

WEAPONS

Hiding A Gun In Someone Else's House Is Not Analogous To Throwing It Away For Purposes of Inferring Knowledge That It Was Stolen.

State v. Wilson, ___ N.C. App. ___, ___ S.E.2d ___ (April 20, 2010).

The evidence was insufficient to establish that the defendant knew a gun was stolen. Case law establishes that guilty knowledge can be inferred from the act of throwing away a stolen weapon. In this case, shortly after a robbery, the defendant and an accomplice went to the home of the accomplice's mother, put the gun in her bedroom, and left the house. These actions were not analogous to throwing an item away for purposes of inferring knowledge that an item was stolen.

(1) G.S. 14-269.4 (Possessing Deadly Weapon in Courthouse), As Applied to Defendant, Did Not Violate North Carolina Constitution (2) G.S. 14-269.4 Does Not Require State to Prove That Defendant Committed Statutory Violation "Knowingly" or "Willfully"

State v. Sullivan, ___ N.C. App. ___, ___ S.E.2d ___ (16 February 2010).

The defendant openly displayed a firearm while in the clerk's office in a courthouse. He was convicted of possessing a deadly weapon in a courthouse under G.S. 14-269.4. The court ruled: (1) G.S. 14-269.4, as applied to the defendant, was not an unconstitutional violation of his right to bear arms under Article I, Section 30 of the North Carolina Constitution; and (2) the trial court did not err when it refused the defendant's request to instruct the jury that it must consider whether the defendant "knowingly" or "willfully" violated G.S. 14-269.4 because the defendant's intent was not an element of the offense.

(1) No Discovery Violation Because Victim's Statement To Prosecutor, Which Was Not Disclosed to Defendant, Did Not Offer Any Significantly New or Different Information From Victim's Prior Statement to Law Enforcement That Had Already Been Provided to Defendant

(2) Trial Court Did Not Err in Using Transferred Intent Instruction in Trial of Discharging Firearm into Occupied Property

(3) Muzzle Velocity Provision in G.S. 14-34.1 (Discharging Firearm or Barreled Weapon into Occupied Property) Does Not Apply to Firearms

State v. Small, ___ N.C. App. ___, 689 S.E.2d 444 (8 December 2009).

The defendant was convicted of discharging a firearm into occupied property and assault with a deadly weapon inflicting serious injury. (1) The court ruled that there was no discovery violation under G.S. 15A-903(a)(1) because the assault victim's statement to the prosecutor, which was not disclosed to the defendant, did not offer any significantly new or different information from the victim's prior statement to law enforcement that had already been provided to the defendant. (2) The state presented evidence that the defendant intentionally fired a weapon toward the assault victim, who was outside a home, and some projectiles penetrated the home's exterior. Evidence was also introduced that the defendant knew people other than the victim were present inside the home. The court ruled that the trial court did not err in using a transferred intent instruction to transfer the intent to shoot a particular person to the offense of

discharging a firearm into occupied property. (3) The court ruled that the provision in G.S. 14-34.1 (discharging firearm or barreled weapon into occupied property) requiring a muzzle velocity of at least 600 feet per second does not apply to firearms.

State in Prosecution of Possession of Weapon of Mass Death and Destruction Is Not Required to Prove That Defendant Knew Barrel of Shotgun Was Less Than Eighteen Inches

State v. Watterson, ___ N.C. App. ___, 679 S.E.2d 897 (4 August 2009).

The court ruled that the state in the prosecution of possession of a weapon of mass death and destruction (G.S. 14-288.8) is not required to prove that the defendant knew that the barrel of a shotgun was less than eighteen inches.

Court, Per Curiam and Without Opinion, Summarily Affirms Ruling of Court of Appeals That: (1) Description of Weapon in Charge of Carrying Concealed Weapon Was Surplusage, and (2) Even Assuming Trial Court Erred in Instructing on Weapon Not Alleged in Charge, Court Did Not Commit Prejudicial Error

State v. Bollinger, ___ N.C. ___, ___ S.E.2d ___ (1 May 2009), affirming, ___ N.C. App. ___, 665 S.E.2d 136 (19 August 2008).

The defendant was charged with carrying a concealed weapon, a metallic set of knuckles. The evidence showed that an officer discovered knives on the defendant's person in addition to the metallic knuckles. The trial court instructed the jury concerning the weapon element as follows: "one or more knives." The court, per curiam and without an opinion, summarily affirmed the ruling of the North Carolina Court of Appeals that (1) the language in the charge for a carrying concealed weapon describing the weapon as "a Metallic set of Knuckles" was unnecessary and thus surplusage; and (2) even assuming the trial court erred in instructing on a weapon not alleged in the charge, the trial court did not commit prejudicial error to require a reversal of the defendant's conviction. The court noted that in this case there was evidence of knives concealed on the defendant's person.

(1) Sufficient Evidence to Prove Defendant's Hands and Fists Were Deadly Weapon and That Serious Injury Was Inflicted to Support Felonious Assault Conviction

State v. Allen, ___ N.C. App. ___, ___ S.E.2d ___ (21 October 2008).

The defendant was convicted of assault with a deadly weapon inflicting serious injury and larceny of a motor vehicle. (1) The court ruled, relying on *State v. Harris*, ___ N.C. App. ___, 657 S.E.2d 701 (2008), that there was sufficient evidence to prove that the defendant's hands and fists were a deadly weapon and that serious injury was inflicted to support the

felonious assault conviction. The defendant was 25 years old, seven inches taller and 40 pounds heavier than the victim, who was 38 years old. The defendant struck repeated blows to the victim's head and face with his hands and fists. The victim suffered traumatic head injuries and extreme facial bruising and swelling, as well as bleeding from her left ear and nose. Her left eye was swollen shut for over a month, and the insides of her ear and mouth were damaged. She lost consciousness and remained disoriented after she awoke,. (2) The court ruled, relying on *State v. Kemmerlin*, 356 N.C. 446 (2002), that there was sufficient evidence that the defendant committed larceny of the assault victim's motor vehicle. After assaulting the victim, the defendant drove her vehicle to Norfolk, Virginia and abandoned it there. The defendant's abandonment of the vehicle placed the vehicle beyond his power to return it to the victim and showed his indifference whether she ever recovered it.

Insufficient Evidence to Support Conviction of Carrying Concealed Weapon

State v. Soles, ___ N.C. App. ___, 662 S.E.2d 564 (1 July 2008).

The court ruled that there was insufficient evidence to support the defendant's conviction of carrying a concealed weapon. An officer stopped the defendant's van for a motor vehicle violation and ordered the defendant out of the van. The officer searched a backpack in the back of the van (there were no seats there) and found a pistol. The court noted case law that there must be evidence that a weapon must be within the reach and control of the defendant. Because the state failed to offer evidence on this issue, there was insufficient evidence to support the defendant's conviction.

Although Trial Judge in Felonious Assault Trial Correctly Submitted Issue Whether 2x4 Board Was Deadly Weapon, Trial Judge Erred in Not Submitting Lesser Offense of Assault Inflicting Serious Injury

State v. Tillery, 186 N.C. App. 447, 651 S.E.2d 291 (16 October 2007).

The defendant was convicted of assault with a deadly weapon inflicting serious injury. The court ruled, relying on *State v. Lowe*, 150 N.C. App. 682 (2002), and *State v. Palmer*, 293 N.C. 633 (1977), that although the trial judge correctly submitted the issue to the jury whether a 2x4 board was a deadly weapon, the trial judge erred in not submitting the lesser offense of assault inflicting serious injury. The 2x4 board used in this case was not a deadly weapon as a matter of law.

(1) Defendant’s Use of Hands and Water Together (By Holding Victim Under Water) Was Sufficient Evidence of a Deadly Weapon in Trial of Assault with Deadly Weapon on Government Officer

State v. Smith, ___ N.C. App. ___, 650 S.E.2d 29 (18 September 2007).

The defendant was convicted of assault with a deadly weapon on a government officer under G.S. 14-34.2 involving an assault on a law enforcement officer who was attempting to arrest the defendant at a river. (1) The defendant used his hands to submerge the officer’s head, chest, and abdomen in the river and to hold him there. The court ruled that the defendant’s use of his hands and the water together was sufficient evidence of a deadly weapon to submit the issue to the jury. The manner in which the defendant used his hands and the water was likely to cause death or serious bodily harm. The court emphasized that the defendant did not assault the officer with his hands alone; rather, he used his hands to bring the officer to an instrument of the assault, forcibly submerging the officer in the river and holding him there. Thus, the state was not required to show (to prove the hands and water together were a deadly weapon) that the officer was significantly smaller or weaker than the defendant or that the officer was injured or otherwise incapacitated when the defendant assaulted him. The court referred to the rulings in *State v. Rogers*, 153 N.C. App. 203 (2002), and *State v. Shubert*, 102 N.C. App. 419 (1991).

Possession of Closed Pocketknife on Educational Property Violates G.S. 14-269.2(d) (Weapon on Educational Property); Operability of Pocketknife Is Irrelevant

In re B.N.S., 182 N.C. App. 155, 641 S.E.2d 411 (6 March 2007).

A juvenile had a closed pocket knife in his coat pocket at a high school. The pocketknife’s blade was 2.5 inches long. The court ruled that this evidence was sufficient to support the juvenile’s adjudication of delinquency for a violation of G.S. 14-269.2(d) (weapon on educational property). The court also stated that the operability of the pocketknife was irrelevant. The court noted that none of the statutory exemptions to this offense in G.S. 14-269.2(g) and (h) applied in this case. [Author’s note: As a result of this ruling, disregard a contrary view on this issue set out on page 412 of the Institute of Government’s publication, *North Carolina Crimes: A Guidebook on the Elements of Crime* (5th ed. 2001).]

Using Hands to Beat Robbery Victim Was Not “Dangerous Weapon, Implement or Means” to Support Conviction of Armed Robbery

State v. Hinton, 361 N.C. 207, 639 S.E.2d 437 (26 January 2007),

affirming, 176 N.C. App. 191, 625 S.E.2d 918 (21 February 2006)
(unpublished opinion).

The defendant was convicted of armed robbery based on using his fists to beat the robbery victim. The court ruled that the use of hands to beat a robbery victim is not a “dangerous weapon, implement or means” to support a conviction of armed robbery under G.S. 14-87. The court determined that the North Carolina General Assembly intended to require the state to prove that a defendant used an external dangerous weapon or means to convict a defendant of armed robbery. Thus, the use of hands, fists, or feet is insufficient. [Author’s note: This ruling does not affect prior rulings that the element of “deadly weapon” in various assault offenses may be satisfied by the use of hands or feet.]

Assault--Knife--Deadly weapon per se

State v Caudle, 172 N. C. APP. 261 (2005)

There was no plain error in an assault prosecution where the court instructed the jury that the kitchen knife used by defendant was a deadly weapon per se. The definition of a deadly weapon clearly encompasses a wide variety of knives, and the actual effects produced by the weapon may be considered in determining whether it is deadly.

Firearms and Other Weapons--Firing into occupied property--Knowledge that closed restaurant was occupied

State v Everette, 172 N. C. APP. 237 (2005)

A defendant charged with firing into an occupied building had reasonable grounds to believe that the building was occupied at the time of the shooting, and the trial court did not err by denying his motion to dismiss. Defendant was shooting at a police officer in the street, the building was a restaurant closed for the night but in a busy area with other businesses remaining open, the owner was still inside, and it is significant that some light was emanating from the restaurant.

1) Firearms and Other Weapons—Forfeiture--Drug use

State v. Oaks, 163 N. C. APP. 719 (2004)

The trial court had the authority to order the forfeiture and destruction of firearms seized from a home where it found that defendant was an unlawful user of a controlled substance.

2) Firearms and Other Weapons--Forfeiture--Evidence of drug use--Not

concurrent--Opportunity to object

State v. Oaks, 163 N. C. APP. 719 (2004)

The court abused its discretion by ordering that firearms belonging to defendant's wife be destroyed because she was an unlawful user of controlled substances where the evidence against her consisted of hearsay testimony from her husband's plea hearing and marijuana convictions from 1992 and 1988. She had no notice or opportunity to object to the testimony at the time it was given, and the drug use was not concurrent with the firearms possession.

3) Firearms and Other Weapons--Forfeiture--Federal law applied in state court

State v. Oaks, 163 N. C. APP. 719 (2004)

The trial court properly based its decision not to return weapons to a marijuana user on federal law despite defendant's contention that the court lacked jurisdiction to apply federal law in a state criminal proceeding. The court cannot issue an order that would place the court and defendant in violation of federal law.

4) Firearms and Other Weapons--Forfeiture order--Indefinite time

State v. Oaks, 163 N. C. APP. 719 (2004)

A trial court conclusion that defendant and his wife (who are marijuana users) may not possess firearms on their premises was vacated because it was for an indefinite time. The order apparently presumes that defendant will always be an unlawful user of controlled substances.

Failure to Give a Defendant Miranda Warnings Did Not Require Suppression of Firearm Obtained as a Result of Defendant's Unwarned But Voluntary Statement

United States v. Patane, (28 June 2004).

An officer arrested the defendant at his residence for violating a restraining order involving his exgirlfriend. When another officer began to give Miranda warnings, the defendant interrupted the officer, asserting he knew his rights, and neither officer attempted to complete the Miranda warnings. Because one of the officers had been previously informed that the defendant, a convicted felon, illegally possessed a Glock pistol, he asked the defendant about it. The defendant, after persistent questioning, told the officer that the pistol was in his bedroom. The officer received consent from the defendant to retrieve the pistol. The pistol was admitted at his trial, and he was convicted of possession of a firearm by a convicted

felon. An opinion representing the views of three Justices and announcing the judgment of the Court ruled, distinguishing *Dickerson v. United States*, 530 U.S. 428 (2000) (Miranda announced a constitutional rule that Congress may not supersede legislatively), that the Fifth Amendment's self-incrimination privilege is not implicated by the admission into evidence of the physical fruit of a voluntary statement taken in violation of the Miranda ruling. An opinion representing the views of two other Justices and concurring in the judgment stated that it agreed with the opinion announcing the judgment of the Court that the nontestimonial physical fruit of the defendant's unwarned statement, the Glock pistol, was admissible-although it did not necessarily agree with all of the statements in the opinion. [Author's note: *State v May*, 334 N.C. 609, 434 S.E.2d 180 (1993) (physical evidence discovered as a result of a voluntary statement taken in violation of Miranda is admissible), is consistent with this ruling.]

Firearms and Other Weapons--Weapon in vehicle--Constructive possession--Sufficiency of evidence

State v. Clark, 159 N. C. APP. 520 (2003)

There was sufficient evidence to submit possession of a firearm by a felon to the jury where a gun was found under the driver's seat of a Jeep driven by defendant after an armed robbery. Defendant was a joint owner of the Jeep and had been the only driver the entire day of the robbery, the gun could be seen readily when the driver's door was open, there was no evidence of movement toward the driver's seat by the occupant of the passenger seat after the Jeep was stopped, and the seat frame and debris would have made it difficult for the passenger in the back seat to shove the gun under the seat.

Sentencing--Habitual felon--Utilizing same felony as basis for underlying conviction

State v. Glasco, 160 N. C. APP. 150 (2003)

The indictment used to charge defendant for being an habitual felon did not violate defendant's double jeopardy rights by allegedly utilizing the same felony charge as the basis for his underlying conviction for possession of a firearm by a convicted felon and as one of the three underlying felonies used to elevate him to habitual felon status, because our courts have determined that elements used to establish an underlying conviction may also be used to establish a defendant's status as a habitual felon.

1) Firearms and Other Weapons--Possessing a weapon on educational

property--Criminal intent--Willfulness

State v. Haskins, 160 N. C. APP. 349 (2003)

The trial court did not err in a prosecution of a bail bondsman for possessing a weapon on educational property by failing to instruct on criminal intent or willfulness, because: 1) N.C.G.S. § 14- 269.2 by its plain terms does not include any reference to criminal intent or mens rea; 2) the purpose of N.C.G.S. § 14-269.2 is to deter students and others from bringing any type of gun onto school grounds based on the increased necessity for safety in our schools; and 3) contrary to defendant's assertion that the exemptions under N.C.G.S. § 14-269.2 violate his equal protection rights, the exemptions bear a rational relationship to a legitimate government interest.

2) Firearms and Other Weapons--Possessing a weapon on educational property--Affirmative defense of reasonable necessity unavailable

State v. Haskins, 160 N. C. APP. 349 (2003)

The trial court did not err in a prosecution of a bail bondsman for possessing a weapon on educational property by instructing the jury that the affirmative defense of reasonable necessity was not a defense to N.C.G.S. § 14-269.2 and by failing to allow defense counsel to read the law of necessity to the jury, because: 1) defendant bail bondsman could have left his gun safely off campus and then notified the school principal that an armed fugitive was on the premises and that the school needed to be secured; 2) defendant could have notified the police or could have asked the school principal to notify the police; and 3) defendant could have avoided the statutory violation by leaving his gun in a locked car or with one of his colleagues and then entered school grounds.

3) Firearms and Other Weapons--Possessing a weapon on educational property--Bail bondsman--State actor exemption inapplicable

State v. Haskins, 160 N. C. APP. 349 (2003)

The trial court did not err in a possessing a weapon on educational property case by concluding as a matter of law that defendant was not a state actor exempt from the prohibitions of N.C.G.S. § 14-269.2 even though defendant was a bondsman attempting to arrest a fugitive, because: 1) bail bondsmen and runners are not officers of the state; and 2) the statutory right of arrest given to a surety under N.C.G.S. § 58-71.30 does not create a law enforcement officer in the person of the bail bondsman.

Firearms and Other Weapons--Firearm enhancement statute--First-degree kidnapping

State v. Jones, 158 N. C. APP. 498 (2003)

The trial court did not err by sentencing defendant to an additional sixty months in prison for first-degree kidnapping pursuant to the firearm enhancement statute even though our Supreme Court held in Lucas, 353 N.C. 568 (2001), that the State must allege the statutory factors supporting the enhancement under N.C.G.S. § 15-1340.16A in an indictment, because: 1) the decision in Lucas was expressly limited to cases that were not yet final; and 2) the judgment in defendant's case was final at the time the decision in Lucas was filed.

Firearms and Other Weapons--Discharging firearm into occupied property - Sufficiency of evidence

State v. Cockerham, 155 N.C. App. 729 (2003)

The trial court did not err by denying defendant's motion to dismiss the charge of discharging a firearm into occupied property even though defendant contends he did not fire into any of the types of property specified in N.C.G.S. § 14-34.1 when he fired a gun through a common wall of an apartment, because: 1) an apartment within an apartment building is an area that is surrounded on all sides or closed in, and therefore, an apartment is an enclosure as that term is used in N.C.G.S. § 14-34.1; and 2) the protection of the occupants of the building was the primary concern and objective of the General Assembly when it enacted N.C.G.S. § 14-34.1.

Firearms and Other Weapons--Discharging firearm into occupied property - General intent crime--Acting in concert--Transferred intent

State v. Byrd, 132 N.C. App. 220 (1999)

The offense of discharging a firearm into occupied property is a general intent crime so that it was not error for the trial court to inform jurors that acting in concert and transferred intent instructions applied to that offense.

Weapons and Firearms 10 (NCI4th) possession of firearm by felon in his own home--Defendant not in his home at time of offense

State v. Locklear, 121 N.C. App. 355 (1996)

The trial court did not err in refusing to dismiss a charge of possession of a

handgun by a felon based on the exception of N.C.G.S. 14-415.1(a) which allows a felon to possess a firearm within his own home, since defendant in this case was in the yard of a trailer which he owned but did not live in; he had plainly surrendered dominion and control of the property to another family; and it was thus not his "home" within the meaning of the statute.