Criminal Case Update
Covering Significant Cases Decided June 21, 2011 – Oct. 4, 2011
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Criminal Procedure

Bond Forfeiture

State v. Cortez, __ N.C. App. __, __ S.E.2d __ (Sept. 20, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMjExLTEucGRm). The county school board's notice of appeal from a judge's order affirming the Clerk's ruling setting aside bond forfeitures divested the Clerk and trial court of jurisdiction to enter a second forfeiture while the appeal was pending.

State ex rel Guilford County Board of Educ. v. Herbin, __ N.C. App. __, __ S.E.2d __ (Sept. 6, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTc4LTEucGRm). (1) A bail agent may file a motion to set aside a forfeiture. (2) Filing such a motion by a bail agent does not constitute unauthorized practice of law. (3) A bail agent may appear pro se at a hearing on a motion to set aside forfeiture if the agent has a financial liability to the surety as a result of the bond. However, a bail agent may not appear at the motion hearing in court to represent the corporate surety.

Controlling the Courtroom

State v. Stanley, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMzUyLTEucGRm). (1) The trial court did not abuse its discretion by failing to remove the defendant's handcuff restraints during trial. The defendant was an incarcerated prisoner charged with possession of drugs at a penal institution. The trial court properly considered the defendant's past record and reasoned that incarceration for second-degree murder and kidnapping raised safety concerns. (2) Although the trial court erred by failing to give the limiting instruction required by G.S. 15A-1031 regarding the defendant's restraints, the error was not prejudicial.

Counsel Issues

State v. Choudhry, __ N.C. __, __ S.E.2d __ (Aug. 26, 2011) (http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMS80MDlBMTAtMS5wZGY=). Although the trial court's inquiry of the defendant was insufficient to assure that the defendant knowingly, intelligently, and voluntarily waived his right to conflict free counsel, because the defendant failed to show that counsel's performance was adversely affected by the conflict, he is not entitled to relief. At the

defendant's noncapital first-degree murder trial, the prosecution informed the trial court that defense counsel had previously represented a State's witness, Michelle Wahome, who was the defendant's girlfriend at the time of the incident in question and with whom the defendant had a child. Specifically, defense counsel had represented Wahome with respect to charges arising out of an incident at a shopping mall. The charges were reduced to common law forgery and although the defendant had not been charged in the matter, both he and Wahome appeared in the video surveillance and the items in question were men's clothing. Defense counsel indicated that the prior representation would not impair his ability to represent the defendant and that he did not plan to question Wahome about the earlier incident. The trial court then informed the defendant that defense counsel had previously represented Wahome, a witness for the State and asked the defendant if he had any concerns about counsel's ability appropriately to represent him, if he was satisfied with counsel's representation, and if he desired to have counsel continue his representation. The defendant said that he had no concerns about counsel's representation and gave an affirmative answer to each remaining question. The defendant was convicted and appealed. In a split decision, the court of appeals found no error. State v. Choudhry, ___ N.C. App. ___, ___, 697 S.E.2d 504 (2010). The dissenting judge contended that the trial court erred by failing to fully inform the defendant of the consequences of the potential conflict and that a remand was required. The supreme court determined that because the prosecutor brought a potential conflict to the trial judge's attention, the trial judge was obligated to make an inquiry. The court concluded that because the trial court did not specifically explain the limitations that the conflict imposed on defense counsel's ability to question Wahome regarding her earlier criminal charges or indicate that he had given the defendant such an explanation, the trial judge failed to establish that the defendant had sufficient understanding of the implications of counsel's prior representation of Wahome to ensure a knowing, intelligent, and voluntary waiver of the potential conflict of interest. However, it went on to conclude that in light of counsel's effective cross-examination of Wahome, the defendant failed to demonstrate an actual conflict of interest adversely affecting performance and thus was not entitled to relief.

State v. Anderson, __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNTczLTEucGRm). Over a dissent, the court held that the trial court erred by allowing the defendant to waive counsel after accepting a waiver of counsel form but without complying with G.S. 15A-1242. Among other things, the trial court failed to clarify the specific charges or inform the defendant of the potential punishments or that he could request court-appointed counsel.

State v. Seymore, __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNTc4LTEucGRm). The trial court erred by allowing the defendant to waive counsel after accepting a waiver of counsel form but without complying with G.S. 15A-1242. Significantly, on the waiver form the defendant checked the box waiving his right to assigned counsel, not the box waiving his right to all assistance of counsel. Citing *State v. Callahan*, 83 N.C. App. 323, 324 (1986), the court noted that "[t]he record must affirmatively show that the inquiry was made and that the defendant, by his answers, was literate, competent, understood the consequences of his waiver, and voluntarily exercised his own free will." It continued, quoting *Callahan* and stating: "In cases where 'the record is silent as to what questions were asked of defendant and what his responses were' this Court has held, '[we] cannot presume that [the] defendant knowingly and intelligently waived his right to counsel[.]' When there is no 'transcription of those proceedings,' the defendant "is entitled to a new trial."

State v. Sorrow, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMzM1LTEucGRm). The trial court

erred by permitting the defendant to waive counsel and proceed pro se at a probation revocation hearing without first satisfying the requirements of G.S. 15A-1242. The court concluded that even though the defendant executed two Waiver of Counsel forms (AOC-CR-227), one of which was certified by the trial court, "these waivers are not presumed to have been knowing, intelligent, and voluntary because the rest of the record indicates otherwise." Nothing in the record indicated that the defendant understood and appreciated the consequences of the decision to proceed pro se, the nature of the charges, the proceedings, or the range of possible punishments. Noting that the trial court is not required to follow a specific "checklist" of questions when conducting the waiver inquiry, the court referenced a checklist that appears in the judges' bench book. [Author's note: the Bench Book cited in the opinion is out of print. However, the relevant section in the current version of the Superior Court Judges' Bench Book is available here, and it includes the relevant checklist].

Discovery and Related Issues

State v. Martinez, __ N.C. App. __, __ S.E.2d __ (June 21, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC04ODUtMS5wZGY=). In a child sex case, the trial court erred by failing to require disclosure of material exculpatory information contained in privileged documents that were reviewed in camera by the trial court and pertained to the victim's allegations. The documents contained "sufficient exculpatory material to impeach the State's witnesses." The court instructed the trial judge to "review the material de novo to determine, in his or her discretion, what material should be made available to Defendant."

DWI Procedure

Lee v. Gore, __ N.C. App. __, __ S.E.2d __ (Aug. 26, 2011) (http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMS80MThBMTAtMS5wZGY=). Affirming a divided decision below, Lee v. Gore, __ N.C. App. __, 698 S.E.2d 179 (Aug. 17, 2010), the court held that the Division of Motor Vehicles (DMV) may not revoke driving privileges for a willful refusal to submit to chemical analysis absent receipt of an affidavit swearing that the refusal was indeed willful. The court reasoned that because G.S. 20-16.2(d) requires that the DMV first receive a "properly executed affidavit" from law enforcement swearing to a willful refusal to submit to chemical analysis before revoking driving privileges, DMV lacked the authority to revoke the petitioner's driving privileges. In this case, the officer swore out the DHHS 3907 affidavit and attached to that affidavit the DHHS 3908 chemical analysis result form indicating the test was "refused." However, neither document indicated that the petitioner's refusal to participate in chemical analysis was willful.

Hoots v. Robertson, __ N.C. App. __, __ S.E.2d __ (Aug. 2, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTE5LTEucGRm). The trial court erred by determining that a clerical error on a law enforcement officer's affidavit under G.S. 20-16.2(d) divests the DMV of its authority to suspend the driving privileges of a person who has willfully refused to submit to a chemical analysis when charged with an implied consent offense where the error does not involve an element of the offense of willful refusal. The clerical error involved listing the time of refusal as 3:45 am instead of 3:47 am.

Indictment Issues

State v. Fox, __ N.C. App. __, ___ S.E.2d __ (Oct. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNDg1LTEucGRm). Because the

defendant was never arraigned on a second indictment (that did not indicate that it was a superseding indictment), the second indictment did not supersede the first indictment.

State v. Khouri, __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMDMwLTEucGRm). In sexual assault case involving a child victim, there was a fatal variance between the indictment, that alleged an offense date of March 30, 2000 – December 31, 2000, and the evidence, which showed that the conduct occurred in the Spring of 2001. The State never moved to amend the indictment.

State v. Carter, __ N.C. App. __, __ S.E.2d __ (June 21, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05NzQtMS5wZGY=). Sentencing factors that might lead to an aggravated sentence need not be alleged in the indictment.

State v. Billinger, __ N.C. App. __, __ S.E.2d __ (July 5, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNDEyLTEucGRm). A conspiracy to commit armed robbery indictment was defective when it did not allege an agreement to commit an unlawful act. The court rejected the State's argument that the indictment's caption, which identified the charge as "Conspiracy to Commit Robbery with a Dangerous Weapon," and the indictment's reference to the offense being committed in violation of G.S. 14-2.4 (governing punishment for conspiracy to commit a felony) saved the indictment.

In re D.B., __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNDc2LTEucGRm). A juvenile petition alleging felony larceny was fatally defective because it contained no allegation that the alleged victim, the Crossings Golf Club, was a legal entity capable of owning property.

State v. Speight, __ N.C. App. __, __ S.E.2d __ (June 21, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNDY3LTEucGRm). A burglary indictment alleging that the defendant intended to commit "unlawful sex acts" was not defective.

State v. Leonard, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMzg3LTEucGRm). An indictment charging felonious speeding to elude arrest and alleging an aggravating factor of reckless driving was not required to specify the manner in which the defendant drove recklessly.

State v. Griffin, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMjc0LTEucGRm). A habitual felon indictment was not defective where it described one of the prior felony convictions as "Possess Stolen Motor Vehicle" instead of Possession of Stolen Motor Vehicle. The defendant's argument was "hypertechnical;" the indictment sufficiently notified the defendant of the elements of the offense. Moreover, it referenced the case number, date, and county of the prior conviction.

Joinder

State v. Ellison, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zODYtMS5wZGY=). The trial court did not abuse its discretion by granting the State's motion to join charges against two defendants. The defendant had argued that as a result of joinder, the jury was allowed to consider against him "other

crimes" evidence introduced against a co-defendant. The court rejected this argument, concluding that the no prejudice occurred; the defendant was clearly not involved in the other crime and the trial court gave an appropriate limiting instruction.

Jury Selection

State v. Jackson, __ N.C. App. __, __ S.E.2d __ (Sept. 6, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNTY2LTEucGRm). The trial court did not err by denying the defendant's motion to discharge the jury venire on grounds that the defendants' race (African-American) was disproportionately underrepresented. To establish a prima facie violation for disproportionate representation in a venire, a defendant must show that: (1) the group alleged to be excluded is a "distinctive" group in the community; (2) the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) this underrepresentation is due to systematic exclusion of the group in the jury selection process. Although the defendants met their burden with respect to the first prong, they failed to satisfy the other prongs. As to the second prong, the defendants failed to produce any evidence that the representation African-Americans was not fair and reasonable in relation to the number of such persons in the community. Defendants stated that the African-American population in the county was "certainly greater than . . . five percent" but produced no supporting evidence. As to the third prong, the defendants presented no evidence showing that the alleged deficiency of African-Americans in the venire was because of the systematic exclusion. Although the defendants noted that only three out of 60 potential jurors were African-American, this fact was insufficient to show systematic exclusion.

State v. Carter, __ N.C. App. __, __ S.E.2d __ (June 21, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05NzQtMS5wZGY=). The trial court did not err by rejecting the defendant's *Batson* challenge as to two black jurors. The prosecutor's explanation with respect to both jurors included the fact that both had a close family member who was incarcerated and had not been "treated fairly." The court rejected the defendant's argument that the State accepted a white male juror whose father had been incarcerated, noting that the white juror indicated that he was not close to his father and that his father had been treated fairly. The court also rejected the defendant's argument that the State's peremptory challenges left the defendant, who was black, with an all-white jury, concluding that *Batson* requires purposeful discrimination; it is not enough that the effect of the challenge was to eliminate all or some African-American jurors.

Judge--Expression of Opinion

State v. Herrin, __ N.C. App. __, __ S.E.2d __ (June 21, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNDQ2LTEucGRm). The trial court did not commit prejudicial error in violation of G.S. 15A-1222 (judge may not express an opinion) by laughing in the presence of the jury upon hearing a witness's testimony that defendant "ran like a bitch all the way, way down past his house." The court concluded that "[a]lthough the judge's outburst may have been ill-advised and did not exemplify an undisturbed atmosphere of judicial calm" (quotation omitted) any resulting error was harmless.

Jury Argument

State v. Teague, __ N.C. App. __, ___ S.E.2d __ (Oct. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS0zOS0xLnBkZg==). In a case

involving attempted murder and other charges, the prosecutor's reference to the victims as sheep and the defendant as a "predator" did not require the trial court to intervene ex mero motu. However, the court stated that comparisons between criminal defendants and animals are strongly disfavored.

State v. Johnson, __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNDEwLTEucGRm). The trial court did not abuse its discretion by allowing the State to display an enhanced version (frame-by-frame presentation) of a video recording during closing argument and jury deliberations. The trial court correctly determined that the enhanced version was not new evidence since the original video had been presented in the State's case.

State v. Edmonds, __ N.C. App. __, __ S.E.2d __ (June 21, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC00NjQtMS5wZGY=). In a child sex case, the court rejected the defendant's argument that the trial court erred by ruling that the defendant could not argue that his nephew or someone else had assaulted the victim. It concluded: "Although defendant argues that he was improperly prevented from arguing that someone else raped the victim, defendant is unable to point to specific portions of his closing argument which were limited by the trial court's ruling, as closing arguments in this case were not recorded. Therefore, defendant has not met his burden of establishing the trial court's alleged error within the record on appeal. This court will not 'assume error by the trial judge when none appears on the record before [it].'"

Jury Deliberations

State v. Garcia, __ N.C. App. __, ___ S.E.2d __ (Oct. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS0yNjItMS5wZGY=). The trial court properly exercised its discretion when denying the jury's request to review testimony. Although the trial court's statements to the jury indicate it thought that a review of that testimony was not possible (statements that normally suggest a failure to exercise discretion), the trial court had previously discussed with counsel the possibility of having the testimony read to the jury. The trial court was aware it had the ability to grant the request, but exercised its discretion in declining to do so.

State v. Williams, __ N.C. App. __, __ S.E.2d __ (Sept. 6, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTMzLTEucGRm). The trial court violated G.S. 15A-1233 by responding to a jury request to review evidence and sending the evidence back to the jury room instead of bringing the jury into the courtroom. However, no prejudice resulted.

State v. Phillpott, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC04MzgtMS5wZGY=). The trial court did not abuse its discretion by refusing to declare a mistrial and instead allowing the jury to go home and return the next day to continue deliberating. The jury deliberated approximately 7 hours over the course of two days; at the end of the day, when asked whether they wished to continue deliberating or come back the next day, a juror indicated that nothing would "change[.]" The trial judge ordered the jury to return the next day. They did so and reached a verdict.

State v. Johnson, __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNDEwLTEucGRm). The trial court did not abuse its discretion by allowing the State to display an enhanced version (frame-by-frame presentation) of a video recording during closing argument and jury deliberations. The trial court

correctly determined that the enhanced version was not new evidence since the original video had been presented in the State's case.

Jury Instructions

State v. Boyd, __ N.C. App. __, __ S.E.2d __ (Aug. 2, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMDcyLTEucGRm). Although the trial judge did not expressly instruct the jury that if it failed to find the required elements it must find the defendant not guilty, the defendant was not prejudiced by the trial court's alternative final mandate language ("If you do not so find . . . you will not return a verdict of guilty"). Notably, the verdict sheet provided an option of returning a not guilty verdict.

State v. Davis, __ N.C. App. __, __ S.E.2d __ (Aug. 2, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMzg4LTEucGRm). In a case in which the defendant was indicted on 24 counts of indecent liberties, 6 counts of first-degree statutory sex offense, and 6 counts of second-degree sex offense, the court cited *State v. Lawrence*, 360 N.C. 368 (2006), and rejected the defendant's argument that because the indictments did not distinguish the separate acts, there was a possibility that the jury verdicts were not unanimous as to all of the convictions.

Motions

State v. Joe, __ N.C. App. __, __ S.E.2d __ (July 5, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMDM3LTEucGRm). The trial court's consideration of the defendant's pre-trial motion to dismiss a charge of resisting an officer for insufficiency of the evidence was invited error from which the State cannot appeal.

State v. Williams, __ N.C. App. __, __ S.E.2d __ (Sept. 6, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTMzLTEucGRm). Although there was no material conflict in the evidence as to whether the defendant was impaired when he made a statement, the court held, over a dissent, that there was a material conflict as to whether he was in custody and that the trial court erred by failing to make the necessary findings of fact on that issue. Because the defendant's testimony did not meet the standard for rendering his statement involuntary, any conflict in the evidence on this issue was not material. As to custody, the officer's testimony suggested the defendant was not in custody. However the defendant's testimony if believed would support a contrary conclusion; therefore there was a material conflict on this issue.

State v. Oates, __ N.C. App. __, __ S.E.2d __ (Sept. 6, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC03MjUtMS5wZGY=). The State failed to give proper notice of appeal from a ruling granting a motion to suppress. The State filed a written notice of appeal after the judge orally granted the motion but before the judge filed his written order.

State v. Hester, __ N.C. App. __, ___ S.E.2d __ (Oct. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS0xOTAtMS5wZGY=). In a case involving first-degree murder and other charges, the trial court did not err by denying the defendant's mistrial motion. On July 16th the trial court learned that while two jurors were leaving the courthouse the previous day after the verdict was rendered in the guilt phase, they saw and heard a man thought to be the defendant's brother, cursing and complaining about the trial. The two jurors informed the other jurors about this incident. On July 20th, the trial court learned that over the weekend juror McRae had discussed

the trial with a spectator at the defendant's trial. The trial court removed McRae and replaced him with an alternate juror. The court concluded that there was no evidence of jury misconduct prior to or during deliberations as to guilt and that there was no prejudice as to sentencing because the defendant received a sentence of life imprisonment not death.

Pleas

State v. White, __ N.C. App. __, __ S.E.2d __ (July 5, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMjMxLTEucGRm). The trial court erred by accepting a plea agreement that attempted to preserve the defendant's right to appeal the trial court's adverse ruling on his motion to dismiss a felon in possession of a firearm charge on grounds that the statute was unconstitutional as applied. Because a defendant has no right to appeal such a ruling, the court vacated the plea and remanded. A dissenting judge would have dismissed the appeal entirely because of the defendant's failure to include a copy of his written motion to dismiss and suppress in the record.

Selective Prosecution

State v. Pope, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05MzItMS5wZGY=). The trial court erred by dismissing charges on grounds of selective prosecution. The defendant, a public works director, was charged with larceny by employee in connection with selling "white goods" and retaining the proceeds. To demonstrate selective prosecution, the defendant must: (1) make a prima facie showing that he or she has been singled out for prosecution while others similarly situated and committing the same acts have not; and (2) demonstrate that the discriminatory selection for prosecution was invidious and done in bad faith in that it rests upon such impermissible considerations as race, religion, or the desire to prevent the exercise of constitutional rights. The trial court erroneously concluded that other similarly situated employees were not charged. The defendant was the public works director while the others were his subordinates; none were in a position to oversee wholesale theft from the town; and the defendant alone received the money from the sales, divided up the money, failed to remit it to the town, and kept a portion for himself while distributing the remainder to other employees. The court also rejected the defendant's assertion that his prosecution resulted from support of certain town political candidates, concluding that he failed to demonstrate that the prosecution, as opposed to the initial investigation, was politically motivated. While the initial investigation may or may not have been politically motivated, local officials subsequently brought in the SBI to investigate and it was the SBI's investigation which resulted in defendant being charged and prosecuted by the district attorney, who is not an agent of local government.

Sentencing

Aggravating Factors

State v. Carter, __ N.C. App. __, __ S.E.2d __ (June 21, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05NzQtMS5wZGY=). There was sufficient evidence supporting the trial judge's submission of the G.S. 15A-1340.16(d)(6) aggravating factor (offense against a law enforcement officer, etc. while engaged in the performance of or because of the exercise of official duties.) to the jury. Subsection (d)(6)'s "engaged in" prong does not require the State to prove that the defendant knew or reasonably should have known that the victim was a member of the protected class engaged in the exercise of his or her official duties; rather, submission simply requires

evidence sufficient to establish the "objective fact" that the victim was a member of the protected class — here, a law enforcement officer — engaged in the performance of his or her official duties. On the facts presented, the evidence was sufficient.

Consolidated or Consecutive Offenses

State v. Herrin, __ N.C. App. __, __ S.E.2d __ (June 21, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNDQ2LTEucGRm). The trial court exceeded its statutory authority by mandating that any later sentence imposed on the defendant must run consecutive to the sentence imposed in the case at hand. The court, however, declined to vacate the relevant portion of the judgment, concluding that because the defendant had not yet been ordered to serve a consecutive sentence, such an opinion would be advisory.

Credit

State v. Stephenson, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMzE5LTEucGRm). The defendant was not entitled to credit under G.S. 15-196.1 for time spent in a drug treatment program as a condition of probation because the program was not an institution operated by a State or local government.

Prior Record Level

State v. Burgess, __ N.C. App. __, __ S.E.2d __ (Sept. 20, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS0xOTMtMS5wZGY=). The trial court erred by sentencing the defendant as a level IV offender when the State failed to present sufficient evidence establishing that out-of-state offenses were substantially similar to North Carolina offenses. The State presented printed copies of out-of-state statutes purportedly serving as the basis for the out-of-state convictions. However, the State's worksheet did not identify the out-of-state crimes by statute number and instead used brief and non-specific descriptions that could arguably describe more than one crime, making it unclear whether the statutes presented were the basis for the defendant's convictions. Also, the State presented 2008 versions of statutes when the defendant's convictions were from 1993 and 1994, and there was no evidence that the statutes were unchanged. Finally, the trial erred by accepting the classification of the defendant's out-of-state offenses without comparing the elements of those offenses to the elements of the North Carolina offenses the State contended were substantially similar.

State v. Wingate, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMzg1LTEucGRm). Where the defendant stipulated that he was previously convicted of one count of conspiracy to sell or deliver cocaine and two counts of selling or delivering cocaine and that these convictions were Class G felonies, there was sufficient proof to establish his prior conviction level. The class of felony for which defendant was previously convicted was a question of fact, to which defendant could stipulate, and was not a question of law requiring resolution by the trial court.

State v. Best, __ N.C. App. __, __ S.E.2d __ (Aug. 2, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMjY0LTEucGRm). Distinguishing *State v. Gentry*, 135 N.C. App. 107 (1999), the court held that the trial court did not err by using a felonious breaking or entering conviction for the purpose of both supporting a possession of a firearm by a felon charge and calculating the defendant's prior record level.

Probation

State v. Floyd, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMDk4LTEucGRm). The trial court erred by failing to make findings of fact that clearly show it considered and evaluated the defendant's evidence before concluding that the defendant violated his probation by failing to pay the cost of his sexual abuse treatment program. The defendant presented ample evidence of an inability to pay after efforts to secure employment; the probation officer corroborated this evidence and testified that he believed that the defendant would complete the treatment program if he could pay for it.

State v. Stephenson, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMzE5LTEucGRm). The defendant's explanation that she was addicted to drugs was not a lawful excuse for violating probation by failing to complete a drug treatment program.

State v. Cleary, __ N.C. App. __, __ S.E.2d __ (July 5, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMzI0LTEucGRm). G.S. 15A-1023(b), which grants a defendant the right to a continuance when a trial court refuses to accept a plea, does not apply when the trial court refuses to accept a plea in the context of a probation revocation proceeding.

Restitution

State v. Billinger, __ N.C. App. __, __ S.E.2d __ (July 5, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNDEyLTEucGRm). The trial court erred by ordering the defendant to pay restitution in connection with a conviction for possessing a weapon of mass death and destruction where the State conceded that the restitution had no connection to that conviction.

Right to be Present

State v. Arrington, __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTM0LTEucGRm). The defendant's right to be present when sentence is pronounced was not violated when the trial judge included in the judgment court costs and fees for community service that had not been mentioned in open court. The change in the judgment was not substantive. "[E]ach of the conditions imposed . . . was a non-discretionary byproduct of the sentence that was imposed in open court." Further, the court noted, payment of costs does not constitute punishment and, therefore, the imposition of costs on the defendant outside of his presence did not infringe upon his right to be present when sentence is pronounced.

State v. Wright, __ N.C. App. __, __ S.E.2d __ (June 21, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMjUxLTEucGRm). (1) Excluding the defendant from an in-chambers conference held prior to the sentencing hearing was harmless beyond a reasonable doubt. The in-chambers conference was recorded, the defendant was represented by counsel and given an opportunity to be heard and to make objections at the sentencing hearing, and the trial court reported the class level for each offense and any aggravating or mitigating factors on the record in open court. (2) Evidence of two awards from the Crime Victim's Compensation Commission properly

supported the trial court's restitution award. However, because restitution exceeded the amounts stated in these awards, the court remanded for the trial court to amend the order accordingly.

Sex Offenders

State v. Sims, __ N.C. App. __, ___ S.E.2d __ (Oct. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS0xODctMS5wZGY=). (1) The court rejected the defendant's argument that since no civil summons was issued, the trial court had no jurisdiction to impose SBM; the trial court had jurisdiction under G.S. 14-208.40A to order SBM. (2) The trial judge erroneously concluded that the defendant had a reportable conviction on grounds that indecent liberties is an offense against a minor. However, since that offense is a sexually violent offense, no error occurred.

State v. Burgess, __ N.C. App. __, __ S.E.2d __ (Sept. 20, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS0xOTMtMS5wZGY=). The trial court erred by ordering that the defendant register as a sex offender. Although the trial court determined that that the defendant was convicted of a sexually violent offense, neither of the offenses for which the defendant was convicted—second-degree kidnapping and crime against nature—is a sexually violent offense.

State v. Jarvis, __ N.C. App. __, __ S.E.2d __ (Aug. 2, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS0zMS0xLnBkZg==). (1) The court rejected the defendant's argument that the trial court lacked subject matter jurisdiction to order SBM enrollment because the State failed to file a written pleading providing notice regarding the basis for SBM. (2) The court rejected the defendant's argument that the trial court violated his due process rights by ordering him to enroll in SBM without providing any notice of the ground triggering SBM. Because the defendant was placed on probation and as a condition of his probation was incarcerated for 120 days, his eligibility for SBM was determined by the trial court pursuant to G.S. 14-208.40A; neither the DOC nor the trial court was responsible for any type of notice regarding defendant's eligibility. (3) Citing *State v. Cowan*, ___ N.C. App. ___, ___, 700 S.E.2d 239, 247 (2010), the court rejected the defendant's argument that the trial court erred by determining that indecent liberties involved the physical, mental, or sexual abuse of a minor. (4) The trial court erred by requiring the defendant to enroll in satellite-based monitoring (SBM) for ten years after finding that he required the highest level of supervision and monitoring. The DOC risk assessment classified the defendant as a low risk and only two of the trial court's four additional findings of fact were supported by competent evidence. One finding of fact involved the defendant's *Alford* plea and lack of remorse. Remanding, the court instructed that the trial court may consider whether the defendant's actions showed lack of remorse but indicated that no authority suggests that the fact of an *Alford* plea itself shows lack of remorse.

State v. Mann, __ N.C. App. __, __ S.E.2d __ (Aug. 2, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTg2LTEucGRm). The trial court erred by finding that sex offense in a parental role (G.S. 14-27.7(a)) is an aggravated offense.

State v. Fox, __ N.C. App. __, ___ S.E.2d __ (Oct. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS0yNzMtMS5wZGY=). In a case involving a sex offender's failure to give notice of an address change, the court held that the evidence was sufficient to establish that the defendant changed his address. Among other things, a neighbor at the new address testified that the defendant stayed in an upstairs apartment every day and evening. Although the

defendant claimed that he had not moved from his father's address, his father told an officer that the defendant did not live there any longer.

Verdict

State v. Wade, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC00MTItMS5wZGY=). The trial court did not err by accepting a verdict of guilty of assault with a deadly weapon with intent to kill inflicting serious injury when the jury had acquitted the defendant of attempted first-degree murder. The verdicts were not mutually exclusive under *State v. Mumford*, 364 N.C. 394 (2010).

State v. Johnson, __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNDEwLTEucGRm). Guilty verdicts of trafficking in opium and selling and possessing with intent to sell and deliver a schedule III preparation of an opium derivative are not mutually exclusive. There is no support for the defendant's argument that a schedule III preparation of an opium derivative does not qualify as a "derivative . . . or preparation of opium" for purposes of trafficking.

Evidence

Authentication

State v. Collins, __ N.C. App. __, ___ S.E.2d __ (Oct. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS0yMDctMS5wZGY=). The trial court did not err by admitting a videotape of a controlled buy as substantive evidence where the State laid a proper foundation for the videotape. The court rejected the defendant's argument that the State was required to proffer a witness to testify that the tape accurately depicted the events in question.

404(b) Evidence

State v. Flaugher, __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMDQ0LTEucGRm). In a maiming case in which the defendant was accused of attacking the victim with a pickaxe and almost severing his finger, no plain error occurred when the trial judge admitted 404(b) evidence that the defendant had previously attacked the victim with a fork and stabbed his finger. The 404(b) evidence was admitted to show absence of accident or mistake. Although the defendant argued that she never intended to purposefully strike the victim's finger with the pickaxe, the defendant knew from the fork incident that she could end up stabbing the victim's hand or fingers if she swung at him with a weapon and he attempted to defend himself. The evidence was thus relevant to whether the defendant intended to disable the victim or whether she accidentally struck his finger and did not intend to maim it. The court also rejected the defendant's argument that the 404(b) evidence was inadmissible because the State had previously dismissed charges arising from the fork incident, distinguishing cases in which the defendants had been tried and acquitted of the 404(b) conduct.

State v. Khouri, __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMDMwLTEucGRm). In sexual assault case involving a child victim, no error occurred when the trial court admitted 404(b) evidence that the defendant engaged in sexual contact with another child to show common plan or scheme. The court rejected the defendant's argument that the acts were not sufficiently similar, concluding that both

incidents occurred while the victims were in the care of the defendant, their grandfather; the victims were around the same age when the conduct began; for both victims, the conduct occurred more than once; and with both victims, the defendant initiated the conduct by talking to them about whether they were old enough for him to touch their private parts. The court also determined that the acts met the temporal proximity requirement.

Course of Conduct

State v. Howard, __ N.C. App. __, __ S.E.2d __ (Sept. 6, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMjczLTEucGRm). In an armed robbery prosecution, evidence of a break-in occurring hours after the incident in question was properly admitted under the "'course of conduct'" or 'complete story' exception." The evidence was necessary for the jury to understand how the defendant was identified as the perpetrator and how items stolen from the robbery victim and purchased with her credit card were recovered. The break-in evidence "was necessary for the jury to understand the complete story and timeline of the events that took place on the night in question, and therefore was properly admitted under the 'course of conduct' exception." A footnote to the court's opinion suggests that this basis for admission was separate from and independent of admissibility under Rule 404(b).

Crawford Issues

Bullcoming v. New Mexico, 564 U.S. ___, 131 S. Ct. 2705 (June 23, 2011) (http://www.supremecourt.gov/opinions/10pdf/09-10876.pdf). In a straightforward application of *Melendez-Diaz v. Massachusetts*, 557 U.S. __, 129 S. Ct. 2527 (June 25, 2009) (holding that forensic laboratory reports are testimonial and thus subject to *Crawford*), the Court held that substitute analyst testimony in an impaired driving case violated *Crawford*. The defendant was arrested on charges of driving while intoxicated (DWI). Evidence against him included a forensic laboratory report certifying that his blood-alcohol concentration was well above the threshold for aggravated DWI. At trial, the prosecution did not call the analyst who signed the certification. Instead, the State called another analyst who was familiar with the laboratory's testing procedures, but had neither participated in nor observed the test on the defendant's blood sample. The New Mexico Supreme Court determined that, although the blood-alcohol analysis was "testimonial," the Confrontation Clause did not require the certifying analyst's in-court testimony. Instead, New Mexico's high court held, live testimony of another analyst satisfied the constitutional requirements. The Court reversed, holding that "surrogate testimony of that order does not meet the constitutional requirement."

State v. McMillan, __ N.C. App. __, __ S.E.2d __ (Aug. 2, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNDE5LTEucGRm). Assuming arguendo that the defendant properly preserved the issue for appeal, no confrontation clause violation occurred when the State's expert forensic pathologist, Dr. Deborah Radisch, testified about the victim's autopsy and gave her own opinion concerning cause of death. Distinguishing *State v. Locklear*, 363 N.C. 438 (2009), and *Bullcoming v. New Mexico*, ___ U.S. ___, 180 L. Ed. 2d. 610 (2011), and following *State v. Blue*, ___ N.C. App. ___, 699 S.E.2d 661 (2010), the court noted that Dr. Radisch was present for the autopsy and testified as to her own independent opinion as to cause of death.

State v. Jackson, __ N.C. App. __, ___ S.E.2d __ (Oct. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTM1LTEucGRm). (1) In a child sexual assault case, the defendant's confrontation rights were not violated when the trial court permitted

the child victim to testify by way of a one-way closed circuit television system. The court held that *Maryland v. Craig* survived *Crawford* and that the procedure satisfied *Craig's* procedural requirements. (2) The court also held that the child's remote testimony complied with the statutory requirements of G.S. 15A-1225.1.

State v. Castaneda, __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS03LTEucGRm). Because the statements at issue were not admitted for the truth of the matter asserted and therefore were not hearsay, their admission did not implicate the confrontation clause.

Cross-Examination, Impeachment, Opening the Door, Invited Error and Rebuttal

State v. Ellison, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zODYtMS5wZGY=). In a drug trafficking case, the trial court did not abuse its discretion by allowing the State's witness to identify the substance as an opium derivative on rebuttal. Under G.S. 15A-1226, a trial judge may, in his or her discretion, permit a party to introduce additional evidence prior to the verdict and offer new evidence which could have been offered in the party's case in chief or during a previous rebuttal as long as the opposing party is permitted further rebuttal.

Forfeiture Exception

State v. James, __ N.C. App. __, __ S.E.2d __ (Sept. 20, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMzc1LTEucGRm). Under the circumstances, no error occurred when the trial court allowed an officer to testify that a substance was crack cocaine based on visual examination and on the results of a narcotics field test kit (NIK). After officers observed the substance, the defendant ate it, in an attempt to conceal evidence. As to the visual identification, the court noted that "[u]nder normal circumstances" the testimony would be inadmissible under *State v. Ward*, 364 N.C. 133 (2010) (testimony identifying a controlled substance must be based on a scientifically valid chemical analysis and not mere visual inspection). It also noted that testimony regarding the NIK typically would be inadmissible because the State did not sufficiently establish the reliability of that test. However, the court concluded that "[u]nder the unique circumstances of this case . . . Defendant forfeited his right to challenge the admission of this otherwise inadmissible testimony." It reasoned that "[j]ust as a defendant can lose the benefit of a constitutional right established for his or her benefit, we hold a defendant can lose the benefit of a statutory or common law legal principle established for his or her benefit in the event that he or she engages in conduct of a sufficiently egregious nature to justify a forfeiture determination." It concluded: "[H]aving prevented the State from conducting additional chemical analysis by eating the crack cocaine, Defendant has little grounds to complain about the trial court's decision to admit the police officers' testimony identifying the substance as crack cocaine based on visual inspection and the NIK test results."

Hearsay

State v. Castaneda, __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS03LTEucGRm). The trial court did not err by denying the defendant's request to redact certain statements from a transcript of the defendant's interview with the police. In the statements at issue, an officer said that witnesses saw the defendant pick up a knife and stab the victim. The statements were not hearsay because they were not admitted for the

truth of the matter asserted but rather to provide context for the defendants' answers and to explain the detectives' interviewing techniques. The court also noted that the trial court gave an appropriate limiting instruction.

State v. Stanley, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMzUyLTEucGRm). When statements were offered to explain an officer's subsequent action, they were not offered for the truth of the matter asserted and thus were not hearsay.

State v. Speight, __ N.C. App. __, __ S.E.2d __ (June 21, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNDY3LTEucGRm). In the defendant's trial for sex offense, burglary, and other crimes, the trial court did not err by admitting the defendant's statement, made to an officer upon the defendant's arrest: "Man, I'm a B and E guy." Given the charges, the statement was a statement against penal interest pursuant to Rule 804(b)(3).

Opinions

Expert Opinions

State v. McDonald, __ N.C. App. __, ___ S.E.2d __ (Oct. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS0xMDQtMS5wZGY=). (1) In a drug case, no plain error occurred when the trial court allowed the State's expert forensic chemist to testify as to the results of his chemical analysis of the substance in question. Through the expert's testimony as to his professional background and use of established forensic techniques, the State met its burden of establishing "indices of reliability," as contemplated in *Howerton.* The court noted that although the laboratory was not accredited the defendant provided no legal authority establishing that accreditation is required when the forensic chemist who conducted the analysis at issue testifies at trial. (2) The court rejected the defendant's argument that the expert's lab report was inadmissible under G.S. 8-58.20(b) because the lab was not accredited. That statutory provision is relevant only when the State seeks to have the report admitted without the testimony of the preparer.

State v. Khouri, __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMDMwLTEucGRm). In a child sexual abuse case, no plain error occurred when the trial court allowed the State's expert to testify that the victim exhibited some classic signs of a sexually abused child. The expert did not testify that the victim was in fact sexually abused.

State v. Norman __ N.C. App. __, __ S.E.2d __ (July 5, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTA4LTEucGRm). (1) The trial court did not abuse its discretion by qualifying the State's witness as an expert in the fields of forensic blood alcohol physiology and pharmacology, breath and blood alcohol testing, and the effects of drugs on human performance and behavior. The witness was the head of the Forensic Test for Alcohol branch of the N.C. Department of Health and Human Services, oversaw the training of law enforcement officers on the operation of alcohol breath test instruments and of drug recognition experts. His specialty is in "scientific issues related to breath testing and blood testing for drugs and alcohol." He has a B.A. and master's in biology and is certified as a chemical analyst. He attended courses on the effects of alcohol on the human body and various methods for determining alcohol concentrations and the effects of drugs on human psychomotor performance. He has published several works and has previously been qualified as an expert in forensic blood alcohol physiology and pharmacology, breath and blood alcohol testing, and

the effects of drugs on human performance and behavior over 230 times in North Carolina. Despite his lack of a formal degree or certification in physiology and pharmacology, his extensive practical experience qualifies him to testify as an expert. (2) The trial court did not abuse its discretion by admitting the State's expert's testimony regarding the relative amount of cocaine in the defendant's system at the time of the collision and the effects of cocaine on an individual's ability to drive. The defendant argued that the testimony was based upon unreliable methods. Based on cocaine's half-life and a report showing unmetabolized cocaine in the defendant's system, the expert determined that the defendant had recently used cocaine and that the concentration of cocaine in his system would have been higher at the time of the crash. On cross-examination, he testified that there was no way to determine the quantity of cocaine in the defendant's system. He further testified as to the effects of cocaine on driving ability, noting a correlation between "high-risk driving, speeding, [and] sometimes fleeing . . . when cocaine is present." He based this testimony on a study which "looked at crashes and behaviors and found [an] association or correlation between the presence of cocaine and high-risk driving." He testified that it was possible for cocaine to be detected in a person's system even after the person was no longer impaired by the drug. The expert's testimony that the level of cocaine in the defendant's system would have been higher at the time of the collision and his testimony as to the general effects of cocaine on a person's ability to drive was supported by reliable methods. Notably, the defendant's expert corroborated this testimony both as to the half-life of cocaine and the existence of studies showing a correlation between the effects of cocaine and "high-risk" driving.

State v. Norton, __ N.C. App. __, __ S.E.2d __ (June 21, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNTQ0LTEucGRm). The trial judge did not commit plain error by allowing a witness accepted as an expert forensic toxicologist to testify about the effects of cocaine on the body. The defendant had argued that this testimony was outside of the witness's area of expertise. The court concluded that "[a]s a trained expert in forensic toxicology with degrees in biology and chemistry, the witness in this case was plainly in a better position to have an opinion on the physiological effects of cocaine than the jury."

State v. Trogdon, __ N.C. App. __, __ S.E.2d __ (Sept. 20, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMzQ0LTEucGRm). No plain error occurred when the trial court admitted expert medical testimony identifying the victim's death as a homicide. Medical experts described the nature of the victim's injuries and how those injuries had resulted in his death. Their testimony did not use the word "homicide" as a legal term of art but rather to explain that the victim's death did not occur by accident. Neither witness provided evidence that amounted to a legal conclusion based on the facts; instead, they testified as to the factual mechanism that resulted in the victim's death.

Lay Opinions

State v. Collins, __ N.C. App. __, ___ S.E.2d __ (Oct. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS0yMDctMS5wZGY=). The trial court did not commit plain error by admitting an officer's lay opinion testimony identifying the defendant as the person depicted in a videotape. The defendant argued that the officer was in no better position than the jury to identify the defendant in the videotape. However, the officer had contact with the defendant prior to the incident in question; because he was familiar with the defendant, the officer was in a better position than the jury to identify defendant in the videotape.

State v. Howard, __ N.C. App. __, __ S.E.2d __ (Sept. 6, 2011)

(http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMjczLTEucGRm). The trial court did not commit plain error by allowing a detective to identify the defendant as the person shown in a still photograph from a store's surveillance tapes. The detective observed the defendant in custody on the morning that the photo was taken, affording him the opportunity to see the defendant when his appearance most closely matched that in the video. The detective also located the defendant's clothes. As such, the detective had more familiarity with the defendant's appearance at the time the photo was taken than the jury could have.

State v. Norman __ N.C. App. __, __ S.E.2d __ (July 5, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTA4LTEucGRm). The trial court did not err by allowing a lay witness to testify that the defendant was impaired. The witness formed the opinion that the defendant was impaired because of the strong smell of alcohol on him and because the defendant was unable to maintain balance and was incoherent, acting inebriated, and disoriented. The witness's opinion was based on personal observation immediately after the collision.

State v. Phillips, __ N.C. __, __ S.E.2d __ (June 16, 2011) (http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMS80OEEwOC0xLnBkZg==). In this capital case, the trial court did not commit plain error by admitting lay opinion testimony by an eyewitness. When the eyewitness was asked about the defendant's demeanor, she stated: "He was fine. I mean it was -- he had -- he knew what he was doing. He had it planned out. It was a -- he -- he knew before he ever got there what was going to happen." The defendant argued that the eyewitness had no personal knowledge of any plans the defendant might have had. The court noted that a lay witness may provide testimony based upon inference or opinion if the testimony is rationally based on the witness's perception and helpful to a clear understanding of his or her testimony or the determination of a fact in issue. It further noted that this rule permits a witness to express "instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time. Such statements are usually referred to as shorthand statements of facts." Immediately before the testimony at issue, the witness testified that the defendant had said that "[h]e was in debt with somebody who he needed money for and that's why they came to [the] house," that the debt was "with a drug dealer and they were going to kill him, if he did not come up with their money," and that "his brother had been shot and he was dying and he had to get their money." In context, the witness's statements that the defendant "had it planned out" and "knew before he ever got there what was going to happen" were helpful to an understanding of her testimony and were rationally based on her perceptions upon seeing the defendant commit the multiple murders at issue.

State v. Howard, __ N.C. App. __, __ S.E.2d __ (Sept. 6, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMjczLTEucGRm). No plain error occurred when the trial court allowed a detective to give lay opinion testimony that items were purchased with a stolen credit card and it looked like someone had tried to hide them; subtotals on a store receipt indicated that the credit card was stolen; blood was present on clothing and in a car; and a broken wood panel piece matched a break at the entry site. Some testimony was proper on grounds that an officer may give lay opinion testimony based on investigative training. Other testimony was nothing more than an instantaneous conclusion reached by the detective. Finally, the Supreme Court of North Carolina has upheld lay opinion testimony identifying blood or bloodstains.

On Credibility

State v. Castaneda, __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011)

(http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS03LTEucGRm). The trial court did not err by denying the defendant's motion to redact an officer's statements in a transcript of an interview of the defendant in which the officer accused the defendant of telling a "lie" and giving an account of the events that was "bullshit" and like "the shit you see in the movies." The defendant argued that these statements were inadmissible opinion evidence about the defendant's credibility. The court noted that issue of the admissibility of an interrogator's statements during an interview that the suspect is being untruthful has not been decided by North Carolina's appellate courts. It concluded that because the officer's statements were part of an interrogation technique designed to show the defendant that the detectives were aware of the holes and discrepancies in his story and were not made for the purpose of expressing an opinion as to the defendant's credibility or veracity at trial, the trial court properly admitted the evidence. The court went on to note that investigators' comments reflecting on the suspect's truthfulness are not, however, always admissible. It explained that an interrogator's comments that he or she believes the suspect is lying are admissible only to the extent that they provide context to a relevant answer by the suspect. Here, the officer's statements that he believed the defendant to be lying were admissible because they provided context for the defendant's inculpatory responses. For similar reasons the court rejected the defendant's argument that admission of these statements violated Rule 403.

State v. Martinez, __ N.C. App. __, __ S.E.2d __ (June 21, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC04ODUtMS5wZGY=). In a child sex case, the trial court erred by admitting a DSS social worker's testimony that she "substantiated" the victim's claim of sexual abuse by the defendant. This testimony was an impermissible expression of opinion as to the victim's credibility.

Rape Shield

State v. Khouri, __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMDMwLTEucGRm). The trial court did not err by sustaining the State's objection under the Rape Shield Statute. After the victim had already testified that she was unsure whether her aborted child was fathered by the defendant or her boyfriend, the defense questioned a witness in order to show that the victim had sexual relations with a third man. Introducing such evidence would not have shown that the alleged acts were not committed by defendant given evidence that already had been admitted. Additional evidence would have only unnecessarily humiliated and embarrassed the victim while having little probative value.

State v. Edmonds, __ N.C. App. __, __ S.E.2d __ (June 21, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC00NjQtMS5wZGY=). (1) In a child sex case, the trial judge did not err by limiting the defendant's cross-examination of the prosecuting witness regarding inconsistent statements about her sexual history, made to the police and medical personnel. The evidence did not fit within any exception to Rule 412. The court went on to hold that any probative value of the evidence for impeachment purposes was outweighed by its prejudicial effect. (2) The trial court did not err by refusing to admit the victim's unredacted medical records containing statements regarding her prior sexual history, given that the records had little if any probative value.

Rule 403

State v. King, __ N.C. App. __, __ S.E.2d __ (Aug. 2, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMjM3LTEucGRm). Over a dissent, the court held that the trial court did not abuse its discretion by excluding the State's expert testimony

regarding repressed memory under Rule 403.

Miscellaneous Cases

State v. McDowell, __ N.C. App. __, __ S.E.2d __ (Sept. 6, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNTUzLTEucGRm). In a murder case, the trial court did not err by allowing law enforcement officers to testify that they had observed a small hair on the wall at the murder scene and that the hair appeared to have tissue attached. The hair was not collected as evidence. The court concluded that the State is not required to collect evidence as a pre-condition to offering testimony about a particular subject.

Arrest, Search, and Investigation

Stops

State v. Salinas, __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNTYzLTEucGRm). Because the trial court incorrectly applied a probable cause standard instead of a reasonable suspicion standard when determining whether a vehicle stop was unconstitutional, the court reversed the trial court's ruling suppressing evidence and remanded for a new determination under the correct standard. The State argued that the court should go on to make a determination, based upon the evidence presented at the suppression hearing, that a reasonable suspicion justifying the stop existed as a matter of law. The court declined to do so. Concurring with the court's ruling reversing the trial court's order, one judge dissented to the court's decision to remand, concluding that the court should make the relevant determination itself.

State v. White, __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTQzLTEucGRm). The trial court erred by denying the defendant's motion to suppress when there was no reasonable suspicion for the stop. Officers responded to a complaint of loud music in a location they regarded as a high crime area. The officers did not see the defendant engaged in any suspicious activity and did not see any device capable of producing loud music. Rather, the defendant was merely standing outside at night, with two or three other men. These facts do not provide reasonable suspicion to justify an investigatory stop of the defendant. That being the case, the officer's encounter with the defendant was entirely consensual, which the defendant was free to and did ignore by running away. Once the officer caught up with the defendant and handcuffed him for resisting arrest, a seizure occurred. However, because the defendant's flight from the consensual encounter did not constitute resisting, the arrest was improper.

State v. Burke, __ N.C. App. __, __ S.E.2d __ (June 21, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMDg0LTEucGRm). Over a dissent, the court held that the trial judge erred by denying the defendant's motion to suppress when no reasonable suspicion supported a stop of the defendant's vehicle. The officer stopped the vehicle because the numbers on the 30-day tag looked low and that the "low" number led him to "wonder[] about the possibility of the tag being fictitious." The court noted that it has previously held that 30-day tags that were unreadable, concealed, obstructed, or illegible, justified stops of the vehicles involved. Here, although the officer testified that the 30-day tag was dirty and worn, he was able to read the tag without difficulty; the tag was not faded; the information was clearly visible; and the information was accurate and proper.

In re A.J.M-B, __ N.C. App. __, __ S.E.2d __ (June 21, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMzUwLTEucGRm). The trial court erred by denying the juvenile's motion to dismiss a charge of resisting a public officer when no reasonable suspicion supported a stop of the juvenile (the activity that the juvenile allegedly resisted). An anonymous caller reported to law enforcement "two juveniles in Charlie district . . . walking, supposedly with a shotgun or a rifle" in "an open field behind a residence." A dispatcher relayed the information to Officer Price, who proceeded to an open field behind the residence. Price saw two juveniles "pop their heads out of the wood line" and look at him. Neither was carrying firearms. When Price called out for them to stop, they ran around the residence and down the road.

State v. Heien, __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS01Mi0xLnBkZg==). An officer improperly stopped a vehicle on the basis of a non-functioning brake light. The evidence indicated that although the left brake light was operating, the right light was not. There was no violation under G.S. 20-129(g) because that statute only requires one brake light to be operational. Nor was a stop proper for a violation of G.S. 20-129(d) because that statute deals with rear lamps, not brake lights. For similar reasons, the court also concluded that there was no violation of G.S. 20-183.3 (violation of safety inspection requirements).

State v. Brown, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05MjAtMS5wZGY=). Officers had reasonable suspicion to stop the defendant. When officers on a gang patrol noticed activity at a house, they parked their car to observe. The area was known for criminal activity. The defendant exited a house and approached the officers' car. One of the officers had previously made drug arrests in front of the house in question. As the defendant approached, one officer feared for his safety and got out of the car to have a better defensive position. When the defendant realized the individuals were police officers his "demeanor changed" and he appeared very nervous--he started to sweat, began stuttering, and would not speak loudly. Additionally, it was late and there was little light for the officers to see the defendant's actions.

State v. Williams, __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC03MzgtMS5wZGY=). Over a dissent, the court held that the totality of the circumstances gave rise to a reasonable articulable suspicion that criminal activity was afoot justifying an extended detention of the defendant after the officer dealt with the initial purpose of 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. Based on uncertainties in and inconsistencies between the driver and the defendant's stories, the duration of the stop was justified. Specifically, the driver did not know the name of the city from which the pair travelled nor any details about their destination; the vehicle was travelling on I-77 purportedly from Louisville, KY to Myrtle Beach, SC which is an indirect route; the defendant initially stated that the driver was her cousin, but later stated she and the driver simply called each other cousins based on their close and long term relationship; and while the driver told the officer that the defendant owned the vehicle, the defendant stated that a friend of hers was the owner, but that she intended to purchase it.

State v. Ellison, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zODYtMS5wZGY=). An officer had

reasonable suspicion to stop the defendant's vehicle. An informant told the officer that after having his prescriptions for hydrocodone and Xanax filled, Mr. Shaw would immediately take the medication to defendant Treadway's residence, where he sold the medications to Treadway; Treadway then sold some or all of the medications to defendant Ellison. Subsequently, the officer learned that Shaw had a prescription for Lorcet and Xanax, observed Shaw fill the prescriptions, and followed Shaw from the pharmacy to Treadway's residence. The officer watched Shaw enter and exit Treadway's residence. Minutes later the officer observed Ellison arrive. The officer also considered activities derived from surveillance at Ellison's place of work, which were consistent with drug-related activities. Although the officer had not had contact with the informant prior to this incident, one of his co-workers had worked with the informant and found the informant to be reliable; specifically, information provided by the informant on previous occasions had resulted in arrests.

State v. Carrouthers, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNDcwLTEucGRm). An officer's act of handcuffing the defendant during a *Terry* stop was reasonable and did not transform the stop into an arrest. The officer observed what he believed to be a hand-to-hand drug transaction between the defendant and another individual; the defendant was sitting in the back seat of a car, with two other people up front. Upon frisking the defendant, the officer felt an item consistent with narcotics, corroborating his suspicion of drug activity. The officer then handcuffed the defendant and recovered crack cocaine from his pocket. The circumstances presented a possible threat of physical violence given the connection between drugs and violence and the fact that the officer was outnumbered by the people in the car.

Frisk

In re D.B., __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNDc2LTEucGRm). The trial court erred by admitting evidence obtained by an officer who exceeded the proper scope of a *Terry* frisk. After the officer stopped the juvenile, he did a weapons frisk and found nothing. When the officer asked the juvenile to identify himself, the juvenile did not respond. Because the officer thought he felt an identification card in the juvenile's pocket during the frisk, he retrieved it. It turned out to be a stolen credit card, which was admitted into evidence. Although officers who lawfully stop a person may ask a moderate number of questions to determine his or her identity and to gain information confirming or dispelling the officers' suspicions that prompted the stop, no authority suggests that an officer may physically search a person for evidence of his identity in connection with a *Terry* stop.

Informants

State v. Mack, __ N.C. App. __, __ S.E.2d __ (Aug. 2, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMDIwLTEucGRm). The trial court did not err by denying the defendant's motion to disclose the identity of a confidential informant in a drug case where—for reasons discussed in the court's opinion—the defendant failed to show that the circumstances of his case required disclosure.

State v. Ellison, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zODYtMS5wZGY=). The trial court did not err by denying the defendant's motion for disclosure of an informant's identity where the informant's existence was sufficiently corroborated under G.S. 15A-978(b).

Miranda

J.D.B. v. North Carolina, 564 U.S. __, 131 S. Ct. 2394 (June 16, 2011) (http://www.supremecourt.gov/opinions/10pdf/09-11121.pdf). In this North Carolina case, the Court held, in a five-to-four decision, that the age of a child subjected to police questioning is relevant to the *Miranda* custody analysis. J.D.B. was a 13-year-old, seventh-grade middle school student when he was removed from his classroom by a uniformed police officer, brought to a conference room, and questioned by police. This was the second time that police questioned J.D.B. in a week. Five days earlier, two home break-ins occurred, and items were stolen. Police stopped and questioned J.D.B. after he was seen behind a residence in the neighborhood where the crimes occurred. That same day, police spoke to J.D.B.'s grandmother—his legal guardian—and his aunt. Police later learned that a digital camera matching the description of one of the stolen items had been found at J.D.B.'s school and in his possession. Investigator DiCostanzo went to the school to question J.D.B. A uniformed school resource officer removed J.D.B. from his classroom and escorted him to a conference room, where J.D.B. was met by DiCostanzo, the assistant principal, and an administrative intern. The door to the conference room was closed. With the two police officers and the two administrators present, J.D.B. was questioned for 30-45 minutes. Before the questioning began, J.D.B. was given neither *Miranda* warnings nor the opportunity to speak to his grandmother. Nor was he informed that he was free to leave. J.D.B. eventually confessed to the break-ins. Juvenile petitions were filed against J.D.B. and at trial, J.D.B.'s lawyer moved to suppress his statements, arguing that J.D.B. had been subjected to a custodial police interrogation without *Miranda* warnings. The trial court denied the motion and J.D.B. was adjudicated delinquent. The N.C. Court of Appeals affirmed. The N.C. Supreme Court held that J.D.B. was not in custody, declining to extend the test for custody to include consideration of the age of the individual questioned. The U.S. Supreme Court reversed, holding that the *Miranda* custody analysis includes consideration of a juvenile suspect's age and concluding, in part: "[A] reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go. We think it clear that courts can account for that reality without doing any damage to the objective nature of the custody analysis." Slip Op. at 8. The Court distinguished a child's age "from other personal characteristics that, even when known to police, have no objectively discernible relationship to a reasonable person's understanding of his freedom of action." Slip Op. at 11. It held: "[S]o long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test." Slip Op. at 14. However, the Court cautioned: "This is not to say that a child's age will be a determinative, or even a significant, factor in every case." *Id.* The Court remanded for the North Carolina courts to determine whether J.D.B. was in custody when the police interrogated him, "this time taking account of all of the relevant circumstances of the interrogation, including J.D.B.'s age." Slip Op. at 18.

State v. Carter, __ N.C. App. __, __ S.E.2d __ (June 21, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05NzQtMS5wZGY=). The defendant was not in custody when he made a statement to detectives. The defendant rode with the detectives to the police station voluntarily, without being frisked or handcuffed. He was told at least three times — once in the car, once while entering the police station, and once at the beginning of the interview — that he was not in custody and that he was free to leave at any time. He was not restrained during the interview and was left unattended in the unlocked interview room before the interview began. The defendant was not coerced or threatened. To the contrary, he was repeatedly asked if he wanted anything to eat or drink and was given food and a soda when he asked for it.

State v. Jordan, __ N.C. App. __, ___ S.E.2d __ (Oct. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNDMyLTEucGRm). Because the defendant presented an incomplete record on appeal the court treated as binding the trial court's findings of fact regarding a suppression motion (at issue was a police interrogation; the trial court had reviewed a transcript and video of the interview; although portions of the transcript were inaudible, the video was not included in the record on appeal). The court went on to hold that the trial court's findings supported its conclusions of law that the defendant was fully informed and advised of his *Miranda* rights, fully understood those rights, and intelligently, voluntarily, and knowingly waived them.

Plain Feel & Plain Feel

State v. Richmond, __ N.C. App. __, __ S.E.2d __ (Sept. 6, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMjk2LTEucGRm). The evidence supported the trial court's finding that based on an officer's training and experience, he immediately formed the opinion that a bulge in the defendant's pants contained a controlled substance when conducting a pat down. The officer was present at the location to execute a search warrant in connection with drug offenses.

State v. Lupek, __ N.C. App. __, __ S.E.2d __ (Aug. 2, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS02My0xLnBkZg==). In a drug case, the trial court did not err by denying the defendant's motion to suppress when an officer saw the item in question—a bong—in plain view while standing on the defendant's front porch and looking through the open front door. The court rejected the defendant's argument that the officer had no right to be on the porch. The officer responded to a call regarding a dog shooting, the defendant confirmed that his dog was shot by a neighbor, and the officer went to the defendant's residence to investigate. Once there he encountered a witness from whom he sought to obtain identification as he followed her to the porch.

Search Warrants & Related Issues

State v. Richmond, __ N.C. App. __, __ S.E.2d __ (Sept. 6, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMjk2LTEucGRm). An officer executing a search warrant at a home reasonably believed that for officer safety he should pat down the defendant, who was present at the house when officers arrived to execute the search warrant. The search warrant application stated that illegal narcotics were being sold from the residence and that officers had conducted two previous controlled buys there, one only 72 hours earlier. When officers entered, they found six individuals, including defendant and saw drugs in plain view. Based on his experience as a narcotics officer, the officer testified to a connection between guns and drugs.

State v. Garcia, __ N.C. App. __, ___ S.E.2d __ (Oct. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS0yNjItMS5wZGY=). The trial court did not err by denying the defendant's motion to suppress statements made while a search warrant was being executed. The defendant and his wife were present when the search warrant was executed. After handcuffing the defendant, an officer escorted him to a bathroom, read him *Miranda* rights, and questioned him about drug activities in the apartment. While this procedure was applied to the defendant's wife, an officer discovered a digital scale and two plastic bags of a white, powdery substance; the defendant then stated that the drugs were his not his wife's. The court rejected the defendant's argument that he was arrested when he was moved to the bathroom and read his rights, noting that the questioning occurred during the search.

Searches of Students

In re T.A.S., __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0yNzUtMS5wZGY=). In a split opinion, the court held that a search of a juvenile's bra was constitutionally unreasonable. The school's principal was told by students that pills that "would cause kids to be unsafe" were coming into the school; no detail was provided regarding the nature of the pills or of the students responsible. The only other information provided was that some students were hiding the pills in places not normally searched when they came through metal detectors at the school's entrance, like shoe tongues, socks, bras, and underwear. As a result of the tip and after passing through the metal detectors, all students were brought one-by-one to a classroom to be searched. They emptied their book bags, had their jackets thoroughly searched, removed their shoes, and emptied their pockets. A staff member of unspecified sex conducted the searches and patted down the students' socks. The girls were required to perform a "bra lift," where they "pull their shirts out," "shake them," and "go underneath themselves with their thumb in the middle of their bra [to] pull it out." Other administrators and a resource officer, whose sexes were unspecified, were in the room, along with a male law enforcement officer who observed. The juvenile unsuccessfully moved to suppress drugs and drug paraphernalia founds during her search. The court concluded that when the school required the juvenile to pull out her bra in searching for evidence of pills of an unknown nature and quantity, the content of the suspicion failed to match the degree of intrusion and the search was unreasonable. One judge concurred in the result; another dissented.

Consent

State v. McMillan, __ N.C. App. __, __ S.E.2d __ (Aug. 2, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNDE5LTEucGRm). The fact that officers advised the defendant that if he did not consent to giving oral swabs and surrendering certain items of clothing they would detain him until they obtained a search warrant did not negate the defendant's voluntary consent to the seizure of those items.

Identification

State v. Jones, __ N.C. App. __, ___ S.E.2d __ (Oct. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS0xNDktMS5wZGY=). The trial court's admission of photo identification evidence did not violate the defendant's right to due process. The day after a break-in at her house, one of the victims, a high school student, became upset in school. Her mother was called to school and brought along the student's sister, who was also present when the crime occurred. After the student told the Principal about the incident, the Principal took the student, her sister and her mother into his office and showed the sisters photographs from the N.C. Sex Offender Registry website to identify the perpetrator. Both youths identified the perpetrator from one of the pictures. The mother then contacted the police and the defendant was eventually arrested. At trial, both youths identified the defendant as the perpetrator in court. The court rejected the defendant's argument that the Principal acted as an agent of the State when he showed the youths the photos, finding that his actions "were more akin to that of a parent, friend, or other concerned citizen offering to help the victim of a crime." Because the Principal was not a state actor when he presented the photographs, the defendant's due process rights were not implicated in the identification. Even if the Principal was a state actor and the procedure used was unnecessarily suggestive, the procedure did not give rise to a substantial likelihood of irreparable misidentification given the circumstances of the identification. Finally, because the photo

identification evidence was properly admitted, the trial court also properly admitted the in-court identifications of defendant.

Criminal Offenses

Participants in Crime

State v. Bowden, __ N.C. App. __, ___ S.E.2d __ (Oct. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS0zMDUtMS5wZGY=). The trial court did not err by dismissing charges of felony breaking or entering and felony larceny. The State presented evidence that an unknown man, who appeared to be concealing his identity, was seen walking around the victim's yard carrying property later determined to have been taken from the victim's home. The man fled when he saw officers and was never apprehended or identified. The defendant was also seen in the yard, but was never seen entering or leaving the home or carrying any stolen property. Although the defendant also fled from officers, no evidence linked him to the unknown man. The defendant's presence in the yard and his flight was insufficient evidence of acting in concert.

State v. Jackson, __ N.C. App. __, __ S.E.2d __ (Sept. 6, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNTY2LTEucGRm). The evidence was sufficient to support a conviction of armed robbery under an acting in concert theory. Although the record did not reveal whether the defendant shared the intent or purpose to use a dangerous weapon during the robbery, this was not a necessary element under the theory of acting in concert.

Homicide

Malice

State v. Trogdon, __ N.C. App. __, __ S.E.2d __ (Sept. 20, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMzQ0LTEucGRm). There was sufficient evidence of malice to support a second-degree murder conviction. Based on expert testimony the jury could reasonably conclude that the child victim did not die from preexisting medical conditions or from a fall. The jury could find that while the victim was in the defendant's sole custody, he suffered non-accidental injuries to the head with acute brain injury due to blunt force trauma of the head. The evidence would permit a finding that the victim suffered a minimum of four impacts to the head, most likely due to his head being slammed into some type of soft object. Combined with evidence that the defendant bit the victim, was upset about the victim's mother's relationship with the victim's father, and that the defendant resented the victim, the jury could find that the defendant intentionally attacked the month-old child, resulting in his death.

State v. McMillan, __ N.C. App. __, __ S.E.2d __ (Aug. 2, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNDE5LTEucGRm). There was sufficient evidence of malice to sustain a second-degree murder conviction. Because there was evidence that the defendant killed the victim with a deadly weapon, the jury could infer that the killing was done with malice. The court rejected the defendant's argument that his statements that he and the victim "had words or something" provided evidence of provocation sufficient to negate the malice presumed from the use of a deadly weapon or require a voluntary manslaughter instruction.

State v. Norman __ N.C. App. __, __ S.E.2d __ (July 5, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTA4LTEucGRm). There was sufficient evidence of malice in a case arising from a vehicle accident involving impairment. The

defendant admitted that he drank 4 beers prior to driving. The State's expert calculated his blood alcohol level to be 0.08 at the time of the collision and other witnesses testified that the defendant was impaired. Evidence showed that he ingested cocaine and that the effects of cocaine are correlated with high-risk driving. The defendant admitted that he was speeding, and experts calculated his speed to be approximately 15 mph over the posted speed limit. The State also introduced evidence that the defendant had 4 prior driving while impaired convictions.

State v. Carter, __ N.C. App. __, __ S.E.2d __ (June 21, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05NzQtMS5wZGY=). The trial court did not err by denying the defendant's motion to dismiss a charge of second-degree murder. The defendant, after being kicked in the face in a fight inside a nightclub, became angry about his injury, retrieved a 9mm semi-automatic pistol and loaded magazine from his car, and loaded the gun, exclaiming "Fuck it. Who wants some?" He then began firing toward the crowd, killing an officer. Evidence of the intentional use of a deadly weapon — here, a semi-automatic handgun — that proximately causes death triggers a presumption that the killing was done with malice. This presumption is sufficient to withstand a motion to dismiss a second-degree murder charge. The issue of whether the evidence is sufficient to rebut the presumption of malice in a homicide with a deadly weapon is then a jury question.

Proximate Cause

State v. Norman __ N.C. App. __, __ S.E.2d __ (July 5, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTA4LTEucGRm). There was sufficient evidence that the defendant's actions were the proximate cause of death. The defendant argued that two unforeseeable events proximately caused the victims' deaths: a third-party's turn onto the road and the victims' failure to yield the right-of-way. The court found that the first event foreseeable. As to the second, it noted that the defendant's speeding and driving while impaired were concurrent proximate causes.

Felony-Murder

State v. McMillan, __ N.C. App. __, __ S.E.2d __ (Aug. 2, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNDE5LTEucGRm). The evidence was sufficient to support a first-degree felony-murder conviction when the underlying felony was armed robbery and where the defendant used the stolen item—a .357 Glock handgun—to commit the murder and the two crimes occurred during a continuous transaction.

Multiple Convictions/Lesser Included Offenses

State v. Wright, __ N.C. App. __, __ S.E.2d __ (June 21, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMjUxLTEucGRm). Citing *State v. Washington*, 141 N.C. App. 354 (2000), the court held that the defendant was properly charged and convicted of attempted murder and assault as to each victim, even though the offenses arose out of a single course of conduct involving multiple shots from a gun.

Assaults

Assault by Pointing a Gun

In re N.T., __ N.C. App. __, __ S.E.2d __ (Aug. 2, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMjgxLTEucGRm). The evidence was insufficient to support an adjudication of delinquency based on assault by pointing a gun where the weapon was an airsoft gun from which plastic pellets were fired using a "pump action" mechanism. For purposes of the assault by pointing a gun statute, the term "gun" "encompasses devices ordinarily understood to be 'firearms' and not other devices that fall outside that category." Slip op. at 12. Thus, imitation firearms are not covered. The court noted that its conclusion had no bearing on whether the juvenile might be found delinquent for assault with a deadly weapon inflicting serious injury, assault with a deadly weapon, assault inflicting serious injury, or assault on a child under twelve.

Deadly Weapon

State v. Flaugher, __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMDQ0LTEucGRm). The trial court did not err by instructing the jury that a pickaxe was a deadly weapon. The pickaxe handle was about 3 feet long, and the pickaxe weighed 9-10 pounds. The defendant swung the pickaxe approximately 8 times, causing cuts to the victim's head that required 53 staples. She also slashed his middle finger, leaving it hanging only by a piece of skin.

Multiple Convictions

State v. Wright, __ N.C. App. __, __ S.E.2d __ (June 21, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMjUxLTEucGRm). Citing *State v. Washington*, 141 N.C. App. 354 (2000), the court held that the defendant was properly charged and convicted of attempted murder and assault as to each victim, even though the offenses arose out of a single course of conduct involving multiple shots from a gun.

Maiming

State v. Flaugher, __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMDQ0LTEucGRm). In a maiming without malice case, the evidence was sufficient to show that the defendant intended to strike the victim's finger with the intent to disable him. The intent to maim or disfigure may be inferred from an act which does in fact disfigure the victim, unless the presumption is rebutted by evidence to the contrary. Here, the near severing of the victim's finger triggered that presumption, which was not rebutted.

Stalking

State v. Fox, __ N.C. App. __, ___ S.E.2d __ (Oct. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNDg1LTEucGRm). The defendant's right to be protected from double jeopardy was violated when, after being convicted of felony stalking, he was again charged and convicted of that crime. Because the time periods of the "course of conduct" for both indictments overlapped, the same acts could result in a conviction under either indictment. Also, in the second trial the State introduced evidence that would have established stalking during the overlapping time period.

Sexual Assaults

State v. Sims, __ N.C. App. __, ___ S.E.2d __ (Oct. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS0xODctMS5wZGY=). In an indecent liberties case, the evidence was sufficient to establish that the defendant engaged in conduct for the purpose of arousing or gratifying sexual desire. While at a store, the defendant crouched down to look at the victim's legs, "fell into" the victim, wrapping his hands around her, and kneeled down, 6-8 inches away from her legs. Other evidence showed that he had asked another person if he could hug her legs and that he admitted to being obsessed with women's legs.

Kidnapping

State v. Boyd, __ N.C. App. __, __ S.E.2d __ (Aug. 2, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMDcyLTEucGRm). The defendant's right to a unanimous verdict was violated in a kidnapping case where the trial judge instructed on the theories of restraint, confinement and removal but no evidence supported a theory of removal. Although evidence supported confinement and restraint, no evidence suggested that the defendant removed the victim in a case where the crime occurred entirely in the victim's living room. The court stated: "where the victim was moved a short distance of several feet, and was not transported from one room to another, the victim was not 'removed' within the meaning of our kidnapping statute."

Larceny

State v. Louali, __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNTkwLTEucGRm). The evidence was sufficient to sustain a conviction for receiving goods explicitly represented as stolen by a law enforcement officer. No specific words are required to be spoken to fulfill the "explicitly represented" element of the offense. Rather the statute "merely requires that a person knowingly receives or possesses property that was clearly expressed, either by words or conduct, as constituting stolen property." Here, the officer said that he was told that the business bought "stolen property, stolen laptops" and twice reminded the defendant that "this stupid guy kept leaving the door open, [and] I kept running in the back of it and taking laptops." After the exchange of money for the laptops, the officer told the defendant that he could get more laptops.

State v. Whitley, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMjgzLTEucGRm). The trial court did not err by failing to define the term "larceny" for the jury. The court noted that it has previously determined that "larceny" is a word of "common usage and meaning to the general public[,]" and thus it is not error to not define it in the jury instructions. It further noted: "While we disagree that the legal term "larceny" is commonly understood by the general public, we are bound by precedent . . . and thus this issue is overruled."

Robbery

State v. Speight, __ N.C. App. __, __ S.E.2d __ (June 21, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNDY3LTEucGRm). In an armed robbery case, there was sufficient evidence that the defendant took the victim's personal property by the use or threatened use of a knife. The victim awoke to find the defendant on top of her holding a knife to her throat. After struggling with him, she pleaded and negotiated with him for almost 90 minutes. The defendant acknowledged that he had already taken money from the victim's purse. However, when the

defendant fled, he took a knife from her kitchen and the victim's sports bra and the victim never saw her purse again.

State v. Flaugher, __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMDQ0LTEucGRm). Where the evidence showed that the defendant's attack on the victim and the taking of his wallets constituted a single, continuous transaction, the evidence was sufficient to support an armed robbery charge. The court rejected the defendant's argument that she took the victim's wallets only as an afterthought. The court also rejected the defendant's argument that the evidence was insufficient because it was not positive that she possessed the weapon when she demanded the victim's money. The court noted that the defendant held the pickaxe when she assaulted the victim and had already overcome and injured him when she demanded his wallets and took his money; the pickaxe had already served its purpose in subduing the victim.

State v. McMillan, __ N.C. App. __, __ S.E.2d __ (Aug. 2, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNDE5LTEucGRm). The evidence was sufficient to sustain an armed robbery conviction when the item stolen—a handgun—was also the item used to threaten or endanger the victim's life.

State v. Lee, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMjYzLTEucGRm). In a robbery case, the court held that the trial judge properly instructed the jury on the doctrine of recent possession as to non-unique goods (cigarettes).

Bombing, Terrorism, and Related Offenses

State v. Lee, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMjYzLTEucGRm). The evidence was sufficient to support multiple counts of possession of a weapon of mass death and destruction and possession of a firearm by a felon. The defendant had argued that the evidence was insufficient to support multiple charges because it showed that a single weapon was used, and did not show that the possession on each subsequent date of offense was a new and separate possession. The court distinguished *State v. Wiggins*, ___ N.C. App. ___, 707 S.E.2d 664 (2011), on grounds that in that case, the offenses were committed in close geographic and temporal proximity. Here, the court determined, the offenses occurred in nine different locations on ten different days over the course of a month. It concluded: "While the evidence tended to show that defendant used the same weapon during each armed robbery, the robberies all occurred on different days and in different locations. Because each possession of the weapon was separate in time and location, . . . the trial court did not err in denying defendant's motion to dismiss the multiple weapons possession charges."

State v. Billinger, __ N.C. App. __, __ S.E.2d __ (July 5, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNDEyLTEucGRm). There was sufficient evidence to establish that the defendant constructively possessed a weapon of mass death and destruction. Following law from other jurisdictions, the court held that "constructive possession may be established by evidence showing the defendant's ownership of the contraband." Because the evidence showed that the defendant owned the sawed-off shotgun at issue, it was sufficient to show possession of a weapon of mass death and destruction.

Weapons Offenses

State v. Best, __ N.C. App. __, __ S.E.2d __ (Aug. 2, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMjY0LTEucGRm). There was sufficient evidence that the defendant constructively possessed a gun found in a van to support charges of carrying a concealed weapon and possession of a firearm by a felon. The fact that the defendant was the driver of the van gave rise to an inference of possession. Additionally, other evidence showed possession: the firearm was found on the floor next to the driver's seat, in close proximity to the defendant; the defendant admitted that he owned the gun; and this admission was corroborated by a passenger in the van who had seen the defendant in possession of the weapon that afternoon, and remembered that the defendant had been carrying the gun in his pants pocket and later placed it on the van floor.

State v. Lee, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMjYzLTEucGRm). The evidence was sufficient to support multiple counts of possession of a weapon of mass death and destruction and possession of a firearm by a felon. The defendant had argued that the evidence was insufficient to support multiple charges because it showed that a single weapon was used, and did not show that the possession on each subsequent date of offense was a new and separate possession. The court distinguished *State v. Wiggins*, ___ N.C. App. ___, 707 S.E.2d 664 (Mar. 1, 2011), on grounds that in that case, the offenses were committed in close geographic and temporal proximity. Here, the court determined, the offenses occurred in nine different locations on ten different days over the course of a month. It concluded: "While the evidence tended to show that defendant used the same weapon during each armed robbery, the robberies all occurred on different days and in different locations. Because each possession of the weapon was separate in time and location, . . . the trial court did not err in denying defendant's motion to dismiss the multiple weapons possession charges."

Obstruction of Justice and Related Offenses

State v. White, __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTQzLTEucGRm). The defendant's flight from a consensual encounter with the police did not constitute probable cause to arrest him for resisting an officer.

State v. Joe, __ N.C. App. __, __ S.E.2d __ (July 5, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMDM3LTEucGRm). There was insufficient evidence of resisting an officer when the defendant fled from a consensual encounter. When the officer approached an apartment complex on a rainy, chilly day, the defendant was standing outside, dressed appropriately in a jacket with the hood on his head. Although the officer described the complex as a known drug area, he had no specific information about drug activity on that day. When the defendant saw the officer's van approach, "his eyes got big" and he walked behind the building. The officer followed to engage in a consensual conversation with him. When the officer rounded the corner, he saw the defendant run. The officer chased, yelling several times that he was a police officer. The officer eventually found the defendant squatting beside an air conditioning unit and arrested him for resisting.

In re A.J.M-B, __ N.C. App. __, __ S.E.2d __ (June 21, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMzUwLTEucGRm). The trial court erred by denying the juvenile's motion to dismiss a charge of resisting a public officer when no reasonable suspicion supported a stop of the juvenile (the activity that the juvenile allegedly resisted). An

anonymous caller reported to law enforcement "two juveniles in Charlie district . . . walking, supposedly with a shotgun or a rifle" in "an open field behind a residence." A dispatcher relayed the information to Officer Price, who proceeded to an open field behind the residence. Price saw two juveniles "pop their heads out of the wood line" and look at him. Neither was carrying firearms. When Price called out for them to stop, they ran around the residence and down the road.

Drug Offenses

State v. Ellison, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zODYtMS5wZGY=). (1) The trial court did not err by denying the defendant's motion to dismiss trafficking charges on the grounds that a conviction would infringe upon his constitutional rights to due process and freedom from cruel and unusual punishment. The defendant argued that he lacked adequate notice that "possession of prescription Lorcet pills could result in being charged with trafficking in an opiate and being responsible for the entire weight of the pills" and because punishment would be grossly unfair given the relatively small amount of controlled substance at issue. The court rejected the defendant's "lack of notice" argument concluding that in North Carolina, liability for trafficking cases involving prescription medications hinges upon the total weight of the pills or tablets in question not the weight of the controlled substance in those medications. The court rejected his "substantive unfairness" argument, concluding that there is a rational basis for subjecting individuals involved with large-scale distribution of mixtures containing controlled substances to more severe punishment: deterrence of large scale drug distribution. (2) The trial court did not err by denying the defendants' motions to dismiss trafficking in opium charges; the defendant had asserted that the medications at issue, which were Schedule III controlled substances, were not punishable under G.S. 90-95(h)(4). At trial the State's witness testified that a portion of the pills contained a mixture of hydrocodone and acetaminophen; that hydrocodone is a derivative of opium; that a mixture consisting of hydrocodone combined with acetaminophen is called dihydrocodeinone; and that dihydrocodeinone is a derivative of opium. Thus, there was substantial evidence that the pills consisted of a mixture containing an opiate derivative. The court rejected the defendant's argument that the General Assembly intended G.S. 90-95(d)(2) to govern criminal liability in connection with prescription drugs, reasoning, in part, that G.S. 90-95(d)(2) clearly limits its application to situations not covered by G.S. 90-95(h)(4). The court further concluded: "the controlled substance schedule to which a particular opiate derivative is assigned has nothing to do with the extent to which activities involving that substance are subject to punishment under the trafficking statutes."

Motor Vehicle Offenses

State v. Arrington, __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTM0LTEucGRm). The evidence was sufficient to sustain the defendant's conviction for impaired driving when there was evidence of two .08 readings. The court rejected the defendant's argument that since the blood alcohol reading was the lowest for which he could be convicted under the statute, the margin of error of the Intoxilyzer should be taken into account to undermine the State's case against him.

State v. Norton, __ N.C. App. __, __ S.E.2d __ (June 21, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNTQ0LTEucGRm). The evidence was sufficient to survive a motion to dismiss. Evidence of faulty driving, along with evidence of consumption of alcohol and cocaine, is sufficient to show a violation of G.S. 20-138.1. Witnesses observed the defendant's behavior as he was driving, not sometime after. Multiple witnesses testified as

to his faulty driving and other conduct, including that he "had a very wild look on his face" and appeared to be in a state of rage; drove recklessly without regard for human life; drove in circles on a busy street and on a golf course; twice collided with other motorists; drove on the highway at speeds varying between 45 and 100 mph; drove with the car door open and with his left leg and both hands hanging out; struck a patrol vehicle; and exhibited "superhuman" strength when officers attempted to apprehend him. Blood tests established the defendant's alcohol and cocaine use, and one witness testified that she smelled alcohol on the defendant.

State v. Leonard, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMzg3LTEucGRm). There was sufficient evidence of felonious serious injury by motor vehicle. The defendant had argued that his willful action in attempting to elude arrest was the proximate cause of the victim's injuries, not his impaired driving. The court rejected this argument concluding that even if his willful attempt to elude arrest was a cause of the injuries, his driving under the influence could also be a proximate cause.

State v. Banks, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05MzUtMS5wZGY=). (1) In a felony speeding to elude case, the trial court did not err by giving a disjunctive jury instruction that allowed the jury to convict the defendant if it found at least two of three aggravating factors submitted. The defendant had argued that the trial court should have required the jury to be unanimous as to which aggravating factors it found. (2) The trial judge did not commit plain error by failing to define the aggravating factor of reckless driving in felony speeding to elude jury instructions. The defendant had argued that the trial court was obligated to include the statutory definition of reckless driving in G.S. 20-140.

Defenses

Diminished Capacity

State v. McDowell, __ N.C. App. __, __ S.E.2d __ (Sept. 6, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNTUzLTEucGRm). In a murder case, the trial court did not err by denying the defendant's request for a jury instruction on diminished capacity. The defendant had argued that he was entitled to the instruction based on evidence that he suffered from post-traumatic stress syndrome, alcohol dependence, and cognitive impairment resulting from a head injury, causing him to possibly overreact to stress or conclude that deadly force was necessary to deal with a threatening situation. The court found no evidence casting doubt on the defendant's ability to premeditate, deliberate, or form the specific intent to kill necessary for guilt of first-degree murder on the basis of malice, premeditation, and deliberation.

Entrapment

State v. Pope, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05MzItMS5wZGY=). The trial court erred by dismissing larceny by employee charges based on the theory of entrapment by estoppel. The defendant, a public works supervisor, was accused of selling "white goods" and retaining the proceeds. The court concluded that while officials testified that they were aware that some "white goods" were sold and that the money was deposited to a common pool, no evidence was offered to show that government officials expressly condoned the defendant pocketing money from that fund. Thus, the explicit permission requirement for entrapment by estoppel was not met.

Insanity

State v. Castillo, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC04MTQtMS5wZGY=). No plain error occurred when the trial judge instructed the jury on insanity using N.C.P.I.—Crim. 304.10. The defendant had argued that the trial court erred by failing to instruct the jury that the insanity defense applies if a defendant believed, due to mental illness, that his conduct was morally right.

Self-Defense

State v. Whetstone, __ N.C. App. __, __ S.E.2d __ (June 21, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMDQ2LTEucGRm). The trial court committed plain error by charging the jury with a self-defense instruction that related to assaults not involving deadly force (N.C.P.I.—Crim. 308.40) when the defendant was charged with assault with a deadly weapon with intent to kill inflicting serious injury. The court explained: "in those cases where the weapon is not a deadly weapon per se, but . . . the trial judge concludes on the evidence . . . that the weapon used was a deadly weapon as a matter of law, the jury should be instructed that the assault would be excused as being in self-defense only if the circumstances at the time the defendant acted were such as would create in the mind of a person of ordinary firmness a reasonable belief that such action was necessary to protect himself from death or great bodily harm." The instruction given lessened the State's burden of proving that the defendant did not act in self-defense.

Voluntary Intoxication

State v. Flaugher, __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMDQ0LTEucGRm). The trial court did not err by refusing to instruct on voluntary intoxication. Some evidence showed that the defendant had drunk two beers and "could feel it," had taken Xanax, and may have smoked crack cocaine. However, the defendant herself said she was not drunk and had not smoked crack. The defendant did not produce sufficient evidence to show that her mind was so completely intoxicated that she was utterly incapable of forming the necessary intent.

Capital

State v. Phillips, __ N.C. __, __ S.E.2d __ (June 16, 2011) (http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMS80OEEwOC0xLnBkZg==). The trial court did not err by submitting the (f)(1) mitigating circumstance (no significant history of prior criminal activity) to the jury. The defendant's prior record included: felony breaking and entering in 1999; felony larceny in 1998; driving under the influence in 1996; larceny in 1993; sale of marijuana in 1991; and sale of a narcotic or controlled substance in 1990. The court found it significant that the priors were somewhat remote in time and did not appear to involve violence against a person.

State v. Phillips, __ N.C. __, __ S.E.2d __ (June 16, 2011) (http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMS80OEEwOC0xLnBkZg==). The trial court erred by submitting the (f)(4) mitigating circumstance (defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor) to the jury where it was not supported by substantial evidence. However, in the absence of "extraordinary facts," the court concluded that the error was harmless.

Post-Conviction

G.S. 15A-1335

State v. Skipper, __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMjI1LTEucGRm). No violation of G.S. 15A-1335 occurred on resentencing. A jury found the defendant guilty of felonious breaking and entering, felonious larceny, felonious possession of stolen goods, and for being a habitual felon. The trial court consolidated the offenses for judgment and sentenced the defendant to 125-159 months of imprisonment. The appellate court subsequently vacated the felony larceny conviction and remanded for resentencing. At resentencing the trial court consolidated the offenses and again sentenced the defendant to 125-150 months. The defendant argued that because he received the same sentence even though one of the convictions had been vacated, the new sentence violated G.S. 15A-1335. The court disagreed, concluding that the pursuant to G.S. 15A-1340.15(b), having consolidated the sentences, the trial court was required to sentenced the defendant for the most serious offense, which it did at the initial sentencing and the resentencing.

Clerical Errors/Error Correction

State v. Carrouthers, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNDcwLTEucGRm). In dicta, the court noted that the trial judge was entitled to modify her ruling on a suppression motion because court was still in session.

State v. Ellison, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zODYtMS5wZGY=). The court remanded to the trial court for correction of a clerical error in the judgment so that the judgment would reflect the offense the defendant was convicted of committing (trafficking by transportation versus trafficking by delivery).