

Recent Criminal Cases
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Criminal Procedure Counsel Issues

State v. McLeod, __ N.C. App. __, __ S.E.2d __ (July 7, 2009). Trial court erred by allowing the defendant to dismiss counsel and proceed pro se mid-trial without making the inquiry required by G.S. 15A-1242.

State v. Boyd, __ N.C. App. __, __ S.E.2d __ (Sept. 15, 2009). Holding that the defendant willfully obstructed and delayed court proceedings by refusing to cooperate with his appointed attorneys and insisting that his case would not be tried; he thus forfeited his right to counsel. The defendant's lack of cooperation led to the withdrawal of both of his court-appointed attorneys. His original appointed counsel was allowed to withdraw over disagreements with the defendant including counsel's refusal to file a motion for recusal of the trial judge on grounds that various judges were in collusion to fix the trial. In his first motion to withdraw, the defendant's next lawyer stated that the defendant did not want him as counsel and that he could not effectively communicate with the defendant. In his second motion to withdraw, counsel stated that the defendant had been "totally uncooperative" such that counsel "was unable to prepare any type of defense to the charges." Further, the defendant repeatedly told counsel that his case was not going to be tried.

Discovery and Related Issues

State v. Rainey, __ N.C. App. __, __ S.E.2d __ (Aug. 4, 2009). A witness testified at trial that the defendant made the following statement about the victim during the robbery: "I hope this spic is dead." The court rejected the defendant's argument that the evidence should have been excluded because of a discovery violation. The State provided information prior to trial that the witness had stated that "they hated Mexicans" and there was no unfair surprise.

State v. Flint, __ N.C. App. __, __ S.E.2d __ (Sept. 15, 2009). The trial court did not abuse its discretion in denying the defendant's motion to continue alleging that the defendant did not receive discovery at a reasonable time prior to trial where the defendant never made a motion for discovery and there was no written discovery agreement and thus the State was not required to provide discovery pursuant to G.S. 15A-903(a)(1). The trial court did not abuse its discretion in allowing a witness named Karen Holman to testify when her name allegedly was listed on the State's witness list as Karen Holbrook where the defendant never made a motion for discovery and there was no written discovery agreement, even if such a motion had been made, the trial judge had discretion under the statute to permit any undisclosed witness to testify, and the witness's testimony served only to authenticate a videotape.

State v. Graham, __ N.C. App. __, __ S.E.2d __ (Oct. 6, 2009). The trial court did not abuse its discretion by denying the defendant's motion to bar the State from introducing forensic evidence related to his vehicle where the police impounded his vehicle during the investigation, but subsequently lost it. The State's evidence suggested that soil from the defendant's car matched soil where the victims were found. The State preserved the soil samples, the defendant had access to them and presented expert testimony that the soil was not a unique match, the defense informed the jury that the police lost the vehicle, and there was no evidence of bad faith by the police.

Extending the Session

State v. Hunt, __ N.C. App. __, __ S.E.2d __ (Aug. 4, 2009). Although the trial judge did not enter a formal order extending the session, the judgment was not null and void. The trial judge repeatedly

announced that it was recessing court and the defendant made no objection at the time. On these facts there was sufficient compliance with G.S. 15-167.

Habitual Felon

State v. Flint, __ N.C. App. __, __ S.E.2d __ (Sept. 15, 2009). Although a habitual felon indictment may be returned before, after, or simultaneously with a substantive felony indictment, it is improper where it is issued before the substantive felony even occurred.

Indictment Issues

General Matters

Victim's Name

In Re M.S., __ N.C. App. __, __ S.E.2d __ (Aug. 18, 2009). Distinguishing *McKoy* (discussed immediately above), the court held that juvenile petitions alleging that the juvenile committed first-degree sexual offense were defective because they failed to name a victim. The petitions referenced the victim as "a child," without alleging the victims' names.

Specific Offenses

Child Abuse

State v. Lark, __ N.C. App. __, 678 S.E.2d 693 (July 7, 2009). An indictment charging felony child abuse by sexual act under G.S. 14-318.4(a2) is not required to allege the particular sexual act committed. Language in the indictment specifying the sexual act as anal intercourse was surplusage.

Kidnapping

State v. Yarborough, __ N.C. App. __, __ S.E.2d __ (July 7, 2009). Although a kidnapping indictment need not allege the felony intended, if it does, the State is bound by that allegation. Here, the indictment alleged confinement and restraint for the purpose of committing murder, but the evidence showed that the confinement or restraint was for the purpose of committing a robbery. The State was bound by the allegation and had to prove the confinement and restraint was for the purposes of premeditated and deliberate murder (it could not rely on felony-murder).

Involuntary Commitment

In Re Hayes, __ N.C. App. __, __ S.E.2d __ (Aug. 18, 2009), *temporary stay allowed*, 681 S.E.2d 786 (N.C. Sept. 4, 2009). At a recommitment hearing for an involuntarily-committed respondent based on a verdict of not guilty by reason of insanity, the trial court may order conditional release as an alternative to unconditional release or recommitment.

Judge

Expression of Opinion

State v. Springs, __ N.C. App. __, __ S.E.2d __ (Oct. 6, 2009). The trial judge impermissibly expressed an opinion during the defendant's testimony that tended to discredit the defense theory and required a new trial. In this drug case, the defense's principal theory was that the defendant did not possess the controlled substance and paraphernalia because her boyfriend brought the items to her apartment while she was at work. During her testimony, the defendant was questioned about how often her boyfriend went to her

apartment. The State objected. The trial court sustained the objection, and stated: “Let’s move on to another area. He has no involvement with these charges.”

Jury Argument

Comment on Defendant’s Failure to Testify

State v. Anderson, __ N.C. App. __, __ S.E.2d __ (Oct. 6, 2009). The prosecutor did not improperly comment on the defendant’s failure to testify by pointing out to the jury in closing that the defense had not put on any mental health evidence as forecasted in its opening statement; however, the court disapproved of the prosecutor’s statement that this constituted “[b]roken promises from the defense.” The prosecutor did not comment on the defendant’s failure to testify by stating in closing that there was no evidence regarding accident.

State v. Graham, __ N.C. App. __, __ S.E.2d __ (Oct. 6, 2009). The prosecutor’s comments during closing did not constitute a reference to the defendant’s failure to testify; the comments responded to direct attacks on the State’s witnesses and pertained to the defendant’s failure to produce witnesses or exculpatory evidence.

Regarding Aggravating Factors

State v. Lopez, __ N.C. __, __ S.E.2d __ (Aug. 28, 2009). The trial judge abused her discretion in overruling a defense objection to the State’s jury argument regarding the effect of an aggravating factor on the sentence. Although the jury’s understanding of aggravating factors is relevant to sentencing, the prosecutor’s argument introduced error because it was inaccurate and misleading. The court indicated that consistent with G.S. 7A-97, parties may explain to a jury the reasons why it is being asked to consider aggravating factors and may discuss and illustrate the general effect of finding such factors, such as the fact that a finding of an aggravating factor may allow the trial court to impose a more severe sentence or that the court may find mitigating factors and impose a more lenient sentence.

Jury Instructions

Instructioning Less Than Full Jury in Violation of Right to Unanimous Verdict

State v. Wilson, __ N.C. __, __ S.E.2d __ (Aug. 28, 2009). The trial court violated the defendant’s constitutional right to a unanimous verdict by instructing the jury foreperson during recorded and unrecorded bench conferences, out of the presence of the other jurors. The error was preserved for appeal notwithstanding the defendant’s failure to object at trial.

Involuntary Manslaughter

State v. Davis, __ N.C. App. __, __ S.E.2d __ (Aug. 4, 2009). The defendant’s right to a unanimous verdict was not violated when the trial judge instructed the jury that it could find culpable negligence based on several possible motor vehicle violations (driving left of center, exceeding the posted speed limit, or passing in a no passing zone), if such violation was accompanied by a reckless disregard for the probable consequences, or was a willful, wanton or intentional violation of one or more of these traffic laws.

Mutually Exclusive Offenses

State v. Melvin, __ N.C. App. __, __ S.E.2d __ (Sept. 1, 2009). Ordering a new trial after finding that the trial judge committed plain error by failing to instruct the jury that it could convict the defendant of

one of two mutually exclusive offenses that arose out of the same transaction, but not both. The mutually exclusive offenses at issue were first-degree murder and accessory after the fact to murder.

Motions

Motion to Continue

State v. Flint, __ N.C. App. __, __ S.E.2d __ (Sept. 15, 2009). The trial court did not abuse its discretion in denying a motion to continue asserting that the State provided discovery at a late date. The defendant failed to show that additional time was necessary for the preparation of a defense.

Motion to Dismiss

State v. Lowry, __ N.C. App. __, __ S.E.2d __ (Aug. 4, 2009). Where the State's evidence in this murder case showed both motive and opportunity, it was sufficient to survive a motion to dismiss on the issue of whether the defendant was the perpetrator.

Suppression Motions

State v. Rollins, __ N.C. App. __, __ S.E.2d __ (Sept. 15, 2009). Remanding for a new suppression hearing where the trial court failed to provide any basis or rationale for its denial of the defendant's suppression motion. The court "again urge[d] the trial courts . . . to remember 'it is always the better practice to find all facts upon which the admissibility of the evidence depends.'"

State v. Wade, __ N.C. App. __, __ S.E.2d __ (July 21, 2009). The trial court did not abuse its discretion by denying the defendant's motion to renew his suppression motion in light of an officer's trial testimony. There was no additional relevant information discovered during trial that required reconsideration of the motion to suppress.

Pleas

Factual Basis

State v. Flint, __ N.C. App. __, __ S.E.2d __ (Sept. 15, 2009). Holding, over a dissent, that there was an inadequate factual basis for some of the pleaded-to felonies. While the transcript of plea addressed 68 felony charges plus a habitual felon indictment, the trial court relied solely on the State's factual basis document, which addressed only 47 charges. The transcript of plea form could not provide the factual basis for the plea. Nor could the indictments serve this purpose where they did not appear to have been before the trial judge at the time of the plea.

Satellite-Based Monitoring (SBM) & Pleas

State v. Wagoner, __ N.C. App. __, __ S.E.2d __ (Sept. 1, 2009). In a case in which there was a dissenting opinion, the court rejected the defendant's argument that the trial court erred in imposing SBM when SBM was not addressed in the defendant's plea agreement with the State.

State v. Anderson, __ N.C. App. __, 679 S.E.2d 165 (July 7, 2009). Following *State v. Bare* and holding that when taking a plea, a judge is not required to inform a defendant of possible imposition of lifetime SBM.

Sentencing Aggravating Factors

State v. Anderson, __ N.C. App. __, __ S.E.2d __ (Oct. 6, 2009). Rejecting the defendant’s argument that the trial court erred by not holding a separate sentencing proceeding for aggravating factors.

State v. Rivens, __ N.C. App. __, 679 S.E.2d 145 (July 7, 2009). There was sufficient evidence to establish the aggravating factor that the defendant had previously been adjudicated delinquent for an offense that would be a B2 felony if it had been committed by an adult. The evidence of that prior adjudication was a Transcript of Admission from the juvenile proceeding, not the Juvenile Adjudication Order or Disposition/Commitment Order. Under G.S. 15A-1131(b), a person has been convicted when he or she has been adjudged guilty or has entered a guilty plea. An admission by a juvenile, like that recorded in a Transcript of Admission is equivalent to a guilty plea.

Post-Release Supervision

State v. Harris, __ N.C. App. __, __ S.E.2d __ (July 21, 2009). The trial court did not err in ordering that an indigent defendant reimburse the State for the costs of providing a transcript of the defendant’s prior trial as a condition of post-release supervision.

Prior Record Level Habitual Felon

State v. Flint, __ N.C. App. __, __ S.E.2d __ (Sept. 15, 2009). When calculating prior record level points for a new felony, points may be assigned based on a prior substantive felony supporting a prior habitual felon conviction, but not based on the prior habitual felon conviction itself.

Proof Issues & Stipulations

State v. Bohler, __ N.C. App. __, __ S.E.2d __ (Aug. 4, 2009). The defendant’s stipulation that certain out-of-state convictions were substantially similar to specified North Carolina offenses was ineffective. However, the defendant could stipulate that the out-of-state convictions occurred and that they were either felonies or misdemeanors under the other state’s law, for purposes of assigning prior record level points. Based on the stipulation in this case, the defendant’s out-of-state convictions could be counted for prior record level purposes using the “default” classifications in G.S. 15A-1340.14(e).

Probation

State v. Hubbard, __ N.C. App. __, 678 S.E.2d 390 (July 7, 2009). Although the probation report might have been ambiguous regarding the condition allegedly violated, because the report set forth the specific facts at issue (later established at the revocation hearing), the report gave the defendant sufficient notice of the alleged violation, as required by G.S. 15A-1345(e). The State presented sufficient evidence that the defendant violated a special condition of probation requiring compliance with the rules of intensive probation. The State’s evidence included testimony by probation officers that they informed the defendant of his curfew and their need to communicate with him during curfew checks, and that compliance with curfew meant that the defendant could not be intoxicated in his home. During a curfew check, the defendant was so drunk that he could not walk; later that evening the defendant was drunk and disruptive, to the extent that his girlfriend was afraid to enter the residence.

State v. Willis, __ N.C. App. __, __ S.E.2d __ (Aug. 18, 2009). Although a trial court has authority under G.S. 15A-1344(d) to modify conditions of probation, modifications only may be made after notice and a hearing, and if good cause is shown. Although one modification made in this case was permissible as a clerical change, a second modification was substantive and was invalid as it was made without notice and a hearing.

Satellite-Based Monitoring (SBM)

State v. Wagoner, __ N.C. App. __, __ S.E.2d __ (Sept. 1, 2009). Holding, over a dissent, that requiring the defendant to enroll in SBM does not violate the constitutional prohibition against ex post facto law or double jeopardy.

State v. Anderson, __ N.C. App. __, 679 S.E.2d 165 (July 7, 2009). Because SBM is civil in nature, its imposition does not violate a defendant's right to be free from double jeopardy.

State v. Kilby, __ N.C. App. __, __ S.E.2d __ (July 21, 2009). The trial judge erred in concluding that the defendant required the highest possible level of supervision and monitoring when the Department of Correction risk assessment found that the defendant posed only a moderate risk and trial judge made no findings of fact that would support its conclusion beyond those stated on form AOC-CR-616.

State v. Causby, __ N.C. App. __, __ S.E.2d __ (Sept. 15, 2009). Following *Kilby* (discussed immediately above), on similar facts.

State v. Morrow, __ N.C. App. __, __ S.E.2d __ (Oct. 6, 2009). Following *State v. Bare* and concluding, over a dissent, that the SBM statute does not violate the Ex Post Facto clause. In determining whether the defendant requires the highest possible level of supervision and monitoring, the trial court may consider any evidence relevant to the defendant's risk and is not limited to the DOC's risk assessment. Because evidence supporting a finding of high risk was presented in a probation revocation hearing held the same day (the defendant admitted that he failed to attend several sexual abuse treatment program sessions), the court remanded for an evidentiary hearing as to the defendant's risk. Concluding that it was error for the trial court to order that the defendant enroll in SBM for a period of 7-10 years; G.S. 14-208.40B(c) requires the trial court to set a definite period of time for SBM enrollment.

State v. Stines, __ N.C. App. __, __ S.E.2d __ (Oct. 6, 2009). Requiring enrollment in the SBM program deprives an offender of a significant liberty interest, triggering procedural due process protections. The State violated the defendant's procedural due process rights by failing to give him sufficient notice in advance of the SBM hearing of the basis for the DOC's preliminary determination that he met the criteria for enrollment in the SBM program. G.S. 14-208.40B requires the DOC to notify the offender, in advance of the SBM hearing, of the basis for its determination that the offender falls within one of the categories in G.S. 14-208.40(a), making the offender subject to enrollment in the SBM program.

Speedy Trial

State v. Graham, __ N.C. App. __, __ S.E.2d __ (Oct. 6, 2009). Concluding that the defendant's claim of pre-indictment delay was not covered by the Speedy Trial clause; reviewing the defendant's claim of pre-indictment delay as a violation of due process and finding no prejudice.

Verdict

Inconsistent Verdicts

State v. Cole, __ N.C. App. __, __ S.E.2d __ (Aug. 18, 2009). The trial court did not err in accepting seemingly inconsistent verdicts of guilty of misdemeanor assault with a deadly weapon and not guilty of possession of a firearm by a felon.

Polling the Jury

State v. Hunt, __ N.C. App. __, __ S.E.2d __ (Aug. 4, 2009). The clerk was not required to question the jurors separately about each of the two offenses; the polling was proper when the clerk posed one question about both offenses, to each juror individually.

Evidence

404(b) Evidence

Evidence Admissible

State v. Locklear, __ N.C. __, __ S.E.2d __ (Aug. 28, 2009). In this capital murder case, the trial court did not err in admitting evidence that the defendant committed another murder 32 months earlier. Evidence of the prior murder was admitted to show knowledge, plan, opportunity, modus operandi, and motive. The court found the two crimes sufficiently similar and rejected the defendant's argument that because the trial court declined to join the offenses for trial, they lacked the necessary similarity. The court noted that remoteness is less significant when the prior bad act is used to show intent, motive, knowledge, or lack of accident and that it generally goes to weight not admissibility.

State v. Madures, __ N.C. App. __, 678 S.E.2d 361 (July 7, 2009). In a trial for assault on a law enforcement officer and resisting and obstructing, the trial court properly admitted evidence relating to the defendant's earlier domestic disturbance arrest. The same officer involved in the present offenses handled the earlier arrest, and at the time had told the defendant's mother to call him if there were additional problems. It was the defendant's mother's call that brought the officers to the residence on the date in question. Thus, the fact of the earlier arrest helped to provide a complete picture of the events for the jury. The court also held that the trial court did not abuse its discretion in admitting the defendant's statement to the police after his arrest while he was being transported to the jail. The court found that the defendant's argumentative statements showed both his intent to assault or resist officers as well as absence of mistake.

State v. Hargrave, __ N.C. App. __, __ S.E.2d __ (Aug. 4, 2009). Evidence of that the defendant drove with a revoked license *after* his arrest for several crimes, including driving while license revoked, which lead to the prosecution at issue, was admissible under Rule 404(b) to show that he knowingly drove with a revoked license.

State v. Graham, __ N.C. App. __, __ S.E.2d __ (Oct. 6, 2009). The trial court properly admitted evidence of the defendant's prior assault on a murder victim when the evidence showed that the defendant wanted to prevent the victim from testifying against him in the assault trial; the prior bad act showed motive, malice, hatred, ill-will and intent. There was no abuse of discretion in the 403 balancing with respect to this highly probative evidence.

Evidence Inadmissible

State v. Ward, __ N.C. App. __, __ S.E. 2d __ (Aug. 18, 2009), *temporary stay allowed*, 681 S.E.2d 786 (N.C. Sept. 4, 2009). The trial court erred in admitting 404(b) evidence obtained as a result of an earlier arrest when the earlier charges were dismissed for insufficient evidence and the probative value of the evidence depended on the defendant's having committed those offenses. The court distinguished cases where several items are seized from a defendant at one time but the defendant is tried separately for possession of the various items; in this context, evidence may be admissible even if there has been an earlier acquittal, if the evidence forms an integral and natural part of an account of the present crime.

State v. Ray, __ N.C. App. __, 678 S.E.2d 378 (July 7, 2009), *temp. stay allowed*, 681 S.E.2d 341 (N.C. July 7, 2009). Ordering a new trial in a child sex case because the trial court erroneously admitted 404(b) evidence pertaining to instances of domestic violence between the defendant and his former girlfriend that occurred 15 years before the incident in question. Although the State asserted that the instances were similar because in both the defendant had been drinking, there was no evidence of alcohol being involved in the prior events. Additionally, the prior events were different from the current event, which involved an alleged sexual assault on a seven-year-old girl who the defendant barely knew; the assault allegedly occurred during a picnic at the defendant's home. By contrast, the prior events were based on personal conflicts between the defendant and an adult woman with whom the defendant was involved romantically. The only similarity was that both victims were females.

Corroboration

State v. Horton, __ N.C. App. __, __ S.E.2d __ (Sept. 15, 2009). In a child sexual assault case, prior statements of the victim made to an expert witness regarding "grooming" techniques employed by the defendant were properly admitted to corroborate the victim's trial testimony. Although the prior statements provided new or additional information, they tended to strengthen the child's testimony that she had been sexually abused by the defendant.

Crawford Issues

Melendez-Diaz v. Massachusetts, 557 U.S. __, 129 S. Ct. 2527 (June 25, 2009). Forensic laboratory reports are testimonial and thus subject to the rule of *Crawford v. Washington*, 541 U.S. 36 (2004). For a detailed analysis of this case, see the paper entitled "*Melendez-Diaz & the Admissibility of Forensic Laboratory Reports & Chemical Analyst Affidavits in North Carolina Post-Crawford*," posted online at: <http://www.sog.unc.edu/programs/crimlaw/faculty.htm>

State v. Locklear, __ N.C. __, __ S.E.2d __ (Aug. 28, 2009). A *Crawford* violation occurred when the trial court admitted opinion testimony of two non-testifying experts regarding a victim's cause of death and identity. The testimony was admitted through the Chief Medical Examiner, an expert in forensic pathology, who appeared to have read the reports of the non-testifying experts into evidence, rather than testifying to an independent opinion based on facts or data reasonable relied upon by experts in the field.

Demonstrations and Experiments

State v. Witherspoon, __ N.C. App. __, __ S.E.2d __ (Aug. 18, 2009). Use of a mannequin's head and a newly-purchased couch to refute the defendant's version of the events on the day she shot her husband was properly allowed as a demonstration. Because the evidence did not constitute an experiment, the State did not have to show that the circumstances were substantially similar to those at the time of the

actual shooting. As a demonstration, the evidence was admissible because it was relevant (it was probative of premeditation) and not unfairly prejudicial.

State v. Anderson, __ N.C. App. __, __ S.E.2d __ (Oct. 6, 2009). The State laid a proper foundation to establish the relevancy of a demonstration by an expert witness who used a doll to illustrate how shaken baby syndrome occurs and the amount of force necessary to cause the victim's injuries, where a demonstration of how the injuries were inflicted was relevant to defendant's intent to harm the victim. The demonstration did not have to be substantially similar to the manner in which the crime occurred because that standard applies to experiments, not demonstrations. Finally the demonstration was not unduly prejudicial and would not cause the jury decide the case on emotion.

Direct Examination

State v. Streater, __ N.C. App. __, 678 S.E.2d 367 (July 7, 2009). The trial court erred when it allowed the State to question its witness on direct examination about whether she had told the truth.

State v. Wade, __ N.C. App. __, __ S.E.2d __ (July 21, 2009). The trial judge erred by overruling defense counsel's objection to a question posed by the prosecutor to a State's witness alluding to the fact that a superior court judge had found that there was probable cause to search the defendant. The court reiterated the rule that a trial judge's legal determination on evidence made in a hearing outside of the jury's presence should not be disclosed to the jury.

Opinions

Expert Opinions

Child Victim Cases

State v. Streater, __ N.C. App. __, 678 S.E.2d 367 (July 7, 2009). The state's expert pediatrician was improperly allowed to testify that his findings were consistent with a history of anal penetration received from the child victim where no physical evidence supported the diagnosis. The expert was properly allowed to testify that victim's history of vaginal penetration was consistent with his findings, which included physical evidence supporting a diagnosis of sexual intercourse. The expert's testimony that his findings were consistent with the victim's allegations that the defendant perpetrated the abuse was improper where there was no foundation for the testimony that the defendant was the one who committed the acts.

State v. Horton, __ N.C. App. __, __ S.E.2d __ (Sept. 15, 2009). Prejudicial error occurred warranting a new trial when the trial court overruled an objection to testimony of a witness who was qualified as an expert in the treatment of sexually abused children. After recounting a detailed description of an alleged sexual assault provided to her by the victim, the State asked the witness: "As far as treatment for victims . . . why would that detail be significant?" The witness responded: "[W]hen children provide those types of specific details it enhances their credibility." The witness's statement was an impermissible opinion regarding credibility. Additionally, it was error to allow the witness to testify that the child "had more likely than not been sexually abused," where there was no physical evidence of abuse; such a statement exceeded permissible opinion testimony that a child has characteristics consistent with abused children.

State v. Ray, __ N.C. App. __, 678 S.E.2d 378 (July 7, 2009), *temporary stay allowed*, 681 S.E.2d 341 (N.C. July 27, 2009). The trial court did not err in admitting the State's expert witness's testimony that the results of his examination of the victim were consistent with a child who had been sexually abused; the expert did not testify that abuse had in fact occurred and did not comment on the victim's credibility.

Drug Cases

State v. Ward, __ N.C. App. __, __ S.E.2d __ (Aug. 18, 2009), *temporary stay allowed*, 681 S.E.2d 786 (N.C. Sept. 4, 2009). The trial court erred by allowing the State's expert to identify prescription pills as controlled substances solely by visual examination and without chemical analysis. The expert identified the pills by comparing their appearance and markings to information contained in Micromedics Literature, a publication used by doctors in hospitals and pharmacies to identify prescription medicines.

Generally

State v. Hargrave, __ N.C. App. __, __ S.E.2d __ (Aug. 4, 2009). A laboratory technician who testified that substances found by law enforcement officers contained cocaine was properly qualified as an expert even though she did not possess an advanced degree.

Lay Opinions

State v. Hargrave, __ N.C. App. __, __ S.E.2d __ (Aug. 4, 2009). The trial judge did not err by allowing officers to give lay opinion testimony that the cocaine at issue was packaged as if for sale and that the total amount of money and the number of twenty-dollar bills found on the defendant were indicative of drug sales. The officers' testimony was based on their personal knowledge of drug practices, through training and experience.

Refreshing Recollection

State v. Black, __ N.C. App. __, 678 S.E.2d 689 (July 7, 2009). The trial court did not abuse its discretion in admitting a witness's refreshed recollection. The witness's testimony was not merely a recitation of the refreshing memorandum. The witness testified to some of the relevant events before being shown a transcript of his police interview. After being shown the transcript, the witness was equivocal about whether he made the statements recorded in it. However, after hearing an audio tape of the interview out of the presence of the jury, the witness said that his memory was refreshed. He then testified in detail regarding the night in question, apparently without reference to the interview transcript. Where, as here, there is doubt about whether about whether the witness was testifying from his or her own recollection, the testimony is admissible, in the trial court's discretion.

Vouching for the Credibility of a Victim

State v. Giddens, __ N.C. App. __, __ S.E.2d __ (Aug. 18, 2009), *temporary stay allowed*, 681 S.E.2d 785 (N.C. Sept. 3, 2009). Holding, over a dissent, that plain error occurred in a child sex case when the trial court admitted the testimony of a child protective services investigator. The investigator testified that the Department of Social Services (DSS) had "substantiated" the defendant as the perpetrator and that the evidence she gathered caused DSS personnel to believe that the abuse alleged by the victims occurred. Case law holds that a witness may not vouch for the credibility of a victim.

Arrest, Search, and Investigation

Arrests and Investigatory Stops

Anonymous and Other Tips

State v. Brown, __ N.C. App. __, __ S.E.2d __ (Aug. 18, 2009). A detailed tip by an individual, who originally called the police anonymously but then identified himself and met with the police in person, was sufficiently corroborated by the police to establish probable cause to arrest the defendant.

Seizure

State v. Morton, __ N.C. App. __, __ S.E.2d __ (July 21, 2009). No seizure occurred when officers approached the defendant and asked to speak with him regarding a shooting. The defendant submitted to questioning without physical force or show of authority by the police; the officers did not raise their weapons or activate their blue lights.

Vehicle Stops

State v. Jackson, __ N.C. App. __, __ S.E.2d __ (Aug. 18, 2009). A passenger in a vehicle that has been stopped by the police has standing to challenge the constitutionality of the vehicle stop. There were no grounds providing reasonable and articulable suspicion for extending a vehicle stop once the original purpose of the stop (suspicion that the driver was operating the vehicle without a license) had been addressed. After the officer verified that the driver had a valid license, she extended the stop by asking whether there was anything illegal in the vehicle, and the defendant gave consent to search the vehicle. The encounter did not become consensual after the officer verified that the driver was licensed. Although such an encounter could have become consensual if the officer had returned the driver's license and registration, here there was no evidence that the driver's documentation was returned. Because the extended detention was unconstitutional, the driver's consent was ineffective to justify the search of the vehicle and the weapon and drugs found were fruits of the poisonous tree.

State v. Corpening, __ N.C. App. __, __ S.E.2d __ (Oct. 6, 2009). Declining to consider the defendant's challenge to the constitutionality of a vehicle checkpoint where officers did not stop the defendant's vehicle as a part of the checkpoint but rather approached it after the defendant parked it on the street about 100-200 feet from the checkpoint.

Consent

State v. McLeod, __ N.C. App. __, __ S.E.2d __ (July 7, 2009). Officers had implied consent to search a residence occupied by the defendant and his mother. After the defendant's mother told the officers that the defendant had a gun in the residence, the defendant confirmed that to be true and told the officers where it was located. The defendant and his mother gave consent by their words and actions for the officers to enter the residence and seize the weapon.

State v. Troy, __ N.C. App. __, __ S.E.2d __ (July 21, 2009). The defendant gave implied consent to the recording of three-way telephone calls in which he participated while in an out-of-state detention center. Although the defendant did not receive a recorded message when the three-way calls were made informing him that the calls were being monitored and recorded, he was so informed when he placed two other calls days before the three-way calls at issue were made.

Frisk

State v. Miller, __ N.C. App. __, 678 S.E.2d 802 (July 7, 2009). An officer had reasonable suspicion to frisk the defendant after stopping him for a traffic violation. Even though the officer could see something in the defendant's clenched right hand, the defendant stated that he had nothing in his hand; the defendant appeared to be attempting to physically evade the officer; the defendant continually refused to show the officer what was in his hand; and the defendant raised his fist, suggesting an intent to strike the officer.

State v. Morton, __ N.C. __, __ S.E.2d __ (July 21, 2009). Over a dissent, the court held that the trial judge erred in concluding that a frisk was justified because officers had reasonable suspicion to believe that the defendant was armed or dangerous. The court ruled, in part, that the record did not support the trial judge's factual finding that information received from confidential informants and concerned citizens was reliable.

Identification of Defendant Pretrial Line-Up

State v. Rainey, __ N.C. App. __, __ S.E.2d __ (Aug. 4, 2009). Pretrial photographic line-ups were not suggestive, on the facts.

Plain Smell

State v. Corpening, __ N.C. App. __, __ S.E.2d __ (Oct. 6, 2009). The plain smell of marijuana emanating from the defendant's vehicle provided sufficient probable cause to support a search.

Plain View

State v. Carter, __ N.C. App. __, __ S.E.2d __ (Sept. 15, 2009). Holding that the plain view exception to the warrantless arrest rule did not apply. When the officer approached the defendant's vehicle from the passenger side to ask about an old and worn temporary tag, he inadvertently noticed several whole papers in plain view on the passenger seat. The officer then returned to his cruiser to call for backup. When the officer came back to the defendant's vehicle to arrest the defendant, the previously intact papers had been torn to pieces. Under the plain view doctrine, police may seize contraband or evidence if (1) the officer was in a place where the officer had a right to be when the evidence was discovered; (2) the evidence was discovered inadvertently; and (3) it was immediately apparent to the police that the items observed were evidence of a crime or contraband. The court found that the first two prongs of the test were satisfied but that the third prong was not. It concluded that the officer's suspicion that the defendant was trying to conceal information on the papers was not sufficient to bypass the warrant requirement.

Search Incident to Arrest

State v. Carter, __ N.C. App. __, __ S.E.2d __ (Sept. 15, 2009). Applying *Arizona v. Gant* and holding that the trial court erred by denying the defendant's motion to suppress evidence (papers) obtained during a warrantless search of his vehicle subsequent to his arrest for driving with an expired registration and failing to notify the DMV of an address change. Because the defendant had been removed from the vehicle, handcuffed, and was sitting on a curb when the search occurred, there was no reason to believe that he was within reaching distance or otherwise able to access the passenger compartment of the vehicle. Additionally, there was no evidence that the arresting officer believed that the papers were related to the charged offenses and furthermore, it would be unreasonable to think that papers seen on the passenger seat of the car were related to those offenses.

State v. Wilkerson, __ N.C. __, __ S.E.2d __ (Aug. 28, 2009). Seizure and search of the defendant's cell phone was proper as a search incident to arrest. The defendant was arrested for two murders shortly after they were committed. While in custody, he received a cell phone call, at which point the seizure occurred.

Standing

State v. Jackson, __ N.C. App. __, __ S.E.2d __ (Aug. 18, 2009). A passenger in a vehicle that has been stopped by the police has standing to challenge the constitutionality of the vehicle stop.

Students, Searches of

Safford Unified School District v. Redding, 557 U.S. __, 129 S. Ct. 2633 (June 25, 2009). Although school officials had reasonable suspicion to search a middle school student's backpack and outer clothing for pills, they violated the Fourth Amendment when they required her to pull out her bra and underwear. After learning that the student might have prescription strength and over-the-counter pain relief pills, school officials searched her backpack but found no pills. A school nurse then had her remove her outer clothing, pull her bra and shake it, and pull out the elastic on her underpants, exposing her breasts and pelvic area to some degree. No pills were found. Because there was no indication that the drugs presented a danger to students or were concealed in her undergarments, the officials did not have sufficient justification to require the students to pull out her bra and underpants. However, the school officials were protected from civil liability by qualified immunity.

Criminal Offenses

General Crimes

Accessory After the Fact

State v. Keller, __ N.C. App. __, __ S.E.2d __ (Aug. 4, 2009). A defendant may not be convicted of second-degree murder and accessory after the fact to first-degree murder. The offenses are mutually exclusive.

Homicide

State v. Davis, __ N.C. App. __, __ S.E.2d __ (Aug. 4, 2009). A defendant may not be sentenced for both involuntary manslaughter and felony death by vehicle arising out of the same death. A defendant may not be sentenced for both felony death by vehicle and impaired driving arising out of the same incident. However, a defendant may be sentenced for both involuntary manslaughter and impaired driving.

Assaults

Culpable Negligence

State v. Davis, __ N.C. App. __, 678 S.E.2d 385 (July 7, 2009). Committing a violation of G.S. 20-138.1 (impaired driving) constitutes culpable negligence as a matter of law sufficient to establish the requisite intent for assault with a deadly weapon inflicting serious injury.

Serious Bodily Injury

State v. Rouse, __ N.C. App. __, __ S.E.2d __ (July 21, 2009). There was sufficient evidence that a 70-year-old victim suffered from a protracted condition causing extreme pain supporting a charge of assault inflicting serious bodily injury when the facts showed: the victim had dried blood on her lips and in her nostrils and abdominal pain; she had a bruise and swelling over her left collarbone limiting movement of her shoulder, and a broken collarbone, requiring a sling; she had cuts in her hand requiring stitches; she received morphine immediately and was prescribed additional pain medicine; she had to return to the emergency room 2 days later due to an infection in the sutured hand, requiring re-stitching and antibiotics; a nurse was unable to use a speculum while gathering a rape kit because the victim was in too much pain.

Sexual Assaults and Sex Offender Registration Offenses
Age Difference Between Defendant and Victim for Sexual Assaults

State v. Faulk, __ N.C. App. __, __ S.E.2d __ (Sept. 15, 2009). In a case charging offenses under G.S. 14-27.7A (statutory rape or sexual offense of person who is 13, 14, or 15 years old), the court held that the trial judge misapplied the “birthday rule” (a person reaches a certain age on his or her birthday and remains that age until his or her next birthday) to the calculation of the age difference between the defendant and the victim. The defendant’s and victim’s ages at the time in question were 19 years, 7 months, and 5 days and 15 years, 2 months, and 8 days respectively. Applying the birthday rule, the trial court concluded that the defendant was 19 at the time in question and that the victim was 15, making the age difference 4 years, when the relevant statute required it to be more than 4 years. The appellate court concluded that the statutory element of more than 4 years but less than 6 years means 4 years 0 days to 6 years 0 days, “or anywhere in the range of 1460 days to 2190 days.”

Indecent Liberties

State v. McClary, __ N.C. App. __, __ S.E.2d __ (July 7, 2009). There was sufficient evidence to survive a motion to dismiss where it showed that the defendant gave the child a letter containing sexually graphic language for the purpose of soliciting sexual intercourse and oral sex for money. Additionally, the jury could reasonably infer that the defendant’s acts of writing and delivering the letter to the child were taken for the purpose of arousing and gratifying sexual desire.

Failure to Register/Notify of Address or Other Change

State v. Worley, __ N.C. App. __, __ S.E.2d __ (July 21, 2009). The trial court did not err in denying the defendant’s motion to dismiss a charge of failure to notify of a change of address within 10 days where the evidence showed, at a minimum, that the defendant ceased to reside at his last listed reported address on or before August 10th, but did not submit a change of address form until September 16th. The court noted that individuals required to notify the sheriff of a change address must do so, even if the change of address is temporary; it rejected the defendant’s contention that there may be times when a registered sex offender lacks a reportable address, such as when the person has no permanent abode.

Kidnapping
Confinement

State v. Yarborough, __ N.C. App. __, __ S.E.2d __ (July 7, 2009). There was sufficient evidence of confinement where the defendant entered a trailer, brandished a loaded shotgun, and ordered everyone to lie down. It was immaterial that the victim did not comply with the defendant’s order to lie down.

Live Victim

State v. Keller, __ N.C. App. __, __ S.E.2d __ (Aug. 4, 2009). Kidnapping requires a live victim.

Multiple Convictions

State v. Cole, __ N.C. App. __, __ S.E.2d __ (Aug. 18, 2009). Because the restraint of the victim did not go beyond that inherent in the accompanying robbery, the kidnapping conviction could not stand. The victim was not moved to another location or injured and was held for only 30 minutes.

State v. Payton, __ N.C. App. __, __ S.E.2d __ (July 21, 2009). The trial court erred in denying the defendant's motion to dismiss kidnapping charges where the removal and restraint of the victims was inherent in a charged robbery. Distinguishing cases where the victims were bound and physically harmed, the court noted that in this case, the victims only were moved from a bathroom area to the bathroom (a movement deemed merely a technical asportation), and were asked to lie on the bathroom floor until the robbery was complete. The removal and restraint did not expose the victims to greater danger than the robbery itself and thus were inherent in the robbery.

Robbery

Stat v. Porter, __ N.C. App. __, 679 S.E.2d 167 (July 7, 2009). The defendant's use of violence was concomitant with and inseparable from the theft of the property from a store where the store manager confronted the defendant in the parking lot and attempted to retrieve the stolen property, at which point the defendant struck the store manager. This constituted a continuous transaction.

Burglary and Breaking and Entering

State v. Rawlinson, __ N.C. App. __, __ S.E.2d __ (Aug. 4, 2009). The defendant did not have implied consent to enter an office within a video store. Even if the defendant had implied consent to enter the office, his act of theft therein rendered that implied consent void ab initio.

Trespass

In re S.M.S., __ N.C. App. __, 675 S.E.2d 44 (April 7, 2009). A male juvenile's entry into a school's female locker room with a door marked "Girl's Locker Room" was sufficient evidence to support the juvenile's adjudication of second-degree trespass. The sign was reasonably likely to give the juvenile notice that he was not authorized to go into the locker room.

Bombing, Terrorism, and Related Offenses

Manufacture, Possession, Etc. of a Machine Gun, Sawed-Off Shotgun, or Weapon of Mass Destruction

State v. Watterson, __ N.C. App. __, __ S.E.2d __ (Aug. 4, 2009). In a prosecution under G.S. 14-288.8, the State is not required to prove that the defendant knew of the physical characteristics of the weapon that made it unlawful.

Weapons Offenses

Britt v. North Carolina, __ N.C. __, __ S.E.2d __ (Aug. 28, 2009). The court held that G.S. 14-415.1 (felon in possession), as applied to the plaintiff, was unconstitutional. In 1979, the plaintiff was convicted of possession of a controlled substance with intent to sell and deliver, a nonviolent crime that did not involve the use of a firearm. He completed his sentence in 1982 and in 1987, his civil rights were fully restored, including his right to possess a firearm. The then-existing felon in possession statute did not bar the plaintiff from possessing a firearm. In 2004, G.S. 14-415.1 was amended to extend the prohibition to all firearms by anyone convicted of a felony and to remove the exceptions for possession within the felon's own home and place of business. Thereafter, the plaintiff spoke with his local sheriff about whether he could lawfully possess a firearm and divested himself of all firearms, including sporting rifles and shotguns that he used for game hunting on his land. Plaintiff, who had never been charged with another crime, filed a civil action against the State, alleging that G.S. 14-415.1 violated his constitutional rights. The North Carolina Supreme Court held that as applied to him, G.S. 14-415.1, which contains no

exceptions, violated the plaintiff's right to keep and bear arms protected by Article I, Section 30 of the North Carolina Constitution. Specifically, the court held that as applied, G.S. 14-451.1 was not a reasonable regulation. The court held: "Plaintiff, through his uncontested lifelong nonviolence towards other citizens, his thirty years of law-abiding conduct since his crime, his seventeen years of responsible, lawful firearm possession between 1987 and 2004, and his assiduous and proactive compliance with the 2004 amendment, has affirmatively demonstrated that he is not among the class of citizens who pose a threat to public peace and safety." It concluded: "[I]t is unreasonable to assert that a nonviolent citizen who has responsibly, safely, and legally owned and used firearms for seventeen years is in reality so dangerous that any possession at all of a firearm would pose a significant threat to public safety."

Motor Vehicle Offenses

State v. Davis, __ N.C. App. __, __ S.E.2d __ (Aug. 4, 2009). A defendant may not be sentenced for both felony death by vehicle and impaired driving arising out of the same incident. However, a defendant may be sentenced for both involuntary manslaughter and impaired driving.

Defenses

Accident

State v. Yarborough, __ N.C. __, __ S.E.2d __ (July 7, 2009). The trial court did not err by failing to instruct on accident. The defense is unavailable when the defendant was engaged in misconduct at the time of the killing. Here, the defendant was engaged in misconduct—he broke into a home with the intent to commit robbery and the killing occurred during a struggle over the defendant's gun. The court also rejected the defendant's argument that because he abandoned his plan to commit the robbery, his right to the defense of accident was "restored." Even assuming that the defendant abandoned his plan, that fact would not break the sequence of events giving rise to the shooting.

Capital

Mental Retardation Issues

State v. Locklear, __ N.C. __, __ S.E.2d __ (Aug. 28, 2009). The trial court erred by denying the defendant's request to instruct the jury that a verdict finding the defendant mentally retarded would result in a sentence of life imprisonment without parole. The trial judge had given N.C.P.J.I.—Crim. 150.05, which states, in part, that "no defendant who is mentally retarded shall be sentenced to death," and the attorneys argued that if the defendant was found mentally retarded he would receive life in prison. Stating that on remand, the trial court should instruct the jury that "[i]f the jury determines the defendant to be mentally retarded, the court shall declare the case noncapital and the defendant shall be sentenced to life imprisonment."

Judicial Administration

One Trial Judge Overruling Another

State v. Harris, __ N.C. App. __, __ S.E.2d __ (July 21, 2009). When a mistrial was declared, the judge retrying the case was not bound by rulings made by the judge who presided over the prior trial. Here, the rulings pertained to the admissibility of 404(b) evidence and complete recordation of the trial.

Sealing Search Warrants

In Re Cooper, __ N.C. App. __, __ S.E.2d __ (Oct. 6, 2009). Affirming the trial court's order denying the plaintiffs' motion to unseal three returned search warrants and related papers. Holding that although

returned search warrants are public records, the trial court did not abuse its discretion by sealing the documents where the release of information would undermine the ongoing investigation, and that sealing for a limited time period was necessary to ensure the interests of maintaining the State's right to prosecute a defendant, protecting a defendant's right to a fair trial, and preserving the integrity of an investigation. The court also rejected the plaintiffs' argument that the orders violated North Carolina common law on the public's right of access to court records and proceedings, concluding that the public records law had supplanted any common law right and that even if the common law right existed no abuse of discretion occurred. The court rejected the plaintiffs' First Amendment argument, concluding that because the documents were not historically open to the press and public, the plaintiffs did not have a qualified First Amendment right to access. The court rejected the plaintiff's argument that the sealing orders violated the open courts provision of Article I, § 18 of the State Constitution. Although the court recognized a qualified right of access to the documents under the open courts provision, it found that right was outweighed by compelling governmental interests. Finally, the court concluded that the trial court's findings were sufficiently specific, that any alternatives were not feasible, and that by limiting the sealing orders to 30 days the trial court used the least restrictive means of keeping the information confidential.