Criminal Law Case Update

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Contents:

Criminal Procedure

Bond Forfeiture

State v. Largent, __ N.C. App. __, __ S.E.2d __ (June 16, 2009). The trial court properly denied the surety's motion to set aside a bond forfeiture under G.S. 15A-544.5(b)(7) (defendant incarcerated at the time of the failure to appear). The statute refers to a one continuous period of incarceration beginning at the time of the failure to appear and ending no earlier than 10 days after the date that the district attorney is notified of the incarceration. In this case, the period of incarceration was not continuous.

Counsel Issues

State v. Lane, 362 N.C. 667 (Dec. 12, 2008). Remanding for consideration under *Indiana v. Edwards*, 128 S. Ct. 2379 (2008), as to whether the trial judge should have exercised discretion to deny the defendant's request to represent himself. *Edwards* held that states may require counsel to represent defendants who are competent to stand trial but who suffer from severe mental illness to the extent that they are not competent to represent themselves at trial.

Corpus Delecti Rule

State v. Smith, 362 N.C. 583 (Dec. 12, 2008). Under the corpus delecti rule, there was insufficient evidence independent of the defendant's extrajudicial confession to sustain a conviction for first-degree sexual offense; however, there was sufficient evidence to support an indecent liberties conviction. Note: under the rule, the state may not rely solely on the extrajudicial confession of a defendant, but must produce substantial independent corroborative evidence that supports the facts underlying the confession.

Discovery and Related Issues

State v. Williams, 362 N.C. 628 (Dec. 12, 2008). The trial judge properly dismissed a charge of felony assault on a government officer under G.S. 15A-954(a)(4) where the defendant established that the state flagrantly violated his constitutional rights and irreparably prejudiced preparation of the defense. The state willfully destroyed material evidence favorable to the defense. The destroyed evidence consisted of two photographs of the defendant that were displayed in the prosecutor's office, one taken of the defendant before the events in question, another taken after the events in question. The defendant was uninjured in the first photograph, which was captioned "Before he sued the D.A.'s office;" the defendant was injured in the second photograph, which was "After he sued the D.A.'s office."

Cone v. Bell, 129 S. Ct. 1769 (April 28, 2009). Although exculpatory evidence suppressed by the state was immaterial to the jury's finding of guilt, it might have affected the jury's decision to recommend a death sentence. The defendant offered an insanity defense based on his habitual use of an excessive amount of drugs and their affect on his behavior during the commission of the offenses. After the defendant was convicted and sentenced to death, it was discovered that the state had suppressed exculpatory evidence concerning the defendant's drug use The Court remanded to the federal habeas trial court for a full review of the suppressed evidence and its effect on sentencing.

Van de Kamp v. Goldstein, 129 S. Ct. 855 (Jan. 26, 2009). Supervisory prosecutors were entitled to absolute immunity in connection with the plaintiff's claims that prosecutors failed to disclose impeachment material due to the failure to train prosecutors, failure to supervise prosecutors, or failure to establish an information system in the district attorney's office containing potential impeachment material about informants. The plaintiff, whose murder conviction was later reversed, had sued prosecutors under § 1983 for the alleged suppression of potential impeachment information that could have been used against a state's witness in the defendant's murder trial. The conviction was allegedly based in critical

part on the testimony of this witness, who was a jailhouse informant and had previously received reduced sentences for providing prosecutors with favorable testimony in other cases.

Double Jeopardy

Bobby v. Bies, __ S. Ct. __ (June 2, 2009). Nearly ten years before the U.S. Supreme Court's decision in *Atkins v. Virginia,* 536 U.S. 304 (2002) (Eighth Amendment bars execution of mentally retarded defendants), the defendant was tried for murder and other crimes. The defendant was found guilty and, after being instructed to weigh mitigating circumstances (including evidence of the defendant's borderline mental retardation) against aggravating circumstances, the jury recommended a sentence of death. On direct review, the state supreme court noted that the defendant's mild to borderline mental retardation deserved some weight in mitigation but affirmed the conviction. However, on federal habeas, the Sixth Circuit upheld a lower court order vacating the death sentence, concluding that double jeopardy precluded an *Atkins* hearing on the defendant's mental retardation. The U.S. Supreme Court reversed, holding that double jeopardy did not preclude an *Atkins* hearing on mental retardation.

DWI Procedure

State v. Fowler, __ N.C. App. __, __ S.E.2d __ (May 19, 2009). A defendant, charged with DWI, made a pretrial motion in district court under G.S. 20-38.6(a) alleging that there was no probable cause for his arrest. The district court entered a preliminary finding granting the motion under G.S. 20-38.6(f) and ordering dismissal of the charge. When the state appealed to superior court under G.S. 20-38.7(a), that court found that the district court's conclusions of law granting the motion to dismiss were based on findings of fact cited in its order. It also concluded that G.S. 20-38.6 and 20-38.7, which allow the state to appeal pretrial motions from district to superior court for DWI cases, violated various constitutional provisions. The superior court remanded to district court for the entry of an order consistent with the superior court's findings. The state gave notice of appeal and filed a petition for a writ of certiorari to the North Carolina Court of Appeals. (1) The court ruled that the state did not have a right to appeal the superior court's order to the court of appeals. The order was interlocutory and did not grant the defendant's motion to dismiss. However, it granted the state's petition for certiorari to review the issues. (2) The court rejected the defendant's constitutional and other challenges to G.S. 20-38.6(a) (requires defendant to submit motion to suppress or dismiss pretrial), 20-38.6(f) (requires district court to enter written findings of fact and conclusions of law concerning defendant's pretrial motion and prohibits court from entering final judgment granting the defendant's pretrial motion until after state has opportunity to appeal to superior court), and 20-38.7(a) (allows state to appeal to superior court district court's preliminary finding indicating it would grant defendant's pretrial motion). (3) The court stated that the legislature's intent was to grant the state a right to appeal to superior court only from a district court's preliminary determination indicating that it would grant a defendant's *pretrial* motion to suppress evidence or dismiss DWI charges which (i) is made and decided before jeopardy has attached (before the first witness is sworn for trial), and (ii) is entirely unrelated to the sufficiency of evidence concerning an element of the offense or the defendant's guilt or innocence. The court opined that the legislature intended pretrial motions to suppress evidence or dismiss charges under G.S. 20-38.6(a) to address only procedural matters including, but not limited to, delays in the processing of a defendant, limitations on a defendant's access to witnesses, and challenges to chemical test results. Separately, the court noted that G.S. 20-38.7(a) does not specify a time by which the state must appeal the district court's preliminary finding to grant a motion to suppress or to dismiss. The court indicated that an appeal must be taken and perfected within a reasonable time, which depends on the circumstances of the case. (4) Based on the record, the court inferred that the district court not only considered whether the officer had probable cause to arrest the defendant but also preliminarily determined whether there was insufficient evidence for the state to proceed against the defendant for DWI (the court noted that a motion to dismiss for insufficiency of

evidence cannot be made pretrial). Because there was no indication that the state had an opportunity to present its evidence, the superior court erred when it concluded that it appeared that the district court's conclusions of law granting the motion to dismiss were based on findings of fact cited in the district court's order. Accordingly, the court remanded to superior court with instructions to remand to district court for a final order granting the defendant's motion to suppress evidence of his arrest for lack of probable cause. Only after the state has had an opportunity to establish a prima facie case may a motion to dismiss for insufficient evidence be made by the defendant and considered by the trial court, unless the state elects to dismiss the DWI charge. When the district court enters its final order on remand granting the defendant's pretrial motion to suppress, the state will have no further right to appeal from that order.

State v. Palmer, ___ N.C. App. ___, ___ S.E.2d ___ (May 19, 2009). The state's notice of appeal to superior court of the district court's preliminary notice of its intention to grant the defendant's motion to suppress in a DWI case was properly perfected. The court cited *Fowler* (discussed above), and noted that the procedures in G.S. 15A-1432(b) are a guide but not binding; an appeal must be taken and perfected within a reasonable time, which depends on the circumstances of each case.

Fifth Amendment

Use of Defendant's Silence at Trial

State v. Adu, ___ N.C. App. ___, 672 S.E.2d 84 (Feb. 3, 2009). The trial court erred in allowing the state to question the defendant about his failure to make a statement to law enforcement and to reference the defendant's silence in closing argument.

Indictment Issues

Date of Offense

State v. Hueto, ___ N.C. App. ___, 671 S.E.2d 62 (Jan. 20, 2009). No fatal variance between the period of time alleged in the indictment and the evidence introduced at trial. The defendant was indicted on six counts of statutory rape: two counts each for the months of June, August, and September 2004. Assuming that the victim's testimony was insufficient to prove that the defendant had sex with her twice in August, the court held that the state nevertheless presented sufficient evidence that the defendant had sex with her at least six times between June 2004 and August 12, 2004, including at least four times in July.

Delay in Obtaining Indictment

State v. Martin, ___ N.C. App. ___, 671 S.E.2d 53 (Jan. 20, 2009). No due process violation resulted from the delay between commission of the offenses (2000) and issuance of the indictments (2007). Although the department of social services possessed the incriminating photos and instituted an action to terminate parental rights in 2001, the department did not then share the photos or report evidence of abuse to law enforcement or the district attorney. Law enforcement was not informed about the photos until 2007. The department's delay was not attributable to the state.

Injury to Real Property

State v. Lilly, ___ N.C. App. ___, 673 S.E.2d 718 (2009). No fatal variance between an indictment charging injury to real property and the evidence at trial. The indictment incorrectly described the lessee of the real property as its owner. The indictment was sufficient because it identified the lawful possessor of the property.

Larceny

State v. Patterson, ___ N.C. App. ___, 671 S.E.2d 357 (Jan 6, 2009). Larceny indictment alleging victim's name as "First Baptist Church of Robbinsville" was fatally defective because it did not indicate that the church was a legal entity capable of owning property.

State v. Gayton-Barbossa, __ N.C. App. __, __ S.E.2d __ (May 19, 2009). Fatal variance in larceny indictment alleging that the stolen gun belonged to an individual named Minear and the evidence showing that it belonged to and was stolen from a home owned by an individual named Leggett. Minear had no special property interest in the gun even though the gun was kept in a bedroom occupied by both women.

Short Form Indictments

State v. Thomas, ___ N.C. App. ___, ___ S.E.2d ___ (May 5, 2009). The trial court did not err by denying the defendant's request to submit the lesser offense of assault on a female when the defendant was charged with rape using the statutory short form indictment. The defense to rape was consent. The defendant argued on appeal that the jury could have found that the rape was consensual but that an assault on a female had occurred. The court rejected that argument reasoning that the acts that the defendant offered in support of assault on a female occurred separately from those constituting rape.

Victim's Name

State v. McKoy, ___ N.C. App. ___, 675 S.E.2d 406 (May 5, 2009). Rape and sexual offense indictments were not fatally defective when they identified the victim solely by her initials, "RTB." The defendant was not confused regarding the victim's identity; because the victim testified at trial and identified herself in open court, the defendant was protected from double jeopardy.

Weapons Offenses

State v. Bollinger, ___ N.C. ___, 675 S.E.2d 333 (May 1, 2009). No fatal variance between indictment and the evidence in a carrying a concealed weapon case. After an officer discovered that the defendant was carrying knives and metallic knuckles, the defendant was charged with carrying a concealed weapon. The indictment identified the weapon as "a Metallic set of Knuckles." The trial court instructed the jury concerning "one or more knives." The court, per curiam and without an opinion, summarily affirmed the ruling of the North Carolina Court of Appeals that the charging language, "a Metallic set of Knuckles," was unnecessary surplusage, and even assuming the trial court erred in instructing on a weapon not alleged in the charge, no prejudicial error required a reversal where there was evidence that the defendant possessed knives.

Joinder

State v. Anderson, ___ N.C. App. ___, 669 S.E.2d 793 (Dec. 16, 2008). The trial court did not abuse its discretion in granting the state's motion to join ten counts of third-degree sexual exploitation of a minor and ten counts of second-degree sexual exploitation of a minor with an appeal for trial de novo of misdemeanor peeping.

Jury Argument

State v. English, ___ N.C. App. ___, 669 S.E.2d 869 (Dec. 16, 2008). The trial judge erred in denying the defendant final jury argument. The defendant did not introduce evidence under Rule 10 of the General

Rules of Practice when cross-examining an officer. Defense counsel referred to the contents of the officer's report when cross-examining the officer. However, the officer's testimony on cross-examination did not present "new matter" to the jury when considered with the state's direct examination of the officer.

Jury Instructions

Sex Crimes

State v. Smith, 362 N.C. 583 (Dec. 12, 2008). When instructing on indecent liberties, the trial judge is not required to specifically identify the acts that constitute the charge.

Jury Selection

***Batson* Issues**

Rivera v. Illinois, 129 S. Ct. 1446 (March 31, 2009). During a state murder trial, the defendant was denied the opportunity to exercise a peremptory challenge against a female juror because the trial judge erroneously, but in good faith, believed that the defendant's use of a peremptory challenge violated *Batson*. The Due Process Clause does not require an automatic reversal of a conviction when a state trial court committed a good-faith error in denying the defendant's peremptory challenge of a juror and all jurors seated in the trial were qualified and unbiased.

Peremptories

State v. Thomas, ___ N.C. App. ___, 673 S.E.2d 372 (Mar. 3, 2009). The trial court erred by denying the defendant the opportunity to use his one remaining peremptory challenge after voir dire was reopened. After the jury was impaneled, the judge learned that a seated juror had attempted to contact an employee in the district attorney's office before impanelment. The trial judge reopened voir dire, questioned the juror, allowed the parties to do so as well, but denied the defendant's request to remove the juror. The court of appeals noted that after a jury has been impaneled, further challenge of a juror is in the trial court's discretion. However, once the trial court reopens examination of a juror, each party has an absolute right to exercise any remaining peremptory challenges.

Jury's Request for Transcripts

State v. Long, ___ N.C. App. ___, 674 S.E.2d 696 (April 7, 2009). The trial court erred in not exercising its discretion when denying the jury's request for transcripts of testimony of the victim and the defendant.

Pleas

Motion to Withdraw a Plea

State v. Watkins, ___ N.C. App. ___, 672 S.E.2d 43 (Feb. 3, 2009). The trial court did not err in denying the defendant's motion to withdraw his plea before sentencing; no fair and just reason supported the motion.

Plea Agreements

State v. Smith, ___ N.C. App. ___, 668 S.E.2d 612 (Nov. 18, 2008). The defendant's plea had to be vacated where the plea agreement included a term that the defendant had a right to appeal an adverse ruling on a pretrial motion but the pretrial motion was not subject to appellate review.

Plea Colloquy

State v. Bare, __ N.C. App. __, __ S.E.2d __ (June 16, 2009). When taking a plea, a judge is not required to inform a defendant of possible imposition of sex offender satellite-based monitoring (SBM). Such a statement is not required by G.S. 15A-1022. Nor is SBM a direct consequence of a plea.

Prayer for Judgment Continued

State v. Popp, __ N.C. App. __, __ S.E.2d __ (May 19, 2009). The following conditions went beyond requirements to obey the law and transformed a PJC into a final judgment: abide by a curfew, complete high school, enroll in an institution of higher learning or join the armed forces, cooperate with random drug testing, complete 100 hours of community service, remain employed, and write a letter of apology.

Sentencing

Aggravating Factors

State v. Sellars, 363 N.C. 112 (Mar. 20, 2009). The court affirmed a ruling of the North Carolina Court of Appeals finding no error in the defendant's trial and sentence. However, it rejected the implication in the court of appeals' opinion that a jury's determination that a defendant is not insane resolves the presence or absence of the statutory aggravating factor, G.S. 15A-1340.16(d)(8) (knowingly creating great risk of death to more than one person by weapon normally hazardous to lives of more than one person). Nor does a jury's finding that a defendant is not insane automatically render any *Blakely* error concerning this aggravating factor harmless beyond a reasonable doubt. However, the court examined the evidence and determined that the trial judge's finding of the aggravating factor was harmless beyond a reasonable doubt.

Blakely Issues

Oregon v. Ice, 129 S. Ct. 711 (Jan. 14, 2009). *Apprendi*, and later rulings do not provide a Sixth Amendment right to jury trial under an Oregon law that requires findings of fact to support a judge's decision to impose consecutive sentences. The Court made clear that states such as North Carolina, which do not require a judge to make findings of fact to impose consecutive sentences, are not required to provide a defendant with a jury trial on the consecutive sentences issue.

DWI Sentencing

State v. Dalton, __ N.C. App. __, __ S.E.2d __ (June 2, 2009). G.S. 20-179(a1)(1) (requiring the state, in an appeal to superior court, to give notice of grossly aggravating factors) only applies to offenses committed on or after the effective date of the enacting legislation, December 1, 2006.

Impermissibly Based on Exercise of Rights

State v. Anderson, ___ N.C. App. ___, 669 S.E.2d 793 (Dec. 16, 2008). Rejecting the defendant's argument that the trial court imposed a greater sentence because the defendant chose to proceed to trial rather than plead guilty. At a conference between the judge, prosecutor, and defense counsel, the judge commented that if the parties were engaged in plea discussions, he would be amenable to a probationary sentence. Defense counsel objected to the judge's comments, stating that it could be inferred that the judge would be less likely to give the defendant probation if he did not plead guilty. The judge stated that he had not meant to make any such implication, but rather to encourage the parties to enter plea

negotiations. The defendant failed to show that it can be reasonably inferred that the defendant's sentence was improperly based, even in part, on his insistence on a jury trial.

Prior Record Level

State v. Lee, ___ N.C. App. ___, 668 S.E.2d 393 (Nov. 18, 2008). The defendant's stipulation that a New Jersey conviction was substantially similar to a North Carolina offense for prior record level points was ineffective. The "substantially similar" issue is a question of law that must be determined by a judge.

State v. Hussey, ___ N.C. App. ___, 669 S.E.2d 864 (Dec. 16, 2008). A stipulation signed by the prosecutor and defense counsel in Section III of AOC-CR-600 (prior record level worksheet) supported the judge's finding regarding prior record level. The court distinguished a prior case on grounds that the current version of the form includes a stipulation to prior record level.

State v. Ford, ___ N.C. App. ___, 672 S.E.2d 689 (Feb. 3, 2009). The defendant was convicted of attempted felony larceny and then pled guilty to being a habitual felon. The defendant previously had been convicted of felony larceny. That the judge properly found one point under G.S. 15A-1340.16(b)(6) (all elements of current offense are included in offense for which defendant was previously convicted) in calculating prior record level. Attempted felony larceny is a lesser-included offense of felony larceny regardless of the theory of felony larceny. It was irrelevant that the defendant's prior felony larceny convictions did not include the element that the defendant took property valued over $1,000.

State v. Watkins, ___ N.C. App. ___, 672 S.E.2d 43 (Feb 3, 2009). There was no ex post facto violation in determining the defendant's prior record level when prior record level points were calculated using the classification of the prior offense at the time of sentencing (Class G felony) rather than the lower classification in place when the defendant was convicted of the prior (Class H felony).

Probation

State v. Black, __ N.C. App. __, __ S.E.2d __ (June 2, 2009). Holding, in a case decided under the old version of G.S. 15A-1344(f), that the trial court lacked jurisdiction to hold a probation revocation hearing where the state failed to make reasonable efforts to notify the defendant and to hold the hearing before the period of probation expired.

Restitution

State v. Best, ___ N.C. App. ___, 674 S.E.2d 467 (April 7, 2009). The trial court erred in ordering restitution to the murder victims' families when there was no direct and proximate causal link between the defendant's actions and harm caused to those families. The defendant was convicted as an accessory after the fact to murder and none of the defendant's actions obstructed the murder investigation or assisted the principals in evading detection, arrest, or punishment.

State v. Swann, __ N.C. App. __, __ S.E.2d __ (May 19, 2009). Restitution of $510 was not supported by the evidence. The prosecutor had presented a restitution worksheet stating that the victim sought $510 in restitution. The worksheet was not supported by documentation, the victim did not testify, and the defendant did not stipulate to the amount. The prosecutor's statement that the amount represented "additional repairs and medical expenses" was insufficient to support the award.

Satellite-Based Monitoring (SBM)

State v. Wooten, ___ N.C. App. ___, 669 S.E.2d 749 (Dec. 16, 2008). Affirming the trial court's order requiring the defendant to enroll in SBM for life as a recidivist based on convictions for indecent liberties with a minor in 1989 and 2006. The defendant's bring-back hearing was held in January, 2008, days before his release from prison. The defendant argued that the court lacked jurisdiction to hold the bring-back hearing because he did not receive notice of the hearing in the manner set out in G.S. 14-208.40B(b), that is, by certified mail "sent to the address provided by the offender pursuant to G.S. 14-208.7 [the sex offender registration statute]." Notice in this manner would have been impossible, because the defendant had not been released from prison and had not established a registration address. The court held that the failure to follow the precise letter of the statute's notice provisions was not a jurisdictional error. The defendant also argued that his 1989 conviction for indecent liberties should not qualify him as a recidivist because that conviction was not itself reportable (convictions for indecent liberties are reportable for those convicted or released from a penal institution on or after January 1, 1996). The court held that a prior conviction need only be "described" in the statute defining reportable offenses. Thus, a prior conviction can qualify a person as a recidivist no matter how far back in time it occurred. The court also concluded that the defendant had not properly preserved the claim that SBM violates ex post facto.

State v. Bare, __ N.C. App. __, __ S.E.2d __ (June 16, 2009). SBM does not violate the ex post facto clause by increasing the punishment for a crime. The legislature intended SBM to be a civil and regulatory scheme, rather than a punitive scheme. Further, the regulatory scheme is not so punitive either in purpose or effect as to negate the General Assembly's intent to deem it civil in nature. Based on the record before it, the court concluded that (1) the SBM device is not a "modern-day shame sanction" (the defendant had argued that the bulky device is a physical, visible sign notifying the public that the wearer committed a sex offense); (2) wearing an electronic tracking device at all times and being required to cooperate with the Department of Correction in order to ensure that the device is working properly does not impose a punitive restraint on daily activities; (3) although the SBM provisions could have a deterrent effect, this single factor is insufficient to override a non-punitive purpose; (4) the SBM provisions have a rational connection to the non-punitive purpose of protecting the public; and (5) the SMB provisions are not excessive in light of the legislative purpose.

Spectators in the Courtroom

State v. Dean, ___ N.C. App. ___, 674 S.E.2d 453 (April 7, 2009). The trial court did not abuse its discretion in ordering the removal of four spectators in a gang-related murder trial. Jurors had expressed concern for their safety, as jurors had in the first trial of this case. The trial court found that the spectators were talking in the courtroom in violation of a pretrial order and had not followed orders of the court.

Speedy Trial

Vermont v. Brillon, 129 S. Ct. 1283 (Mar. 9, 2009). Delay caused by appointed defense counsel or a public defender is not attributable to the state in determining whether a defendant's speedy trial right was violated, unless the delay resulted from a systemic breakdown in the public defender system.

Verdict

State v. Douglas, __ N.C. App. __, __ S.E.2d __ (May 19, 2009). Ordering a new trial because of a defective verdict form. On the verdict form, the jury answered "Yes" to each of these questions: "Did the defendant possess cocaine, a controlled substance, with the intent to sell or deliver it? Did the defendant sell cocaine, a controlled substance, to Officer Eugene Ramos?" Because the verdict form did not include

the words "guilty" or "not guilty," the jury did not fulfill its constitutional responsibility to make an actual finding of defendant's guilt. The verdict form only required the jury to make factual findings on the essential elements of the crimes; it thus was a "true special verdict" and could not support the judgment.

Evidence

403 Balancing

State v. Miller, __ N.C. App. __, __ S.E.2d __ (May 19, 2009). Trial judge was not required to view a DVD before ruling on a Rule 403 objection to portions of an interview of the defendant contained on it. Trial judge did not abuse his discretion by refusing to redact portions of the DVD. However, the court "encourage[d] trial courts to review the content of recorded interviews before publishing them to the jury to ensure that all out-of-court statements contained therein are either admissible for a valid nonhearsay purpose or as an exception to the hearsay rule in order to safeguard against an end-run around the evidentiary and constitutional proscriptions against the admission of hearsay." The court also "remind[ed] trial courts that the questions police pose during suspect interviews may contain false accusations, inherently unreliable, unconfirmed or false statements, and inflammatory remarks that constitute legitimate points of inquiry during a police investigation, but that would otherwise be inadmissible in open court." It continued: "[A]s such, the wholesale publication of a recording of a police interview to the jury, especially law enforcement's investigatory questions, might very well violate the proscriptions against admitting hearsay or Rule 403. In such instances, trial courts would need to redact or exclude the problematic portions of law enforcement's investigatory questions/statements."

State v. Cook, ___ N.C. App. ___, 672 S.E.2d 25 (Feb 3, 2009). The trial judge did not err under Rule 403 in excluding evidence of the victim's alleged false accusation that another person had raped her. The circumstances surrounding that accusation were different from those at issue in the trial and the evidence could have caused confusion.

404(b) Evidence

State v. Dean, ___ N.C. App. ___, 674 S.E.2d 453 (April 7, 2009). In a murder case, evidence of an assault committed by the defendant two days before the murder was admissible to show identity when ballistics evidence showed that the same weapon was used in both the murder and the assault. The court rejected the defendant's argument that the probative value of the prior assault was diminished because of the dissimilarity of the incidents.

State v. Maready, 362 N.C. 614 (Dec. 12, 2008). The defendant was convicted of second-degree murder involving impaired driving. No plain error occurred when the trial judge admitted, under Rule 404(b), the defendant's prior traffic-related convictions that were more than sixteen years old. The court rejected the implication that it previously had adopted a bright line rule that it was plain error to admit traffic-related convictions that occurred more than sixteen years before the date of a second-degree vehicular murder. Of the defendant's six previous DWI convictions, four occurred in the sixteen years before the events at issue, including one within six months of the event at issue. Those convictions "constitute part of a clear and consistent pattern of criminality highly probative of his mental state." Although temporal proximity is relevant to the assessments of probative value under 404(b), remoteness generally affects the weight of the evidence, not its admissibility, especially when the prior conduct tends to show state of mind as opposed to common scheme or plan.

Character of Victim

State v. Buie, ___ N.C. App. ___, 671 S.E.2d 351 (Jan. 1, 2009). The trial judge erred under Rule 404(a)(2) in allowing the state to offer evidence of the victim's good character. The court concluded that the defense had not offered evidence of the victim's bad character, even though defense counsel had forecast evidence of the victim's bad character in an opening statement.

Corroboration

State v. Cook, ___ N.C. App. ___, 672 S.E.2d 25 (Feb. 3, 2009). Officer's testimony relating an incident of digital penetration described to him by the victim was properly admitted to corroborate victim's testimony, even though the victim did not mention the incident in her testimony. The victim testified that the first time she remembered the defendant touching her was in the "summer time of 2002" and that he touched her other times including incidents in December 2003 and July 2004. The victim's established a course of sexual misconduct by defendant and the officer testified to an incident within defendant's course of conduct that did not directly contradict the victim's testimony. The officer's testimony sufficiently strengthened the victim's testimony to warrant its admission as corroborative evidence.

Hearsay Exceptions

State v. Wilson, __ N.C. App. __, __ S.E.2d __ (May 19, 2009). An audio recording can be admitted under the Rule 803(5) exception for recorded recollection. However, the statement at issue was not admissible under this exception because the witness did not recall making the statement and when asked whether she fabricated it, the witness testified that because of her mental state she was "liable to say anything."

Impeachment

State v. Wilson, __ N.C. App. __, __ S.E.2d __ (May 19, 2009). Once a witness denies having made a prior inconsistent statement, a party may not introduce the prior statement in an attempt to discredit the witness because the prior statement concerns only a collateral matter, i.e., whether the statement was ever made. Here, the defendant cross-examined a witness named Morgan regarding statements Morgan supposedly made to a person named Daughtridge. Morgan admitted making some statements to Daughtridge but denied telling Daughtridge, among other things that the victim had a gun on the day of the shooting. The defendant argued that he should have been allowed to impeach Morgan by introducing a tape recording of a statement Daughtridge gave to the police in which she said that Morgan told her that the victim had a gun on the day of the shooting. Under Rule 608(b), the defendant was limited to Morgan's answers on cross-examination.

Opinions

Expert Opinions

State v. Smart, ___ N.C. App. ___, 674 S.E.2d 684 (Mar. 17, 2009). Rule 702(a1) obviates the state's need to prove that the horizontal gaze nystagmus testing method is sufficiently reliable.

Lay Opinions

State v. Llamas-Hernandez, 363 N.C. 8 (Feb. 6, 2009). The court, per curiam and without an opinion, reversed the ruling of the North Carolina Court of Appeals and held, for the reasons stated in the dissenting opinion below, that the trial judge erred in allowing a detective to offer a lay opinion that 55

grams of a white powder was cocaine. The officer's identification of the powder as cocaine was based solely on the detective's visual observations. There was no testimony why the officer believed that the white powder was cocaine other than his extensive experience in handling drug cases. There was no testimony about any distinguishing characteristics of the white powder, such as its taste or texture.

State v. Buie, ___ N.C. App. ___, 671 S.E.2d 351 (Jan. 6, 2009). The trial judge erred in allowing a detective to offer lay opinion testimony regarding whether what was depicted in crime scene surveillance videos was consistent with the victim's testimony. For example, the detective was impermissibly allowed to testify that the videotapes showed a car door being opened, a car door being closed, and a vehicle driving away. The court found that the officer's testimony was neither a shorthand statement of facts nor based on firsthand knowledge.

Privileges

State v. Watkins, ___ N.C. App. ___, 672 S.E.2d 43 (Feb. 3, 2009). Conversation between the defendant and his lawyer was not privileged because the defendant told his lawyer the information with the intention that it be conveyed to the prosecutor. At a hearing on the defendant's motion to withdraw his guilty plea, the defendant's former attorney, who had represented the defendant during plea negotiations, testified over the defendant's objection. Former counsel testified about a meeting in which the defendant provided former counsel with information to be relayed to the prosecutor to show what testimony the defendant could offer against his co-defendants.

State v. Rollins, __ N.C. __, 675 S.E.2d 334 (May 1, 2009). Marital communications privilege does not protect conversations between a husband and wife that occur in the public visiting areas of state correctional facilities. No reasonable expectation of privacy exists in those places.

Rape Shield

State v. Cook, ___ N.C. App. ___, 672 S.E.2d 25 (Feb. 3, 2009). The trial judge did not err under Rule 412 in excluding evidence of the victim's prior sexual activity with a boy named C.T. and with her boyfriend. As to the activity with C.T., the defendant failed to offer evidence that it occurred during the in camera hearing (when the victim denied having sex with C.T.), or at trial. Additionally, the defendant failed to establish the relevance of the sexual activity when it allegedly occurred shortly before the incidents at issue but the victim's scarring indicated sexual activity that had occurred a month or more earlier. As to the sexual activity with the boyfriend, the defendant failed to present evidence during the in camera hearing that the activity could have caused the victim's internal scarring.

State v. Adu, ___ N.C. App. ___, 672 S.E.2d 84 (Feb. 3, 2009). In a child sex case, the defendant proffered evidence of a third person's sexual abuse of the victim as an alternative explanation for the victim's physical trauma. The trial judge properly excluded this evidence under Rule 412(b)(2) because it did not show that the third person's abuse involved penetration and thus an alternative explanation for the trauma to the victim's vaginal area.

Arrest, Search, and Investigation

Admissibility of Statements Made in Violation of 6th Amendment Right to Counsel

Kansas v. Ventris, __ U.S. __ (April 29, 2009). The defendant's incriminating statement to a jailhouse informant, obtained in violation of the defendant's Sixth Amendment right to counsel, was admissible on rebuttal to impeach the defendant's trial testimony that conflicted with statement. The statement would not have been admissible during the state's presentation of evidence in its case-in-chief.

Arrests and Investigatory Stops

Anonymous Tips

State v. Garcia, __ N.C. App. __, __ S.E.2d __ (June 16, 2008). Anonymous informant's tips combined with officers' corroboration provided reasonable suspicion for a stop. The anonymous tips provided specific information of possessing and selling marijuana, including the specific location of such activity (a shed at the defendant's residence). The tips were buttressed by officers' knowledge of the defendant's history of police contacts for narcotics and firearms offenses, verification that the defendant lived at the residence, and subsequent surveillance of the residence. During surveillance an officer observed individuals come and go and observed the defendant remove a large bag from the shed and place it in a vehicle. Other officers then followed the defendant in the vehicle to a location known for drug activity.

State v. Maready, 362 N.C. 614 (Dec. 12, 2008). See the discussion of this case, below, under Vehicle Stops.

State v. Allen, __ N.C. App. __, __ S.E.2d __ (May, 19, 2009). See the discussion of this case, below, under Vehicle Stops.

State v. Hudgins, ___ N.C. App. ___, 672 S.E.2d 717 (Feb. 17, 2009). See the discussion of this case, below, under Vehicle Stops.

State v. Peele, ___ N.C. App. ___, ___ S.E.2d ___ (May 5, 2009). See the discussion of this case, below, under Vehicle Stops.

Generally

State v. Williams, ___ N.C. App. ___, 673 S.E.2d 394 (Mar. 3, 2009). Officer had reasonable suspicion to stop and frisk the defendant. The officer saw the defendant, who substantially matched a "be on the lookout" report following a robbery, a few blocks from the crime scene, only minutes after the crime occurred and travelling in the same direction as the robber. The defendant froze when confronted by the officer and initially refused to remove his hands from his pockets.

State v. Washington, ___ N.C. App. ___, 668 S.E.2d 622 (Nov. 18, 2008). There was probable cause to arrest the defendant for resisting, delaying, and obstructing when the defendant fled from an officer who was properly making an investigatory stop. Although the investigatory stop was not justified by the fact that a passenger in the defendant's car was wanted on several outstanding warrants, it was justified by the fact that the defendant was driving a car that had no insurance and with an expired registration plate. It was immaterial that the officer had not explained the proper basis for the stop before the defendant fled.

Vehicle Stops

Arizona v. Johnson, 129 S. Ct. 781 (Jan. 26, 2009). Summarizing existing law, the Court noted that a "stop and frisk" is constitutionally permissible if: (1) the stop is lawful; and (2) the officer reasonably suspects that the person stopped is armed and dangerous. It noted that that in an on-the-street encounter, the first requirement—a lawful stop—is met when the officer reasonably suspects that the person is committing or has committed a criminal offense. The Court held that in a traffic stop setting, the first requirement—a lawful stop—is met whenever it is lawful for the police to detain an automobile and its occupants pending inquiry into a vehicular violation. The police do not need to have cause to believe that any occupant of the vehicle is involved in criminal activity. Also, an officer may ask about matters

unrelated to the stop provided that those questions do not measurably extend the duration of the stop. The Court further held that to justify a frisk of the driver or a passenger during a lawful stop, the police must believe that the person is armed and dangerous.

State v. Maready, 362 N.C. 614 (Dec. 12, 2008). Reasonable suspicion supported the officer's stop of a vehicle in a case in which the defendant was convicted of second-degree murder and other charges involving a vehicle crash and impaired driving. Officers saw an intoxicated man stumble across the road and enter a Honda. They then were flagged down by a vehicle that they observed driving in front of the Honda. The vehicle's driver, who was distraught, told them that the driver of the Honda had been running stop signs and stop lights. The officers conducted an investigatory stop of the Honda, and the defendant was driving. The court considered the following facts as supporting the indicia of reliability of the informant's tip: the tipster had been driving in front of the Honda and thus had firsthand knowledge of the reported traffic violations; the driver's own especially cautious driving and apparent distress were consistent with what one would expect of a person who had observed erratic driving; the driver approached the officers in person and gave them information close in time and place to the scene of the alleged violations, with little time to fabricate; and because the tip was made face-to-face, the driver was not entirely anonymous.

State v. Allen, __ N.C. App. __, __ S.E.2d __ (May, 19, 2009). Reasonable suspicion existed for a stop. An assault victim reported to a responding officer that the perpetrator was a tall white male who left in a small dark car driven by a blonde, white female. The officer saw a small, light-colored vehicle travelling away from the scene; driver was a blonde female. The driver abruptly turned into a parking lot and drove quickly over rough pavement. When the officer approached, the defendant was leaning on the vehicle and appeared intoxicated. Although there was a passenger in the car, the officer could not determine if the passenger was male or female. The officer questioned the defendant, determined that she was not involved in the assault, but arrested her for impaired driving. The court held that although there was no information in the record about the victim's identity, this was not an anonymous tip case; it was a face-to-face encounter with an officer that carried a higher indicia of reliability than an anonymous tip. Additionally, the officer's actions were not based solely on the tip. The officer observed the defendant's "hurried actions," it appeared that the defendant was trying to avoid the officer, and the defendant was in the proximity of the crime scene. Even though the defendant's vehicle did not match the description given by the victim, the totality of the circumstances supported a finding of reasonable suspicion.

State v. Hudgins, ___ N.C. App. ___, 672 S.E.2d 717 (Feb. 17, 2009). Following *Maready* (discussed above) and holding that there was reasonable suspicion to stop the defendant's vehicle. At 2:55 am, a man called the police and reported that his car was being followed by a man with a gun. The caller reported that he was in the vicinity of a specific intersection. The caller remained on the line and described the vehicle following him, and gave updates on his location. The caller was directed to a specific location, so that an officer could meet him. When the vehicles arrived, they matched the descriptions provided by the caller. The officer stopped the vehicles. The caller identified the driver of the other vehicle as the man who had been following him and drove away without identifying himself. The officer ended up arresting the driver of the other vehicle for DWI. No weapon was found. The court held that there were indicia of reliability similar to those that existed in *Maready*: (1) the caller telephoned police and remained on the telephone for approximately eight minutes; (2) the caller provided specific information about the vehicle that was following him and their location; (3) the caller carefully followed the dispatcher's instructions, which allowed the officer to intercept the vehicles; (4) defendant followed the caller over a peculiar and circuitous route between 2 and 3 a.m.; (5) the caller remained on the scene long enough to identify defendant to the officer; and (6) by calling on a cell phone and remaining at the scene, caller placed his anonymity at risk.

State v. Peele, ___ N.C. App. ___, ___ S.E.2d ___ (May 5, 2009). Neither an anonymous tip nor an officer's observation of the vehicle weaning once in its lane provided reasonable suspicion to stop the vehicle in this DWI case. At approximately 7:50 p.m., an officer responded to a dispatch concerning "a possible careless and reckless, D.W.I., headed towards the Holiday Inn intersection." The vehicle was described as a burgundy Chevrolet pickup truck. The officer immediately arrived at the intersection and saw a burgundy Chevrolet pickup truck. After following the truck for about 1/10 of a mile and seeing the truck weave once in its lane once, the officer stopped the truck. Although the anonymous tip accurately described the vehicle and its location, it provided no way for officer to test its credibility. Neither the tip nor the officer's observation, alone or together established reasonable suspicion to stop.

State v. Fields, ___ N.C. App. ___, 673 S.E.2d 765 (Mar. 17, 2009). No reasonable suspicion existed for the stop. Around 4:00 p.m., an officer followed the defendant's vehicle for about 1 1/2 miles. After the officer saw the defendant's vehicle swerve to the white line on the right side of the traffic lane three times, the officer stopped the vehicle for impaired driving. The court noted that the officer did not observe the defendant violating any laws, such as driving above or below the speed limit, the hour of the stop was not unusual, and there was no evidence that the defendant was near any places to purchase alcohol.

State v. Hodges, ___ N.C. App. ___, 672 S.E.2d 724 (Feb. 17, 2009). (1) Reasonable suspicion supported prolonging the detention of the defendant after the officer returned his license and the car rental contract and issued him a verbal warning for speeding. The defendant misidentified his passenger and was nervous. Additionally other officers had informed the officer that they had been conducting narcotics surveillance on the vehicle; that they had observed passenger appear to put something under his seat which might be drugs or a weapon; and that the officer should be careful in conducting the traffic stop. (2) A five-minute detention after the traffic stop had concluded was reasonable. (3) By telling the officer that he had to ask the passenger for permission to search the vehicle, the defendant-driver waived any standing that he might have had to challenge the passenger's consent to the search.

Consent Search

State v. Kuegel, ___ N.C. App. ___, 672 S.E.2d 97 (Feb. 3, 2009). The defendant's consent to search his residence was voluntary, even though it was induced by an officer's false statements. After receiving information that the defendant was selling marijuana and cocaine from his apartment, an officer went to the apartment to conduct a knock and talk. The officer untruthfully told the defendant that he had conducted surveillance of the apartment, saw a lot of people coming and going, stopped their cars after they left the neighborhood, and each time recovered either marijuana or cocaine. The exchange continued and the defendant gave consent to search. Based on the totality of circumstances, the consent was voluntary.

Exclusionary Rule

Herring v. United States, 129 S. Ct. 695 (Jan. 14, 2009). The exclusionary rule does not require the exclusion of evidence found during a search incident to arrest when the officer reasonably believed that there was an outstanding warrant but that belief was wrong because of a negligent bookkeeping error by another police employee. An officer arrested the defendant based on an outstanding arrest warrant listed in a neighboring county sheriff's computer database. A search incident to arrest discovered drugs and a gun, which formed the basis for criminal charges. Minutes after the search was completed, it became known that the warrant had been recalled but that a law enforcement official had negligently failed to record the recall in the system. The Court reasoned that the exclusionary rule is not an individual right and that it applies only where it will result in appreciable deterrence. Additionally, the benefits of deterrence must outweigh the social costs of exclusion of the evidence. An important part of the

calculation is the culpability of the law enforcement conduct. Thus, the abuses that gave rise to the exclusionary rule featured intentional conduct that was patently unconstitutional. An error that arises from nonrecurring and attenuated negligence is far removed from the core concerns that lead to adoption of the rule. The Court concluded: "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. . . . [T]he . . . rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." The negligence in recordkeeping at issue, the Court held, did not rise to that level. Finally the Court noted that not all recordkeeping errors are immune from the exclusionary rule: "[i]f the police have been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests, exclusion would be . . . justified . . . ."

Exigent Circumstances

State v. Fuller, ___ N.C. App. ___, 674 S.E.2d 824 (April 21, 2009). Exigent circumstances supported officers' warrantless entry into a mobile home to arrest the defendant pursuant to an outstanding warrant. The officers knew that the defendant previously absconded from a probation violation hearing and thus was a flight risk, that defendant had previously engaged in violent behavior and was normally armed, and when they announced their presence, they watched, through a window, as the defendant disappeared from view. The officers reasonably believed that the defendant was attempting to escape and presented a danger to the officers and others in the home.

Identification of Defendant

State v. Hussey, ___ N.C. App. ___, 669 S.E.2d 864 (Dec. 16, 2008). An armed robbery victim's identification of the defendant in the courtroom did not violate due process. When contacted prior to trial for a photo lineup, the victim had refused to view the pictures. The victim saw the defendant for the first time since the robbery at issue when the victim saw him sitting in the courtroom immediately prior to trial. This identification, without law enforcement involvement or suggestion, was not impermissibly suggestive.

Interrogation

Montejo v. Louisiana, ___ S. Ct. ___ (May 26 2009). The defendant was arrested for murder, waived his *Miranda* rights, and gave statements in response to officers' interrogation. He was brought before a judge for a preliminary hearing, who ordered that the defendant be held without bond and appointed counsel to represent him. Later that day, two officers visited the defendant in prison and asked him to accompany them to locate the murder weapon. He was again read his *Miranda* rights and agreed to go with the officers. During the trip, he wrote an inculpatory letter of apology to the murder victim's widow. Only on his return did the defendant finally meet his court-appointed attorney. The issue before the Court was whether the letter of apology was erroneously admitted in violation of the defendant's Sixth Amendment right to counsel. In *Michigan v. Jackson*, 475 U.S. 625 (1986), the Court had ruled that when a defendant requests counsel at an arraignment or similar proceeding at which the Sixth Amendment right to counsel attaches, an officer is thereafter prohibited under the Sixth Amendment from initiating interrogation. In this case, the defendant was appointed counsel as a matter of course per state law; no specific request for counsel was made. Instead of deciding whether *Jackson* barred the officers from initiating interrogation of the defendant after counsel was appointed, the Court overruled *Jackson.* Thus, it now appears that the Sixth Amendment is not violated when officers interrogate a defendant after the defendant has requested counsel, provided a waiver of the right to counsel is obtained. The Court hinted that a standard *Miranda*

waiver will suffice to waive both the Fifth Amendment right to counsel and Sixth Amendment right to counsel. The Court remanded the case to the state court to determine unresolved factual and legal issues. Note that after *Montejo,* a defendant's 5th Amendment right to counsel under *Miranda* for custodial interrogations remains intact.

State v. Dix, ___ N.C. App. ___, 669 S.E.2d 25 (Dec. 2, 2008). The defendant's statement, "I'm probably gonna have to have a lawyer," was not an invocation of his right to counsel. The defendant had already expressed a desire to tell his side of the story and was asked to wait until they got to the station. Notwithstanding this, he gave a brief unsolicited statement to one officer while en route to the station, and this statement was relayed to the questioning officer. The questioning officer reasonably expected the defendant to continue their former conversation and proceed with the statement he apparently wished to make. Thus, when the defendant made the remark, the officer was understandably unsure of the defendant's purpose, and followed up with an attempt to clarify the defendant's intentions, at which point the defendant agreed to talk.

State v. Herrera, ___ N.C. App. ___, 672 S.E.2d 71 (Feb. 3, 2009). The police did not impermissibly interrogate the defendant after he requested a lawyer by offering to allow him to speak with his grandmother by speaker phone. Once the defendant stated that he wished to have a lawyer, all interrogation ceased. However, before leaving for the magistrate's office, an interpreter who had been working with the police, informed an officer that he had promised to let the defendant's grandmother know when the defendant was in custody. The officer allowed the interpreter to use a speaker phone to call the grandmother to so inform the grandmother. When the interpreter asked the defendant if he wanted to speak with his grandmother, the defendant responded affirmatively. While on the phone with his grandmother, the defendant admitted that he did the acts charged. The grandmother urged him to tell the police everything. Thereafter, the defendant indicated that he wanted to make a statement, was given *Miranda* warnings, waived his rights, and made a statement confessing to the crime.

Jurisdiction of Officers

Parker v. Hyatt, ___ N.C. App. ___, 675 S.E.2d 109 (April 21, 2009). A wildlife enforcement officer had authority under G.S. 113-136(d) to stop the plaintiff's vehicle for impaired driving and to arrest her for that offense. Driving while impaired satisfies the statutory language, "a threat to public peace and order which would tend to subvert the authority of the State if ignored."

Plain Feel Doctrine

State v. Williams, ___ N.C. App. ___, 673 S.E.2d 394 (Mar. 3, 2009). Remanding for a determination of whether the officer had probable cause to seize a crack cocaine cookie during a frisk, where the trial court improperly applied a standard of reasonable suspicion to the plain feel doctrine.

Random Drug Testing

Jones v. Graham County Board of Education, __ N.C. App. __, __ S.E.2d __ (June 2, 2009). County Board of Education policy mandating random, suspicionless drug and alcohol testing of all Board employees violated the N.C. Constitutional protection against unreasonable searches and seizures. The policy could not be justified as a "special needs search." The court determined that the policy was "remarkably intrusive," that Board employees did not have a reduced expectation of privacy by virtue of their employment in a public school system, and that there was no evidence of a concrete problem that the policy was designed to prevent. It concluded: "[c]onsidering and balancing all the circumstances, . . . the employees' acknowledged privacy interests outweigh the Board's interest . . . ."

Search Incident to Arrest

Arizona v. Gant, 129 S. Ct. 1710 (April 21, 2009). Holding that officers may search a vehicle incident to arrest only if (1) the arrestee is unsecured and within reaching distance of the passenger compartment when the search is conducted; or (2) it is reasonable to believe that evidence relevant to the crime of arrest might be found in the vehicle. For more complete analysis of this ruling, see the online paper available at http://www.sog.unc.edu/programs/crimlaw/arizonagantbyfarb.pdf.

Vienna Convention

State v. Herrera, ___ N.C. App. ___, 672 S.E.2d 71 (Feb. 3, 2009). A violation of the Vienna Convention on Consular Relations (requiring notification to arrested foreign national of right to have consul of national's country notified of arrest) does not require suppression of a confession.

Criminal Offenses

Accessory After the Fact

State v. Best, ___ N.C. App. ___, 674 S.E.2d 467 (April 7, 2009). Double jeopardy prohibited convictions of both accessory after fact to first-degree murder and accessory after the fact to first-degree kidnapping when the jury could have found that accessory after fact of first-degree murder was based solely on kidnapping under the felony murder rule. The jury's verdict did not indicate whether it found first-degree murder based on premeditation and deliberation or felony murder based on first-degree kidnapping, or both. The court arrested judgment on the defendant's convictions of accessory after the fact to first-degree kidnapping, reasoning that if a defendant cannot be convicted of felony murder and the underlying felony, a defendant could not be convicted of accessory after the fact to felony murder and accessory after the fact to the underlying felony.

State v. McGee, __ N.C. App. __, __ S.E.2d __ (June 2, 2009). The defendant could be convicted of accessory after the fact to assault with a deadly weapon with intent to kill inflicting serious injury even if the principal pled guilty to a lesser offense of that assault.

Assaults

State v. Liggons, ___ N.C. App. ___, 670 S.E.2d 333 (Jan. 6, 2009). There was sufficient evidence of an intent to kill and the weapon used was deadly as a matter of law. The defendant was convicted of assault with a deadly weapon with intent to kill inflicting serious injury and other offenses. There was sufficient evidence of an intent to kill where the defendant and his accomplice discussed intentionally forcing drivers off the road in order to rob them and one of them then deliberately threw a very large rock or concrete chunk through the driver's side windshield of the victim's automobile as it was approaching at approximately 55 or 60 miles per hour. The court concluded that it is easily foreseeable that such deliberate action could result in death, either from the impact of the rock on or a resulting automobile accident. The court also held that the trial judge did not err by declining to instruct on assault inflicting serious injury as a lesser of assault with a deadly weapon with intent to kill inflicting serious injury. The size of the rock and the manner in which it was used establishes that it was a deadly weapon. Thus, the trial court did not err in determining as a matter of law that the rock was a deadly weapon and in refusing to charge the jury as to the lesser offense.

State v. Wallace, ___ N.C. App. ___, ___ S.E.2d ___ (June 2, 2009). The defendant and an accomplice, both female, assaulted a male with fists and tree limbs. The two females individually, but not collectively,

weighed less than the male victim, and both were shorter than him. They both were convicted of assault with a deadly weapon inflicting serious injury. The court ruled that the evidence was sufficient to prove that the fists and the tree limbs were deadly weapons.

State v. Corbett, ___ N.C. App. ___, 675 S.E.2d 150 (April 21, 2009). Assault is not a lesser-included offense of sexual battery.

Conspiracy

State v. Robledo, ___ N.C. App. ___, 668 S.E.2d 91 (Nov. 4, 2008). There was sufficient evidence to support the defendant's conviction of conspiracy to traffic in marijuana; the fact that the state took a voluntary dismissal of the conspiracy charge against the co-conspirator was irrelevant to that determination.

Drug Offenses

Maintaining a Dwelling

State v. Fuller, ___ N.C. App. ___, 674 S.E.2d 824 (April 21, 2009). There was insufficient evidence to establish that the defendant "maintained" the dwelling. Evidence showed only that the defendant had discussed, with the home's actual tenant, taking over rent payments but never reached an agreement to do so; a car, similar to defendant's was normally parked at the residence; and the defendant's shoes and some of his personal papers were found there.

Possession

State v. Miller, 363 N.C. 96 (Mar. 20, 2009). There was sufficient evidence that the defendant constructively possessed cocaine. Two factors frequently considered in analyzing constructive possession are the defendant's proximity to the drugs and indicia of the defendant's control over the place where the drugs are found. The court found the following evidence sufficient to support constructive possession: Officers found the defendant in a bedroom of a home where two of his children lived with their mother. When first seen, the defendant was sitting on the same end of the bed where the cocaine was recovered. Once the defendant slid to the floor, he was within reach of the package of cocaine recovered from the floor behind the bedroom door. The defendant's birth certificate and state-issued identification card were found on top of a television stand in that bedroom. The only other person in the room was not near any of the cocaine. Even though the defendant did not exclusively possess the premises, these incriminating circumstances permitted a reasonable inference that the defendant had the intent and capability to exercise control and dominion over cocaine in that room.

State v. Robledo, ___ N.C. App. ___, 668 S.E.2d 91 (Nov. 4, 2008). There was sufficient evidence to show that the defendant knowingly possessed marijuana in a case where the defendant was convicted of trafficking in marijuana and conspiracy to traffic by possession. Defendant signed for and collected a UPS package containing 44.1 pounds of marijuana. About a half hour later, the defendant helped load a second UPS package containing 43.8 pounds of marijuana into the back seat of a car. Both boxes were found when police searched the car, driven by the defendant. The defendant had once lived in the same residence as his niece, the person to whom the packages were addressed, and knew that his niece frequently got packages like these. Also, the defendant expected to earn between $50 and $200 for simply taking the package from UPS to his niece. Finally the address on one of the boxes did not exist.

State v. Fuller, ___ N.C. App. ___, 674 S.E.2d 824 (April 21, 2009). There was sufficient evidence of constructive possession of cocaine for purposes of charges of trafficking by possession, possession with intent, and possession of paraphernalia.

Trafficking

State v. Conway, ___ N.C. App. ___, 669 S.E.2d 40 (Dec. 2, 2008). The evidence was insufficient to support the defendant's methamphetamine trafficking convictions because G.S. 90-95(h)(3b) requires the state to prove the actual weight of the methamphetamine in a mixture. The defendant was convicted of trafficking by possession and manufacture of 400 grams or more methamphetamine. The state's evidence consisted of 530 grams of a liquid that contained a detectable amount of methamphetamine. The exact amount of methamphetamine was not determined. The court noted that the trafficking statutes for methaqualone, cocaine, heroin, LSD, and MDA/MDMA specifically contain the clause "or mixture containing such substance," whereas G.S. 90-95(h)(3b) for methamphetamine and as amphetamine does not contain that clause. Note: The court did not discuss whether the use of the term "mixture" at the end of the introductory paragraph in G.S. 90-95(h)(3b) is relevant in determining the legislature's intent and outweighs what may have been the inadvertent omission of the clause "or mixture containing such substance" earlier in the paragraph.

Kidnapping

State v. Thomas, ___ N.C. App. ___, ___ S.E.2d ___ (May 5, 2009). In a case in which the defendant was convicted of kidnapping and rape, the kidnapping conviction could stand where the confinement and restraint of the victim went beyond the restraint inherent in the commission of the rape. The defendant threatened the victim with a gun while she was in his car. When she tried to escape, he pulled her back into the car and sprayed her with mace. He drove her away from her car and children. When she jumped out, he forced her back into the car at gunpoint. He then drove her to a secluded wooded area, where he raped her.

State v. Gayton-Barbossa, __ N.C. App. __, __ S.E.2d __ (May 19, 2009). The evidence was sufficient to support a charge of kidnapping where the restraint used against the victim was not inherent in the assaults committed. The defendant kept the victim from leaving her house by repeatedly striking her with a bat. When she was able to escape, he chased her, grabbed her, and shot her. Detaining the victim in her home and again outside was not necessary to effectuate the assaults.

State v. Smith, ___ N.C. App. ___, 669 S.E.2d 8 (Dec. 2, 2008). The fact that the state proceeded on a theory of acting in concert does not require the conclusion that the defendants released the victim in a safe place simply because one of the other perpetrators arguably did so. The record contained substantial evidence that defendants did not undertake conscious, willful action to assure that the victim was released in a safe place.

Larceny

State v. Patterson, ___ N.C. App. ___, 671 S.E.2d 357 (Jan. 6, 2009). The doctrine of recent possession applied to a video camera and a DVD player found in the defendant's exclusive possession 21 days after the break-in.

Obscenity and Related Offenses

State v. Anderson, ___ N.C. App. ___, 669 S.E.2d 793 (Dec. 16, 2008). Double jeopardy did not bar conviction and punishment for both second-degree and third-degree sexual exploitation offenses where the third-degree charges were based on the defendant's possession of the images of minors, and the second-degree charges were based on the defendant's receipt of those images.

State v. Martin, ___ N.C. App. ___, 671 S.E.2d 53 (Jan. 20, 2009). No double jeopardy violation when the defendant was convicted and punished for indecent liberties and using a minor in obscenity based on the same photograph depicting the child and defendant. Each offense has at least one element that is not included in the other offense.

Robbery

State v. Ford, ___ N.C. App. ___, 669 S.E.2d 832 (Dec. 16, 2008). There was sufficient evidence to establish that the defendant used a firearm in an armed robbery case. The evidence showed that the defendant and an accomplice entered a store and that one of them pointed what appeared to be a silver handgun at the clerk. When later arresting the accomplice at a residence, an officer saw what appeared to be a silver gun on the ground. However, the item turned out to be some type of lighter that appeared to be a gun. Neither the state nor the defendant presented evidence at trial that the item found was the one used during the robbery. When a person perpetrates a robbery by brandishing an instrument that appears to be a firearm or other dangerous weapon, in the absence of any evidence to the contrary, the law will presume the instrument to be what the person's conduct represents it to be.

Sexual Assaults and Sex Offender Registration Offenses

Indecent Liberties

State v. Smith, 362 N.C. 583 (Dec. 12, 2008). The trial judge did not commit plain error in the jury instruction on indecent liberties. When instructing on indecent liberties, the trial judge is not required to specifically identify the acts that constitute the charge.

Failure to Register/Notify of Address or Other Change

State v. Worley, __ N.C. App. __, __ S.E.2d __ (June 16, 2009). Upholding a conviction for willfully violating the change of address requirement applicable to sex offenders during a period in which the defendant was homeless and was living in a van at a specific location. Stating: "[T]he sex offender registration statutes operate on the basis of an assumption that everyone does, at all times, have an "address" of some sort, even if it is a homeless shelter, a location under a bridge or some similar place. In the event that we were to accept the argument that "drifters" such as [d]efendant have no "address" . . . then such individuals would be effectively immune from the registration requirements found in current law as long as they continued to "drift.""

Rape

State v. Lawrence, 363 N.C. 118 (Mar. 20, 2009). The court, per curiam and without an opinion, affirmed the ruling of the court of appeals that there was substantial evidence that the defendant displayed an article which the victim reasonably believed to be a dangerous or deadly weapon. The evidence showed that the defendant grabbed the victim, told her that he was going to kill her and reached into his pocket to get something; although the victim did not see if the item was a knife or a gun, she saw something shiny and silver that she believed to be a knife.

Sexual Battery

State v. Corbett, ___ N.C. App. ___, 675 S.E.2d 150 (April 21, 2009). Assault is not a lesser-included offense of sexual battery.

Sexual Offense

State v. Crocker, __ N.C. App. __, __ S.E.2d __ (June 2, 2009). The evidence was sufficient of a sexual offense where the child victim testified that the defendant reached beneath her shorts and touched between "the skin type area" in "[t]he area that you pee out of" and that he would rub against a pressure point causing her pain and to feel faint. A medical expert testified that because of the complaint of pain, the victim's description was "more suggestive of touching . . . on the inside."

States of Mind

State v. Goode, __ N.C. App. __, __ S.E.2d __ (June 16, 2009). An instruction on transferred intent was proper in connection with a charge of attempted first-degree murder of victim B where the evidence showed that B was injured during the defendant's attack on victim A, undertaken with a specific intent to kill A.

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

State v. Byrd. __ N.C. __, 675 S.E.2d 323 (May 1, 2009). Reversing the court of appeals and holding that a temporary restraining order (TRO) entered pursuant to Rule 65(b) of the N.C. Rules of Civil Procedure on a motion alleging acts of domestic violence in an action for divorce from bed and board was not a valid domestic violence protective order as defined by Chapter 50B and was not entered after a hearing by the court or with consent of the parties. Thus, the TRO could not support imposition of the punishment enhancement prescribed by G.S. 50B-4.1(d).

Trespass

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

Weapons Offenses

State v. Fuller, ___ N.C. App. ___, 674 S.E.2d 824 (April 21, 2009). There was sufficient evidence of constructive possession to sustain conviction for possession of a firearm by a felon.

Defenses

Entrapment

State v. Morse, ___ N.C. App. ___, 671 S.E.2d 538 (Jan. 6, 2009). The trial judge did not err by refusing to instruct on entrapment. The defendant was convicted of soliciting a child by computer with intent to commit an unlawful sex act. The "child" was a law enforcement officer pretending to be a 14 year old in an adults-only Yahoo chat room. The court concluded that there was no credible evidence that the criminal design originated in the minds of the government officials, rather than defendant, such that the

crime was the product of the creative activity of the government. Instead, it stated, the evidence indicates that undercover deputies merely provided the opportunity for the defendant and, when presented with that opportunity, the defendant pursued it with little hesitance.

Capital

Aggravating and Mitigating Circumstances

State v. Garcell, 363 N.C. 10 (Mar. 20, 2009). The defendant was convicted of first-degree murder and sentenced to death. The defendant was eighteen years and five months old when he committed the murder. The court rejected the defendant's argument that *Roper v. Simmons*, 543 U.S. 551 (2005) (Eighth Amendment prohibits execution of one who commits murder before eighteenth birthday), required it to conclude that the defendant's age had mitigating value as a matter of under the G.S. 15A-2000(f)(7) (defendant's age when murder committed) mitigating circumstance. Notwithstanding *Roper*, prior violent felonies committed when the defendant was only 16 years old could be considered with respect to the G.S. 15A-2000(e)(3) (prior violent felony conviction) aggravating circumstance.

Physician Participation in Execution

N.C. Dep't of Correction v. N.C. Medical Board, __ N.C. __, 675 S.E.2d 641 (May 1, 2009). The N.C. Medical Board's position statement on physician participation in executions exceeds its authority under G.S. Chapter 90 because it contravenes the specific requirement of physician presence in G.S. 15-190.

Post-Conviction

Ineffective Assistance of Counsel

Knowles v. Mirzayance, 129 S. Ct. 1411 (Mar. 24, 2009). Counsel was not ineffective by recommending that the defendant withdraw his insanity defense. The defendant entered pleas of not guilty and not guilty by reason of insanity (NGI) at his first-degree murder trial in state court. State procedure required a bifurcated trial consisting of a guilt phase followed by a NGI phase. During the guilt phase, the defendant sought, through medical testimony, to show that he was insane and thus incapable of premeditation and deliberation. The jury nevertheless convicted him of first-degree murder. For the NGI phase, the defendant had the burden of showing insanity. Counsel had planned to meet that burden presenting medical testimony similar to that offered in the guilt phase. Although counsel had planned to offer additional testimony of the defendant's parents, counsel learned that the parents were refusing to testify. At this point, counsel advised the defendant to withdraw his NGI plea and the defendant complied. Defense counsel was not ineffective by recommending withdrawal of a defense that counsel reasonably believed was doomed to fail. The defendant's medical testimony already had been rejected in the guilt phase and the defendant's parents' expected testimony, which counsel believed to be the strongest evidence, was no longer available. Counsel is not required to raise claims that are almost certain to lose. Additionally, the defendant did now show prejudice; it was highly improbable that jury that had just rejected testimony about the defendant's mental state when the state bore the burden of proof would have reached a different result when the defendant presented similar evidence at the NFI phase.

State v. Goode, __ N.C. App. __, __ S.E.2d __ (June 16, 2009). No *Harbison* error occurred in this murder case where the defendant consented, on the record, to counsel's strategy of admitting guilt.

Judicial Administration

Due Process and Recusal

Caperton v. Massey Coal Co., Inc., __ S. Ct. __ (June 8, 2009). A violation of due process occurred when West Virginia Supreme Court justice Brent Benjamin denied a recusal motion. The Supreme Court of West Virginia reversed a trial court judgment which had entered a jury verdict of $50 million against A.T. Massey Coal Co., Inc. Five justices heard the case, and the vote was 3 to 2. The basis for the recusal motion was that Justice Benjamin had received campaign contributions in an extraordinary amount from, and through the efforts of, Don Blankenship, Massey's board chairman and principal officer. After the initial verdict in the case, but before the appeal, West Virginia held its 2004 judicial elections. Benjamin was running against an incumbent justice. In addition to contributing the $1,000 statutory maximum to Benjamin's campaign committee, Blankenship donated almost $2.5 million to a political organization opposed to the incumbent and supporting Benjamin. Additionally, Blankenship spent just over $500,000 on independent expenditures—direct mailings and letters soliciting donations as well as television and newspaper advertisements supporting Benjamin. Blankenship's $3 million in contributions were more than the total amount spent by all other Benjamin supporters and three times the amount spent by Benjamin's own committee. Benjamin won, in a close election. In October 2005, before Massey filed its petition for appeal to the West Virginia Supreme Court, the plaintiffs in the underlying action moved to disqualify now-Justice Benjamin based on the conflict caused by Blankenship's campaign involvement. Justice Benjamin denied the motion. In November 2007, the West Virginia Supreme Court reversed the $50 million verdict against Massey. It did so again on rehearing, after another recusal motion was denied. The U.S. Supreme Court held that "Blankenship's significant and disproportionate influence—coupled with the temporal relationship between the election and the pending case—offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear, and true" and that "[o]n these extreme facts, the probability of actual bias rises to an unconstitutional level."