Criminal Case Update
Significant Cases Decided June 17, 2010 – Oct. 5, 2010
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Criminal Procedure

Corpus Delicti Rule

State v. Blue, __ N.C. App. __, __ S.E.2d __ (Oct. 5, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091717-1.pdf). Applying the corpus delicti rule (State may not rely solely on the extrajudicial confession of a defendant, but must produce substantial independent corroborative evidence) the court held that the State produced substantial independent corroborative evidence to show that a robbery and rape occurred. As to the robbery, aspects of the defendant's confession were corroborated with physical evidence found at the scene (weapons, etc.) and by the medical examiner's opinion testimony (regarding cause of death and strangulation). As to the rape, the victim's body was partially nude, an autopsy revealed injury to her vagina, rape kit samples showed spermatozoa, and a forensic analysis showed that defendant could not be excluded as a contributor of the weaker DNA profile.

Counsel Issues

State v. Choudhry, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090773-1.pdf). Over a dissent, the court held that the trial court did not err by failing to conduct an evidentiary hearing concerning defense counsel's possible conflict of interest due to prior representation, in unrelated matters, of a person who appeared in a crime scene videotape. When the prosecutor brought the matter to the trial court's attention, the trial court conducted a hearing and fully advised the defendant of the facts underlying the potential conflict and gave him the opportunity to express his views. In light of this, the court held that the defendant waived any possible conflict of interest. The dissenting judge believed that the trial court's inquiry did not fully inform the defendant of the potential conflict of interest and that the defendant's waiver was not knowing, intelligent, and voluntary.

State v. Wray, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090304-1.pdf). The trial court erred by ruling that the defendant forfeited his right to counsel. The defendant's first lawyer was allowed to withdraw because of a breakdown in the attorney-client relationship. His second lawyer withdrew on grounds of conflict of interest. The defendant's third lawyer was allowed to withdraw after the defendant complained that counsel had not promptly visited him and had "talked hateful" to his wife and after counsel reported that the defendant accused him of conspiring with the prosecutor and contradicted everything the lawyer said. The trial court appointed Mr. Ditz and warned the defendant that failure to cooperate with Ditz would result in a forfeiture of the right to counsel. After the defendant indicated that he did not want to be represented by Ditz, the trial court explained that the defendant either could accept representation by Ditz or proceed pro se. The defendant rejected these choices and asked for new counsel. When Ditz subsequently moved to withdraw, the trial court allowed the motion and found that the defendant had forfeited his right to counsel. On appeal, the court recognized "a presumption against the casual forfeiture" of constitutional rights and noted that forfeiture should be restricted cases of "severe misconduct." The court held that the record did not support the trial court's finding of forfeiture because: (1) it suggested that while the defendant was competent to be tried, under *Indiana v. Edwards*, 554 U.S. 164 (2008), he may have lacked the capacity to represent himself; (2) Ditz had represented the defendant in prior cases without problem; (3) the record did not establish serious misconduct required to support a forfeiture (the court noted that there was no evidence that the defendant used profanity in court, threatened counsel or court personnel, was abusive, or was otherwise inappropriate); (4) evidence of the defendant's misbehavior created doubt as to his competence; and (5) the defendant was given no opportunity to be heard or participate in the forfeiture hearing.

State v. Boyd, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100051-1.pdf). Defendant's forfeiture of his right to counsel did not carry over to his resentencing, held after a successful appeal. To determine the life of a forfeiture of counsel the court adopted the standard for life of a waiver of counsel (a waiver is good and sufficient until the

proceedings are terminated or the defendant makes it known that he or she desires to withdraw the waiver). Applying this standard, the court found that "a break in the period of forfeiture occurred" when the defendant accepted the appointment of counsel (the Appellate Defender) for the appeal of his initial conviction. The court noted in dicta that the defendant's statement at resentencing that he did not want to be represented and his refusal to sign a written waiver did not constitute a new forfeiture. Because the initial forfeiture did not carry through to the resentencing and because the trial judge did not procure a waiver of counsel under G.S. 15A-1242 at the resentencing, the defendant's right to counsel was violated.

State v. Covington, __ N.C. App. __, __ S.E.2d __ (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091291-1.pdf). The trial court did not abuse its discretion by denying the defendant's request for substitute counsel where there was no evidence that the defendant's constitutional right to counsel was violated. The defendant waived the right to appointed counsel and retained an attorney. The day after the jury was impaneled for trial the defendant requested substitute counsel, asserting that counsel had not communicated enough with him, that the defendant was unaware the case would be tried that day, and that he had concerns about counsel's strategy, particularly counsel's advice that the defendant not testify. None of these concerns constituted a violation of the defendant's constitutional right to counsel.

Discovery and Related Issues

State v. Ellis, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090869-1.pdf). The trial court did not abuse its discretion by denying the defendant's motion to continue because of the State's alleged discovery violation. Although the State provided the defendant with a copy the robbery victim's pre-trial written statement and a composite sketch of the perpetrator based on the victim's description, the defendant argued that the State violated its continuing duty to disclose by failing to inform the defense of the victim's statement, made on the morning of trial, that she recognized the defendant as the robber when he entered in the courtroom. After the victim identified the defendant as the perpetrator, the defense moved to continue to obtain an eyewitness identification expert. Finding no abuse of discretion, the court relied, in part, on the timing of the events and that the defendant could have anticipated that the victim would be able to identify the defendant.

DWI Procedure

Lee v. Gore, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090370-2.pdf). After a rehearing, the court issued a new opinion, over a dissent, superseding and replacing its prior opinion. *See* Lee v. Gore, __ N.C. App. __, __ S.E.2d __ (Jan. 19, 2010). The court rejected the DMV's implicit argument that a suspension of driving privileges can occur based on a refusal to submit to chemical analysis in the absence of willfulness. As in its prior decision, the court held that form DHHS 3908 is not a substitute for a properly executed affidavit required by G.S. 20-16.2(c1). The court noted that form DHHS 3908 or other relevant documents may be attached to a properly executed affidavit but held "that the affidavit, in whatever form submitted, must indicate that a person's refusal to submit to chemical analysis was willful." Because the officer here testified that he did not check the box indicating that there was a willful refusal before executing the affidavit, the requirements of G.S. 20-16.2(c1) were not satisfied. Construing G.S. 20-16.2, the court held that before the DMV can revoke a person's driving privileges, it must receive a properly executed affidavit that meets all of the requirements in G.S. 20-16.2(c1). Given this, the DMV had no authority to revoke the Petitioner's license and there was no authority for a DMV review hearing or appellate review in the superior court. The court remanded for reinstatement of the Petitioner's driving privileges. For a more detailed discussion of this case, see the blog post here: http://sogweb.sog.unc.edu/blogs/ncclaw/?p=1516.

Indictment Issues

In Re J.C., __ N.C. App. __, __ S.E. 2d __ (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100031-1.pdf). A juvenile petition sufficiently alleged that the juvenile was delinquent for possession of a weapon on school grounds in violation of G.S. 14-269.2(d). The petition alleged that the juvenile possessed an "other weapon," specified as a "steel link from chain."

The evidence showed that the juvenile possessed a 3/8-inch thick steel bar forming a C-shaped "link" about 3 inches long and 1½ inches wide. The link closed with a ½-inch thick bolt and the object weighed at least 1 pound. The juvenile could slide his fingers through the link so that 3-4 inches of the bar could be held securely across his knuckles and used as a weapon. Finding the petition sufficient the court stated: "the item . . . is sufficiently equivalent to what the General Assembly intended to be recognized as 'metallic knuckles' under [the statute]."

State v. Clagon, __ N.C. App. __, __ S.E.2d __ (Oct. 5, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100299-1.pdf). A burglary indictment does not need to identify the felony that the defendant intended to commit inside the dwelling.

State v. Guarascio, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090883-1.pdf). There was no fatal variance between a forgery indictment and the evidence presented at trial. The indictment charged the defendant with forgery of "an order drawn on a government unit, STATE OF NORTH CAROLINA, which is described as follows: NORTH CAROLINA UNIFORM CITATION." The evidence showed that the defendant, who was not a law enforcement officer, issued citations to several individuals. The court rejected the defendant's arguments that the citations were not "orders" and were not "drawn on a government unit" because he worked for a private police entity.

Interpreters

State v. Mohamed, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090943-1.pdf). The court rejected the defendant's claim that inadequacies with his trial interpreters violated his constitutional rights. The court held that because the defendant did not challenge the adequacy of the interpreters at trial, the issue was waived on appeal and that plain error review did not apply. The court further held that because the defendant selected the interpreters, he could not complain about their adequacy. Finally, the court concluded that the record did not reveal inadequacies, given the interpreters' limited role and the lack of translation difficulties.

Joinder

State v. Guarascio, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090883-1.pdf). The trial court did not err by joining charges of impersonating a law enforcement officer and felony forgery that occurred in March 2006 with charges of impersonating a law enforcement officer that occurred in April 2006. The offenses occurred approximately one month apart. Additionally, on both occasions the defendant acted as a law enforcement officer (interrogating individuals and writing citations for underage drinking), notified the minors' family members that they were in his custody for underage drinking, and identified himself as a law enforcement officer to family members. His actions evidence a scheme or plan to act under the guise of apparent authority as a law enforcement officer to interrogate, belittle, and intimidate minors.

State v. Peterson, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090365-1.pdf). The trial court did not abuse its discretion by joining charges of felony assault with a deadly weapon and possession of stolen firearms. There was a sufficient transactional connection (a firearm that was the basis of the firearm charge was used in the assault) and joinder did not prejudicially hinder the defendant's ability to receive a fair trial.

Jury Argument

State v. Simmons, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090862-1.pdf). The trial court abused its discretion when it allowed the prosecutor, in closing argument and over the defendant's objection, to compare the defendant's impaired driving case to a previous impaired driving case litigated by the prosecutor. The prosecutor discussed the facts of the case, indicated that the jury had returned a guilty verdict, and quoted from the appellate decision finding no reversible error. Reversed for a new trial.

State v. Ferguson, __ N.C. App. __, __ S.E.2d __ (Sept. 21, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091507-1.pdf). (1) The prosecutor did not call the defendant a liar in closing arguments; the prosecutor merely asked the jury to conclude that the defendant was lying because he had lied several times about his name and had given multiple accounts of the events. (2) The prosecutor's reference, in closing argument during the guilt phase of a murder trial, to victim impact evidence was not so grossly improper as to require the trial court's intervention ex mero moto. (3) Although the prosecutor's closing argument that "[i]f you are convicted of voluntary manslaughter, you can get as little as 38 months in the jail" was improper, the defendant failed to show that the argument was so grossly improper that it impeded his right to a fair trial.

State v. Mills, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091144-1.pdf). The trial court did not abuse its discretion by denying the defendant's mistrial motion based on the prosecutor's closing statement. During closing arguments in this murder case, defense counsel stated that "a murder occurred" at the scene in question. In his own closing, the prosecutor stated that he agreed with this statement by defense counsel. Although finding no abuse of discretion, the court "remind[ed] the prosecutor that the State's interest in a criminal prosecution is not that it shall win a case, but that justice shall be done."

Jury Instructions

State v. Haire, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100037-1.pdf). The trial court did not abuse its discretion by declining to provide the jury with a written copy of the jury instructions when asked to do so by the jury.

State v. Smith, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091640-1.pdf). In a murder case, the trial court did not err by denying the defendant's request for an alibi instruction. The alibi defense rested on the defendant's testimony that he did not injure the child victim and that he left the child unattended in a bathtub for an extended period of time while meeting with someone else. The court concluded that this testimony was merely incidental to the defendant's denial that he harmed the child and did not warrant an alibi instruction. The testimony did not show that the defendant was somewhere which would have made it impossible for him to have been the perpetrator, given that the precise timing of the incident was not determined and the defendant had exclusive custody of the child before his death.

State v. Ferguson, __ N.C. App. __, __ S.E.2d __ (Sept. 21, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091507-1.pdf). The trial court properly instructed the jury according to N.C.P.I. – Crim. 104.70 pertaining to confessions where the defendant told the police that he stabbed the victim and described the altercation in detail.

State v. Bettis, __ N.C. App. __, __ S.E. 2d __ (Sept. 7, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091345-1.pdf). There was sufficient evidence to support an instruction on flight. A masked man robbed a store and left in a light-colored sedan. Shortly thereafter, an officer saw a vehicle matching this description and a high speed chase ensued. The vehicle was owned by the defendant. The driver abandoned the vehicle; a mask and a gun were found inside. Although the defendant initially reported that his car was stolen, he later admitted that his report was false. The court rejected the defendant's argument that the instruction was improper because there was only circumstantial evidence that defendant was the person who fled the scene.

State v. Owens, __ N.C. App. __, __ S.E.2d __ (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091441-1.pdf). In a case involving a charge of possession of implements of housebreaking, the trial court erred by instructing the jury that bolt cutters, vice grips, channel lock pliers, flashlights, screwdrivers, a hacksaw, and a ratchet and socket are implements of housebreaking.

The instruction was tantamount to a peremptory instruction that the tools at issue were implements of housebreaking. However, the error was not plain error.

Jury Selection

State v. Headen, __ N.C. App. __, __ S.E.2d __ (Aug. 3, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090606-1.pdf). The trial court did not err by overruling the defendant's *Batson* objection to the State's peremptory challenge of an African-American juror. The defendant, who is African-American, was tried for murder. In response to the defendant's *Batson* objection, the prosecutor explained to the trial court that the juror was challenged because he was heavily tattooed and dressed in baggy, low hanging jeans decorated with a blood-red colored splatter. The prosecutor expressed concern over what the juror chose to wear to court and "his choice of applying . . . that much ink." The court found the State's reason for striking the juror to be race-neutral. It also held that the trial court did not err by finding that the defendant failed to prove purposeful discrimination. The court determined that the defendant's statistical evidence was not helpful because the jury pool contained only one or two African-Americans. Although defense counsel had suggested to the trial court that there were "racial overtones" in the defendant's prior trials, no evidence of this was presented. The court also rejected the defendant's argument that the State's explanation for excluding the juror was pretextual. Finally, the court noted that both the victim and the defendant were African-American, the State asked no racially motivated questions, the State's method of questioning the juror did not differ from its method of questioning other jurors, the State used only two peremptory challenges and contemporaneously challenged both a black and white prospective juror, the defendant left unresolved the question whether one of the jurors accepted by the State was African-American, and the defendant failed to show that any other prospective jurors wore clothing or had tattooing similar to that displayed by the juror in question.

State v. Simmons, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090862-1.pdf). In an impaired driving case, the trial court did not abuse its discretion by allowing the State's challenge for cause of a juror while denying a defense challenge for cause of another juror. The juror challenged by the State had a pending impaired driving case in the county and admitted to consuming alcohol at least three times a week, and stated that despite his pending charge, he could be fair and impartial. The juror challenged by the defense was employed with a local university police department as a traffic officer. He had issued many traffic citations, worked closely with the District Attorney's office to prosecute those and other traffic cases, including impaired driving cases, and had never testified for the defense. He indicated that he could be fair and impartial. Distinguishing *State v. Lee*, 292 N.C. 617 (1977), the court noted that the juror challenged by the defense did not have a personal relationship with any officer involved in the case and never indicated he might not be able to be fair and impartial. The court rejected the notion that a juror must be excused solely on the grounds of a close relationship with law enforcement.

Skilling v. United States, 561 U.S. __ (June 24, 2010) (http://www.supremecourt.gov/opinions/09pdf/08-1394.pdf). The defendant was tried for various federal crimes in connection with the collapse of Enron. The Court held that the defendant's Sixth Amendment right to trial by an impartial jury was not violated when the federal district court denied the defendant's motion to change venue because of pretrial publicity. The Court distinguished the case at hand from previous decisions and concluded that given the community's population (Houston, Texas), the nature of the news stories about the defendant, the lapse in time between Enron's collapse and the trial, and the fact that the jury acquitted the defendant of a number of counts, a presumption of juror prejudice was not warranted. The Court went on to conclude that actual prejudice did not infect the jury, given the voir dire process.

Motion to Dismiss

State v. Pastuer, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091432-1.pdf). The trial court erred by denying the defendant's motion to dismiss a charge alleging that he murdered his wife. The State's case was based entirely on circumstantial evidence. Distinguishing *State v. Lowry*, and another case, the court held that although the State may have introduced sufficient evidence of motive, evidence of the defendant's opportunity and ability to commit the crime was insufficient to show that he was the perpetrator. No evidence put the defendant at the scene. Although a

trail of footprints bearing the victim's blood was found at her home and her blood was found on the bottom of one of the defendant's shoes, the State failed to present substantial evidence that the victim's DNA could only have gotten on the defendant's shoe at the time of the murder. Evidence that the defendant was seen walking down a highway sometime around the victim's disappearance and that her body was later found in the vicinity did not supply substantial evidence that he was the perpetrator.

State v. Kirby, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091631-1.pdf). The trial court did not err by denying the defendant's motion to dismiss a charge of second-degree murder based on the defendant's contention that he acted in self-defense. The evidence was sufficient to establish that rather than acting in self-defense, the defendant went armed after the victim to settle an argument.

Suppression Motions

State v. Reavis, __ N.C. App. __, __ S.E.2d __ (Sept. 21, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091425-1.pdf). The defendant's motion to suppress his statement made during a police interview was untimely. The motion was not made until trial and there was no argument that the State failed to disclose evidence of the interview or statement in a timely manner.

Juror Misconduct

State v. Patino, __ N.C. App. __, __ S.E.2d __ (Oct. 5, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100201-1.pdf). The trial court did not abuse its discretion by failing to conduct an inquiry into allegations of jury misconduct or by denying the defendant's motion for a new trial. The day after the verdict was delivered in the defendant's sexual battery trial and at the sentencing hearing, defense counsel moved for a new trial, arguing that several jurors had admitted looking up, on the Internet during trial, legal terms (sexual gratification, reasonable doubt, intent, etc.) and the sexual battery statute. The trial court did not conduct any further inquiry and denied defendant's motion. Because definitions of legal terms are not extraneous information under Evidence Rule 606 and did not implicate defendant's constitutional right to confront witnesses against him, the allegations were not proper matters for an inquiry by the trial court.

Pleas

State v. Mohamed, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090943-1.pdf). The inclusion of an incorrect file number on the caption of a transcript of plea was a clerical error that did not invalidate a plea to obtaining property by false pretenses where the plea was taken in compliance with G.S. 15A-1022 and the body of the form referenced the correct file number. The incorrect file number related to an armed robbery charge against the defendant.

Sentencing

Active Sentence

State v. Miller, __ N.C. App. __, __ S.E.2d __ (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091193-1.pdf). Under the Structured Sentencing Act a trial judge does not have authority to allow a defendant to serve an active sentence on nonconsecutive days, such as on weekends only.

***Blakely/Apprendi* Issues**

State v. Shaw, __ N.C. App. __, __ S.E.2d __ (Oct. 5, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091096-1.pdf). The court rejected the defendant's argument that the trial court took into account a non-statutory aggravating factor neither stipulated to nor found by the jury beyond a reasonable doubt. The defendant's argument was based on the trial court's comments that (1) the defendant could have been tried for premeditated first degree murder and (2) "the State . . . made a significant

concession . . . allowing [him] to plead second-degree murder." When taken in context, these comments were merely responses to those made by defense counsel.

Mitigating Factors

State v. Davis, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091589-1.pdf). The trial court did not abuse its discretion by failing to find mitigating factors. As to acceptance of responsibility, the court found that although the defendant apologized for her actions, her statement did not lead to the "sole inference that [s]he accepted [and that] [s]he was answerable for the result of [her] criminal conduct." Although defense counsel argued other mitigating factors, no supporting evidence was presented to establish them. Finally, although the defendant alleged that a drug addiction compelled her to commit the offenses, the court noted that drug addiction is not *per se* a statutorily enumerated mitigating factor and in any event, the defendant did not present any evidence on this issue at sentencing.

Expunction

State v. Frazier, __ N.C. App. __, __ S.E.2d __ (Aug. 3, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100019-1.pdf). The trial court erred by applying G.S. 14-50.30 and expunging the defendant's conviction for an offense occurring on February 6, 1995. At the time, the statute only applied to offenses occurring on or after December 1, 2008.

Impermissibly Based on Exercise of Rights

State v. Pinkerton, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090654-1.pdf). Over a dissent, the court held that when sentencing the defendant in a child sexual assault case, the trial court impermissibly considered the defendant's exercise of his right to trial by jury. After the jury returned a guilty verdict and the defendant was afforded the right to allocution, the trial court stated that "if you truly cared–if you had one ounce of care in your heart about that child–you wouldn't have put that child through this." Instead, according to the trial court, defendant "would have pled guilty, and you didn't." The court stated: "I'm not punishing you for not pleading guilty . . . I would have rewarded you for pleading guilty."

Merger Rule

State v. Blymyer, __ N.C. App. __, __ S.E.2d __ (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091722-1.pdf). The trial court erred by consolidating for judgment convictions for first-degree murder and robbery with a dangerous weapon where the jury did not specify whether it had found the defendant guilty of first-degree murder based on premeditation and deliberation or on felony-murder. In this situation, the robbery merged with the murder.

Prayer for Judgment Continued

State v. Craven, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091138-1.pdf). The court had jurisdiction to enter judgment on a PJC. The defendant was indicted on August 7, 2006, and entered a guilty plea on January 22, 2007, when a PJC was entered, from term to term. Judgment was entered on March 13, 2009. Because the defendant never requested sentencing, he consented to continuation of sentencing and the two-year delay was not unreasonable.

Prior Record Level

State v. Fair, __ N.C. App. __, __ S.E.2d __ (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091381-1.pdf). On appeal, a defendant is bound by his or her stipulation to the existence of a prior conviction. However, even if a defendant has stipulated to his or her

prior record level, the defendant still may appeal the propriety of counting a stipulated-to conviction for purposes of calculating prior record level points. In this case, the trial court erred by counting, for prior record level purposes, two convictions in a single week of court in violation of G.S. 15A-1340.14(d).

Restitution

State v. Ferguson, __ N.C. App. __, __ S.E.2d __ (Sept. 21, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091507-1.pdf). The trial court erroneously ordered the defendant to pay restitution where the State offered only the Restitution Worksheet in support of the award.

State v. Dallas, __ N.C. App. __, __ S.E.2d __ (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090644-1.pdf). In a larceny of motor vehicle case, the restitution award was not supported by competent evidence. Restitution must be supported by evidence adduced at trial or at sentencing; the unsworn statement of the prosecutor is insufficient to support restitution. In this case, the trial court ordered the defendant to pay $8,277.00 in restitution based on an unverified worksheet submitted by the State. However, the evidence at trial showed that the value of the stolen items was $1,200.00 - $1,400.00.

State v. Davis, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091589-1.pdf). The evidence was insufficient to support a restitution award. The State conceded that it did not introduce evidence to support the restitution request. However, it argued that the defendant stipulated to the amount of restitution when she stipulated to the factual basis for the plea and that the specific amounts of restitution owed were incorporated into the stipulated factual basis by reference to the restitution worksheets submitted to the court. The court rejected these arguments, concluding that a restitution worksheet, unsupported by testimony or documentation, cannot support a restitution order and that the defendant did not stipulate to the amounts awarded.

Good Time/Gain Time

Jones v. Keller, __ N.C. __, __ S.E.2d __ (Aug. 27, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/518PA09-1.pdf). The trial court erred by granting the petitioner habeas corpus relief from incarceration on the grounds that he had accumulated various credits against his life sentence, imposed on September 27, 1976. The petitioner had argued that when his good time, gain time, and merit time were credited to his life sentence, which was statutorily defined as a sentence of 80 years, he was entitled to unconditional release. The court rejected that argument, concluding that DOC allowed credits to the petitioner's sentence only for limited purposes that did not include calculating an unconditional release date. DOC had asserted that it recorded gain and merit time for the petitioner in the event that his sentence was commuted, at which time they would be applied to calculate a release date; DOC asserted that good time was awarded solely to allow him to move to the least restrictive custody grade and to calculate a parole eligibility date. The court found that the limitations imposed by DOC on these credits were statutorily and constitutionally permissible and that, therefore, the petitioner's detention was lawful. The court also rejected the petitioner's ex post facto and equal protection arguments.

Brown v. North Carolina DOC, __ N.C. __, __ S.E.2d __ (Aug. 27, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/517PA09-1.pdf). For the reasons stated in *Jones* (discussed above), the court held that the trial court erred by granting the petitioner habeas corpus relief from incarceration on the grounds that she had accumulated various credits against her life sentence.

Sex Offenders

Reportable Convictions

State v. Stanley, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091263-1.pdf). A conviction for abduction of a child under G.S. 14-41 triggers registration requirements if the offense is committed against a minor and the person committing the offense is not the minor's parent. The court held that as used in G.S. 14-208.6(1i), the term parent

includes only a biological or adoptive parent, not one who "acts as a parent" or is a stepparent.

Satellite-Based Monitoring (SBM)

State v. Cowan, __ N.C. App. __, __ S.E.2d __ (Sept. 21, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091415-1.pdf). (1) G.S. 14-208.40B (procedure for determining SBM eligibility when eligibility was not determined when judgment was imposed) applies to SBM proceedings initiated after December 1, 2007, even if those proceedings involve offenders who had been sentenced or had committed the offenses that resulted in SBM eligibility before that date. The defendant received a probationary sentence for solicitation of indecent liberties on August 30, 2007 and thus was subject to SBM requirements, which apply to any offender sentenced to intermediate punishment on or after August 16, 2006. He challenged the trial court's later order requiring him to enroll in SBM, arguing that G.S. 14-208.40B did not apply to offenses committed prior to December 1, 2007, the statute's effective date. (2) Following prior case law, the court held that the SBM statute did not violate the constitutional prohibition against ex post facto laws. (3) The defendant did not receive adequate notice of the basis for the Department of Correction's preliminary determination that he should be required to enroll in SBM under the version of G.S. 14-208.40B(b) applicable to the defendant's case. Specifically the notice failed to specify the category set out in G.S. 14-208.40(a) into which the Department had determined that the defendant fell and to briefly state the factual basis for its conclusion. (4) Assuming without deciding that an elements-based approach should be used when determining eligibility for SBM under G.S. 14-208.40(a)(2), the trial court did not err by requiring the defendant to enroll in SBM on the grounds that the offense involved the physical, mental, or sexual abuse of a minor. Interpreting the word "involve," the court concluded that eligibility for SBM under G.S. 14-208.40(a)(2) includes both completed acts and acts that create a substantial risk that such abuse will occur. The court determined that an attempt to take an indecent liberty has "within or as part of itself" the physical, mental, or sexual abuse of a minor. It concluded that although solicitation of an indecent liberty need not involve the commission of the completed crime, an effort to "counsel, entice, or induce" another to commit that crime also creates a substantial risk that the "physical, mental, or sexual abuse of a minor" will occur, so that such a solicitation has the sexual abuse of a minor "as a "necessary accompaniment." (5) The trial court erred in requiring lifetime SBM under G.S. 14-208.40(a)(2); that provision subjects a person to SBM for a term of years.

State v. Oxendine, __ N.C. App. __, __ S.E.2d __ (Aug. 3, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090858-1.pdf). (1) Following *McCravey*, the court granted the State's petition for writ of certiorari and remanded for entry of an order requiring lifetime SBM enrollment on the basis of the defendant's second-degree rape conviction, which involved a mentally disabled victim. A concurring opinion agreed that the second-degree rape conviction was an aggravated offense, but not as a direct result of *McCravey*. (2) Following *Kilby* and *Causby*, the court held that the trial court erroneously determined that the defendant required the highest level of supervision and monitoring. The Static 99 concluded that the defendant posed a low risk of re-offending and no other evidence supported the trial court's determination.

State v. Clayton, __ N.C. App. __, __ S.E.2d __ (Aug. 3, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090987-1.pdf). Because the trial court previously held a hearing pursuant to G.S. 14-208.40B (SBM determination after sentencing) and determined that the defendant was not required to enroll in SBM, the trial court lacked jurisdiction to later hold a second SBM hearing on the same reportable conviction. In this case, the defendant was summoned for the second SBM hearing after a probation violation. The trial court required the defendant to enroll in SBM based on the fact that his probation violation was sexual in nature. The court reasoned that a probation violation is not a crime and cannot constitute a new reportable conviction.

Sequestration

State v. Patino, __ N.C. App. __, __ S.E.2d __ (Oct. 5, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100201-1.pdf). The trial court did not abuse its discretion by denying the defendant's motion to sequester the State's witnesses. In support of sequestration, defense counsel argued that there were a number of witnesses and that they might have forgotten about the incident. The court noted that neither of these reasons typically supports a sequestration order and that counsel did not explain or

give specific reasons to suspect that the State's witnesses would be influenced by each other's testimony. The court also held that a trial court is not required to explain or defend a ruling on a motion to sequester.

Use of Defendant's Silence at Trial

State v. Mendoza, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090327-1.pdf). The trial court erred by allowing the State to introduce evidence, during its case in chief, of the defendant's pre-arrest and post-arrest, pre-*Miranda* warnings silence. The only permissible purpose for such evidence is impeachment; since the defendant had not yet testified when the State presented the evidence, the testimony could not have been used for that purpose. Also, the State's use of the defendant's post-arrest, post-*Miranda* warnings silence was forbidden for any purpose. However, the court concluded that there was no plain error given the substantial evidence pointing to guilt.

State v. Smith, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091640-1.pdf). The trial court did not improperly allow use of the defendant's post-arrest silence when it allowed the State to impeach him with his failure to provide information about an alleged meeting with a drug dealer. In this murder case, the defendant claimed that the child victim drowned in a bathtub while the defendant met with the dealer. The defendant's pre-trial statements to the police never mentioned the meeting. The court held that because the defendant waived his rights and made pre-trial statements to the police, the case did not involve the use of post-arrest silence for impeachment. Rather, it involved only the evidentiary issue of impeachment with a prior inconsistent statement.

Venue

Skilling v. United States, 561 U.S. __ (June 24, 2010) (http://www.supremecourt.gov/opinions/09pdf/08-1394.pdf). The defendant was tried for various federal crimes in connection with the collapse of Enron. The Court held that the defendant's Sixth Amendment right to trial by an impartial jury was not violated when the federal district court denied the defendant's motion to change venue because of pretrial publicity. The Court distinguished the case at hand from previous decisions and concluded that given the community's population (Houston, Texas), the nature of the news stories about the defendant, the lapse in time between Enron's collapse and the trial, and the fact that the jury acquitted the defendant of a number of counts, a presumption of juror prejudice was not warranted. The Court went on to conclude that actual prejudice did not infect the jury, given the voir dire process.

Verdict

State v. Sargeant, __ N.C. App. __, __ S.E.2d __ (Aug. 3, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090262-1.pdf). Over a dissent, the court held that by taking a partial verdict, the trial court violated the defendant's state constitutional right to a unanimous verdict and that the error was not harmless beyond a reasonable doubt. The defendant was convicted of first-degree murder, first-degree kidnapping, robbery with a dangerous weapon, and burning of personal property. At the end of the first day of deliberations, the jury had not reached a unanimous decision as to each of the charges. The trial court asked the jury to submit verdict sheets for any of the charges for which it had unanimously found the defendant guilty. The trial court then received the jury's verdicts finding the defendant guilty of first-degree kidnapping, robbery with a dangerous weapon, and burning of personal property, as well as first-degree murder on the bases of both felony murder and lying in wait. The only issue left for the jury to decide was whether the defendant was guilty of first-degree murder on the basis of premeditation and deliberation. The next morning, the court gave the jury a new verdict sheet asking only whether the defendant was guilty of first-degree murder on the basis of premeditation and deliberation. The jury returned a guilty verdict later that day. The trial court erred by taking a verdict as to lying in wait and felony murder when the jury had not yet agreed on premeditation and deliberation. Premeditation and deliberation, felony murder, and lying in wait are not crimes, but rather theories of first-degree murder. The trial court cannot take a verdict on a theory. Therefore, the trial court erred by taking partial verdicts on theories of first-degree murder. Because the State had not proved that the error was not harmless beyond a reasonable doubt, the court ordered a new trial on the murder charge.

Evidence

404(b) Evidence

State v. Register, __ N.C. App. __, __ S.E. 2d __ (Sept. 7, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090629-1.pdf). In a child sexual abuse case involving a female victim, the trial court did not err by allowing testimony from four individuals (three females and one male) that the defendant sexually abused them when they were children. The events occurred 14, 21, and 27 years prior to the abuse at issue. Citing *State v. Jacob*, 113 N.C. App. 605 (1994), and *State v. Frazier*, 121 N.C. App. 1 (1995), the court rejected the defendant's argument that the evidence lacked sufficient temporal proximity to the events in question. The challenged testimony, showing common plan, established a strikingly similar pattern of sexually abusive behavior by the defendant over a period of 31 years in that: the defendant was married to each of the witnesses' mothers or aunt; the victims were prepubescent; the incidents occurred when the defendant's wife was at work and he was watching the children; and the abuse involved fondling, fellatio, or cunnilingus, mostly taking place in the defendant's wife's bed. Although there was a significant gap in time between the last abuse and the events in question, that gap was the result of defendant's not having access to children related to his wife and thus did not preclude admission under Rule 404(b). Finally, the court held that trial judge did not abuse his discretion by admitting this evidence under Rule 403.

State v. Mohamed, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090943-1.pdf). In an armed robbery case, evidence of the defendant's involvement in another robbery was properly admitted under Rule 404(b). In both instances, the victims were robbed of their credit or debit cards by one or more handgun-wielding individuals with African accents, which were then used by the defendant to purchase gas at the same gas station within a very short period of time. The evidence was admissible to prove a common plan or scheme and identity. The court further held that the trial court did not abuse its discretion by failing to exclude the evidence under Rule 403.

State v. Blymyer, __ N.C. App. __, __ S.E.2d __ (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091722-1.pdf). In a murder and armed robbery case, the trial court did not commit plain error by admitting 404(b) evidence that the defendant broke into and stole from two houses near the time of the victim's death. The evidence was relevant to illustrate the defendant's motive for stealing from the victim—to support an addiction to prescription pain killers.

State v. Ferguson, __ N.C. App. __, __ S.E.2d __ (Sept. 21, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091507-1.pdf). In a murder case, the trial court did not abuse its discretion by excluding under Rule 404(b) defense evidence that the murder victim was openly homosexual and had a preference for heterosexual individuals. The defendant testified that the victim said he would forgive the defendant's debt in exchange for sex and that when the defendant refused this offer, the victim drew a knife and cut him, starting the altercation. The defendant argued that the evidence proved that the victim "made aggressive homosexual advances on heterosexual men for sex in exchange for favors." Citing, *State v. Laws*, 345 N.C. 585 (1997) (victim's homosexuality has no more tendency to prove that he would be likely to sexually assault a male than would a victim's heterosexuality show that he would be likely to sexually assault a female; because an individual's sexual orientation bears no relationship to the likelihood that one would threaten a sexual assault, it bears no relationship to defendant's claim that he killed in self-defense in response to a threatened sexual assault), the court rejected the defendant' argument.

Authentication

State v. Mobley, __ N.C. App. __, __ S.E.2d __ (Aug. 3, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090975-1.pdf). The trial court did not abuse its discretion by concluding that an audio recording of a booking-area phone call was properly authenticated under Rule 901 as having been made by the defendant. The State's authentication evidence showed: (1) the call was made to the same phone number as later calls made using the defendant's jail positive identification number; (2) the voice of the caller was similar to later calls placed from the jail using the defendant's jail positive identification number; (3) a witness familiar with the defendant's voice identified the defendant as the caller; (4) the caller identified himself as

"Little Renny" and the defendant's name is Renny Mobley; and (5) the caller discussed circumstances similar to those involved with the defendant's arrest.

Competency of Witnesses

State v. Forte, __ N.C. App. __, __ S.E. 2d __ (Sept. 7, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091591-1.pdf). The trial court did not abuse its discretion by finding an elderly victim to be competent. The witness correctly testified to his full name and birth date and where he lived. He was able to correctly identify family members, the defendant, and his own signature. He understood that he was at the courthouse, that a trial was occurring, and his duty to tell the truth. His testimony also demonstrated his ability to tell the truth from a lie. Noting that some of his answers were ambiguous and vague and that he was unable to answer some questions, the court concluded that it would not be unusual for an elderly person to have some difficulty in responding coherently to all of the voir dire questions.

Crawford Issues

State v. Craven, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091138-1.pdf). Following *State v. Brewington*, the court held that the defendant's confrontation clause rights were violated when the trial court allowed a substitute analyst to testify that a substance was cocaine, based on testing done and reports prepared by non-testifying analysts. Even though the State had offered lay testimony by a cocaine user that the substance was cocaine, the court concluded that the error was not harmless beyond a reasonable doubt, reasoning that a lay opinion would not have the same effect on the jury as an expert opinion.

State v. Grady, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090823-1.pdf). Even if the defendant's confrontation clause rights were violated when the trial court allowed a substitute analyst to testify regarding DNA testing done by a non-testifying analyst, the error was harmless beyond a reasonable doubt.

State v. Blue, __ N.C. App. __, __ S.E.2d __ (Oct. 5, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091717-1.pdf). The trial court did not err by allowing the Chief Medical Examiner to testify regarding an autopsy of a murder victim when the Medical Examiner was one of three individuals who participated in the actual autopsy. The Medical Examiner testified to his own observations, provided information rationally based on his own perceptions, and did not testify regarding anyone else's declarations or findings.

State v. Blackwell, __ N.C. App. __, __ S.E.2d __ (Sept. 21, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091476-1.pdf). The court ordered a new trial in a drug case in which the trial court admitted laboratory reports regarding the identity, nature, and quantity of the controlled substances where the State had not complied with the notice and demand provisions in G.S. 90-95(g) and (g1). Instead of sending notice directly to the defendant, who was *pro se*, the State sent notice to a lawyer who was not representing the defendant at the time.

Cross-Examination, Impeachment, and Opening the Door

State v. Smith, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091640-1.pdf). The State properly impeached the defendant with prior inconsistent statements. In this murder case, the defendant claimed that the child victim drowned in a bathtub while the defendant met with a drug dealer. Although the defendant gave statements prior to trial, he never mentioned that meeting. At trial, the State attempted to impeach him with this fact. The court noted that to qualify as inconsistent, the prior statement must have eliminated "a material circumstance presently testified to which would have been natural to mention in the prior statement." The court noted that the defendant voluntarily gave the police varying explanations for why the child stopped breathing (he threw up and then stopped breathing after falling asleep; he drowned in the tub). An alleged meeting while the child was in the tub would have been

natural to include in these prior statements. Thus, the court concluded, his prior inconsistent statements were properly used for impeachment.

State v. Choudhry, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090773-1.pdf). Because the State did not offer a portion of a co-defendant's inadmissible hearsay statement into evidence, it did not open the door to admission of the statement. The only evidence in the State's case pertaining to the statement was an officer's testimony recounting the defendant's response after being informed that the co-defendant had made a statement to the police.

State v. Ligon, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090747-1.pdf). In a sexual exploitation of a minor and indecent liberties case, the court held that the defendant opened the door to admission of hearsay statements by the child victim and her babysitter.

State v. Reavis, __ N.C. App. __, __ S.E.2d __ (Sept. 21, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091425-1.pdf). The defendant opened the door to the State's cross-examination of a defense expert regarding prior offenses. On direct examination, the defendant's psychiatric expert reviewed the defendant's history of mental illness, including mention of his time in prison in 1996 for robbery. Defense counsel presented evidence as to defendant's time in prison, the year of the crime, the type of crime, defendant's time on probation, and a probation violation which returned him to prison. On cross-examination, the State questioned the expert about the defendant's time in prison, the defendant's previous "pleas which ultimately sent [defendant] to prison[,]" and the exact dates and times of the incidents, one of which led to the defendant's incarceration. The defendant raised no objection until the State presented police reports from the defendant's prior robbery conviction. Because the expert had testified about the robbery, the State could inquire into his knowledge of the events which led to the conviction.

State v. Ferguson, __ N.C. App. __, __ S.E.2d __ (Sept. 21, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091507-1.pdf). (1) Under the rationale of *State v. Wallace*, 351 N.C. 481 (2000), the trial court did not abuse its discretion in a murder case by allowing the State to cross-examine the defendant's expert psychiatrist concerning a 2005 murder. At a pretrial hearing, the trial court held that the evidence was inadmissible. At trial, the defendant called the expert, Dr. Corbin, who opined that the victim's conduct triggered a traumatic reaction in defendant and that it was improbable that defendant intentionally planned the murder. On cross, the State examined Corbin concerning the 2005 homicide and why that murder was committed without the traumatic reaction that Corbin stated was caused by the victim's conduct. The court noted that as in *Wallace*, the issue was presented during the guilt-innocence phase; also, the prosecutor's questions pertained to the bases of the expert's opinion and were not solely designed to put the 2005 murder before the jury, the trial court's initial exclusion of the murder charges showed its awareness of the potential danger of undue prejudice, and in accordance with *Wallace*, the trial court gave a detailed limiting instruction to the jury. (2) The court rejected the defendant's argument that the trial court erred by allowing the prosecutor to impeach the defendant with evidence regarding his exercise of his right to counsel. The State cross-examined the defendant concerning whether he had talked to his attorneys, how many times he talked with them, whether they discussed his trial testimony, whether they discussed the strengths and weaknesses of his case, whether defendant changed his story after learning the difference in punishment for voluntary manslaughter and murder, and whether he understood the felony murder rule. The focus of the testimony was to show that the defendant changed his story to avoid the most serious consequences of his actions. Defense counsel made a general objection to the first question but did not lodge further objections. The court held that in the absence of a specific objection raising attorney-client privilege or a constitutional issue, the trial court did not abuse its discretion in overruling defendant's objection. (3) Distinguishing *State v. Locklear*, 294 N.C. 210 (1978) (improper for a lawyer to assert that witness is lying), the court held that the prosecutor did not call the defendant a liar or state that he was lying. The defendant admitted lying during direct examination. On cross, the prosecutor asked the defendant how many people he had lied to. (4) Although the court found that the prosecutor's cross-examination mentioning potential sentencing ranges was "fraught with . . . dangers of misleading the jury," it did not rise to the level of plain error.

Hearsay

Hearsay Exceptions

State v. McLean, __ N.C. App. __, __ S.E.2d __ (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091602-1.pdf). Information in a police department database linking the defendant's name to her photograph fell within the Rule 803(8) public records hearsay exception. After an undercover officer engaged in a drug buy from the defendant, he selected the defendant's photograph from an array presented to him by a fellow officer. The fellow officer then cross-referenced the photograph in the database and determined that the person identified was the defendant. This evidence was admitted at trial. The court noted that although the Rule 803(8) exception excludes matters observed by officers and other law enforcement personnel regarding a crime scene or apprehension of the accused, it allows for admission of public records of purely ministerial observations, such as fingerprinting and photographing a suspect, and cataloguing a judgment and sentence. The court concluded that the photographs in the police department's database were taken and compiled as a routine procedure following an arrest and were not indicative of anything more than that the person photographed has been arrested. It concluded: "photographing an arrested suspect is a routine and unambiguous record that Rule 803(8) was designed to cover. Absent evidence to the contrary, there is no reason to suspect the reliability of these records, as they are not subject to the same potential subjectivity that may imbue the observations of a police officer in the course of an investigation."

State v. Dallas, __ N.C. App. __, __ S.E.2d __ (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090644-1.pdf). In a larceny of motor vehicle case, the court held that the Kelley Blue Book and the NADA pricing guide fall within the Rule 803(17) hearsay exception for "[m]arket quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations." Those items were use to establish the value of the motor vehicles stolen.

State v. Choudhry, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090773-1.pdf). (1) The trial court did not abuse its discretion by sustaining the State's objection to a defense proffer of a co-defendant's hearsay statement indicating that he and the defendant acted in self-defense. The statement was not admissible under Rule 804(b)(3) (statement against interest exception). To be admissible under that rule, (1) the statement must be against the declarant's interest, and (2) corroborating circumstances must indicate its trustworthiness. As to the second prong, there must be an independent, non-hearsay indication of trustworthiness. There was no issue about whether the statement satisfied the first prong. However, as to the second, there was no corroborating evidence. Furthermore, the co-defendant had a motive to lie: he was he friends with the defendant, married to the defendant's sister, and had an incentive to exculpate himself. Nor was the statement admissible under the Rule 804(b)(5) catchall exception. Applying the traditional six-part residual exception analysis, the court concluded that, for the reasons noted above, the statement lacked circumstantial guarantees of trustworthiness. (2) The trial court did not abuse its discretion by sustaining the State's objection to a defense proffer of a co-defendant's hearsay statement indicating that he and the defendant acted in self-defense. The statement was not admissible under Rule 804(b)(3) (statement against interest exception). To be admissible under that rule, (1) the statement must be against the declarant's interest, and (2) corroborating circumstances must indicate its trustworthiness. As to the second prong, there must be an independent, non-hearsay indication of trustworthiness. There was no issue about whether the statement satisfied the first prong. However, as to the second, there was no corroborating evidence. Furthermore, the co-defendant had a motive to lie: he was he friends with the defendant, married to the defendant's sister, and had an incentive to exculpate himself. Nor was the statement admissible under the Rule 804(b)(5) catchall exception. Applying the traditional six-part residual exception analysis, the court concluded that, for the reasons noted above, the statement lacked circumstantial guarantees of trustworthiness.

State v. Sargeant, __ N.C. App. __, __ S.E.2d __ (Aug. 3, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090262-1.pdf). Over a dissent, the court ordered a new trial on grounds that the trial court erred by excluding defense evidence of an accomplice's hearsay statement, proffered under the residual hearsay exception. The court noted that the only factor in dispute under the six-factor residual exception *Triplett* test was the circumstantial guarantees of trustworthiness factor. To evaluate that factor, a

court must assess, among other things, (1) the declarant's personal knowledge of the underlying event; (2) the declarant's motivation to speak the truth; (3) whether the declarant recanted; and (4) the reason for the declarant's unavailability. In this case, it was clear that the declarant had personal knowledge. However, for reasons discussed in the opinion, the court held that the trial court erred with respect to its findings as to factors (2) – (4) and by assessing the trustworthiness of the statement by comparing it to other evidence presented at trial.

Opinions

Expert Opinions

State v. Livengood, __ N.C. App. __, __ S.E. 2d __ (Sept. 7, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091414-1.pdf). In a child sexual abuse case, the trial court did not abuse its discretion by overruling a defense objection to a response by the State's expert. On direct examination, the expert testified that the child's physical examination revealed no signs of trauma to the hymen. On cross-examination, she opined, without objection, that her physical findings could be consistent with rape or with no rape. On recross-examination, defense counsel asked: "And the medical aspects of this case physically are that there are no showings of any rape; correct?" The witness responded: "There's no physical findings which do not rule out her disclosure, sir." The trial judge overruled a defense objection to this response. The court rejected the defendant's argument that the expert's answer impermissibly commented on the victim's credibility, concluding that the expert's response was consistent with her prior testimony that her physical findings were consistent with rape or no rape.

State v. Register, __ N.C. App. __, __ S.E. 2d __ (Sept. 7, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090629-1.pdf). The trial court erred by denying the defendant's motion to strike a response by the State's expert witness in a child sexual abuse case. During cross-examination, defense counsel asked whether the victim told the expert that she had been penetrated. The expert responded: "She described the rubbing; and, I would say that, as far as vaginal penetration, since the oral penetration — well, I'm not discussing that. I mean, I felt that that was very graphic and believable." The testimony was not responsive to the question and was opinion testimony on the victim's credibility. The court rejected the State's argument that the statement was offered as a basis of the expert's opinion. However, the court found that the error was harmless.

State v. Ward, __ N.C. __, __ S.E.2d __ (June 17, 2010) (online at: http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/365PA09-1.pdf). In a drug case, the trial court abused its discretion by allowing the State's expert in chemical analyses of drugs and forensic chemistry to identify the pills at issue as controlled substances when the expert's method of making that identification consisted of a visual inspection and comparison with information in Micromedex literature, a publication used by doctors in hospitals and pharmacies to identify prescription medicines. The court concluded that the expert's proffered method of proof was not sufficiently reliable under the first prong of the *Howerton/Goode* analysis. It concluded: "Unless the State establishes before the trial court that another method of identification is sufficient to establish the identity of the controlled substance beyond a reasonable doubt, some form of scientifically valid chemical analysis is required." The court limited its holding to Rule 702 and stated that it "does not affect visual identification techniques employed by law enforcement for other purposes, such as conducting criminal investigations." Finally, the court indicated that "common sense limits this holding regarding the scope of the chemical analysis that must be performed." It noted that in the case at issue, the State submitted sixteen batches of over four hundred tablets to the laboratory, and that "a chemical analysis of each individual tablet is not necessary." In this regard, the court reasoned that the "SBI maintains standard operating procedures for chemically analyzing batches of evidence, and the propriety of those procedures is not at issue here. A chemical analysis is required in this context, but its scope may be dictated by whatever sample is sufficient to make a reliable determination of the chemical composition of the batch of evidence under consideration."

Lay Opinions

State v. Maready, __ N.C. App. __, __ S.E.2d __ (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/070171-2.pdf). It was error to allow officers, who were not proffered as experts in accident reconstruction and who did not witness the car accident in question, to

testify to their opinions that the defendant was at fault based on their examination of the accident scene. The court stated: "Accident reconstruction opinion testimony may only be admitted by experts, who have proven to the trial court's satisfaction that they have a superior ability to form conclusions based upon the evidence gathered from the scene of the accident than does the jury." However, the court went on to find that the error did not rise to the level of plain error.

State v. Ligon, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090747-1.pdf). In a sexual exploitation of a minor and indecent liberties case, the trial court did not err by allowing lay opinion testimony regarding photographs of a five-year-old child that formed the basis for the charges. None of the witnesses perceived the behavior depicted; instead they formed opinions based on their perceptions of the photographs. In one set of statements to which the defendant failed to object at trial, the witnesses stated that the photographs were "disturbing," "graphic," "of a sexual nature involving children," "objectionable," "concerning" to the witness, and that the defendant pulled away the minor's pant leg to get a "shot into the vaginal area." As to these statements, any error did not rise to the level of plain error. However the defendant did object to a statement in the Police Incident report stating that the photo "has the juvenile's female private's [sic] showing." At to this statement, the court held that the trial court did not abuse its discretion by admitting this testimony as a shorthand statement of fact.

On Credibility

State v. Ligon, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090747-1.pdf). In a sexual exploitation of a minor and indecent liberties case, the court rejected the defendant's argument that a testifying detective's statement that the defendant's explanation of the events was not consistent with photographic evidence constituted an improper opinion as to credibility of a witness. The court concluded that no improper vouching occurred.

Privilege

State v. Terry, __ N.C. App. __, __ S.E.2d __ (Oct. 5, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100009-1.pdf). The marital privilege did not apply when the parties did not have a reasonable expectation of privacy of their conversation, which occurred after they were arrested and in an interview room at the sheriff's department. Warning signs indicated that the premises were under audio and visual surveillance and there were cameras and recording devices throughout the department.

Relevancy

State v. Peterson, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090365-1.pdf). Evidence of events leading up to the assault in question was relevant to complete the story of the crime.

State v. Blymyer, __ N.C. App. __, __ S.E.2d __ (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091722-1.pdf). The trial court did not commit plain error under Rules 401 or 403 by admitting photographs of the murder victim's body. The trial court admitted 28 photographs and diagrams of the interior of the home where the victim was found, 12 of which depicted the victim's body. The trial court also admitted 11 autopsy photographs. An officer used the first set of photos to illustrate the position and condition of the victim's body and injuries sustained. A forensic pathology expert testified to his observations while performing the autopsy and the photographs illustrated the condition of the body as it was received and during the course of the autopsy. The photographs had probative value and that value, in conjunction with testimony by the officer and the expert was not substantially outweighed by their prejudicial effect.

Rule 403

State v. Blymyer, __ N.C. App. __, __ S.E.2d __ (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091722-1.pdf). The trial court did not commit plain

error under Rules 401 or 403 by admitting photographs of the murder victim's body. The trial court admitted 28 photographs and diagrams of the interior of the home where the victim was found, 12 of which depicted the victim's body. The trial court also admitted 11 autopsy photographs. An officer used the first set of photos to illustrate the position and condition of the victim's body and injuries sustained. A forensic pathology expert testified to his observations while performing the autopsy and the photographs illustrated the condition of the body as it was received and during the course of the autopsy. The photographs had probative value and that value, in conjunction with testimony by the officer and the expert was not substantially outweighed by their prejudicial effect.

State v. Kirby, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091631-1.pdf). In a homicide case in which the defendant asserted self-defense, the trial court did not abuse its discretion by admitting evidence that the defendant had been selling drugs in the vicinity of the shooting and was affiliated with a gang. The evidence showed that both the defendant and the victim were gang members. The court held that gang affiliation and selling drugs were relevant to show that the defendant could have had a different objective in mind when the altercation took place and could refute the defendant's claim of self-defense.

Victim Impact Evidence

State v. Ferguson, __ N.C. App. __, __ S.E.2d __ (Sept. 21, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091507-1.pdf). Although admission of victim impact evidence during the guilt phase of a murder trial was "likely" error, it did not rise to the level of plain error. The victim's sister testified that that "[w]hen [the victim] entered the room, it was like sunshine. He brought sunshine to our family. He was that person that no matter what, he loved his family and we loved him. Now that he is gone, there is not going to be any peace in our family." Also, a photograph of the victim and his mother was introduced.

Admissibility of Chemical Test Results in an Impaired Driving Case

State v. Simmons, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090862-1.pdf). The trial court did not err by denying the defendant's motion to suppress the results of the chemical analysis performed on the defendant's breath with the Intoxilyzer 5000 on grounds that preventative maintenance was not performed on the machine at least every 4 months as required by the Department of Health and Human Services. Preventive maintenance was performed on July 14, 2006 and December 5, 2006. The court concluded that although the defendant's argument might have had merit if the chemical analysis had occurred after November 14, 2006 (4 months after the July maintenance) and before December 5, 2006, it failed because the analysis at issue was done only 23 days after the December maintenance.

Miscellaneous Cases

State v. Dallas, __ N.C. App. __, __ S.E.2d __ (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090644-1.pdf). In a larceny of motor vehicle case, the court rejected the defendant's argument that testimony by the vehicle owners regarding the value of the stolen vehicles invaded the province of the jury as fact-finder, stating: "the owner of property is competent to testify as to the value of his own property even though his knowledge on the subject would not qualify him as a witness were he not the owner."

Arrest, Search, and Investigation

Vehicle Stops

State v. Simmons, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090862-1.pdf). Distinguishing *State v. Fields*, the court held that reasonable suspicion existed to support the stop. The defendant was not only weaving within his lane, but also was weaving across and outside the lanes of travel, and at one point ran off the road.

State v. Hudson, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091421-1.pdf). An officer had reasonable suspicion to stop the defendant's vehicle after the officer observed the vehicle twice cross the center line of I-95 and pull back over the fog line.

State v. Hopper, __ N.C. App. __, __ S.E.2d __ (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091211-1.pdf). The trial court properly concluded that an officer had reasonable suspicion to believe that the defendant was committing a traffic violation when he saw the defendant driving on a public street while using his windshield wipers in inclement weather but not having his taillights on. The trial court's conclusion that the street at issue was a public one was supported by competent evidence, even though conflicting evidence had been presented. The court noted that its conclusion that the officer correctly believed that the street was a public one distinguished the case from those holding that an officer's mistaken belief that a defendant had committed a traffic violation is constitutionally insufficient to support a traffic stop.

Consent

State v. Medina, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100071-1.pdf). A warrantless search of the defendant's car was valid on grounds of consent. The court rejected the defendant's argument that his consent was invalid because the officer who procured it was not fluent in Spanish. The court noted that the defendant was non-responsive to initial questions posed in English, but that he responded when spoken to in Spanish. The officer asked simple questions about weapons or drugs and when he gestured to the car and asked to "look," the defendant nodded in the affirmative. Although not fluent in Spanish, the officer had Spanish instruction in high school and college and the two conversed entirely in Spanish for periods of up to 30 minutes. The officer asked open ended-questions which the defendant answered appropriately. The defendant never indicated that he did not understand a question. The court also rejected the defendant's argument that his consent was invalid because the officer wore a sidearm while seeking the consent, concluding that the mere presence of a holstered sidearm does not render consent involuntary.

Exigent Circumstances

State v. Cline, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100007-1.pdf). Exigent circumstances existed for an officer to make a warrantless entry into the defendant's home to ascertain whether someone inside was in need of immediate assistance or under threat of serious injury. The officer was summoned after motorists discovered a young, naked, unattended toddler on the side of a major highway. The officer was able to determine that the child was the defendant's son with reasonable certainty and that the defendant resided at the premises in question. When the officer knocked and banged on front door, he received no response. The officer found the back door ajar. It would have taken the officer approximately two hours to get a search warrant for the premises.

Frisk

State v. King, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091659-1.pdf). An officer had reasonable suspicion to believe that the defendant was armed and dangerous justifying a pat-down frisk. Around midnight, the officer stopped the defendant's vehicle after determining that the tag was registered to a different car; prior to the stop, the defendant and his passenger had looked oddly at the officer. After the stop, the defendant held his hands out of the window, volunteered that he had a gun, which was loaded, and when exiting the vehicle, removed his coat, even though it was cold outside. At this point, the pat down occurred. The court rejected the defendant's argument that his efforts to show that he did not pose a threat obviated the need for the pat down. It also rejected the defendant's argument that the discovery of the gun could not support a reasonable suspicion that he still might be armed and dangerous; instead the court concluded that the confirmed presence of a weapon is a compelling factor justifying a frisk, even where that weapon is secured and out of the defendant's reach. Additionally, the officer was entitled to

formulate “common-sense conclusions,” based upon an observed pattern that one weapon often signals the presence other weapons, in believing that the defendant, who had already called the officer’s attention to one readily visible weapon, might be armed.

Interrogation

Miranda

State v. Mohamed, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090943-1.pdf). (1) The trial court did not commit plain error by failing to exclude the defendant’s statements to investigating officers after his arrest. The defendant had argued that because of his limited command of English, the *Miranda* warnings were inadequate and he did not freely and voluntarily waive his *Miranda* rights. The court determined that there was ample evidence to support a conclusion that the defendant’s English skills sufficiently enabled him to understand the *Miranda* warnings that were read to him. Among other things, the court referenced the defendant’s ability to comply with an officer’s instructions and the fact that he wrote his confession in English. The court also concluded that the evidence was sufficient to permit a finding that the defendant’s command of English was sufficient to permit him to knowingly and intelligently waive his *Miranda* rights, referencing, among other things, his command of conversational English and the fact that he never asked for an interpreter. (2) The trial court did not commit plain error by failing to exclude the defendant’s statements to investigating officers after his arrest. The defendant had argued that because of his limited command of English, the *Miranda* warnings were inadequate and he did not freely and voluntarily waive his *Miranda* rights. The court determined that there was ample evidence to support a conclusion that the defendant’s English skills sufficiently enabled him to understand the *Miranda* warnings that were read to him. Among other things, the court referenced the defendant’s ability to comply with an officer’s instructions and the fact that he wrote his confession in English. The court also concluded that the evidence was sufficient to permit a finding that the defendant’s command of English was sufficient to permit him to knowingly and intelligently waive his *Miranda* rights, referencing, among other things, his command of conversational English and the fact that he never asked for an interpreter.

In Re L.I., __ N.C. App. __, __ S.E.2d __ (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091306-1.pdf). A juvenile’s statement, made while in custody, was the product interrogation and not a voluntary, spontaneous statement. The trial court thus erred by denying the juvenile’s motion to suppress the statement, since the juvenile had not advised her of her rights under *Miranda* and G.S. 7B-2101(a). The juvenile was a passenger in a vehicle stopped by an officer. When the officer ordered the juvenile out of the vehicle, he asked, “[Where is] the marijuana I know you have[?]” After handcuffing and placing juvenile in the back of the patrol car, the officer told her that he was going to "take her downtown" and that "if [she] t[ook] drugs into the jail it[] [would be] an additional charge." The juvenile later told the officer that she had marijuana and that it was in her coat pocket. The court went on to hold that the trial judge did not err by admitting the seized marijuana. Rejecting the juvenile’s argument that the contraband must be excluded as fruit of the poisonous tree, the court concluded that because there was no coercion, the exclusionary rule does not preclude the admission of physical evidence obtained as a result of a *Miranda* violation. Although the juvenile was in custody at the time of her statement and her *Miranda* rights were violated, the court found no coercion, noting that there was no evidence that the juvenile was deceived, held incommunicado, threatened or intimidated, promised anything, or interrogated for an unreasonable period of time; nor was there evidence that the juvenile was under the influence of drugs or alcohol or that her mental condition was such that she was vulnerable to manipulation.

State v. Medina, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100071-1.pdf). The defendant’s waiver of *Miranda* rights was valid where *Miranda* warnings were given by an officer who was not fluent in Spanish. The officer communicated effectively with the defendant in Spanish, notwithstanding the lack of fluency. The defendant gave clear, logical, and appropriate responses to questions. Also, when the officer informed the defendant of his *Miranda* rights, he did not translate English to Spanish but rather read aloud the Spanish version of the waiver of rights form. Even if the defendant did not understand the officer, the defendant read each right, written in Spanish, initialed next to each right, and signed the form indicating that he understood his rights. The court noted that officers are not required to orally apprise a defendant of *Miranda* rights to effectuate a valid waiver.

State v. Moses, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091468-1.pdf). The trial court did not err by denying the defendant's motion to suppress where, although the defendant initially invoked his *Miranda* right to counsel during a custodial interrogation, he later reinitiated conversation with the officer. The defendant was not under the influence of impairing substances, no promises or threats were made to him, and the defendant was again fully advised of and waived his *Miranda* rights before he made the statement at issue.

Police Power

State v. Yencer, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090001-1.pdf). A Davidson College Police Department officer who arrested the defendant for impaired and reckless driving had no authority to do so. Applying precedent, the court held that because Davidson College is a religious institution, delegation of state police power to Davidson's campus police force pursuant to G.S. 74G was unconstitutional under the Establishment Clause of the First Amendment. The court "urge[d]" the North Carolina Supreme Court to grant a petition for discretionary review.

Government Employer Searches

City of Ontario v. Quon, 560 U.S. __ (June 17, 2010). Because a search of a government employee's text messages sent and received on a government-issued pager was reasonable, there was no violation of Fourth Amendment rights.

Search Warrants

State v. Terry, __ N.C. App. __, __ S.E.2d __ (Oct. 5, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100009-1.pdf). In a drug case, officers properly knocked and announced their presence when executing a search warrant. The court rejected the defendant's argument that the period of time between the knock and announcement and the entry into the house was too short. It concluded that because the search warrant was based on information that marijuana was being sold from the house and because that drug could be disposed of easily and quickly, the brief delay between notice and entry was reasonable.

Criminal Offenses

Acting in Concert

State v. Clagon, __ N.C. App. __, __ S.E.2d __ (Oct. 5, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100299-1.pdf). The court rejected the defendant's argument that to convict of burglary by acting in concert the State was required to show that the defendant had the specific intent that one of her accomplices would assault the victim with deadly weapon. The State's evidence, showing that the defendant forcibly entered the residence accompanied by two men carrying guns and another person, armed with an axe, who immediately asked where the victim was located, was sufficient evidence that an assault on the victim was in pursuance of a common purpose or as a natural or probable consequence thereof.

Homicide

State v. Ferguson, __ N.C. App. __, __ S.E.2d __ (Sept. 21, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091507-1.pdf). There was sufficient evidence of premeditation and deliberation where the defendant made contradictory statements to the police following the killing, the defendant and the victim had a dispute over money related to prior drug dealings, and the defendant inflicted 79 stab wounds on the victim, attempted to conceal evidence, and stole the victim's motor vehicle.

State v. Blue, __ N.C. App. __, __ S.E.2d __ (Oct. 5, 2010)

(http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091717-1.pdf). (1) The defendant's statement that he formed the intent to kill the victim and contemplated whether he would be caught before he began the attack was sufficient evidence that he formed the intent to kill in a cool state of blood for purposes of a first-degree murder charge. (2) The court rejected the defendant's argument that his evidence of alcohol and crack cocaine induced intoxication negated the possibility of premeditation and deliberation as a matter of law.

State v. Mack, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090672-1.pdf). There was sufficient evidence of malice in a second-degree murder case involving a vehicle accident. The defendant, whose license was revoked, drove extremely dangerously in order to evade arrest for breaking and entering and larceny. When an officer attempted to stop the defendant, he fled, driving more than 90 miles per hour, running a red light, and traveling the wrong way on a highway — all with the vehicle's trunk open and with a passenger pinned by a large television and unable to exit the vehicle.

Assaults

State v. Maready, __ N.C. App. __, __ S.E.2d __ (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/070171-2.pdf). The trial judge committed prejudicial error with respect to its instruction on the intent element for the charges of assault with a deadly weapon, in a case in which a vehicle was the deadly weapon. In order for a jury to convict of assault with a deadly weapon, it must find that it was the defendant's actual intent to strike the victim with his vehicle, or that the defendant acted with culpable negligence from which intent may be implied. Because the trial court's instruction erroneously could have allowed the jury to convict without a finding of either actual intent or culpable negligence, reversible error occurred.

Threats, Harassment, Stalking & Violation of Domestic Violence Protective Orders

State v. Van Pelt, __ N.C. App. __, __ S.E. 2d __ (Sept. 7, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091361-1.pdf). (1) In a prosecution under the prior version of the stalking statute, there was sufficient evidence to sustain a conviction. The court rejected the defendant's argument that the evidence showed communications to persons other than the alleged victim on all but one occasion, concluding that all of the communications were directed to the victim. The defendant harassed the victim by written communications, pager, and phone with no legitimate purpose. The communications were directed to the victim, including those to his office staff, made with the request that they be conveyed to the victim. The harassment placed the victim in fear as evidenced by his testimony, his actions in having his staff make sure the office doors were locked and ensuring the outside lights were working along with encouraging them to walk in "twos" to their cars, his wife's testimony of his demeanor during and after his phone call with the defendant, his late night phone call to a police officer, his action in taking out a restraining order, and his visit to his children's school to speak with teachers and counselors and to have them removed from the school's website. The victim's fears were reasonable given the defendant's odd behavior exhibiting a pattern of escalation. (2) The evidence was sufficient to establish that the defendant violated G.S. 14-196(a)(3) by making harassing phone calls. The defendant repeatedly called the victim at work to annoy and harass him. It was not necessary for the State to show that defendant actually spoke with the victim.

Sexual Assaults and Related Offenses

In Re R.N., __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091406-1.pdf). The trial court erred by denying the juvenile's motion to dismiss a charge of crime against nature; as to a second charge alleging the same offense, defects in the transcript made appellate review impossible. The first count alleged that the juvenile licked the victim's genital area. The evidence established that the juvenile licked her private, put his mouth on her private area, and "touch[ed] . . . on her private parts." Citing, *State v. Whittemore*, 255 N.C. 583 (1961), the court held that the evidence was insufficient to establish penetration. As to the second count, alleging that the juvenile put his penis in the victim's mouth, the evidence showed that the juvenile forced the victim's head down to his private and that she

saw his private area. Under *Whittemore*, this was insufficient evidence of penetration. However, when a social worker was asked whether there was penetration, she responded: "[the victim] told me there was *(Indistinct Muttering)* penetration." The court concluded that because it could not determine from this testimony whether penetration occurred, it could not meaningfully review the sufficiency of the evidence. The court vacated the adjudication and remanded for a hearing to reconstruct the social worker's testimony.

State v. Williams, __ N.C. App. __, __ S.E. 2d __ (Sept. 7, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100011-1.pdf). In a sexual offense case, there was sufficient evidence that the victim, an adult with 58 I.Q., was mentally disabled and that the defendant knew or should reasonably have known this. (1) Because the parties agreed that the victim was capable of appraising the nature of his conduct and of communicating an unwillingness to submit to a sexual act (he told the defendant he did not want to do the act), the issue on the mentally disabled element was whether the victim was substantially capable of resisting a sexual act. The victim was mildly mentally retarded. He had difficulty expressing himself verbally, was able to read very simple words and solve very simple math problems, and had difficulty answering questions about social abilities and daily tasks. He needed daily assistance with cooking and personal hygiene. Notwithstanding the victim's communication of his unwillingness to receive oral sex, the defendant completed the sexual act, allowing an inference that the victim was unable to resist. (2) There was sufficient evidence that the defendant knew or should have known that the victim was mentally disabled. An officer testified that within three minutes of talking with the victim, it was obvious that he had some deficits. By contrast, the defendant appeared normal and healthy. While the defendant had a driver's license, held regular jobs, took care of the victim's mother, could connect a VCR, and could read "somewhat," the victim could not drive, never held a regular job, could cook only in a microwave, had to be reminded to brush his teeth, did not know how to connect a VCR, and could not read. Moreover, the defendant had sufficient opportunity to get to know the victim, having dated the victim's mother for thirteen years and having spent many nights at the mother's house, where the victim lived.

State v. Patino, __ N.C. App. __, __ S.E.2d __ (Oct. 5, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100201-1.pdf). In a sexual battery case, the evidence was sufficient to establish that the defendant grabbed the victim's crotch for the purpose of sexual arousal, sexual gratification, or sexual abuse. The defendant previously had asked the victim for her phone number and for a date, and had brushed against her thigh in such a manner that the victim reported the incident to her supervisor and was instructed not to be alone with the defendant.

Larceny and Possession of Stolen Goods

State v. Ferguson, __ N.C. App. __, __ S.E.2d __ (Sept. 21, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091507-1.pdf). The evidence was sufficient to establish that the defendant intended to permanently deprive the victim of his property where the evidence showed that the defendant left the victim dead or dying in his apartment, stole his motor vehicle, and abandoned it at a car wash.

State v. Tanner, __ N.C. __, __ S.E.2d __ (June 17, 2010) (online at: http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/474PA08-1.pdf). Reversing the Court of Appeals and overruling *State v. Marsh*, 187 N.C. App. 235 (2007), and *State v. Goblet*, 173 N.C. App. 112 (2005), the Supreme Court held that a defendant who is acquitted of underlying breaking or entering and larceny charges may be convicted of felonious possession of stolen goods on a theory that the defendant knew or had reasonable grounds to believe that the goods were stolen.

State v. Moses, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091468-1.pdf). A defendant may not be sentenced for both robbery and possession of stolen property taken during the robbery.

State v. Marshall, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091416-1.pdf). In a possession of stolen property case, the trial court committed reversible error by instructing the jury on constructive possession. The property, a

vehicle stolen from a gas station, was found parked on the street outside of the defendant's residence. The defendant claimed that unknown to him, someone else drove the vehicle there. The State argued that evidence of a surveillance tape showing the defendant at the station when the vehicle was taken, the defendant's opportunity to observe the running, unoccupied vehicle, the fact that the vehicle was not stolen until defendant left the station, and the later discovery of the vehicle near the defendant's residence was sufficient to establish constructive possession. The court concluded that although this evidence showed opportunity, it did not show that the defendant was aware of the vehicle's location outside his residence, was at home when it arrived, that he regularly used that location for his personal use, or that the public street was any more likely to be under his control than the control of other residents. The court concluded that the vehicle's location on a public street not under the defendant's exclusive control and the additional circumstances recounted by the State did not support an inference that defendant had "the intent and capability to maintain control and dominion over" the vehicle. Based on the same analysis, the court also agreed with the defendant's argument that the trial court erred by denying his motions to dismiss as there was insufficient evidence that he actually or constructively possessed the stolen vehicle and by accepting the jury verdict as to possession of stolen goods because it was fatally inconsistent with its verdict of not guilty of larceny of the same vehicle.

State v. Nickerson, __ N.C. App. __, __ S.E.2d __ (Oct. 5, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091511-1.pdf). Reversing and remanding for a new trial because the trial court failed to submit unauthorized use of a motor vehicle as a lesser included offense of felonious possession of stolen goods. Based on a "fact-specific inquiry," the court concluded that unauthorized use was a lesser-included offense of felonious possession. The evidence showed that the defendant told the police that he was in the area for a funeral and that the car belonged to his friend. The defendant's mother testified that the defendant had gone to a funeral, and the police confirmed a funeral in the area. The evidence, the court concluded, was more than a mere denial by the defendant that he knew the vehicle was stolen, and established contradictory evidence to two of the elements of the possession offense. Accordingly, the court held, the trial judge should have instructed the jury on the lesser-included offense of unauthorized use of a motor vehicle.

Robbery

State v. Ferguson, __ N.C. App. __, __ S.E.2d __ (Sept. 21, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091507-1.pdf). The evidence was sufficient to establish armed robbery where the defendant's taking of the victim's vehicle following the murder was part of one continuous transaction.

State v. Blue, __ N.C. App. __, __ S.E.2d __ (Oct. 5, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091717-1.pdf). There was sufficient evidence that the theft and the use of force were part of one continuous transaction when the defendant formed an intent to rob the victim, attacked her, and then took her money. The court rejected the defendant's argument that his rape of the victim constituted a break in the continuous transaction.

State v. Moses, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091468-1.pdf). A defendant may not be sentenced for both robbery and possession of stolen property taken during the robbery.

State v. Bettis, __ N.C. App. __, __ S.E. 2d __ (Sept. 7, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091345-1.pdf). Where witness testimony indicated that the defendant used a gun in an armed robbery and there was no evidence that the gun was inoperable, the State was not required to affirmatively demonstrate operability and the trial court was not required to instruct on common law robbery.

State v. Williamson, __ N.C. App. __, __ S.E. 2d __ (Sept. 7, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091475-1.pdf). The trial court did not err by failing to instruct the jury on the lesser included offense of common law robbery and by denying defendant's motion to dismiss the armed robbery charges. Because the defendant presented no evidence at trial to rebut the presumption

that the firearm used in the robbery was functioning properly, he was not entitled to either an instruction on common law robbery or dismissal of the armed robbery charges.

Frauds

State v. Forte, __ N.C. App. __, __ S.E. 2d __ (Sept. 7, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091591-1.pdf). The defendant was charged with offenses under the current (G.S. 14-112.2) and prior (G.S. 14-32.3) statutes proscribing the crime of exploitation of an elder adult. (1) There was sufficient evidence that the victim was an elder adult. The victim was either 99 or 109 years old and had not driven a vehicle for years. Individuals helped him by paying his bills, driving him, bringing him meals and groceries, maintaining his vehicles, cashing his checks, helping him with personal hygiene, and making medical appointments for him. (2) There was sufficient evidence that the defendant was the victim's caretaker. The defendant assisted the victim by, among other things, performing odd jobs, running errands, serving as a driver, taking him shopping, purchasing items, doing projects on the victim's property, writing checks, visiting with him, taking him to file his will, making doctor appointments, and cutting his toenails. Additionally, the two had a close relationship, the defendant was frequently at the victim's residence, and was intricately involved in the victim's financial affairs. The court rejected the defendant's argument that these activities were not sufficient to transform the "friendly relationship" into that of caretaker and charge.

State v. Guarascio, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090883-1.pdf). (1) There was sufficient evidence of forgery under G.S. 14-119 when the evidence showed that the defendant signed a law enforcement officer's name on five North Carolina Uniform Citations. (2) The trial court erred in its jury instructions for the crime of impersonating an officer under G.S. 14-277(b). The court noted that while G.S. 14-277(a) makes it a crime for an individual to make a false representation to another person that he is a sworn law enforcement officer, G.S. 14-277(b) makes it a crime for an individual, while falsely representing to another that he is a sworn law enforcement officer, to carry out any act in accordance with the authority granted to a law enforcement officer. Accordingly, the court concluded, a charge under G.S. 14-277(b) includes all of the elements of a charge under G.S. 14-277(a). The court further concluded that while NCPJI – Crim. 230.70 correctly charges an offense under G.S. 14-277(a), NCPJI – Criminal 230.75 "inadequately guides the trial court regarding the elements of [an offense under G.S. 14-277(b)] . . . by omitting from the instruction the ways enumerated in [G.S. 14-277(a)] and N.C.P.I. – Crim. 230-70 by which an individual may falsely represent to another that he is a sworn law enforcement officer." The trial court's instructions based on this pattern instruction were error, however the error was harmless.

Burglary and Breaking and Entering

State v. Reavis, __ N.C. App. __, __ S.E.2d __ (Sept. 21, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091425-1.pdf). Although the victim's testimony tended to show that the crime did not occur at nighttime, there was sufficient evidence of this element where the victim called 911 at 5:42 am; she told police the attack occurred between 5:00 and 5:30 am; a crime scene technician testified that "it was still pretty dark" when she arrived, and she used a flashlight to take photographs; and the defendant stipulated to a record from the U.S. Naval Observatory showing that on the relevant date the sun did not rise until 6:44 am.

State v. Clagon, __ N.C. App. __, __ S.E.2d __ (Oct. 5, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100299-1.pdf). The evidence was sufficient to establish that the defendant intended to commit a felony assault inside the dwelling. Upon entering the residence, carrying an axe, the defendant asked where the victim was and upon locating her, assaulted her with the axe.

State v. Owens, __ N.C. App. __, __ S.E.2d __ (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091441-1.pdf). First-degree trespass is a lesser included offense of felony breaking or entering.

Trespass

State v. Owens, __ N.C. App. __, __ S.E.2d __ (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091441-1.pdf). First-degree trespass is a lesser included offense of felony breaking or entering.

Weapons Offenses

McDonald v. City of Chicago, 561 U.S. __ (June 28, 2010) (http://www.supremecourt.gov/opinions/09pdf/08-1521.pdf). The Second Amendment right to keep and bear arms applies to the states. For a more detailed discussion of this case see the blog post, *McDonald's* Impact in North Carolina (online at: http://sogweb.sog.unc.edu/blogs/ncclaw/?p=1386).

In Re J.C., __ N.C. App. __, __ S.E. 2d __ (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100031-1.pdf). The evidence was sufficient to support the court's adjudication of a juvenile as delinquent for possession of a weapon on school grounds in violation of G.S. 14-269.2(d). The evidence showed that while on school grounds the juvenile possessed a 3/8-inch thick steel bar forming a C-shaped "link" about 3 inches long and 1½ inches wide. The link closed by tightening a ½-inch thick bolt and the object weighed at least 1 pound. The juvenile could slide several fingers through the link so that 3-4 inches of the 3/8-inch thick bar could be held securely across his knuckles and used as a weapon.

Obscenity and Related Offenses

State v. Ligon, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090747-1.pdf). The evidence was insufficient to sustain a conviction for first-degree sexual exploitation of a minor. The State's evidence consisted of photographs of the five-year-old victim but did not depict any sexual activity. The court rejected the State's arguments that a picture depicting the child pulling up the leg of her shorts while her fingers were in her pubic area depicted masturbation; the court concluded that the photograph merely showed her hand in proximity to her crotch. It also rejected the State's argument that this picture, along with other evidence supported an inference that the defendant coerced or encouraged the child to touch herself for the purpose of producing a photograph depicting masturbation, concluding that no statutorily prohibited sexual activity took place. Finally, it rejected the State's argument that a photograph of the defendant pulling aside the child's shorts depicted prohibited touching constituting sexual activity on grounds that the picture depicted the defendant touching the child's shorts not her body.

Obstruction of Justice and Related Offenses

State v. Goble, __ N.C. App. __, __ S.E.2d __ (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091192-1.pdf). The trial court did not err by denying the defendant's motion to dismiss a charge of felony failure to appear. To survive a motion to dismiss a charge of felonious failure to appear, the State must present substantial evidence that (1) the defendant was released on bail pursuant to G.S. Article 26 in connection with a felony charge or, pursuant to section G.S. 15A-536, after conviction in the superior court; (2) the defendant was required to appear before a court or judicial official; (3) the defendant did not appear as required; and (4) the defendant's failure to appear was willful. In this case, the defendant signed an Appearance Bond for Pretrial Release which included the condition that the defendant appear in the action whenever required. The defendant subsequently failed to appear on the second day of trial. The court further held that the defendant, who failed to appear on felony charges, was not entitled to an instruction on misdemeanor failure to appear even though the felony charges resulted in misdemeanor convictions.

State v. Wright, __ N.C. App. __, __ S.E.2d __ (Aug. 3, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090674-1.pdf). The trial court did not err by denying the defendant's motion to dismiss a charge of felony obstruction of justice. The State argued that the defendant knowingly filed with the State Board of Elections (Board) campaign finance reports with the intent of misleading the Board and the voting public about the sources and uses of his campaign contributions. The defendant

was a member of the House of Representatives and a candidate for re-election. He was required to file regular campaign finance disclosure reports with the Board to provide the Board and the public with accurate information about his compliance with campaign finance laws, the sources of his contributions, and the nature of his expenditures. His reports were made under oath or penalty of perjury. The defendant's sworn false reports deliberately hindered the ability of the Board and the public to investigate and uncover information to which they were entitled by law: whether defendant was complying with campaign finance laws, the sources of his contributions, and the nature of his expenditures. Further, his false reports concealed illegal campaign activity from public exposure and possible investigation. The lack of any pending judicial proceeding or a specific investigation into whether the defendant had violated campaign finance laws was immaterial. The court also rejected the defendant's argument that the trial court's jury instructions deviated from the indictment. The defendant argued that the indictment alleged that he obstructed public access to the information but that the jury instructions focused on obstructing the Board's access to information. The court found this to be a distinction without a difference.

Drug Offenses

Maintaining a Dwelling

State v. Craven, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091138-1.pdf). The trial court did not err by denying the defendant's motion to dismiss a charge of maintaining a vehicle where the evidence was sufficient to establish that the defendant had possession of cocaine in his mother's vehicle over a duration of time and/or on more than one occasion.

State v. Hudson, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091421-1.pdf). The evidence was sufficient to support a conviction for maintaining a vehicle. Drugs were found in a vehicle being transported by a car carrier driven by the defendant. The evidence showed that the defendant kept or maintained the vehicle where the bill of lading showed that the defendant picked it up and maintained possession as the authorized bailee continuously and without variation for two days. Having stopped to rest overnight at least one time during the time period, the defendant retained control and disposition over the vehicle and resumed his planned route with the car carrier.

Possession

State v. Biber, __ N.C. App. __, __ S.E. 2d __ (Sept. 7, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090331-1.pdf). Over a dissent, the court held that there was insufficient evidence that the defendant had constructive possession of the substance at issue, found in a motel room's bathroom light fixture while the defendant and two others were present. Ms. Hensley, who had rented the room with an unidentified friend, twice complained that people were using drugs in her room and that she did not want them there. The court found no competent evidence that the defendant intended and had the capability to maintain control and dominion over the room or the substance itself. In this regard it noted that because Ms. Hensley did not want the defendant in the room, his control over it was minimal. It also noted that there was no way to determine how long the defendant had been in the room before the officers arrived. Also, there was insufficient evidence of the defendant's proximity to the substance given that no evidence showed that he ever entered the bathroom. Rather, the evidence showed that when the officers entered the room, one of the other people present ran into the bathroom, refused to come out, and engaged in activity consistent with the destruction or concealing of contraband. [Note: Although the case was before the court on an appeal from an adverse ruling on a suppression motion, the court reached the issue of sufficiency of the evidence].

State v. Hudson, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091421-1.pdf). There was sufficient evidence of constructive possession to sustain a conviction for possession with the intent to sell and deliver marijuana. The drugs were found in a vehicle being transported by a car carrier driven by the defendant. The court determined that based on the defendant's power and control of the vehicle in which the drugs were found, an inference arose that he had knowledge their presence. The vehicle had been under the defendant's exclusive control since it was loaded onto his car carrier two days earlier and the defendant had keys to every car on the carrier. Although the defendant's

possession of the vehicle was not exclusive because he did not own it, other evidence created an inference of his knowledge. Specifically, he acted suspiciously when stopped (held his hands up, nervous, sweating), he turned over a suspect bill of lading, and he had fully functional keys for all cars on the carrier except the one at issue for which he gave the officers a "fob" key which prevented its user from opening the trunk housing the marijuana.

State v. Terry, __ N.C. App. __, __ S.E.2d __ (Oct. 5, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100009-1.pdf). There was sufficient evidence of constructive possession of drugs found in a house. The defendant lived at and owned a possessory interest in the house; he shared the master bedroom where the majority of the marijuana and drug paraphernalia were found; he was in the living space adjoining the master bedroom when the search warrant was executed; there were drugs in plain view in the back bedroom; he demonstrated actual control over the premises in demanding the search warrant; and in a conversation with his wife after their arrest, the two questioned each other about how the police found out about the drugs and the identity of the confidential informant who said that the contraband belonged to the defendant).

Counterfeit Controlled Substance Offenses

State v. Mobley, __ N.C. App. __, __ S.E.2d __ (Aug. 3, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090975-1.pdf). There was sufficient evidence to support the defendant's conviction of conspiracy to sell a counterfeit controlled substance. The court concluded that G.S. 90-87(6) (definition of counterfeit controlled substance) requires only that the substance be intentionally represented as a controlled substance, not that a defendant have specific knowledge that it is counterfeit. There was sufficient evidence that the defendant intentionally represented the substance as a controlled substance in this case: when an undercover officer asked for a "40" ($40 worth of crack cocaine), an accomplice produced a hard, white substance packaged in two small corner baggies, which the officers believed to be crack cocaine. There also was substantial evidence that the defendant conspired with the accomplice: the defendant initiated contact with the officers, directed them where to park, spoke briefly with the accomplice who emerged from a building with the substance, and the defendant brokered the deal.

Motor Vehicle Offenses

State v. Davis, __ N.C. __, __ S.E.2d __ (Aug. 27, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/320PA09-1.pdf). The trial court erred by imposing punishment for felony death by vehicle and felony serious injury by vehicle when the defendant also was sentenced for second-degree murder and assault with a deadly weapon inflicting serious injury based on the same conduct. G.S. 20-141.4(a) prescribes the crimes of felony and misdemeanor death by vehicle, felony serious injury by vehicle, aggravated felony serious injury by vehicle, aggravated felony death by vehicle, and repeat felony death by vehicle. G.S. 20-141.4(b), which sets out the punishments for these offenses, begins with the language: "Unless the conduct is covered under some other provision of law providing greater punishment, the following classifications apply to the offenses set forth in this section[.]" Second-degree murder and assault with a deadly weapon inflicting serious injury provide greater punishment than felony death by vehicle and felony serious injury by vehicle. The statute thus prohibited the trial court from imposing punishment for felony death by vehicle and felony serious injury by vehicle in this case.

Defenses

Self-Defense

State v. Effler, __ N.C. App. __, __ S.E. 2d __ (Sept. 7, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100053-1.pdf). The trial court did not commit plain error by instructing the jury that a defendant acting in self-defense is guilty of voluntary manslaughter if he was the aggressor, where there was sufficient evidence suggesting that the defendant was indeed the aggressor. Although the trial court erred by failing to include an instruction on no duty to retreat, the error did not rise to the level of plain error given the evidence suggesting that the defendant used excessive force and was the aggressor.

State v. Haire, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100037-1.pdf). No error, much less plain error, occurred when the trial judge gave a self defense instruction based on NCPJI – Crim. 308.45. Although the court found the wording of the pattern instruction confusing as to burden of proof on self defense, it concluded that the trial court properly edited the pattern instruction by repeatedly telling the jury that the State had the burden of proving beyond a reasonable doubt that defendant's actions were not in self-defense.

State v. Kirby, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091631-1.pdf). The trial court did not err by denying the defendant's motion to dismiss a charge of second-degree murder based on the defendant's contention that he acted in self-defense where the evidence was sufficient to establish that rather than acting in self-defense, the defendant went armed after the victim to settle an argument.

State v. Pittman, __ N.C. App. __, __ S.E.2d __ (Sept. 21, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091190-1.pdf). In a murder case, the trial court did not err by declining to instruct on self-defense where there was no evidence that would support a finding that the defendant reasonably believed that he needed to use deadly force against the victim to prevent death or serious bodily injury. Although the victim had threatened the defendant repeatedly, there was no evidence that he threatened to kill the defendant or attempted to harm him. There was no evidence that anyone had ever seen the victim with a weapon or attack another person. There was no indication that the victim had a reputation for violence; in fact, although the victim was angry with the defendant for a while, their conflict had never escalated beyond threats. There was no evidence that the victim threatened to hurt or attack the defendant on the day in question or that the encounter between them was more heated than earlier disputes. Instead, the evidence established that the defendant approached the victim with a gun, fired multiple shots at the victim, and continued firing as the victim attempted to retreat. The victim's prior threats against the defendant, without more, did not establish a reasonable need for deadly force. The defendant's description of the victim's conduct immediately prior to the shooting did not, whether considered in isolation or in the context of the victim's prior threats, suffice to support a self-defense instruction. The fact that the victim may have been "edging up" on the defendant while reaching behind his back did not support a finding that the defendant reasonably believed that he needed to use lethal force given that the defendant did not claim to have seen the victim with a weapon on that or any occasion, the victim had not threatened him immediately prior to the shooting, and the defendant had no other objective basis, aside from prior threats, for believing that the victim was about to attack him and create a risk of death or great bodily injury.

Capital

State v. Ward, __ N.C. __, __ S.E.2d __ (July 17, 2010) (online at: http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/68A99-3.pdf). The trial judge has discretion regarding whether to submit the special issue of mental retardation to the jury in a bifurcated or unitary capital sentencing proceeding. The court held that in the case before it, the trial court did not abuse its discretion by denying a defense motion to bifurcate the issues of mental retardation and sentence.

Post-Conviction

Clerical Errors

State v. Mohamed, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090943-1.pdf). The inclusion of an incorrect file number on the caption of a transcript of plea was a clerical error where the plea was taken in compliance with G.S. 15A-1022 and the body of the form referenced the correct file number.

State v. May, __ N.C. App. __, __ S.E.2d __ (Sept. 21, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100140-1.pdf). When the trial court intended to check one box on AOC-CR-615 (judicial findings and order for sex offenders) but another box was marked on the form signed by the judge, this was a clerical error that could be corrected on remand.

Ineffective Assistance of Counsel

Sears v. Upton, 561 U.S. __ (June 29, 2010) (per curiam) (http://www.supremecourt.gov/opinions/09pdf/09-8854.pdf). After the defendant was sentenced to death in state court, a state post-conviction court found that the defendant's lawyer conducted a constitutionally inadequate penalty phase investigation that failed to uncover evidence of the defendant's significant mental and psychological impairments. However, the state court found itself unable to assess whether counsel's conduct prejudiced the defendant; because counsel presented some mitigating evidence, the state court concluded that it could not speculate as to the effect of the new evidence. It thus denied the defendant's claim of ineffective assistance. The United State Supreme Court held that although the state court articulated the correct prejudice standard (whether there was a reasonable likelihood that the outcome of the trial would have been different if counsel had done more investigation), it failed to properly apply that standard. First, the state court put undue reliance on the assumed reasonableness of counsel's mitigation theory, given that counsel conducted a constitutionally unreasonable mitigation investigation and that the defendant still might have been prejudiced by counsel's failures even if his theory was reasonable. More fundamentally, the Court continued, in assessing prejudice, the state court failed to consider the totality of mitigation evidence (both that adduced at trial and the newly uncovered evidence). The prejudice inquiry, the Court explained, requires the state court to speculate as to the effect of the new evidence. A proper prejudice inquiry, it explained, requires the court to consider the newly discovered evidence along with that introduced at trial and assess whether there is a significant probability that the defendant would have received a different sentence after a constitutionally sufficient mitigation investigation.

State v. Maready, __ N.C. App. __, __ S.E.2d __ (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/070171-2.pdf). Because defense counsel admitted the defendant's guilt to assault with a deadly weapon and involuntary manslaughter to the jury without obtaining the defendant's express consent, counsel was per se ineffective under *State v. Harbison*, 315 N.C. 175 (1985). A majority of the panel distinguished the United States Supreme Court's holding in *Florida v. Nixon*, 543 U.S. 175 (2004) (under federal law, when the defendant alleges ineffective assistance due to an admission of guilt, the claim should be analyzed under the *Strickland* attorney error standard), on grounds that *Nixon* was a capital case and the case before the court was non-capital. The majority further concluded that post-*Nixon* decisions by the North Carolina Supreme Court and the court of appeals required it to apply the *Harbison* rule.

Motions for Appropriate Relief

State v. Chandler, __ N.C. __, __ S.E.2d __ (Aug. 27, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/298PA09-1.pdf). On the State's petition for writ of certiorari, the court reversed the trial court and held that no significant change in the law pertaining to the admissibility of expert opinions in child sexual abuse cases had occurred and thus that the defendant was not entitled to relief under G.S. 15A-1415(b)(7) (in a motion for appropriate relief, a defendant may assert a claim that there has been a significant change in law applied in the proceedings leading to the defendant's conviction or sentence, and retroactive application of the changed legal standard is required). Contrary to the trial court's findings and conclusions, *State v. Stancil*, 355 N.C. 266 (2002), was not a significant change in the law, but merely an application of the court's existing case law on expert opinion evidence requiring that in order for an expert to testify that abuse occurred, there must be physical findings consistent with abuse.

State v. Williamson, __ N.C. App. __, __ S.E. 2d __ (Sept. 7, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091475-1.pdf). (1) Over a dissent, the court held that the trial court properly denied the defendant's MAR claim of newly discovered evidence. The evidence was an accomplice's statement that the gun used in the armed robbery was inoperable. The trial court properly determined that the defendant failed to show that the evidence was probably true; based on the accomplice's prior statements, his refusal to say whether he discussed the operability of the gun with his attorney, and his plea of guilty to armed robbery, the court concluded that the accomplice's testimony that the gun was inoperable was not uncontroverted. The trial court properly concluded that the defendant failed to show that due diligence was used to procure the evidence at trial noting that the State left a report about the accomplice's statement in defense counsel's court mailbox the day before trial and defense counsel interviewed the accomplice at the end of the first day of trial. The

court concluded that because the accomplice already had made the statement about the inoperable nature of the gun to the State, a reasonable interview by defense counsel should have revealed this same information. (2) Over a dissent, the court rejected the defendant's argument that the trial court erred by failing to enter a written order containing its findings of fact and conclusions of law when denying the defendant's MAR. The trial court's oral order, containing findings of fact and conclusions of law and appearing in the transcript, was sufficient. It concluded: "While it is the best practice for the trial court to enter a written order with its findings of fact and conclusions of law when ruling on a defendant's MAR, this practice is not required by the MAR statute."

Judicial Administration

Closing the Courtroom

State v. Register, __ N.C. App. __, __ S.E. 2d __ (Sept. 7, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090629-1.pdf). In a child sexual abuse case, the trial court did not err by excluding spectators from the courtroom during the victim's testimony. The court excluded all spectators except the victim's mother and stepfather, investigators for each side, and a high school class. Because the defendant did not argue that he was denied a public trial, the requirements of *Waller v. Georgia*, 467 U.S. 39 (1984), do not apply. The defendant waived any constitutional issues by failing to raise them at trial. The trial court's action was permissible under G.S. 15-166 (in sexual assault cases the trial judge may, during the victim's testimony, exclude from the courtroom everyone except the officers of the court, the defendant, and those engaged in the trial of the case). Furthermore, the court noted, G.S. 15A-1034(a) gives the trial court authority to restrict access to the courtroom to ensure orderliness in the proceedings. The State was concerned about the child victim being confronted with "a hostile environment with [defendant's] family sitting behind him;" the trial court was concerned about the potential for outbursts or inappropriate reactions by supporters of both the defendant and the victim. Although it was unusual to allow the high school class to stay, this decision was not unreasonable given that the issue was reactions by family members.