sentence), was in direct conflict with *Washington v. Recuenco*.

Arrest, Search, and Confession Issues

Officer Did Not Have Probable Cause to Stop Vehicle for Perceived Traffic Violation: Failing to Signal When Making a Turn, G.S. 20-154(a)

State v. Ivey, 360 N.C. 562, 633 S.E.2d 459 (18 August 2006). A law enforcement officer stopped a vehicle driven by the defendant after observing that the defendant completely stopped at a stop sign at an intersection, and then made a right turn without using a turn signal. The defendant consented to a search of his vehicle, a firearm was found, and the defendant was convicted of possession of a firearm by felon and carrying a concealed weapon. The court ruled, relying on the standard of probable cause set out in Whren v. United States, 517 U.S. 806 (1996), that the officer did not have probable cause to stop the vehicle for a perceived traffic violation, specifically G.S. 20-154(a). The evidence did not indicate that any vehicle or pedestrian was, or might have been, affected by the turn, including the officer's vehicle which was some distance behind the defendant's vehicle. Because the officer's search of the vehicle arose from the unconstitutional stop, all evidence seized during the search should have been excluded by the trial judge, and it was therefore error to deny the defendant's suppression motion. [Author's note: To the extent the court's ruling rests on its statement that the United States Constitution requires an

officer to have probable cause (instead of reasonable suspicion) when seizing a vehicle for a "perceived traffic violation," it is in direct conflict with United States v. Delfin-Colina, 464 F.3d 392 (3d Cir. 2006), and six other federal circuit courts of appeals. The court in *Delfin-Colina* stated that there is little in *Whren* to suggest that the United States Supreme Court intended to create a new probable cause standard in the context of investigatory traffic stops. Instead, the Court in *Whren* was responding to the situation before it—one in which the officer obviously possessed probable cause—and was not altering the longstanding reasonable suspicion standard recognized for traffic stops. The court in *Delfin-Colina*, joining six other circuit courts of appeals, ruled that the reasonable suspicion standard applied to routine traffic stops. The ruling in State v. Wilson, 155 N.C. App. 89, 574 S.E.2d 93 (2002) (probable cause is required to stop a vehicle for a readily observed traffic violation), is also in direct conflict with *Delfin-Colina*.]

North Carolina Court of Appeals

Criminal Law and Procedure

Defendant's Right to a Unanimous Verdict Was Not Violated Involving Eleven Convictions for Raping His Pre-Teen Daughter, When the Victim Testified About One Specific Act of Rape Constituting One Conviction and Offered Generic Testimony (Vaginal Intercourse "More Than Two Times a Week" For More Than a Year) Supporting One Conviction of Rape for Each of Ten Consecutive Months

State v. Bullock, 178 N.C. App. 460, 631 S.E.2d 868 (18 July 2006). The defendant was convicted of eleven counts of rape of his pre-teen daughter. She testified about a specific act of vaginal intercourse that occurred in late 2000. The defendant was indicted and convicted of this rape in an indictment alleging the dates from October through December 2000. She also testified that the defendant continued to have vaginal intercourse with her "more than two times a week" from that first act in late 2000 until at least the Spring of 2002—commonly known as "generic testimony" because she did not describe any particular act of vaginal intercourse during this time period. The defendant was indicted for and convicted of ten rapes based on the generic testimony, one each for the months of January through October 2001. The defendant argued that his constitutional right to a unanimous verdict was violated because the state presented evidence of more acts of rape than charges of rape. The court rejected this argument, based on the ruling in State v. Markeith Lawrence, 360 N.C. 368, 627 S.E.2d 609 (7 April 2006), *reversing in part*, 170 N.C. App. 200, 612 S.E.2d 678 (2005), and the North Carolina Supreme Court's statement in *Markeith Lawrence* that it found persuasive the reasoning of State v. Wiggins, 161 N.C. App. 583, 589 S.E.2d 402 (2003) (upholding convictions of five counts of statutory rape in which the victim testified to four specific acts of rape and offered generic testimony about many other acts of rape). The court also ruled as no longer binding precedent prior rulings of the Court of Appeals that generic testimony can only support one additional conviction beyond those convictions representing specific act testimony. These prior rulings were State v. Gary Lawrence, 165 N.C. App. 548, 599 S.E.2d 87 (2004), *reversed in part*, 360 N.C. 393, 627 S.E.2d 615 (7 April 2006), and State v. Bates, 172 N.C. App. 27, 616 S.E.2d 280 (1 November 2005). The court noted that the Court of Appeals ruling in *Gary Lawrence* was reversed by the North Carolina Supreme Court and *Bates* rested on the Court of Appeals ruling in *Gary Lawrence*. Instead, the court ruled that the binding precedent is State v. Wiggins, cited above. The court stated that there was no language in *Wiggins* that would limit to one the number of convictions based on generic testimony. The court ruled—considering six factors set out by the Supreme Court in *Markeith Lawrence*—that the defendant's ten convictions (one for each month over a ten-month period)

based on the victim generic testimony did not violate the defendant's right to a unanimous verdict.

Defendant's Right to Unanimous Jury Verdict Was Not Violated When Defendant Was Convicted of Twenty-Seven Counts of Indecent Liberties and Eighteen Counts of First-Degree Sexual Offense, Although There Was Evidence of Many More Sexual Acts Than Charges

State v. Richard Brigman, 178 N.C. App. 78, 632 S.E.2d 498 (20 June 2006). The defendant was convicted of twenty-seven counts of indecent liberties and eighteen counts of first-degree sexual offense, although there was evidence of many more sexual acts than charges. None of the verdict sheets set out the specific act that the jury had to find to convict. The trial judge instructed the jury that a verdict must be unanimous, and separate verdict sheets were submitted to the jury. The court ruled, relying on State v. Markeith Lawrence, 360 N.C. 368, 627 S.E.2d 609 (2006), and State v. Gary Lawrence, 360 N.C. 393, 627 S.E.2d 615 (2006), the defendant's right to a unanimous verdict on each charge was not violated.

(1) Defendant's Right to Unanimous Verdict Was Not Violated When Defendant Was Tried for Ten Counts of Indecent Liberties, Evidence Was Presented of Ten Incidents of Indecent Liberties, and Jury Returned Seven Guilty Verdicts
(2) Defendant's Right to Unanimous Verdict Was Not Violated When Defendant Was Tried for Eleven Counts of First-Degree Sexual Offense, Evidence Was Presented of Six to Ten Incidents of First-Degree Sexual Offense, and Jury Returned Six Guilty Verdicts

State v. Bates, 179 N.C. App. 628, 634 S.E.2d 919 (3 October 2006). The defendant was convicted of six counts of first-degree sexual offense and seven counts of indecent liberties, as well as other offenses. In a previous appeal of these convictions, 172 N.C. App. 27 (2005), the court vacated all thirteen convictions because it ruled that the defendant had been denied his right to a unanimous jury verdict. On the state's petition for review, the North Carolina Supreme Court remanded the case for reconsideration in light of its ruling in State v. Markeith Lawrence, 360 N.C. 368 (2006). (1) The court ruled, relying on State v. Brigman, 178 N.C. App. 78, 632 S.E.2d 498 (20 June 2006) (relying on *Markeith Lawrence* to uphold convictions), that the defendant's right to a unanimous verdict was not violated when the defendant was tried for ten counts of indecent liberties, evidence was presented of ten incidents of indecent liberties, and the jury returned seven guilty verdicts. The court stated that the fact that the jury may have considered evidence of all ten counts to reach a unanimous verdict that the defendant was guilty of seven counts did not, under *Markeith Lawrence*, violate the right to a unanimous verdict. (2) The court ruled, relying on the post-*Markeith Lawrence* unpublished Court of Appeals opinion in State v. Spencer (No. COA05-623, 6 June 2006), that the defendant's right to a unanimous verdict was not violated when the defendant was tried for eleven counts of first-degree sexual offense, evidence was presented of six to ten incidents of first-degree sexual offense, and the jury returned six guilty verdicts. The court considered four factors in determining that the defendant's right to a unanimous verdict was not violated: (i) the evidence; (ii) the indictments; (iii) the jury instructions; and (iv) the verdict sheets. The court stated while the fact that more counts were charged than supported by the evidence created an opportunity for confusion, it did not necessarily make it impossible to match the jury's verdict to the evidence. The court noted that the trial judge had instructed the jury that all twelve jurors must unanimously agree as to each charge, which adequately ensured that the jury would match its unanimous verdicts with the charges. After analyzing the verdict sheets, the court concluded that it was possible to match the jury's guilty verdicts with specific incidents presented by the evidence.

(1) Trial Judge Did Not Err in Instructing Jury That Defendant Could Be Convicted of Indecent Liberties as Principal or Aider and Abettor When Indictment Alleged He was Aider and Abettor

(2) Defendant's Right to Unanimous Jury Verdict Was Not Violated With Two Convictions of Indecent Liberties and Three Convictions of First-Degree Rape

State v. Fuller, 179 N.C. App. 61, 632 S.E.2d 509 (1 August 2006). The defendant was convicted of two counts of indecent liberties and three counts of first-degree rape involving his ten-year-old son. (1) The indecent liberties indictments alleged that the defendant acted as an aider and abettor in committing the offenses. The court ruled that the trial judge did not err in instructing the jury that the defendant could be convicted of indecent liberties as a principal or aider and abettor. There was no fatal variance because different theories of criminal liability for one offense are not separate offenses. (2) Based on State v. Lawrence, 360 N.C. 368, 627 S.E.2d 609 (2006), the court ruled that the defendant's right to a unanimous jury verdict for the two convictions of indecent liberties was not violated even though there was evidence at trial of more than two acts of indecent liberties. Based on State v. Lawrence, 360 N.C. 368, 627 S.E.2d 609 (2006), the court ruled that the defendant's right to a unanimous jury verdict for the three convictions of first-degree rape was not violated when the victim testified to three specific acts of rape and the verdict sheets included specific dates for the acts, even though evidence suggested that other rapes may have occurred.

Only One Conviction of Indecent Liberties Permitted For Two Acts of Inappropriately Touching Victim That Was Committed During One Transaction

State v. Laney, 178 N.C. App. 337, 631 S.E.2d 522 (5 July 2006). The defendant was convicted of two counts of indecent liberties. The evidence showed that the defendant entered the bedroom where the victim was sleeping and touched the victim's breasts over her shirt and then put his hand inside the waistband of her pants. The court ruled, relying on State v. Hartness, 326 N.C. 561, 391 S.E.2d 177 (1990), and distinguishing State v. Lawrence, 360 N.C. 368, 627 S.E.2d 609 (2006), that only one conviction of indecent liberties was permitted. The defendant's two acts were part of one transaction. The sole act involved was touching, not two distinct sexual acts. There was no time gap between the two touching incidents, and the two acts combined were for the purpose of arousing or gratifying the defendant's sexual desire.

No Fatal Variance Between Indictment Charging Sex Offense with 13 Year Old and Proof That Victim Was Thirteen Years Old When Sexual Act Occurred, Although Indictment Alleged Offense Occurred When Victim Could Have Been Either 12 Years Old or 13 Years Old

State v. Brown, 178 N.C. App. 189, 631 S.E.2d 49 (20 June 2006). The indictment charging the defendant with sexual offense with a 13 year old alleged the offense occurred over a time span that included dates when the victim was either 12 years old or 13 years old. The victim testified at trial that the defendant committed a sexual act with her when she was 13 years old, and the jury instruction required that the jury must find that the victim was 13 years old when the sexual act occurred. The court ruled that there was not a fatal variance between the indictment and proof under these circumstances.

Sufficient Evidence to Support Defendant's Conviction of Felonious Breaking or Entering When Defendant Entered Inner Office of Law Firm to Which Public Access Was Not Allowed and Committed Theft

State v. Brooks, 178 N.C. App. 211, 631 S.E.2d 54 (20 June 2006). The defendant was convicted of felonious breaking or entering. The defendant entered the reception area of a law office that was open to members of the public seeking legal assistance. However, he later entered one of the lawyer's offices and took some of her possessions. The court ruled, relying on State v. Speller, 44 N.C. App. 59, 259 S.E.2d 784 (1979), that this was an illegal entering and upheld the defendant's conviction of felonious breaking or entering. The court stated that when the defendant entered the reception area, he did so with the law firm's implied consent. However, when he went into an area of the firm not open to the public to commit a theft, the consent was void ab initio.

Sufficient Evidence of Aiding and Abetting Obtaining Property by False Pretenses When Defendant Asked County Employee to Fix Defendant's Toilet at His House and Employee Fixed Toilet During Work Day

State v. Sink, 178 N.C. App. 217, 631 S.E.2d 16 (20 June 2006). The court ruled that there was sufficient evidence to support the defendant's conviction of aiding and abetting obtaining property by false pretenses when the defendant asked a county employee to fix the defendant's toilet at his house and the employee fixed the toilet during the work day. The false pretense consisted of the county employee's wrongfully obtaining public funds when he provided private services and later falsified his time sheets. The defendant instigated and encouraged the county employee to provide private services at taxpayer expense.

First-Degree Murder Indictment Did Not Need to Allege Theory of Aiding and Abetting

State v. Glynn, 178 N.C. App. 689, 632 S.E.2d 551 (1 August 2006). The court ruled that the first-degree murder indictment did not need to allege the theory of aiding and abetting by which the defendant was responsible for the murder.

(1) Forgery Indictments Were Not Fatally Defective For Failing to State Manner in Which Defendant Forged Bank Withdrawal Forms
(2) Insufficient Evidence of Forgery When Defendant Signed Her Own Name on Bank Withdrawal Forms But Did Not Sign Victim's Name

State v. King, 178 N.C. App. 122, 630 S.E.2d 719 (20 June 2006). The defendant was convicted of multiple counts of obtaining property by false pretenses, forgery, and uttering involving the withdrawal of money from the victim's bank account with an illegitimate power of attorney from the victim that had been obtained by defendant. (1) The court ruled that the forgery indictments were not fatally defective for failing to state the manner in which the defendant forged bank withdrawal forms. The indictments alleged all the elements of forgery and copies of the withdrawal forms were attached. (2) The court ruled, relying on State v. Lamb, 198 N.C. 423, 152 S.E. 154 (1930), that there was insufficient evidence of forgery when defendant signed her own name on bank withdrawal forms but did not sign the victim's name.

Locked Desk Compartment Was Not Safe Under Safecracking Law, G.S. 14-89.1

State v. Goodson, 178 N.C. App. 577, 631 S.E.2d 842 (18 July 2006). The court ruled that a locked desk compartment was not a safe under the safecracking law, G.S. 14-89.1.

(1) Indictment for Sale and Delivery of Cocaine Was Fatally Defective for Failing to Name Recipient of Cocaine
(2) Sufficient Evidence to Support Conviction of Keeping Motor Vehicle for Purpose of Selling Controlled Substance
(3) Only One Conviction of Keeping Motor Vehicle for Purpose of Selling Controlled Substance Was Authorized Because Evidence Showed Continuing Offense

State v. Calvino, 179 N.C. App. 219, 632 S.E.2d 839 (15 August 2006). (1) The court ruled, relying on State v. Martindale, 15 N.C. App. 216, 189 S.E.2d 549 (1972), that the indictment for sale and delivery of cocaine was fatally defective because it failed to name the recipient of the cocaine. The state knew the name of the recipient, but had alleged that the defendant sold cocaine to "a confidential source of information." (2) The court ruled that there was sufficient evidence to support the defendant's conviction of keeping a motor vehicle for the purpose of selling a controlled substance. The state's evidence showed the defendant on two separate dates used his van as the place to sell cocaine to the state's witness. (3) The court ruled, relying on State v. Grady, 136 N.C. App. 394, 524 S.E.2d 75 (2000), that only one conviction of keeping a motor vehicle for the purpose of selling a controlled substance was authorized because the state's evidence showed a continuing offense of using the same van to sell cocaine.

Defendant's Positive Urine Test for Cocaine and Witness's Testimony That She Saw Defendant Snort Cocaine Was Sufficient Evidence to Support Conviction of Possessing Cocaine

State v. Harris, 178 N.C. App. 723, 632 S.E.2d 534 (1 August 2006). The court ruled that the defendant's positive urine test for cocaine and a witness's testimony that she saw the defendant snort cocaine was sufficient evidence to support his conviction of possessing cocaine.

(1) Sufficient Evidence of Constructive Possession of Cocaine and Marijuana to Support Convictions of Possessing Cocaine With Intent to Sell and Deliver and Possession of Marijuana
(2) Sufficient Evidence of Intent to Sell and Deliver to Support Conviction of Possessing Cocaine With Intent to Sell and Deliver
(3) Sufficient Evidence to Support Conviction of Intentionally Maintaining Building for Purpose of Keeping or Selling Controlled Substances
(4) Trial Judge Did Err in Failing to Submit Lesser Misdemeanor Offense of Knowingly Maintaining Building for Purpose of Keeping or Selling Controlled Substances

State v. Hart, 179 N.C. App. 30, 633 S.E.2d 102 (1 August 2006). **(Author's note: There was a dissenting opinion, but not on the issues discussed below.)** The defendant was convicted of possessing cocaine with the intent to sell and deliver, intentionally maintaining a building for the purpose of keeping or selling controlled substances, and possession of marijuana. Officers executed a search warrant at an apartment. The apartment contained no beds, refrigerator, food other than some leftovers in the trash, and toiletries other than deodorant. Officers found crack cocaine, marijuana, scales, razor blades, aluminum foil, small red baggies, and an object characterized as a crack pipe. The defendant, who was present at the time of the search, had no drugs on his person but possessed $2,900.00 in denominations of fives, tens, and twenties. The defendant was also in close proximity to the drugs. Officers found in a dresser drawer utility and rent receipts with the defendant's name on them. Another person present (Hooker) had $200.00 in currency. Based on this evidence, the court ruled: (1) there was sufficient evidence of the defendant's constructive possession of the cocaine and marijuana; (2) there was sufficient evidence of intent to sell and deliver the cocaine; (3) there was sufficient evidence to support the

defendant's conviction of intentionally maintaining the building for the purpose of keeping or selling controlled substances; and (4) the trial judge did not err in failing to submit the lesser misdemeanor offense of knowingly maintaining a building for the purpose of keeping or selling controlled substances.

(1) No Double Jeopardy Violation When State Obtained Convictions for Possessing Firearm by Felon for Possessing Firearm in 2003 and Habitual Felon Status and 1998 Conviction of Possessing Firearm by Felon Was Used as Underlying Felony to Prove 2003 Offense, and 1998 Offense Also Was One of Three Felony Convictions Used to Prove Habitual Felon Status

(2) No Double Jeopardy Violation When State Obtained Conviction for Possessing Firearm by Felon for Possessing Firearm in 2003, and 1991 Cocaine Conviction Was Used as Underlying Felony for 1998 Offense Which Then Was Used to Prove 2003 Offense

State v. Crump, 178 N.C. App. 717, 632 S.E.2d 233 (1 August 2006). The defendant was convicted of possessing a firearm by felon for possessing a firearm in 2003. The state used a 1998 conviction of possessing firearm by felon as the underlying felony conviction to prove the 2003 offense. The defendant then pled guilty to habitual felon status. The 1998 conviction was one of the three felony convictions used to prove habitual felon status. The court ruled, relying on State v. Glasco, 160 N.C. App. 150, 585 S.E.2d 257 (2003), that there was no double jeopardy violation based on the imposition of multiple punishments. The court rejected the defendant's "double-counting" double jeopardy argument, which was based on the state's use of the 1998 conviction to prove the 2003 offense and to prove habitual felon status. The defendant was punished for possessing a firearm in 2003, not for possessing a firearm in 1998. The court also stated that the mere reliance on the 1998 conviction to establish that the defendant was a recidivist for sentencing purposes does not implicate double jeopardy concerns. (2) The court rejected the defendant's "double-counting" double jeopardy argument that it was impermissible to use the defendant's 1991 cocaine conviction as the underlying felony to prove the 1998 offense of possessing a firearm by a felon and then derivatively use the 1991 cocaine conviction again because that 1998 offense was then used as the underlying felony of the 2003 offense of possessing a firearm by a felon.

Trial Judge Erred in Denying Defendant the Right to Final Jury Argument Based on Defense Counsel's Cross-Examination of State's Expert Witness

State v. Bell, 179 N.C. App. 430, 633 S.E.2d 712 (5 September 2006). During cross-examination of the state's expert witness, a forensic drug chemist, defense counsel asked to view a graph and lab report prepared and brought to court by the witness. The witness gave the documents to defense counsel, who then cross-examined her about them. The defendant did not present any evidence. The court ruled, relying on State v. Shuler, 135 N.C. App. 449, 520 S.E.2d 585 (1999), and State v. Wells, 171 N.C. App. 136, 613 S.E.2d 705 (2005), that the trial judge erred in denying the defendant the right to final jury argument based on defense counsel's cross-examination of the state's expert witness. The court stated that the cross-examination was relevant and directly related to the witness's testimony on direct examination.

Sufficient Evidence to Support Conviction of G.S. 14-256 (Escape from Officer of County Jail) When Alamance County Deputy Sheriff Picked Up Prisoner from Central Prison for Court Appearance in Alamance County, Placed Him in Alamance County Jail, and Prisoner Escaped When Deputy Was Transporting Him Back to Central Prison

State v. Farrar, 178 N.C. App. 231, 631 S.E.2d 48 (20 June 2006). The court ruled, distinguishing State v. Brame, 71 N.C. App. 270, 321 S.E.2d 449 (1984), that there was sufficient evidence to support a conviction of G.S. 14-256 (escape from officer of county jail) when an Alamance County deputy sheriff picked up a prisoner from Central Prison for a court appearance in Alamance County, placed him in the Alamance County Jail, and the prisoner escaped when the deputy was transporting him back to Central Prison.

(1) Trial Judge Erred in Not Including Possible Verdict of Not Guilty By Reason of Self-Defense in Final Mandate, and Judge Also Erred in Not Correctly Giving Other Self-Defense Instructions to Jury
(2) Trial Judge Did Not Err in Denying Defendant's Motion to Require State to Disclose Identity of Confidential Informant to Prepare Defense at Trial

State v. Withers, 179 N.C. App. 249, 633 S.E.2d 863 (5 September 2006). The defendant was convicted of first-degree murder in which his defense was self-defense. (1) The court ruled that the trial judge erred in not including a possible verdict of not guilty by reason of self-defense in the final mandate to the jury, and the error required a new trial, based on State v. Dooley, 285 N.C. 158, 203 S.E.2d 815 (1974). The court also ruled that the trial judge erred by failing to correctly instruct the jury on: (i) self-defense when the defendant was not the aggressor, and (ii) defense of habitation concerning a person's entry into a home to commit a felony. (See the court's discussion of these issues in its opinion.) (2) The court ruled that the trial judge did not err in denying the defendant's motion to require the state to disclose the identity of a confidential informant to prepare a defense at trial. The court stated that the factors favoring nondisclosure outweighed those favoring disclosure. (See the court's discussion of the factors in its opinion.)

Defendant Was Not Denied Assistance of Counsel for Probation Revocation Hearing When, After Waiving Right to Appointed Counsel, Defendant Failed to Retain Counsel Over Eight-Month Period; Defendant's Own Acts Forfeited His Right to Counsel

State v. Quick, 179 N.C. App. 647, 634 S.E.2d 915 (3 October 2006). The court ruled, relying on State v. Montgomery, 138 N.C. App. 521, 530 S.E.2d 66 (2000), that the defendant was not denied assistance of counsel for his probation revocation hearing when, after waiving his right to appointed counsel, the defendant failed to retain counsel over a eight-month period. The court stated that the defendant through his own acts forfeited his right to proceed with counsel of his choice.

(1) Court's Jurisdiction to Revoke Defendant's Probation for Conviction of Possession of Cocaine Was Lost by Lapse of Time
(2) Court's Revocation of Defendant's Probation for Assault Conviction Was Supported By Sufficient Findings of Trial Judge
(3) Competent Evidence Supported Probation Revocation; Court Notes That Rule 1101(b)(3) Provides That Rules of Evidence Are Inapplicable to Probation Proceedings

State v. Henderson, 179 N.C. App. 191, 632 S.E.2d 818 (15 August 2006). In January 2000, the defendant was placed on 24 months' probation for possession of cocaine (hereafter, cocaine probation). At a probation violation hearing in July 2000, the probation was extended to

December 4, 2002. The defendant was arrested and charged on November 3, 2002, for felonious assault. The defendant's probation officer filed a probation violation report on November 25, 2002, alleging violations of the defendant's probation and noted the defendant's pending assault charge. There was no court hearing based on this report before the expiration of the probation on December 4, 2002. On September 17, 2003, the defendant was placed on 30 months' probation for misdemeanor assault (hereafter, assault probation), reduced from the original felonious assault charge. In October 2003, the defendant's probation officer filed a probation violation report for both probations, and the judge in November 2003 modified each probation and extended the cocaine probation to a total of five years to December 2004. It was later extended to June 2005. In April 2005, the defendant's probation officer alleged violations of both probations. In May 2005, a judge revoked both probations. (1) The court ruled that the court's jurisdiction to revoke the defendant's cocaine probation was lost by the lapse of time and arrested judgment on the sentence imposed by the trial judge. The court noted that G.S. 15A-1344(d) tolled the probationary period when he was charged with felonious assault on November 3, 2002. At that time, he had 31 days remaining on his probation. Once the charge was resolved on September 17, 2003, the court had jurisdiction to modify or revoke his probation for only 31 days thereafter. That was not done. Also, a defendant's probation may be revoked after the probationary period expires if the state complies with the provisions of G.S. 15A-1344(f): a written motion and a reasonable effort to notify the probationer and to conduct the hearing earlier. There was no evidence of compliance with the statute in this case. (2) The court ruled that the court's revocation of the defendant's assault probation was supported by sufficient findings, albeit mostly in the preprinted text in AOC-CR-608 and the probation violation report that was incorporate by reference. The court affirmed the revocation of the defendant's assault probation. (3) The defendant argued that there was no competent evidence of any probation violation for the assault probation because the probation officer who had presented the violations at the revocation hearing had been recently assigned to the case and had no actual knowledge of any violations. The defendant contended that incompetent hearsay evidence was thus introduced at the hearing. The court noted that Rule 1101(b)(3) specifically states that the rules of evidence doe not apply in proceedings granting or revoking probation. The court ruled that even if the rules of evidence fully applied to the proceeding, there was sufficient non-hearsay evidence to prove the probation violation.

Evidence

(1) No Crawford v. Washington Violation When Foster Parents Testified About Statements Made to Them by Non-Testifying Foster Children
(2) Foster Children's Statements to Foster Parents Were Properly Admitted Under Residual Hearsay Exception, Rule 804(b)(5)
(3) No Crawford v. Washington Violation When Pediatrician Testified About Statement Made to Pediatrician by Young Child
(4) Trial Judge Erred in Allowing State's Expert to Offer Opinion That Children Suffered Sexual Abuse by Defendant

State v. Richard Brigman, 178 N.C. App. 78, 632 S.E.2d 498 (20 June 2006). The defendant was convicted of eighteen counts of first-degree sexual offense and twenty-seven counts of indecent liberties involving three child victims. (1) During the investigation of the offenses, the children were removed from their home and placed with foster parents. The three children, who did not testify at trial, told the foster parents about the offenses. The foster parents testified at trial about these statements. The court ruled, relying on State v. Kimberly Brigman, 171 N.C. App. 305, 615 S.E.2d 21 (2005), the children's statements were not testimonial and there was no violation of the ruling in Crawford v. Washington, 541 U.S. 36 (2004). (2) The court ruled that the foster children's statements to their foster parents were properly admitted under the residual

hearsay exception, Rule 804(b)(5). (See the court's analysis of the rule's requirements in its opinion.) (3) The court ruled, relying on State v. Kimberly Brigman, 171 N.C. App. 305, 615 S.E.2d 21 (2005), that there was no Crawford v. Washington violation when a pediatrician testified about a statement made to the pediatrician by a child who was not quite three years old. The court stated that it cannot conclude that a reasonable child under three years of age would know or should know that his statements might later be used at a trial. The child's statement was not testimonial under Crawford. (4) The court ruled, relying on State v. Figured, 116 N.C. App. 1, 446 S.E.2d 838 (1994), that the trial judge erred in allowing the state's expert, a pediatrician, to offer her opinion that the children suffered sexual abuse by the defendant.

In Prosecution for Failure to Provide Notice of Change of Address as Registered Sex Offender, Documents Used to Prove Date of Defendant's Release from Prison Were Admissible Under Rule 803(6) (Business Records Hearsay Exception)

State v. Wise, 178 N.C. App. 154, 630 S.E.2d 732 (20 June 2006). The court ruled, in a prosecution for failure to provide notice of a change of address as a registered sex offender, the following documents used to prove the date of the defendant's release from prison were admissible under Rule 803(6) (business records hearsay exception): (1) a Department of Correction form sent to the sheriff's department and kept in the defendant's file that notified the department of the defendant's date of release and expected registration as a sex offender in its county; and (2) a sex offender registration worksheet that the defendant completed with the assistance of a deputy sheriff. The court stated the exclusion of some police reports in Rule 803(8) (public records hearsay exception) did not bar the admission of these records under Rule 803(6).

New York State Prison Records Were Properly Admitted Under Rule 803(8) (Public Records Hearsay Exception), and Court Noted That Extrinsic Evidence of Authenticity Was Not Required Under Rule 902 When Records Bore a Seal and Were Certified

State v. Watson, 179 N.C. App. 228, 634 S.E.2d 231 (5 September 2006). The state introduced a New York state prisoner's records. There was a signed certification by the prison's records coordinator that the records were true and exact copies of a particular prisoner's file and were kept in the regular course of business. The court ruled that the records were properly admitted under Rule 803(8) (public records hearsay exception). The court relied on United States v. Weiland, 420 F.3d 1062 (9th Cir. 2005), which involved the identically-worded federal hearsay exception. The records were introduced without testimony of the records coordinator; the court noted under Rule 902 that extrinsic evidence of authenticity was not a condition precedent for the admissibility of documents bearing a seal and were certified copies of public records.

In Prosecution of Sexual Offense With 13 Year Old, Evidence of Defendant's Showing Female Victim Nude Photos of Other Females Before Committing Sexual Act With Victim Made Photos Admissible Under Rule 404(b) to Show Plan and Preparation to Commit Offense and To Corroborate Victim's Testimony

State v. Brown, 178 N.C. App. 189, 631 S.E.2d 49 (20 June 2006). In the prosecution of sexual offense with a 13 year old, the victim testified that before the defendant engaged in a sexual act with her, he showed her four photographs of nude adult women with whom she was acquainted and told her he was going to take similar pictures of her. The photographs were admitted into evidence. The court ruled, relying on State v. Williams, 318 N.C. 624, 350 S.E.2d 353 (1986), and other cases, and distinguishing other cases, such as State v. Bush, 164 N.C. App. 254, 595 S.E.2d 715 (2004) (videotapes inadmissible when not shown to victim), that the photographs

were admissible under Rule 404(b) to show plan and preparation to commit the offense as well as to corroborate the victim's testimony.

(1) Sufficient Authentication Under Rule 901 of Incoming and Outgoing Text Messages Sent or Received by Cellphone Number to Allow Introduction of Printouts and Transcripts of Text Messages
(2) Trial Judge Did Not Err in Allowing State's Witness to Testify Who Had Not Been Listed on State's List of Witnesses Provided to Defendant
(3) Trial Judge Did Not Err in Denying Defendant's Motion to Require Law Enforcement Officer to Submit to Interview by Defense Counsel

State v. Taylor, 178 N.C. App. 395, 632 S.E.2d 218 (18 July 2006). The defendant was convicted of first-degree murder of a victim who had traveled to the defendant's city for a sexual encounter arranged through text messages sent and received by a cellphone number. (1) The court ruled, relying on cases from other jurisdictions, that there was sufficient authentication under Rule 901 of incoming and outgoing text messages sent or received by the victim's Nextel-assigned cellphone number to allow the introduction into evidence of printouts and transcripts of the text messages. Two cellphone employees testified how Nextel sent and received text messages and how these particular messages were stored and retrieved. The text messages contained sufficient circumstantial evidence that tended to show that the victim was the person who had sent and received them. (2) The court ruled that the trial judge did not err in allowing a state's witness, a cellphone store manager, to testify who had not been listed on the state's list of witnesses provided to the defendant. The court noted that the state had disclosed that it would call the custodian of Nextel phone records, and the witness's name was in the detective's file that had been provided to the defendant in discovery. (3) The court ruled that the trial judge did not err in denying the defendant's motion to require a law enforcement officer who investigated the case to submit to an interview by defense counsel. The evidence showed that the district attorney's office had not advised the officer that he was prohibited from meeting with defense counsel. The officer had decided not to submit to an interview on his own. The court rejected the defendant's argument that the 2004 discovery amendments supported the defendant's position on this issue.

Trial Judge Abused Discretion in Allowing State's Expert Witness to Testify When State Had Failed to Comply With Defendant's Pretrial Discovery Request Under G.S. 15A-903(a)(2) (Notice of Expert Witness)

State v. Blankenship, 178 N.C. App. 351, 631 S.E.2d 208 (5 July 2006). The defendant filed a request for pretrial discovery, including a request for notice of expert witnesses that the state reasonably expected to call at trial and the additional information required by G.S. 15A-903(a)(2). The state provided the defendant with various discovery materials, but nothing about the use of expert witnesses. The defendant objected when the state during trial called an SBI agent to testify about the manufacturing process of methamphetamine and the ingredients used. The state informed the trial judge that it did not know that this SBI agent would be testifying on this issue until then, although the evidence showed that the state was planning to call someone from the SBI to testify. The trial judge overruled the defendant's objection on the ground that the witness was a fact witness, not an expert. However, the state then sought to qualify the SBI agent as an expert witness on manufacturing methamphetamine. The judge permitted the SBI agent to testify as a lay witness. The court ruled that the agent was in fact qualified as, and testified as, an expert witness. The court also ruled that the trial judge abused his discretion in allowing the SBI agent to testify when the state had failed to comply with its discovery obligations concerning expert witnesses.

(1) Medical Institution Had Right to Appeal Trial Judge's Order That It Provide Appellate Counsel with Medical Records of State's Witness to Prepare Possible Appeal on Evidence Issue
(2) Defendant's Lack of Access to State's Rule 404(b) Witness's Medical Records Was Not Error Because Contents of Records Were Not Material to Issues at Trial
(3) Testimony by State's Witnesses That Defendant Sexually Abused Them Was Properly Admitted Under Rule 404(b) in Defendant's Trial for Sexually Abusing Thirteen-Year-Old

State v. Bradley, 179 N.C. App. 551, 634 S.E.2d 258 (19 September 2006). The defendant was convicted of sex offenses with a thirteen-year-old. Before trial, the defendant subpoenaed Duke University Health Systems (hereafter, DUHS) for medical records concerning a state's witness, not a victim in this trial, who was to give testimony under Rule 404(b) about the defendant's alleged sexual abuse of her. DUHS intervened and the trial judge granted a protective order denying defendant's access to the records, but required DUHS to maintain a sealed copy until final adjudication of the case. After the trial, the court ordered DUHS to provide appellate counsel with the records to prepare a possible appeal on evidence issues. (1) The court ruled that DUHS had a right under G.S.1-271 and 1-277 to appeal the judge's post-trial order. (2) The state's Rule 404(b) witness testified at the trial and was subject to cross-examination. The defendant argued at trial and on appeal that he intended to use the records to impeach the credibility of the witness by showing that she made statements contained in the records at odds with her testimony at trial, or failed to make statements that would have shown sexual abuse by the defendant. The court ruled that even if the witness had testified at variance to statements in the records, the defendant would not have been able to offer the records for purposes of impeachment because extrinsic evidence of prior inconsistent statements may not be used to impeach a witness concerning matters collateral to the issues. Furthermore, although a witness may be impeached on cross-examination concerning her prior inconsistent statements, the answers are conclusive and may not be attacked with direct evidence. Thus, the defendant's lack of access to the records was not error. (3) The court ruled that testimony by state's witnesses that the defendant sexually abused them was properly admitted under Rule 404(b), given the similarity of the their ages with the victim, their placement with the defendant because of familial or quasi-familial relationships, the defendant's purported modus operandi in each instance, and his warning to the witnesses (as he did with the victim) not to tell anyone what had happened.

In Trial of False Pretenses and Forgery Involving Illegitimate Power of Attorney Obtained by Defendant, Evidence of Another Illegitimate Power of Attorney Obtained by Defendant From a Different Victim Was Admissible Under Rule 404(b) to Show Common Plan or Scheme

State v. King, 178 N.C. App. 122, 630 S.E.2d 719 (20 June 2006). The defendant was convicted of multiple counts of obtaining property by false pretenses, forgery, and uttering involving the withdrawal of money from the victim's bank account with an illegitimate power of attorney from the victim that had been obtained by defendant. The court ruled that evidence of another illegitimate power of attorney that had been obtained by defendant from another victim was admissible under Rule 404(b) to show common plan or scheme. to obtain money from victims' bank accounts.

Defendant's Sexual Offenses with Half Sister of Rape Victim That Occurred Nine Years Earlier Than Offenses Being Tried Were Properly Admitted Under Rule 404(b)

State v. Bullock, 178 N.C. App. 460, 631 S.E.2d 868 (18 July 2006). The defendant was convicted of multiple counts of first-degree rape with his pre-teen daughter for offenses committed from late 2000 through late 2001. The court ruled that the defendant's sexual offenses with the pre-teen half sister of the rape victim that occurred nine years earlier than offenses being tried were properly admitted under Rule 404(b) to show common scheme or plan, based on the similarity of the offenses and unnatural character of a father raping his pre-teen daughters. The court rejected the defendant's argument that the time span between the sex offenses with the two daughters was too great to be relevant in showing a common plan or scheme.

Trial Judge Did Not Abuse Discretion in Drug Trial in Admitting Under Rule 404(b) Evidence of Annual Meeting of Drug Users and Sellers Attended by Defendant to Show His Motive, Opportunity, Intent, and Knowledge

State v. Calvino, 179 N.C. App. 219, 632 S.E.2d 839 (15 August 2006). The defendant was convicted of various drug offenses involving two separate sales of cocaine to the state's witness. The state's witness was a dug dealer who was cooperating with the state. The state's witness was allowed to testify about his attending a annual meeting of drug users and sellers in western North Carolina attended by the defendant. The court ruled that the trial judge did not abuse his discretion in admitting this evidence under Rule 404(b) to show defendant's motive, opportunity, intent, and knowledge.

Defendant's Statement to Mother of Indecent Liberties Victim About His Guilt of Offense Was Admissible as Admission by Party-Opponent under Rule 801(d)(A)

State v. Laney, 178 N.C. App. 337, 631 S.E.2d 522 (5 July 2006). The defendant was convicted of indecent liberties. Several months after the offense, the defendant told the mother of the victim that he was sorry for what he had done and that when he came to court, he would be guilty. The court ruled that the defendant's statement was admissible as an admission by a party-opponent under Rule 801(d)(A).

Arrest, Search, and Confession Issues

(1) *Miranda* Warnings Given in Spanish Were Adequate
(2) Waiver of *Miranda* Rights By Defendant With Low Intellectual Ability Was Valid

State v. Ortez, 178 N.C. App. 236, 631 S.E.2d 188 (5 July 2006). A law enforcement officer fluent in Spanish read the defendant his *Miranda* rights in Spanish from a pre-printed *Miranda* rights and waiver form. The defendant signed the waiver form. (1) The defendant on appeal challenged the adequacy of the *Miranda* warnings, specifically the use of "corte de ley" for "court of law" and "interrogatorio" for "questioning." The defendant also challenged the Spanish translation of the *Miranda* right to counsel for an indigent person. The court discussed these issues and ruled that the *Miranda* warnings given in Spanish reasonably conveyed to the defendant his *Miranda* rights and were therefore adequate. (2) The defendant's testing showed he had an IQ ranging from 55 to 77, classifying him as mildly mentally retarded to borderline intellectual or low average functioning. The court noted that a defendant's IQ alone does not mean the defendant could not make a voluntary, knowing, and intelligent waiver of his *Miranda* rights. The court discussed the facts in this case and ruled that the defendant's waiver was valid based on the totality of circumstances.

***Miranda* Waiver by Vietnamese-Speaking Defendant Was Understandingly, Voluntarily, and Knowingly Made When Vietnamese-Speaking Law Enforcement Officer Acted as Translator for Interrogating Officer**

State v. Nguyen, 178 N.C. App. 447, 632 S.E.2d 197 (18 July 2006). The court ruled that *Miranda* waiver by Vietnamese-speaking defendant was understandingly, voluntarily, and knowingly made when a Vietnamese-speaking law enforcement officer acted as the translator for the interrogating law enforcement officer. There was no evidence that the officer-translator was deceitful or acted in an otherwise improper manner during his dealings with the defendant. The court rejected the defendant's argument that the officer-translator was not a neutral translator because he was a law enforcement officer.

Search Warrant's Information Was Not Stale Because Affidavit Showed Defendant's Commission of On-Going Sex Crimes With Children, and Items to Be Seized Were of Continuing Utility to Defendant

State v. Pickard, 178 N.C. App. 330, 631 S.E.2d 203 (5 July 2006). The defendant was convicted of multiple sex crimes committed in his home with several children. The search warrant for the defendant's home authorized the seizure of computers, computer equipment and accessories, cassette videos and DVDs, video cameras, digital cameras, film cameras and accessories, and photographs and printed materials that could be consistent with the exploitation of a minor. The affidavit described the defendant's sexual and other inappropriate activity with four children under nine years old and with a fourteen year old. The victims described the defendant's taking photographs and his use of video cameras and computers. The activity with the fourteen year old had taken place about 18 months before the issuance of the search warrant. (Author's note: The affidavit apparently did not contain specific dates concerning the defendant's sexual activity with the younger children, but the affidavit stated that the officer's interviews with the younger children occurred the day before the officer applied for the search warrant.) The court ruled, relying on State v. Jones, 299 N.C. 298, 261 S.E.2d 860 (1980), and two cases from other jurisdictions, that the search warrant's information was not stale because the affidavit showed the defendant's commission of on-going sex crimes with the children, and the items to be seized were of continuing utility to the defendant.

In Civil Lawsuit, Fifth Amendment Privilege Against Self-Incrimination Did Not Protect Production in Discovery of Civil Defendant's Medical Records But Did Protect Defendant From Having to Answer Interrogatories and Requests for Admissions About Alcohol and Medications Taken Before Vehicular Accident

Roadway Express, Inc. v. Hayes, 178 N.C. App. 165, 631 S.E.2d 41 (20 June 2006). Plaintiffs sued the defendant for a vehicular accident in which a death resulted. Plaintiffs alleged that the defendant was impaired when the accident occurred. The court ruled, relying on Schmerber v. California, 384 U.S. 757 (1966), that the Fifth Amendment privilege against self-incrimination did not protect production in discovery of the defendant's medical records that contained blood test results concerning impairing substances. The court ruled, however, that the privilege protected the defendant from having to answer interrogatories and requests for admissions about alcohol and medications that the defendant may have taken before the accident. (There was a pending criminal prosecution of the defendant.) The court noted that the defendant's assertion of the privilege may bar the defendant's assertion of his affirmative defense of sudden emergency.

Sentencing

Defendant Cannot Stipulate in Prior Record Worksheet That Out-of-State Conviction Was Substantially Similar to North Carolina Offense Because Stipulation to Question of Law Is Invalid

State v. Palmateer, 179 N.C. App. 579, 634 S.E.2d 592 (19 September 2006). The court ruled, relying on State v. Hanton, 175 N.C. App. 250, 623 S.E.2d 600 (3 January 2006), that a defendant cannot stipulate in a prior record worksheet that an out-of-state conviction is substantially similar to a North Carolina offense because a stipulation to a question of law is invalid.

Trial Judge Did Not Err in Calculating Defendant's Prior Record Level By Counting Two Convictions on Same Day in Same County When One Conviction Was in District Court and Other Conviction Was in Superior Court

State v. Fuller, 179 N.C. App. 61, 632 S.E.2d 509 (1 August 2006). The court ruled that the trial judge did not err under G.S. 15A-1340.14(d) in calculating the defendant's prior record level by counting two convictions on the same day in the same county when one conviction was in district court and other conviction was in superior court.