Criminal Case Update

Covering Significant Cases Decided June 6, 2012 – Oct. 2, 2012

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Criminal Procedure

Capacity to Proceed and Related Issues

In re v. Murdock, __ N.C. App. __, __ S.E.2d __ (Aug. 7, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi03OS0xLnBkZg==). When assessing whether a defendant is charged with a violent crime pursuant to G.S. 15A-1003(a) and in connection with an involuntary commitment determination, courts may consider the elements of the charged offense and the underlying facts giving rise to the charge. However, the fact-based analysis applies only with respect to determining whether the crime involved assault with a deadly weapon. The court held:

> [F]or purposes of [G.S.] 15A-1003(a), a "violent crime" can be either one which has as an element "the use, attempted use, threatened use, or substantial risk of use of physical force against the person or property of another[,]" or a crime which does not have violence as an element, but assault with a deadly weapon was involved in its commission.

Slip Op. at 10 (citation omitted). Here, the defendant was charged with possession of a firearm by a felon and resisting an officer. Because violence is not an element of either offense, neither qualifies as a violent crime under the elements-based test. However, applying the fact-based analysis, the commission of the offenses involved an assault with a deadly weapon. The fact that the defendant stated that he wasn't going with the officers, that he ran into a bedroom and stood within reach of a loaded revolver, and that he resisted while being handcuffed and removed showed an unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the officers.

State v. Robinson, __ N.C. App. __, 729 S.E. 2d 88 (July 17, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xNTg0LTEucGRm). The trial court abused its discretion by denying defense counsel's motion requesting that the defendant be evaluated by a mental health professional to determine competency. At the call of the case for trial, defense counsel made a motion, supported by an affidavit by defense counsel and prior mental health evaluation reports, questioning the defendant's capacity to proceed and seeking an assessment of his competency by a mental health professional. After conducting a hearing on the motion and considering the documentary evidence and arguments presented, the trial court denied the motion. Reviewing those materials, the court concluded that "[t]he entirety of the evidence presented . . . indicated a 'significant possibility' that defendant may have been incompetent . . . , necessitating the trial court to appoint an expert or experts to inquire into defendant's mental health". The court noted that when the a trial court conducts a proper competency hearing but abuses its discretion in proceeding to trial in light of the evidence indicating the defendant's incompetency to proceed, the proper remedy is to vacate the judgment and remand the case for a new trial if and when the defendant is properly determined competent to proceed with trial. However, in this case a defense witness, Dr. Corvin, testified on direct examination that "there has been a time during my evaluation where I was somewhat concerned about [defendant's current competency to stand trial], although not currently." The court noted that defense counsel did not question Dr. Corvin on the issue of competency. It concluded: "Given Dr. Corvin's presence at trial and his testimony that he was not currently concerned with defendant's competency to stand trial, we fail to see how the trial court's error prejudiced defendant."

Counsel Issues

State v. Frederick, __ N.C. App. __, 730 S.E.2d 275 (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.

State v. Kelly, __ N.C. App. __, 727 S.E. 2d 912 (July 17, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi00OS0xLnBkZg==). The court admonished defense counsel for exceeding the bounds of zealous advocacy. In attacking the professionalism and ethics of the prosecutors, counsel said that the prosecutor "failed to investigate the truth"; "distort[ed] the truth"; "misled and misrepresented facts"; "subverted the truth by presenting false evidence in the form of [defendant's] confession"; "suppressed the truth by failing to disclose potentially truth-enhancing evidence"; and "dominated the fact-finding process all led directly to [defendant's] conviction for a crime she did not commit." Counsel asserted that "[a] prosecutor should be professionally disciplined for proceeding with prosecution if a fair-minded person could not reasonably conclude, on the facts known to the prosecutor, that the accused is guilty beyond a reasonable doubt." These comments were unsupported by the record and "highly inappropriate." The court "urge[d] counsel to refrain from making such comments in the future."

Discovery

State v. Allen, __ N.C. App. __, __ S.E.2d __ (Sept. 4, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS03NDQtMS5wZGY=). (1) The trial court erred by entering a pretrial order dismissing, under G.S. 15A-954(a)(4), murder, child abuse, and sexual assault charges against the defendant. The statute allows a trial court to dismiss charges if it finds that the defendant's constitutional rights have been flagrantly violated causing irreparable prejudice so that there is no remedy but to dismiss the prosecution. The court held that the trial court erred by finding that the State violated the defendant's *Brady* rights with respect to: a polygraph test of a woman connected to the incident; a SBI report regarding testing for the presence of blood on the victim's underwear and sleepwear; and information about crime lab practices and procedures. It reasoned, in part, that the State was not constitutionally required to disclose the evidence prior to the defendant's plea. Additionally, because the defendant's guilty plea was subsequently vacated and the defendant had the evidence by the time of the pretrial motion, he received it in time to make use of it at trial. The court also found that the trial court erred by concluding that the prosecutor intentionally presented false evidence at the plea hearing by stating that there was blood on the victim's underwear. The court determined that whether such blood existed was not material under the circumstances, which included, in part, substantial independent evidence that the victim was bleeding and the fact that no one else involved was so injured. Also, because the defendant's guilty plea was vacated, he already received any relief that would be ordered in the event of a violation. Next, the court held that the trial court erred by concluding that the State improperly used a threat of the death penalty to coerce a plea while withholding critical information to which the defendant was entitled and thus flagrantly violating the defendant's constitutional rights. The court reasoned that the State was entitled to pursue the case capitally and no *Brady* violation occurred. (2) The trial court erred by concluding that the State's case should be dismissed because of statutory discovery violations. With regard to the trial court's conclusion that the State's disclosure was deficient

with respect to the SBI lab report, the court rejected the notion that the law requires either an affirmative explanation of the extent and import of each test and test result. It reasoned: this "would amount to requiring the creation of an otherwise nonexistent narrative explaining the nature, extent, and import of what the analyst did." Instead it concluded that the State need only provide information that the analyst generated during the course of his or her work, as was done in this case. With regard to polygraph evidence, the court concluded that it was not discoverable.

Indictment and Pleading Issues

State v. Avent, __ N.C. App. __, 729 S.E.2d 708 (Aug. 7, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xNTA2LTEucGRm). In a murder case in which the defendant relied on an alibi defense, the trial court did not err by allowing the State to amend the date of the offense stated in the indictment from December 28, 2009, to December 27, 2009. The court noted that because the defendant's alibi witness's testimony encompassed December 27th the defendant was not deprived of his ability to present a defense. Additionally, the State's evidence included two eyewitness statements and an autopsy report, all of which noted the date of the murder as December 27; the defendant did not argue that he was unaware of this evidence well before trial.

State v. Mason, __ N.C. App. __, __ S.E.2d __ (Aug. 7, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xNTYzLTEucGRm). By failing to assert fatal variance as a basis for his motion to dismiss, the defendant failed to preserve the issue for appellate review. Even if the issue had been preserved, it had no merit. Defendant argued that there was a fatal variance between the name of the victim in the indictment, You Xing Lin, and the evidence at trial, which showed the victim's name to be Lin You Xing. The variance was immaterial.

State v. Barnett, __ N.C. App. __, __ S.E.2d __ (Oct. 2, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0yNjktMS5wZGY=). (1) An indictment charging failing to notify the sheriff's office of change of address by a registered sex offender under G.S. 14-208.9 was defective where it failed to allege that the defendant was a person required to register. (2) Although the indictment failed to specify G.S. 14-208.9(a) (sex offender registration violation) as the statute violated, this omission alone did not create a fatal defect.

State v. Collins, __ N.C. App. __, 727 S.E. 2d 922 (July 17, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0xOS0xLnBkZg==). There was no fatal defect in an indictment for felony assault on a handicapped person. The indictment alleged, in part, that the defendant unlawfully, willfully, and feloniously assaulted and struck "a handicapped person by throwing Carol Bradley Collins across a room and onto the floor and by striking her with a crutch on the arm. In the course of the assault the defendant used a deadly weapon, a crutch. This act was in violation of North Carolina General Statutes section 14-17." The court rejected the argument that the indictment was defective for failing to allege the specific nature of the victim's handicap. The court also rejected the defendant's argument that the indictment was defective by failing to allege that he knew or reasonably should have known of the victim's handicap. Citing *State v. Thomas*, 153 N.C. App. 326 (2002) (assault with a firearm on a law enforcement officer case), the court concluded that although the indictment did not specifically allege this element, its allegation that he "willfully" assaulted a handicapped person indicated that he knew that the victim was handicapped. Finally, the court determined that the indictment was not defective because of failure to cite the statute violated. Although the indictment incorrectly cited G.S. 14-17, the statute on murder, the failure to reference the correct statute was not, by itself, a fatal defect.

State v. Mather, __ N.C. App. __, 728 S.E. 2d 430 (July 17, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMzkzLTEucGRm). When charging

carrying a concealed gun under G.S. 14-269, the exception in G.S. 14-269(a1)(2) (having a permit) is a defense not an essential element and need not be alleged in the indictment.

State v. Whittington, __ N.C. App. __, 728 S.E.2d 385 (June 19, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMTk3LTEucGRm). (1) The State conceded and the court held that an indictment for trafficking in opium by sale was fatally defective because it failed to name the person to whom the defendant allegedly sold or delivered the controlled substance. The indictment stated that the sale was "to a confidential informant[.]" It was undisputed that the name of the confidential informant was known. (2) An indictment for trafficking by delivery was defective for the same reason.

Jury Argument

State v. Harris, __ N.C. App. __, 729 S.E. 2d 99 (July 17, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS04MjktMS5wZGY=). In this sexual assault trial, the prosecutor's comment during closing argument was not a comment on the defendant's failure to testify. The prosecutor stated: "There are only two people in this courtroom as we sit here today that actually know what happened between the two people, and that's [the victim] and the defendant." The comment was made in the context of an acknowledgement that while the SANE nurse who examined the victim testified to abrasions and tears indicative of vaginal penetration, the nurse could not tell if the victim's vagina was penetrated by a penis. The prosecutor went on to recount evidence that semen containing the defendant's DNA was found on the victim's vaginal swabs and on cuttings from her panties. The comment emphasized the limitations of the physical evidence and was not a comment on the defendant's decision not to testify.

Jury Deliberations

State v. Mason, __ N.C. App. __, __ S.E.2d __ (Aug. 7, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xNTA2LTEucGRm). (1) The trial court did not impermissibly coerce a verdict. While deliberating, the jury asked to hear certain trial testimony again. The trial judge initially denied the request. After the jury indicated that it could not reach a verdict, the trial judge asked if it would be helpful to have the testimony played back. This was done and the trial judge gave an *Allen* instruction. (2) Although the trial court erred by sending exhibits to the jury deliberation room over objection of defense counsel, the error was not prejudicial. The deliberating jury asked to review a number of exhibits. After consulting with counsel outside of the presence of the jury the trial court directed that certain items be sent back to the jury. Defense counsel objected. Under G.S. 15A-1233, it was error for the court to send the material to the jury room over the defendant's objection.

Jury Instructions

State v. Perry, __ N.C. App. __, __ S.E.2d __ (Sept. 18, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0zMjItMS5wZGY=). Based on the circumstances of this felon in possession case, the trial court's failure to further inquire into and answer the jury's questions regarding constructive possession of the gun constituted plain error. The circumstances included the fact that the jury was instructed on actual possession even though the State had argued to the jury that there was no evidence of actual possession and that the jury was instructed on constructive possession when no evidence supported such an instruction.

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."

State v. Brown, __ N.C. App. __, __ S.E.2d __ (June 19, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMzQwLTEucGRm). In a burglary case, the trial court did not err by failing to reiterate an instruction on the doctrine of recent possession when instructing the jury on the lesser-included offense of felonious breaking or entering. The trial court properly instructed the jury on felonious breaking and entering by describing how the elements of that offense differed from first-degree burglary, an offense for which they had already received instructions. By describing the differences in charges the trial court left the recent possession instruction intact and applicable to the lesser charge of felonious breaking and entering.

State v. Boyd, __ N.C. App. __, 730 S.E.2d 193 (Aug. 7, 2012) (COA10-1072-2) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMC0xMDcyLTIucGRm). On remand from the N.C. Supreme Court and over a dissent, the court held that the trial court committed plain error by instructing the jury on a theory of second degree kidnapping (removal) that was not charged in the indictment or supported by evidence.

State v. Kelly, __ N.C. App. __, 727 S.E. 2d 912 (July 17, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi00OS0xLnBkZg==). The trial court did not err by refusing to instruct the jury on jury nullification.

Motion to Dismiss

Corpus Delecti Rule

State v. Sweat, __ N.C. __, 727 S.E.2d 691 (June 14, 2012) (http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMi80NzJBMTEtMS5wZGY=). The court affirmed the holding of *State v. Sweat*, __ N.C. App. __, 718 S.E.2d 655 (Oct. 18, 2011), that there was sufficient evidence of fellatio under the corpus delicti rule to support sex offense charges. The court clarified that the rule imposes different burdens on the State:

> If there is independent proof of loss or injury, the State must show that the accused's confession is supported by substantial independent evidence tending to establish its trustworthiness, including facts that tend to show the defendant had the opportunity to commit the crime. However, if there is no independent proof of loss or injury, there must be strong corroboration of essential facts and circumstances embraced in the defendant's

> confession. Corroboration of insignificant facts or those unrelated to the commission of the crime will not suffice.

(quotations omitted). Here, because the substantive evidence of fellatio was defendant's confession to four such acts, the Sate was required to strongly corroborate essential facts and circumstances embraced in the confession. Under the totality of the circumstances, the State made the requisite showing based on: the defendant's opportunity to engage in the acts; the fact that the confession evidenced familiarity with corroborated details (such as the specific acts that occurred) likely to be known only by the perpetrator; the fact that the confession fit within the defendant's pattern of sexual misconduct; and the victim's extrajudicial statements to an investigator and a nurse. The court rejected the defendant's argument that the victim's extrajudicial statements introduced to corroborate her testimony could not be used to corroborate his confession.

State v. Cox, __ N.C. App. __, __ S.E.2d __ (Aug. 7, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS02MDktMi5wZGY=). On remand for reconsideration in light of *State v. Sweat*, __ N.C. __, 727 S.E.2d 691 (June 14, 2012) (clarifying the contours of the corpus delicti rule), the court affirmed its decision in *State v. Cox*, __ N.C. App. __, 721 S.E.2d 346 (Feb. 7, 2012), finding insufficient evidence of constructive possession to support a conviction of felon in possession of a firearm under the corpus delicti rule.

Defendant as Perpetrator

State v. Powell, __ N.C. App. __, __ S.E.2d __ (Oct. 2, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0zMTctMS5wZGY=). There was sufficient evidence that the defendant perpetrated the murder. The defendant's cell phone was found next to the victim, cell phone records showed that the phone was within one mile of the murder scene around the time of the murder, the defendant gave inconsistent statements about his whereabouts, and a witness testified that the defendant stated, "I must have dropped [my phone] after I killed him."

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.

Suppression Motions

State v. Salinas __ N.C. __, 729 S.E.2d 63 (June 14, 2012) (http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMi80MDFBMTEtMS5wZGY=). Modifying and affirming *State v. Salinas*, __ N.C. App. __, 715 S.E.2d 262 (Aug. 16, 2011) (trial court incorrectly applied a probable cause standard instead of a reasonable suspicion standard to a vehicle stop), the court held that the trial court may not rely on allegations contained in a defendant's G.S. 15A-977(a) affidavit when making findings of fact in connection with a motion to suppress.

State v. O'Connor, __ N.C. App. __, 730 S.E.2d 248 (Aug. 7, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0xNjctMS5wZGY=). (1) Although a trial court may summarily deny or dismiss a suppression motion for failure to attach a supporting affidavit, it has the discretion to refrain from doing so. (2) In granting the defendant's motion to suppress, the trial judge erred by failing to make findings of fact resolving material conflicts in the evidence. The court rejected the defendant's argument that the trial court "indirectly provided a rationale from the bench" by stating that the motion was granted for the reasons in the defendant's memorandum.

State v. Braswell, __ N.C. App. __, 729 S.E.2d 697 (Aug. 7, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMzY2LTEucGRm). The trial court was not required to make written finding of fact supporting its denial of a suppression motion where the trial court provided its rationale from the bench and there were not material conflicts in the evidence.

In re N.J., __ N.C. App. __, 728 S.E.2d 9 (June 19, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMzY5LTEucGRm). The district court erred by failing to make findings of fact or conclusions of law in connection with its ruling on the juvenile's motion to suppress in violation of G.S. 15A-977, where the trial court failed to provide its rationale for denying the motion.

Pleas

State v. Rouson, __ N.C. App. __, __ S.E.2d __ (Oct. 2, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0zODItMS5wZGY=). The court rejected the defendant's argument that an insufficient factual basis for his pleas required a remedy where the defendant did not assert prejudice from the lack of a factual basis.

State v. Collins, __ N.C. App. __, 727 S.E. 2d 922 (July 17, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0xOS0xLnBkZg==). (1) The prosecutor's summary of facts and the defendant's stipulations were sufficient to establish a factual basis for the plea. (2) Based on the trial court's colloquy with the defendant, the court rejected the defendant's challenge to the knowing and voluntary nature of his plea. The defendant had argued that the trial court did not adequately explain that judgment may be entered on his plea to assault on a handicapped person if he did not successfully complete probation on other charges.

Probable Cause Hearings

State v. Brunson, __ N.C. App. __, 727 S.E. 2d 916 (July 17, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi04NS0xLnBkZg==). The court rejected the defendant's argument that denying him a probable cause hearing violated his constitutional rights by depriving him of discovery and impeachment evidence. Relying on *State v. Hudson*, 295 N.C. 427 (1978) (the defendant failed to show that he was prejudiced by a lack of a hearing), the court noted that in this case, probable cause was twice established: when the warrant was issued and when the grand jury

returned the indictments. The defendant's speculations about discovery and impeachment evidence failed to establish a reasonable possibility that a different result would have been reached at trial had he been given a preliminary hearing.

Trial in the Defendant's Absence

State v. Anderson, __ N.C. App. __, 730 S.E.2d 262 (Aug. 7, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi02LTEucGRm). The trial court did not err by denying a motion to dismiss asserting that the defendant was deprived of his constitutional rights due to his involuntary absence at trial. The defendant was missing from the courtroom on the second day of trial and reappeared on the third day. To explain his absence he offered two items. First, the fact that his friend Stacie Wilson called defense counsel to say that the defendant was in the hospital suffering from stomach pains. Defense counsel did not know who Stacie Wilson was, what hospital the defendant was in, or any other information. Second, the defendant offered a note from a hospital indicating that he had been treated there at some point. The note did not contain a date or time of treatment. The defendant failed to sufficiently explain his absence and his right to be present was waived.

Sentencing

Aggravating Factors/Sentence

State v. Morston, __ N.C. App. __, 728 S.E.2d 400 (July 3, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0xMzMtMS5wZGY=). The trial court did not abuse its discretion by finding that one aggravating factor outweighed six mitigating factors.

***Blakely* Issues**

Southern Union Co. v. United States, 567 U.S. __, 132 S. Ct. 2344 (June 21, 2012) (http://www.supremecourt.gov/opinions/11pdf/11-94a1b2.pdf). The Court held that the *Apprendi* rule applies to fines. Thus, any fact that increases a defendant's statutory maximum fine must be found by a jury beyond a reasonable doubt

Juveniles

Miller v. Alabama, 567 U.S. __, 132 S. Ct. 2455 (June 25, 2012) (http://www.supremecourt.gov/opinions/11pdf/10-9646g2i8.pdf). The Court held that the 8th Amendment prohibits a sentencing scheme that requires life in prison without the possibility of parole for juvenile homicide offenders.

Prior Record Level

State v. Rollins, __ N.C. App. __, 729 S.E.2d 73 (July 17, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xNDM3LTEucGRm). The trial court erred by determining that the defendant was a prior record level VI when the defendant's Florida conviction for burglary was not sufficiently similar to the corresponding N.C. burglary offense. The Florida statute is broader than the N.C. statute in that it encompasses more than a dwelling house or sleeping apartment. Significantly, the Florida statute does not require that the offense occur in the nighttime or that there be a breaking as well as an entry. Based on these differences, the Florida burglary statute is not sufficiently similar to N.C.'s burglary statute. The court went on to find the Florida crime sufficiently similar to G.S. 14-54, felonious breaking or entering.

State v. Powell, __ N.C. App. __, __ S.E.2d __ (Oct. 2, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0zMTctMS5wZGY=). Sufficient evidence supported the trial court's determination of the defendant's prior record level. Counsel's oral stipulation and the prior record level worksheet established the existence of an out-of-state felony conviction, even though neither the defendant nor defense counsel signed the worksheet.

Probation

State v. Brown, __ N.C. App. __, __ S.E.2d __ (Sept. 4, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0xMTAtMS5wZGY=). (1) The trial court did not abuse its discretion by revoking the defendant's probation. The defendant asserted that the revocation was improper because he never received a written statement containing the conditions of his probation, as required by G.S. 15A-1343(c). The court noted that the statute requires written notice. However, citing an unpublished opinion, it noted that a different approach applies when the violation is a failure to initially report for processing, as happened here. In this case the defendant walked away from the probation office before he could be given the written notice. The court concluded that because the trial judge informed the defendant of his obligation to report and the defendant failed to do so, written confirmation was not necessary. (2) The court also rejected the defendant's argument that he could not have violated probation because he was not assigned a probation officer, reasoning that the defendant was not so assigned because he left in the middle of intake procedure.

State v. Askew, __ N.C. App. __, 727 S.E. 2d 905 (July 17, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xNTk4LTEucGRm). The trial court erred by finding that the defendant willfully violated probation by failing to have an approved residence plan. The defendant was placed on supervised probation to begin when he was released from incarceration on separate charges. On the day that the defendant was scheduled to be released, a probation officer filed a violation report. The defendant demonstrated that he was unable to obtain suitable housing before his release from incarceration because of circumstances beyond his control; the trial court abused its discretion by finding otherwise.

State v. Talbert, __ N.C. App. __, 727 S.E. 2d 908 (July 17, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0yNDAtMS5wZGY=). The trial court erred by revoking the defendant's probation on grounds that he willfully violated the condition that he reside at a residence approved by the supervising officer. The defendant was violated on the day he was released from prison, before he even "touched outside." Prior to his release the defendant, who was a registered sex offender and indigent, had tried unsuccessfully to work with his case worker to secure a residence. At the revocation hearing, the trial judge rejected defense counsel's plea for a period of 1-2 days for the defendant to secure a residence. The court concluded that the defendant's violation was not willful and that probation was "revoked because of circumstances beyond his control."

State v. Gorman, __ N.C. App. __, 727 S.E.2d 731 (June 19, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS04NDAtMS5wZGY=). No statutory authority supported the trial court's orders extending the defendant's probation beyond the original 60-month period and they were thus void. The orders extending probation were not made within the last 6 months of probation and the defendant did not consent to the extension. The orders also resulted in an 8-year period of probation, a term longer that the statutory maximum. Turning to the issue of whether the original 60-month probation was tolled pending resolution of New Jersey criminal charges, the court found the record insufficient and remanded for further proceedings.

Restitution

State v. Anderson, __ N.C. App. __, 730 S.E.2d 262 (Aug. 7, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi02LTEucGRm). The trial court erred by ordering the defendant to pay restitution when the State failed to present any evidence to support the restitution order. The State conceded the error.

State v. Mills, __ N.C. App. __, 726 S.E.2d 926 (June 19, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0zLTEucGRm). There was sufficient evidence to support a restitution order for $730. The victim testified that before being robbed he had "two sets of keys, snuff, a pocket knife, a bandana, [his] money clip," and approximately $680 in cash. He later confirmed that $730 represented the money and the items taken during the crime.

Resentencing

State v. Morston, __ N.C. App. __, 728 S.E.2d 400 (July 3, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0xMzMtMS5wZGY=). (1) The trial court properly conducted a de novo review on resentencing, even though the defendant was sentenced to the same term that he received at the original sentencing hearing. (2) At a resentencing during which new evidence was presented, the trial court did not err by failing to find a mitigating factor of limited mental capacity, a factor that had been found at the first sentencing hearing.

Credit

Lovette v. North Carolina Department of Correction, __ N.C. App. __, __ S.E.2d __ (Aug. 21, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMDgxLTEucGRm). Over a dissent, the court affirmed a trial court order holding that the petitioners had fully served their life sentences after credits had been applied to their unconditional release dates. Both petitioners were sentenced to life imprisonment under former G.S. 14-2, which provided that a life sentence should be considered as imprisonment for eighty years. They filed habeas petitions alleging that based on credits for "gain time," "good time," and "meritorious service" and days actually served, they had served their entire sentences and were entitled to be discharged from incarceration. The trial court distinguished *Jones v. Keller*, 364 N.C. 249 (2010) (in light of the compelling State interest in maintaining public safety, regulations do not require that the DOC apply time credits for purposes of unconditional release to those who committed first-degree murder during the 8 April 1974 through 30 June 1978 time frame and were sentenced to life imprisonment), on grounds that the petitioners in the case at hand were not convicted of first-degree murder (one was convicted of second-degree murder; the other was convicted for second-degree burglary). The trial court went on to grant the petitioners relief. The State appealed. The court of appeals held that the trial court did not err by distinguishing the case from *Jones.* The court also rejected the State's argument that the trial court's order changed the petitioners' sentences and violated separation of powers.

Use of Defendant's Silence at Trial

State v. Moore, __ N.C. __, 726 S.E.2d 168 (June 14, 2012) (http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMi81MjRQQTExLTEucGRm). Affirming an unpublished court of appeals' decision, the court held that no plain error occurred when a State's witness testified that the defendant exercised his right to remain silent. On direct examination an officer testified that after he read the defendant his *Miranda* rights, the defendant "refused to talk about the case." Because this testimony referred to the defendant's exercise of his right to silence, its admission was error. The court rejected the State's argument that no error occurred because the comments were neither made

by the prosecutor nor the result of a question by the prosecutor designed to elicit a comment on the defendant's exercise of his right to silence. It stated: "An improper adverse inference of guilt from a defendant's exercise of his right to remain silent cannot be made, regardless of who comments on it." The court went on to conclude that the error did not rise to the level of plain error. Finally, the court rejected the defendant's argument that other testimony by the officer referred to the defendant's pre-arrest silence.

Witnesses; Securing Attendance Of

State v. Brunson, __ N.C. App. __, 727 S.E. 2d 916 (July 17, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi04NS0xLnBkZg==). In a sexual assault case involving the defendant's stepdaughter, the trial court did not err by quashing a subpoena that would have required a district court judge to testify regarding statements made by the victim's mother to the judge in a DVPO proceeding. At trial the defense questioned the mother about whether she told the district court judge that the defendant committed first-degree rape and first-degree sex offense. The mother denied doing this. The defendant wanted to use the district court judge to impeach this testimony. The district court judge filed an affidavit indicating that he had no independent recollection of the case. Even if the district court judge were to have testified as indicated, his testimony would have had no impact on the case; at most it would have established a lay person's confusion with legal terms rather than an attempt to convey false information. Also, most of the evidence supporting the conviction came from the victim herself.

Evidence

Applicability of the Rules

State v. Foster, __ N.C. App. __, 729 S.E.2d 116 (Aug. 7, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMjI3LTEucGRm). The rules of evidence apply to proceedings related to post-conviction motions for DNA testing under G.S. 15A-269.

404(b) Evidence

State v. Beckelheimer, __ N.C. __, 726 S.E.2d 156 (June 14, 2012) (http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMi8xNzVQQTExLTEucGRm). Reversing *State v. Beckelheimer*, __ N.C. App.__, 712 S.E.2d 216 (April 19, 2011), the court held that the trial judge did not err by admitting 404(b) evidence. The defendant was charged with sexual offense and indecent liberties. At the time of the alleged offense the defendant was 27. The victim was the defendant's 11-year-old male cousin. The victim testified that after inviting him to the defendant's bedroom to play video games, the defendant climbed on top of the victim and pretended to be asleep. He placed his hands in the victim's pants, unzipped the victim's pants, and performed oral sex on the victim while holding him down. The victim testified that on at least two prior occasions the defendant placed his hands on the victim's genital area outside of his clothes while pretending to be asleep. At trial, witness Branson testified about sexual activity between himself and the defendant. Branson, then 24 years old, testified that when he was younger than 13 years old, the defendant, who was 4½ years older, performed various sexual acts on him. Branson and the defendant would play video games together and spend time in the defendant's bedroom. Branson described a series of incidents during which the defendant first touched Branson's genital area outside of his clothes while pretending to be asleep and then reached inside his pants to touch his genitals and performed oral sex on him. Branson also related an incident in which he performed oral sex on the defendant in an effort to stop the defendant from digital anal penetration. The

court found that Branson's testimony was properly admitted to show modus operandi. The conduct was sufficiently similar to the acts at issue given the victim's ages, where they occurred, and how they were brought about. The court of appeals improperly focused on the differences between the acts rather than their similarities (among other things, the court of appeals viewed the acts with Branson as consensual and those with the victim as non-consensual and relied on the fact that the defendant was only 4½ years older than Branson but 16 years older than the victim). The court went on to conclude that given the similarities between the incidents, the remoteness in time was not so significant as to render the prior acts irrelevant and that the temporal proximity of the acts was a question of evidentiary weight. Finally, the court held that the trial court did not abuse its discretion by admitting the evidence under Rule 403.

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 . . . ."

State v. Flood, __ N.C. App. __, 726 S.E.2d 908 (June 19, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS04NTYtMS5wZGY=). In a case involving a drug-related murder that occurred in 2007, the trial court committed reversible error by admitting evidence that the defendant was involved in a 1994 homicide in which he broke into an apartment, found his girlfriend in bed with the victim, and shot the victim. The facts of the 1994 shooting were not admissible to show intent or knowledge. The State argued that the 404(b) evidence showed that the defendant knew that the weapon was lethal and intent to kill. Because the victim in this case was killed by a gunshot to the back of his head, the person who committed that act clearly knew it was lethal and intended to kill. The court found that whatever slight relevance the 1994 shooting might have on these issues was outweighed by undue prejudice. Regarding the 404(b) purpose of identity, the court found that the acts were not sufficiently similar. The court discounted similarities noted by the trial court, such as the fact that both crime occurred with a gun.

Crawford Issues and the Confrontation Clause
Not For the Truth of the Matter Asserted

State v. Mason, __ N.C. App. __, 730 S.E.2d 795 (Aug. 7, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xNTA2LTEucGRm). The defendant's confrontation rights were not violated when an officer testified to the victim's statements made to him at the scene through the use of a telephonic translation service. The defendant argued that his confrontation rights were violated when the interpreter's statements were admitted through the officer's testimony. These statements were outside of the confrontation clause because they were not admitted for the truth of the matter asserted but rather for corroboration.

Substitute Analyst and Related Cases

Williams v. Illinois, 567 U.S. __, 132 S. Ct. 2221 (June 18, 2012) (http://www.supremecourt.gov/opinions/11pdf/10-8505.pdf). In a plurality opinion the Court affirmed the holding below that the defendant's confrontation clause rights were not violated when the State's DNA expert testified to an opinion based on a report done by a non-testifying analyst. The defendant Sandy Williams was charged with, among things, sexual assault of L.J. After the incident in question L.J. was taken to the emergency room, where a doctor performed a vaginal exam and took vaginal swabs. The swabs and other evidence were sent to the Illinois State Police (ISP) Crime Lab for testing and analysis. An analyst confirmed the presence of semen in the swabs. About six months later, the defendant was arrested on unrelated charges and a blood sample was drawn from him pursuant to a court order. An analyst extracted a DNA profile from the sample and entered it into ISP Crime Lab database. Meanwhile, L.J.'s swabs from the earlier incident were sent to Cellmark Diagnostic Laboratory for DNA analysis. Cellmark returned the swabs to the ISP Crime Lab, having derived a DNA profile for the person whose semen was recovered from L.J. At trial, ISP forensic biologist Sandra Lambatos testified as an expert for the State. Lambatos indicated that it is a commonly accepted practice in the scientific community for one DNA expert to rely on the records of another DNA analyst to complete her work and that Cellmark's testing and analysis methods were generally accepted in the scientific community. Over a defense objection, Lambatos then testified to the opinion that the DNA profile received from Cellmark matched the defendant's DNA profile from the blood sample in the ISP database. Cellmark's report was not introduced into evidence. Also, while Lambatos referenced documents she reviewed in forming her opinion, she did not read the contents of the Cellmark report into evidence. At the conclusion of Lambatos' testimony, the defendant moved to strike the evidence of Cellmark's testing based upon a violation of his confrontation clause rights. The motion was denied and the defendant was convicted. On appeal to the Illinois Supreme Court the defendant again argued that Lambatos' testimony violated his rights under *Crawford* and *Melendez-Diaz*. The Illinois court disagreed, reasoning that because the Cellmark report supplied a basis for Lambatos' opinion, it was not admitted for the truth of the matter asserted. The U.S. Supreme Court affirmed. Justice Alito wrote the plurality opinion, which was joined by the Chief Justice and Justices Kennedy and Breyer. The plurality determined that no confrontation clause violation occurred for two reasons. First, the Cellmark report fell outside of the scope of the confrontation clause because it was not introduced for the truth of the matter asserted. In this respect, the plurality was careful to distinguish the Court's prior decisions in *Bullcoming* and *Melendez-Diaz*, which it characterized as involving forensic reports that were introduced for that purpose. Second, the plurality concluded that no confrontation clause violation occurred because the report was non-testimonial. Justice Thomas concurred in judgment only. He agreed that the report was non-testimonial, though he reached this conclusion through different reasoning. Thomas disagreed with that portion of the plurality opinion concluding that the report was not introduced for the truth for the matter asserted. Justices Kagan, Scalia, Ginsburg and Sotomayor dissented, noting among other things, the "significant confusion" created by the fractured opinion.

State v. Harris, __ N.C. App. __, 729 S.E. 2d 99 (July 17, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS04MjktMS5wZGY=). (1) The defendant's confrontation rights were not violated when the State's expert testified about DNA testing on the victim's rape kit done by a non-testifying trainee. The trainee worked under the testifying expert's direct observation and supervision and the findings were his own. (2) The court rejected the defendant's argument that his constitutional rights were violated when a second DNA expert testified that she matched a DNA extract on a specimen taken from the defendant to the profile obtained from the rape kit. Having found that the first expert properly testified about the rape kit profile, the court rejected this argument. (3) No violation of the defendant's confrontation clause rights occurred when the second expert testified that the probability of an unrelated, randomly chosen person who could not be excluded from the DNA mixture taken from the rape kit was extremely low. The defendant argued that the population geneticists who made the probability determination were unavailable for cross-examination about the reliability of their statistical methodology. The court concluded that admission of the statistical information was not error where the second expert was available for cross-examination and gave her opinion that the DNA profile from the rape kit matched the defendant's DNA profile and the statistical information on which she relied was of a type reasonably relied upon by experts in the field. Even assuming that unavailability of the purported population geneticists who prepared the statistical data violated the defendant's rights, the error did not rise to the level of plain error.

Notice & Demand Statutes

State v. Whittington, __ N.C. App. __, 728 S.E.2d 385 (June 19, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMTk3LTEucGRm). In a drug case the State failed to give proper notice under the G.S. 90-95(g) notice and demand statute when it failed to prove that it provided the defendant with a copy of the lab report in question. The court rejected the notion that the State's discovery materials indicating that a copy of the report "will be delivered upon request" satisfied the notice and demand statute. It stated: "the State may not shift the burden to Defendant by requiring Defendant to request a lab report that the State intends to introduce at trial." The court also rejected the State's argument that the defendant bore the burden of showing that the State did not send the report; the burden of proving that the defendant received the report, the court determined, rests with the State. It concluded:

> It is the State's burden to show that it has complied with the requirements of N.C.G.S. § 90-95(g)(1), and that a defendant has waived his constitutional right to confront a witness against him. This burden includes insuring the record on appeal contains sufficient evidence demonstrating full compliance with N.C.G.S. § 90-95(g)(1). Proper appellate review will be greatly facilitated if . . . the trial court conducts a hearing to determine whether waiver pursuant to N.C.G.S. § 90-95(g)(1) has actually occurred.

Cross-Examination & Impeachment

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.

State v. Avent, __ N.C. App. __, 729 S.E.2d 708 (Aug. 7, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xNTA2LTEucGRm). In a murder case, the trial court did not abuse its discretion by allowing the State to impeach two witnesses with their prior inconsistent statements to the police. Both witnesses testified that they were at the scene but did not see the defendant. The State then impeached them with their prior statements to the police putting the defendant at the scene, with one identifying the defendant as the shooter. Both of the witnesses' statements to the police were material and both witnesses admitted having made them. Use of the inconsistent statements did not constitute subterfuge on the State's part to present otherwise inadmissible evidence, where there was no evidence indicating that the State was not genuinely surprised by the witnesses' testimony.

Direct Examination

State v. Powell, __ N.C. App. __, __ S.E.2d __ (Oct. 2, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0zMTctMS5wZGY=). The prosecutor did not impermissibly vouch for the credibility of a State's witness by asking whether any promises were made to the witness in exchange for his testimony.

Judicial Notice

State v. Brown, __ N.C. App. __, __ S.E.2d __ (June 19, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMzQwLTEucGRm). For purposes of determining whether there was sufficient evidence that a burglary occurred at nighttime, the court took judicial notice of the time of civil twilight and the driving distance between the victim's residence and an apartment where the defendant appeared at 6 am after having been out all night.

Opinions

Expert Opinions

State v. Towe, __ N.C. __, __ S.E.2d __ (June 14, 2012) (http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMi8xMjFQQTExLTEucGRm). The court modified and affirmed *State v. Towe*, __ N.C. App. __, 707 S.E.2d 770 (Mar. 15, 2011). The court of appeals held that the trial court committed plain error by allowing the State's medical expert to testify that the child victim was sexually abused when no physical findings supported this conclusion. On direct examination, the expert stated that 70-75% of sexually abused children show no clear physical signs of abuse. When asked whether she would put the victim in that group, the expert responded, "Yes, correct." The court of appeals concluded that this amounted to impermissible testimony that the victim was sexually abused. The supreme court agreed that it was improper for the expert to testify that the victim fell into the category of children who had been sexually abused when she showed no physical symptoms of such abuse. The supreme court modified the opinion below with respect to its application of the plain error standard, but like the lower court agreed that plain error occurred in this case.

State v. King, __ N.C. __, __ S.E.2d __ (June 14, 2012) (http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMi8zODVBMTEtMS5wZGY=. Affirming *State v. King*, __ N.C. App. __, 713 S.E.2d 772 (Aug. 2, 2011) (trial court did not abuse its discretion by excluding the State's expert testimony regarding repressed memory under Rule 403), the court disavowed that part of the opinion below that relied on *Barrett v. Hyldburg*, 127 N.C. App. 95 (1997), to conclude that all testimony based on recovered memory must be excluded unless it is accompanied by expert testimony. The court agreed with the holding in *Barrett* that a witness may not express the opinion that he or she personally has experienced repressed memory. It reasoned that psychiatric theories of repressed and recovered memories may not be presented without accompanying expert testimony to prevent juror

confusion and to assist juror comprehension. However, *Barrett* "went too far" when it added that even if the adult witness in that case were to avoid use of the term "repressed memory" and simply testified that she suddenly in remembered traumatic incidents from her childhood, such testimony must be accompanied by expert testimony. The court continued: "unless qualified as an expert or supported by admissible expert testimony, the witness may testify only to the effect that, for some time period, he or she did not recall, had no memory of, or had forgotten the incident, and may not testify that the memories were repressed or recovered."

State v. Huerta, __ N.C. App. __, 727 S.E.2d 881 (July 3, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xNDAxLTEucGRm). In a case in which the defendant was convicted of trafficking in more than 400 grams of cocaine, the trial court did not err by allowing the State's expert to testify that the substance was cocaine where the expert combined three separate bags into one bag before testing the substance. After receiving the three bags, the expert performed a preliminary chemical test on the material in each bag. The test showed that the material in each bag responded to the reagent in exactly the same manner. She then consolidated the contents of the three bags into a single mixture, performed a definitive test, and determined that the mixture contained cocaine. The defendant argued that because the expert combined the substance in each bag before performing the definitive test, she had no basis for opining that each bag contained cocaine, that all of the cocaine could have been contained in the smallest of the bags, and thus that he could have only been convicted of trafficking in cocaine based upon the weight of cocaine in the smallest of the three bags. Relying on *State v. Worthington*, 84 N.C. App. 150 (1987), and other cases, the court held that the jury should decide whether the defendant possessed the requisite amount of cocaine and that speculation concerning the weight of the substance in each bag did not render inadmissible the expert's testimony that the combined mixture had a specific total weight.

State v. Martin, __ N.C. App. __, 729 S.E.2d 717 (Aug. 7, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS05NDEtMS5wZGY=). The trial court did not abuse its discretion by refusing to allow a defense witness to testify as an expert. The defense proffered a forensic scientist and criminal profiler for qualification as an expert. Because the witness's testimony was offered to discredit the victim's account of the defendant's actions and to comment on the manner in which the criminal investigation was conducted, it appears to invade the province of the jury. Although disallowing this testimony, the trial court made clear that the defendant would still be allowed to argue the inconsistencies in the State's evidence.

Lay Opinions

State v. Cox, __ N.C. App. __, __ S.E.2d __ (Aug. 7, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS02MDktMi5wZGY=). The trial court did not err by allowing the two officers to identify the green vegetable matter as marijuana based on their observation, training, and experience.

State v. Mills, __ N.C. App. __, 726 S.E.2d 926 (June 19, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0zLTEucGRm). The trial court did not err by permitting detectives to offer lay opinions that a substance found on a lawn chair used to beat the victim was blood. One detective testified that there was blood in the driveway and that a lawn chair close by had blood on it. He based this conclusion on his 7 years of experience as an officer, during which he saw blood on objects other than a person several times and found that blood has a distinct smell and appearance. A second detective opined that there was blood on the lawn chair based on the "hundreds and maybe thousands" of times that he had seen blood in his life, both in the capacity as an officer and otherwise.

Privileges

Mosteller v. Stiltner, __ N.C. App. __, 727 S.E.2d 601 (July 3, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi04OS0xLnBkZg==). Because the social worker-patient privilege belongs to the patient alone, a social worker did not have standing to appeal an order compelling her comply with a subpoena where the patient never asserted the privilege. In this civil action the court found that the record and the patient's failure to participate in the appeal showed that the patient had raised no objection to the social worker's testimony or document production.

Relevancy

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 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.

State v. Huerta, __ N.C. App. __, 727 S.E.2d 881 (July 3, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xNDAxLTEucGRm). In a drug trafficking and maintaining a dwelling case, evidence that a handgun and ammunition were found in the defendant's home was relevant to both charges.

Rule 403

State v. King, __ N.C. __, __ S.E.2d __ (June 14, 2012) (http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMi8zODVBMTEtMS5wZGY=. The court affirmed *State v. King*, __ N.C. App. __, 713 S.E.2d 772 (Aug. 2, 2011) (holding that the trial court did not abuse its discretion by excluding the State's expert testimony regarding repressed memory under Rule 403). The trial court had concluded that although the expert's testimony was "technically" admissible under *Howerton* and was relevant, it was inadmissible under Rule 403 because recovered memories are of "uncertain authenticity" and susceptible to alternative possible explanations. The trial court found that "the prejudicial effect [of the evidence] increases tremendously because of its likely potential to confuse or mislead the jury." The supreme court held that the trial court did not abuse its discretion by excluding the repressed memory evidence under Rule 403. The court noted that its holding was case specific:

> We promulgate here no general rule regarding the admissibility or reliability of repressed memory evidence under either Rule 403 or Rule 702. As the trial judge himself noted, scientific progress is "rapid and fluid." Advances in the area of repressed memory are possible, if not likely, and even . . . [the] defendant's expert, acknowledged that the theory of repressed memory could become established and that he would consider changing his position if confronted with a study conducted using reliable methodology that yielded evidence supporting the theory. Trial courts are fully capable of handling cases involving claims of repressed memory should new or different scientific evidence be presented.

Arrest, Search, and Investigation

Abandoned Property

State v. Joe, __ N.C. App. __, 730 S.E.2d 779 (Aug. 7, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMC0xMDM3LTIucGRm). The defendant did not voluntarily abandon controlled substances. Noting that the defendant was illegally arrested without probable cause, the court concluded that property abandoned as a result of illegal police activity cannot be held to have been voluntarily abandoned.

Arrests and Investigatory Stops

Arrests

State v. Rouson, __ N.C. App. __, __ S.E.2d __ (Oct. 2, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0zODItMS5wZGY=). The court rejected the defendant's argument that a show of force by law enforcement following a traffic stop amounted to an arrest without probable cause. The defendant was a passenger in a vehicle stopped for running a red light. One officer approached the driver's window; another told the four passengers to place their hands where they could be seen. After the passengers failed to comply with this request, the officers removed the passengers from the vehicle. When one of the officers told the defendant that he was going to do a weapons frisk, the defendant admitted to having a gun.

State v. Robinson, __ N.C. App. __, 727 S.E.2d 712 (June 19, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMTYzLTEucGRm). An officer had probable cause to arrest the defendant after he felt something hard between the defendant's buttocks during a weapons pat down. Based on his training and experience the officer inferred that the defendant may have been hiding drugs in his buttocks. The court noted that the location of the item was significant, since the buttocks is an unlikely place for carrying legal substances. Additionally, the officer knew that the defendant was sitting in a car parked in a high crime area; a large machete was observed in the car; a passenger possessed what appeared to be cocaine; when officers began speaking with the vehicle's occupants the defendant dropped a large sum of cash onto the floor; and after dropping the money on the floor, the defendant made a quick movement behind his back.

Seizure

State v. Harwood, __ N.C. App. __, 727 S.E.2d 891 (July 3, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xNTEzLTEucGRm). The defendant was seized when officers parked directly behind his stopped vehicle, drew their firearms, and ordered the defendant and his passenger to exit the vehicle. After the defendant got out of his vehicle, an officer put the defendant on the ground and handcuffed him.

Stops Based on Tips

State v. Harwood, __ N.C. App. __, 727 S.E.2d 891 (July 3, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xNTEzLTEucGRm). No reasonable and articulable suspicion supported seizure of the defendant made as a result of an anonymous tip. When evaluating an anonymous tip in this context, the court must determine whether the tip taken as a whole possessed sufficient indicia of reliability. If not, the court must assess whether the anonymous tip could be made sufficiently reliable by independent corroboration. The tip at issue reported that the defendant would be selling marijuana at a certain location on a certain day and would be driving a white vehicle.

The court held that given the limited details contained in the tip and the failure of the officers to corroborate its allegations of illegal activity, the tip lacked sufficient indicia of reliability.

Vehicle Stops

State v. Otto, __ N.C. __, 726 S.E.2d 824 (June 14, 2012) (http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMi81MjNBMTEtMS5wZGY=). Reversing *State v. Otto*, __ N.C. App. __, 718 S.E.2d 181 (Nov. 15, 2011), the court held that there was reasonable suspicion for the stop. Around 11 pm, an officer observed a vehicle drive past. The officer was about a half mile from Rock Springs Equestrian Center, and the vehicle was coming from the direction of Rock Springs. However, because the road was a busy one, the officer did not know exactly where the vehicle was coming from. He did know that Rock Springs was hosting a banquet that night, and he had heard that Rock Springs sometimes served alcohol. The officer turned behind the vehicle and immediately noticed that it was weaving within its own lane. The vehicle never left its lane, but was "constantly weaving from the center line to the fog line." The vehicle appeared to be traveling at the posted speed limit. After watching the vehicle weave in its own lane for about ¾ of a mile, the officer stopped the vehicle. The defendant was issued a citation for impaired driving and was convicted. The court of appeals determined that the traffic stop was unreasonable because it was supported solely by the defendant's weaving within her own lane. The supreme court disagreed, concluding that under the totality of the circumstances, there was reasonable suspicion for the traffic stop. The court noted that unlike other cases in which weaving within a lane was held insufficient to support reasonable suspicion, the weaving here was "constant and continual" over ¾ of a mile. Additionally, the defendant was stopped around 11:00 pm on a Friday night.

State v. Salinas __ N.C. __, 729 S.E.2d 63 (June 14, 2012) (http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMi80MDFBMTEtMS5wZGY=). The court modified and affirmed *State v. Salinas*, __ N.C. App. __, 715 S.E.2d 262 (Aug. 16, 2011) (trial court incorrectly applied a probable cause standard instead of a reasonable suspicion standard when determining whether a vehicle stop was unconstitutional). The supreme court agreed that the trial judge applied the wrong standard when evaluating the legality of the stop. The court further held that because the trial court did not resolve the issues of fact that arose during the suppression hearing, but rather simply restated the officers' testimony, its order did not contain sufficient findings of fact to which the court could apply the reasonable suspicion standard. It thus remanded for the trial court to reconsider the evidence pursuant to the reasonable suspicion standard.

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 officers 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.

State v. Williams, __ N.C. __, 726 S.E.2d 161 (June 14, 2012) (http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMi8zODRBMTEtMS5wZGY=). The court affirmed *State v. Williams*, __ N.C. App. __, 714 S.E.2d 835 (Aug. 16, 2011) (reasonable articulable suspicion justified extending the traffic stop). The officer stopped the vehicle in which the defendant was a passenger for having illegally tinted windows and issued a citation. The officer then asked for and was denied consent to search the vehicle. Thereafter he called for a canine trained in drug detection; when the dog arrived it alerted on the car and drugs were found. Several factors supported the trial court's determination that reasonable suspicion supported extending the stop. First, the driver told the officer that she and the defendant were coming from Houston, Texas, which was illogical given their direction of travel. Second, the defendant's inconsistent statement that they were coming from Kentucky and were traveling to Myrtle Beach "raises a suspicion as to the truthfulness of the statements." Third, the driver's inability to tell the officer where they were going, along with her illogical answer about driving from Houston, permitted an inference that she "was being deliberately evasive, that she had been hired as a driver and intentionally kept uninformed, or that she had been coached as to her response if stopped." Fourth, the fact that the defendant initially suggested the two were cousins but then admitted that they just called each other cousins based on their long-term relationship "could raise a suspicion that the alleged familial relationship was a prearranged fabrication." Finally, the vehicle, which had illegally tinted windows, was owned by a third person. The court concluded:

> Viewed individually and in isolation, any of these facts might not support a reasonable suspicion of criminal activity. But viewed as a whole by a trained law enforcement officer who is familiar with drug trafficking and illegal activity on interstate highways, the responses were sufficient to provoke a reasonable articulable suspicion that criminal activity was afoot and to justify extending the detention until a canine unit arrived.

State v. Sellars, __ N.C. App. __, 730 S.E.2d 208 (Aug. 7, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMzE1LTEucGRm). The trial court erred by granting the defendant's motion to suppress on grounds that officers impermissibly prolonged a lawful vehicle stop. Officers McKaughan and Jones stopped the defendant's vehicle after it twice weaved out of its lane. The officers had a drug dog with them. McKaughan immediately determined that the defendant was not impaired. Although the defendant's hand was shaking, he did not show extreme nervousness. McKaughan told the defendant he would not get a citation but asked him to come to the police vehicle. While "casual conversation" ensued in the police car, Jones stood outside the defendant's vehicle. The defendant was polite, cooperative, and responsive. Upon entering the defendant's identifying information into his computer, McKaughan found an "alert" indicating that the defendant was a "drug dealer" and "known felon." He returned the defendant's driver's license and issued a warning ticket. While still in the police car, McKaughan asked the defendant if he had any drugs or weapons in his car. The defendant said no. After the defendant refused to give consent for a dog sniff of the vehicle, McKaughan had the dog do a sniff. The dog alerted to narcotics in the vehicle and a search revealed a bag of cocaine. The period between when the warning ticket was issued and the dog sniff occurred was four minutes and thirty-seven seconds. Surveying two lines of cases from the court which "appear to reach contradictory conclusions" on the question of whether a de minimis delay is unconstitutional, the court reconciled the cases and held that any prolonged detention of the defendant for the purpose of the drug dog sniff was de minimis and did not violate his rights.

Consent

State v. Bell, __ N.C. App. __, 728 S.E. 2d 439 (July 17, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS04NjQtMS5wZGY=). The trial court did not err by finding that the defendant consented to a search of his residence. The court rejected the defendant's argument that the trial court must make specific findings regarding the voluntariness of consent even when there is no conflict in the evidence on the issue. Here, there was a conflict regarding

whether the defendant gave consent, not whether if given it was voluntary.

Disclosure of Confidential Informant's Identity

State v. Avent, __ N.C. App. __, 729 S.E.2d 708 (Aug. 7, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xNTA2LTEucGRm). The trial court did not err by denying the defendant's motion to compel disclosure of the identity of a confidential informant who provided the defendant's cell phone number to the police. Applying *Roviaro v. United States*, 353 U.S. 53 (1957), the court noted that the defendant failed to show or allege that the informant participated in the crime and that the evidence did not contradict as to material facts that the informant could clarify. Although the State claimed that the defendant was the shooter and the defendant claimed he was not at the scene, the defendant failed to show how the informant's identity would be relevant to this issue. Additionally, evidence independent of the informant's testimony established the defendant's guilt, including an eyewitness to the murder.

Miranda

State v. Braswell, __ N.C. App. __, 729 S.E.2d 697 (Aug. 7, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMzY2LTEucGRm). Citing *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984), the court held that the defendant was not in custody for purposes of *Miranda* during a traffic stop.

State v. Yancey, __ N.C. App. __, 727 S.E.2d 382 (June 19, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xNDA5LTEucGRm). The juvenile defendant was not in custody for purposes of *Miranda.* After the defendant had been identified as a possible suspect in several breaking or entering cases, two detectives dressed in plain clothes and driving an unmarked vehicle went to the defendant's home and asked to speak with him. Because the defendant had friends visiting his home, the detectives asked the defendant to ride in their car with them. The detectives told the defendant he was free to leave at any time, and they did not touch him. The defendant sat in the front seat of the vehicle while it was driven approximately 2 miles from his home. When the vehicle stopped, one of the detectives showed the defendant reports of the break-ins. The detectives told the defendant that if he was cooperative, they would not arrest him that day. The defendant admitted to committing the break-ins. The juvenile was 17 years and 10 months old at the time. Considering the totality of the circumstances—including the defendant's age—the court concluded that the defendant was not in custody. The court rejected the argument that *J.D.B. v. North Carolina*, ___ U.S. ___, ___, 131 S. Ct. 2394 (June 6, 2011), required a different conclusion.

State v. Robinson, __ N.C. App. __, 729 S.E. 2d 88 (July 17, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xNTg0LTEucGRm). The defendant's waiver of *Miranda* rights was knowing, voluntary, and intelligent. Among other things, the defendant was familiar with the criminal justice system, no threats or promises were made to him before he agreed to talk, and the defendant was not deprived of any necessaries. Although there was evidence documenting the defendant's limited mental capacity, the record in no way indicated that the defendant was confused during the interrogation, that he did not understand any of the rights as they were read to him, or that he was unable to comprehend the ramifications of his statements.

Searches

State v. Robinson, __ N.C. App. __, 727 S.E.2d 712 (June 19, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMTYzLTEucGRm). Over a dissent, the court held that the trial court did not err by denying the defendant's motion to suppress evidence

found as a result of a strip search. The court found that the officer had, based on the facts presented, ample basis for believing that the defendant had contraband beneath his underwear and that reasonable steps were taken to protect his privacy.

State v. Smith, __ N.C. App. __, 729 S.E.2d 120 (Aug. 7, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMzM1LTEucGRm). On what it described as an issue of first impression in North Carolina, the court held that a drug dog's positive alert at the front side driver's door of a motor vehicle does not give rise to probable cause to conduct a warrantless search of the person of a recent passenger of the vehicle who is standing outside the vehicle.

Criminal Offenses

First Amendment Issues

United Sates v. Alvarez, 567 U.S. __, 132 S. Ct. 2537 (June 28, 2012) (http://www.supremecourt.gov/opinions/11pdf/11-210d4e9.pdf). The Stolen Valor Act, 18 U.S.C. § 704, is unconstitutional under the First Amendment. The Act makes it a federal crime to lie about having received a military decoration or medal.

Homicide

State v. Lewis, __ N.C. App. __, __ S.E.2d __ (Sept. 4, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0xMDAtMS5wZGY=). The State presented sufficient evidence of involuntary manslaughter. The State proved that an unlawful killing occurred with evidence that the defendant committed the misdemeanor of improper storage of a firearm. Additionally, the State presented sufficient evidence that the improper storage was the proximate cause of the child's death.

Assaults

State v. Martin, __ N.C. App. __, 729 S.E.2d 717 (Aug. 7, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS05NDEtMS5wZGY=). Assault on a female is not a lesser-included of first-degree sexual offense.

State v. Mills, __ N.C. App. __, _726 S.E.2d 926 (June 19, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0zLTEucGRm). There was sufficient evidence that a lawn chair was a deadly weapon for purposes of assault. The victim was knocked unconscious and suffered multiple facial fractures and injuries which required surgery; after surgery his jaw was wired shut for weeks and he missed 2-3 weeks of work; and at trial the victim testified that he still suffered from vision problems. Because the State presented evidence that the defendant assaulted the victim with the lawn chair and not his fists alone, it was not required to present evidence as to the parties' size or condition.

State v. Anderson, __ N.C. App. __, 730 S.E.2d 262 (Aug. 7, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi02LTEucGRm). In an assault with a deadly weapon inflicting serious injury case, the trial court did not err by instructing the jury that three gunshot wounds to the leg constituted serious injury. The victim was shot three times, was hospitalized for two days, had surgery to remove a bone fragment from his leg, and experienced pain from the injuries

up through the time of trial. From this evidence, the court concluded, it is unlikely that reasonable minds could differ as to whether the victim's injuries were serious.

State v. Collins, __ N.C. App. __, 727 S.E. 2d 922 (July 17, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0xOS0xLnBkZg==). There was a sufficient factual basis to support a plea to assault on a handicapped person where the prosecutor's summary of the facts indicated that the victim was 80 years old, crippled in her knees with arthritis, and required a crutch to walk; the defendant told the victim that he would kill her and cut her heart out, grabbed her, twice slung her across the room, and hit her with her crutch.

Sexual Assaults and Related Offenses

State v. Martin, __ N.C. App. __, 729 S.E.2d 717 (Aug. 7, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS05NDEtMS5wZGY=). Assault on a female is not a lesser-included of first-degree sexual offense.

State v. Hunt, __ N.C. App. __, 728 S.E. 2d 409 (July 17, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMC02NjYtMi5wZGY=). The defendant could not be convicted of second-degree sexual offense (mentally disabled victim) and crime against nature (where lack of consent was based on the fact that the victim was mentally disabled, incapacitated or physically helpless) based on the same conduct (fellatio). The court found that "on the particular facts of Defendant's case, crime against nature was a lesser included offense of second-degree sexual offense, and entry of judgment on both convictions subjected Defendant to unconstitutional double jeopardy." [Author's note: The N.C. Supreme Court has previously held that crime against nature is not a lesser-included offense of forcible rape or sexual offense, State v. Etheridge, 319 N.C. 34, 50–51 (1987); State v. Warren, 309 N.C. 224 (1983), and that a definitional test applies when determining whether offenses are lesser-included offenses, State v. Nickerson, 316 N.C. 279 (2011).].

Kidnapping

State v. Martin, __ N.C. App. __, 729 S.E.2d 717 (Aug. 7, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS05NDEtMS5wZGY=). The defendant's conviction for kidnapping was improper where the restraint involved was inherent in two sexual assaults and an assault by strangulation for which the defendant was also convicted.

State v. Bell, __ N.C. App. __, 728 S.E. 2d 439 (July 17, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS04NjQtMS5wZGY=). (1) The defendant's confinement of the victims was not inherent in related charges of armed robbery and sexual offense and thus could support the kidnapping charges. The defendant robbed the victims of a camera and forced them to perform sexual acts. He then continued to hold them at gunpoint while he talked to them about what had happened to him, grilled one about Bible verses, and made them pray with him. The additional confinement after the robbery and sex offenses were finished was sufficient evidence of kidnapping separate from the other offenses. (2) With respect to a charge of kidnapping a child under 16, there was sufficient evidence that the defendant confined the child. While threatening the child and his mother with a gun, the defendant told the mother to put her son in his room and she complied. After that, whenever her son called out, the victim called back to keep him in his bedroom.

Robbery

State v. Harris, __ N.C. App. __, 730 S.E.2d 834 (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 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.

State v. Mason, __ N.C. App. __, __ S.E.2d __ (Aug. 7, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xNTYzLTEucGRm). A taking occurred when the defendant grabbed the victim's cell phone from his pocket and threw it away. The fact that the taking was for a relatively short period of time is insignificant

State v. Mills, __ N.C. App. __, 726 S.E.2d 926 (June 19, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0zLTEucGRm). There was sufficient evidence that a lawn chair was a dangerous weapon for purposes of armed robbery. The victim was knocked unconscious and suffered multiple facial fractures and injuries which required surgery; after surgery his jaw was wired shut for weeks and he missed 2-3 weeks of work; and at trial the victim testified that he still suffered from vision problems.

Burglary

State v. Brown, __ N.C. App. __, __ S.E.2d __ (June 19, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMzQwLTEucGRm). (1) There was sufficient evidence that a burglary occurred at nighttime. The defendant left his girlfriend's apartment after 10 pm and did not return until 6 am the next day. The burglary occurred during that time period. After taking judicial notice of the time of civil twilight (5:47 am) and the driving distance between the victim's residence and the apartment, the court concluded that it would have been impossible for the defendant to commit the crime after 5:47 am and be back at the apartment by 6 am. (2) When the victim's laptop and other items were found in the defendant's possession hours after the burglary, the doctrine of recent possession provided sufficient evidence that the defendant was the perpetrator.

Weapons Offenses

Felon in Possession

State v. Perry, __ N.C. App. __, __ S.E.2d __ (Sept. 18, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0zMjItMS5wZGY=). (1) In a felon in possession case, evidence that the defendant was "playing with" the guns in question "likely" constituted sufficient evidence to support an instruction on actual possession of the guns. (2) The trial court erred by instructing the jury on constructive possession of the guns. The defendant did not have exclusive control of the apartment where the guns were found (the apartment was not his and he was not staying there; numerous people were at the apartment when the gun was found but the defendant himself was not present at that time). Thus, the State was required to show evidence of "other incriminating circumstances" to establish constructive possession. The court rejected the State's argument that the fact that the defendant said he had played with the gun and that his fingerprints were on it constituted other incriminating circumstances, reasoning that showed actual not constructive possession. The court also found evidence that the defendant saw the gun in the apartment when another person brought it there insufficient to establish constructive possession.

State v. Bradshaw, __ N.C. __, 728 S.E.2d 345 (June 14, 2012) (http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMi80NTZBMTEtMS5wZGY=). Affirming an unpublished opinion below, the court held that the trial court properly denied the defendant's motion to dismiss charges of trafficking by possession and possession of a firearm by a felon. The State presented sufficient evidence to support the jury's determination that the defendant constructively possessed drugs and a rifle found in a bedroom that was not under the defendant's exclusive control. Among other things,

photographs, a Father's Day card, a cable bill, a cable installation receipt, and a pay stub were found in the bedroom and all linked the defendant to the contraband. Some of the evidence placed the defendant in the bedroom within two days of when the contraband was found.

Improper Storage

State v. Lewis, __ N.C. App. __, __ S.E.2d __ (Sept. 4, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0xMDAtMS5wZGY=). The evidence was sufficient on a charge of improper storage of a firearm under G.S. 14-315.1. The defendant argued that the evidence failed to show that he stored or left the handgun in a condition and manner accessible to the victim. The court found sufficient circumstantial evidence on this issue.

Carrying Concealed

State v. Mather, __ N.C. App. __, 728 S.E. 2d 430 (July 17, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMzkzLTEucGRm). In this carrying a concealed gun case, the court addressed the issue of whether the provisions in G.S. 14-269(a1) were elements or defenses. Following *State v. Trimble*, 44 N.C. App. 659 (1980) (dealing with the statute on poisonous foodstuffs in public places), it explained:

> The State has no initial burden of producing evidence to show that Defendant's action of carrying a concealed weapon does not fall within an exception to N.C. Gen. Stat. § 14-269(a1); however, once Defendant puts forth evidence to show that his conduct is within an exception – that he had a concealed handgun permit [under G.S. 14-269(a1)(2) for example] – the burden of persuading the trier of fact that Defendant's action was outside the scope of the exception falls upon the State. Based on the Court's holding in *Trimble*, we conclude that the exception in N.C. Gen. Stat. § 14-269(a1)(2) is a defense, not an essential element of the crime of carrying a concealed weapon . . . .

Obstruction of Justice and Related Offenses

State v. Cornell, __ N.C. App. __, 729 S.E.2d 703 (Aug. 7, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xNDE1LTEucGRm). (1) The evidence was sufficient to support a conviction for resisting, delaying and obstructing an officer during a 10-15 second incident. Officers observed members of the Latin Kings gang yelling gang slogans and signaling gang signs to a group of rival gang members. To prevent conflict, the officers approached the Latin Kings. The defendant stepped between the officer and the gang members, saying, "[t]hey was (sic) waving at me[,]" and "you wanna arrest me 'cuz I'm running for City Council." The officer told the defendant to "get away" and that he was "talking to them, not talking to you." The defendant responded, "[y]ou don't gotta talk to them! They (sic) fine!" Because the defendant refused the officer's instructions to step away, there was sufficient evidence that he obstructed and delayed the officers. Furthermore, there was sufficient evidence of willfulness. Finally, the court rejected the defendant's argument that his conduct was justified on grounds that he acted out of concern for a minor in his care. The court found no precedent for the argument that an individual's willful delay or obstruction of an officer's lawful investigation is justified because a minor is involved. In fact, case law suggest otherwise. (2) The trial court did not err by denying the defendant's request for a jury instruction stating that merely remonstrating an officer does not amount to obstructing. The defendant's conduct went beyond mere remonstrating.

Drug Offenses

State v. Huerta, __ N.C. App. __, 727 S.E.2d 881 (July 3, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xNDAxLTEucGRm). (1) There was sufficient evidence to support a conviction of maintaining a dwelling. The defendant argued that there was insufficient evidence that he knew about the drugs found in the home. However, the court held that its conclusion that he constructively possessed the drugs resolved that issue in favor of the State. (2) In this drug trafficking case the court held that there was sufficient evidence to support a finding of constructive possession of cocaine. Police had previously received a tip that drug sales were occurring at the home where the drugs were found; police later received similar information in connection with a DEA investigation; when officers went to the home the defendant admitted living there with his wife and children for three years, the defendant had a pistol, which he admitted having purchased illegally, ammunition, and more than $9,000.00 in cash in his closet; the defendant had more than $2,000 in cash on his person; almost 2 kilograms of powder cocaine worth more than $50,000 were found within easy reach of an opening leading from the hallway area to the attic; and the home small and had no residents other than the defendant and his family.

State v. Bradshaw, __ N.C. __, 728 S.E.2d 345 (June 14, 2012) (http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMi80NTZBMTEtMS5wZGY=). Affirming an unpublished opinion below, the court held that the trial court properly denied the defendant's motion to dismiss charges of trafficking by possession and possession of a firearm by a felon. The State presented sufficient evidence to support the jury's determination that the defendant constructively possessed drugs and a rifle found in a bedroom that was not under the defendant's exclusive control. Among other things, photographs, a Father's Day card, a cable bill, a cable installation receipt, and a pay stub were found in the bedroom and all linked the defendant to the contraband. Some of the evidence placed the defendant in the bedroom within two days of when the contraband was found.

Motor Vehicle Offenses

State v. Cameron, __ N.C. App. __, __ S.E.2d __ (Oct. 2, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0zOTUtMS5wZGY=). In a speeding to elude case, the court rejected the defendant's argument that she did not intend to elude an officer because she preferred to be arrested by a female officer rather than the male officer who stopped her. The defendant's preference in this regard was irrelevant to whether she intended to elude the officer.

Defenses

Diminished Capacity

State v. Shareef, __ N.C. App. __, 727 S.E.2d 387 (June 19, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS04MjItMS5wZGY=). Although the defendant met his burden of production with respect to diminished capacity in this murder and assault case in which the defendant stuck various persons with a vehicle, the State introduced sufficient evidence of specific intent to kill. The State did not present expert witnesses. Rather, the State's evidence focused on the defendant's acts before, during, and after the crime as showing that he had the specific intent to kill necessary for first-degree murder based on premeditation and deliberation and the other felony assaults. The State's evidence showed for example that the defendant specifically targeted the victims and that he did not just hit them and drive on but rather continued to injure them further after the first impact.

Post-Conviction Proceedings

Clerical Errors/Error Correction

State v. Lewis, __ N.C. App. __, __ S.E.2d __ (Sept. 4, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0xMDAtMS5wZGY=). The court remanded for correction of a clerical error where the trial court announced a fine of $100 but the judgment incorrectly reflected a $500 fine.

DNA Testing

State v. Foster, __ N.C. App. __, 729 S.E.2d 116 (Aug. 7, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMjI3LTEucGRm). (1) The rules of evidence apply to proceedings related to post-conviction motions for DNA testing under G.S. 15A-269. (2) The trial court did not err by denying the defendant's motion for post-conviction DNA testing where the defendant did not meet his burden of showing materiality under G.S. 15A-269(a)(1). The defendant made only a conclusory statement that "[t]he ability to conduct the requested DNA testing is material to the Defendant's defense"; he provided no other explanation of why DNA testing would be material to his defense.

Ineffective Assistance of Counsel

State v. Brunson, __ N.C. App. __, 727 S.E. 2d 916 (July 17, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi04NS0xLnBkZg==). When a defendant discharges counsel and proceeds pro se, he or she may not assert a claim of ineffective assistance of counsel with regard to his or her own representation.

State v. Hunt, __ N.C. App. __, 728 S.E. 2d 409 (July 17, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMC02NjYtMi5wZGY=). (1) Although counsel provided deficient performance in this sexual assault case, the defendant was not prejudiced by this conduct and thus the defendant's claim of ineffective assistance of counsel must fail. The defendant argued that counsel was ineffective when he asked the defendant on direct examination if he had "ever done such a thing before," despite knowing that other sexual offense charges were pending against the defendant. When the defendant responded in the negative, this opened the door to the State calling another witness to testify about the defendant's alleged sexual abuse of her. Counsel's performance fell below an objective standard of reasonableness because there was no strategic benefit in opening the door to this testimony. However, because the evidence about the other pending charges did not likely affect the verdict, no prejudice resulted. (2) Over a dissent, the court held that the trial court did not err by conducting a voir dire when an issue of attorney conflict of interest arose and denying the defendant's mistrial motion. A dissenting judge believed that the trial court erred by failing to conduct an evidentiary hearing to determine whether defense counsel's conflict of interest required a mistrial

Judicial Administration

Preemption

Arizona v. United States, 567 U.S. __, 132 S. Ct. 2492 (June 25, 2012) (http://www.supremecourt.gov/opinions/11pdf/11-182b5e1.pdf). The Court held that federal law preempted three of four provisions of Arizona's immigration statute. Four provisions of the Arizona law were at issue. One section made failure to comply with federal alien registration requirements a state misdemeanor. A second section made it a misdemeanor for an unauthorized alien to seek or engage in work in Arizona. A third section authorized officers to arrest without a warrant a person "the officer has probable cause to believe . . . has committed any public offense that makes the person removable from the United States." A fourth section provided that officers who conduct a stop, detention, or arrest must in some circumstances make efforts to verify the person's immigration status with the Federal Government. The Court held that the first three provisions were preempted by federal law but that it was improper to enjoin the fourth provision "before the state courts had an opportunity to construe it and without some showing that enforcement of the provision in fact conflicts with federal immigration law and its objectives."

Closing the Courtroom

State v. Rollins, __ N.C. App. __, 729 S.E.2d 73 (July 17, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xNDM3LTEucGRm). The trial court violated the defendant's right to a public trial by temporarily closing the courtroom while the victim testified concerning an alleged rape perpetrated by defendant without engaging in the four-part test set forth in *Waller v. Georgia*, 467 U.S. 39 (1984). The court held that while the trial court need not make exhaustive findings of fact, it must make findings sufficient for the appellate court to review the propriety of the trial court's decision to close the proceedings. The court cautioned trial courts to avoid making "broad and general" findings that impede appellate review. The court remanded for a hearing on the propriety of the closure:

> The trial court must engage in the four-part *Waller* test and make the appropriate findings of fact regarding the necessity of closure during [the victim's] testimony in an order. If the trial court determines that the trial should not have been closed during [the victim's] testimony, then defendant is entitled to a new trial. If the trial court determines that the trial was properly closed during [the victim's] testimony on remand, then defendant may seek review of the trial court's order by means of an appeal . . . .