Criminal Procedure

Indictments & Other Charging Documents

State v. Burge, __ N.C. App. __, __ S.E.2d ___ (May 17, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC00OTMtMS5wZGY=). Because an arrest warrant charged the defendant with a violation of G.S. 67-4.2 (failing to confine a dangerous dog), it could not support a conviction for a violation of G.S. 67-4.3 (attack by a dangerous dog). Even though the warrant cited G.S. 67-4.2, it would have been adequate if it had alleged all of the elements of a G.S. 67-4.3 offense. However, it failed to do so as it did not allege that the injuries required medical treatment costing more than $100.

State v. Twitty, __ N.C. App. __, __ S.E.2d ___ (May 17, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMzIwLTEucGRm). The trial court's failure to dismiss the original indictment after a superseding indictment was filed did not render the superseding indictment void or defective.

Jury Argument

State v. Hartley, __ N.C. App. __, __ S.E.2d ___ (May 17, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05NjQtMS5wZGY=). The trial court did not err by failing to intervene ex mero motu when, in a triple homicide case, the prosecutor argued, among other things, "If that . . . isn't murder, I don't know what is" and "I know when to ask for the death penalty and when not to. This isn't the first case, it's the ten thousandth for me."

State v. Twitty, __ N.C. App. __, __ S.E.2d ___ (May 17, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMzIwLTEucGRm). The trial court did not err by failing to intervene ex mero motu when the prosecutor referred to the defendant as a con man, liar, and parasite. The defendant was charged with obtaining property by false pretenses, an offense committed by deceiving or lying to win the confidence of victims. Given that the defendant lied to a church congregation in order to convince them to give him money, there was no impropriety in the State's reference to the defendant as a liar and con man; the terms accurately characterize the charged offense and the evidence presented at trial. As for the term "parasite," the court concluded: "this name-calling by the State was unnecessary and unprofessional, but does not rise to the level of gross impropriety."

Jury Instructions

State v. Hartley, __ N.C. App. __, __ S.E.2d ___ (May 17, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05NjQtMS5wZGY=). (1) In a triple murder case in which the defendant asserted an insanity defense, the trial court did not err by failing to give the defendant's requested jury instruction on the commitment process and instead instructing the jury on the issue pursuant to N.C.P.J.I—Crim. 304.10. The pattern instruction adequately charged the jury regarding procedures upon acquittal on the ground of insanity. (2) The trial court's instruction to the jury did not lower the State's burden of proving specific intent to kill.

Speedy Trial

State v. Twitty, __ N.C. App. __, __ S.E.2d ___ (May 17, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMzIwLTEucGRm). (1) G.S. 15A-711(c) could not support the defendant's statutory speedy trial claim where he had no other criminal charges pending against him at the time he was confined and awaiting trial. (2) The court rejected the defendant's constitutional speedy trial claim. The defendant made no argument that the delay was caused by the neglect or willfulness of the prosecution; he did not properly assert his speedy trial right; and he failed to show actual prejudice.

Sentencing

State v. Twitty, __ N.C. App. __, __ S.E.2d ___ (May 17, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMzIwLTEucGRm). The court rejected the defendant's argument that because his sentence at the top of the presumptive range overlapped with the low end of the aggravated range, it was improper without findings of an aggravating factor. No such findings are required to support the defendant's presumptive range sentence.

Evidence

***Crawford* Issues**

State v. Hartley, __ N.C. App. __, __ S.E.2d ___ (May 17, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05NjQtMS5wZGY=). (1) In a triple murder case, no confrontation clause violation occurred when the State's expert medical examiner was allowed to testify in place of the pathologist who performed the autopsies. The medical examiner provided her own expert opinion and did not simply regurgitate the non-testifying examiner's reports. The testifying expert made minimal references to the autopsy reports, which were never introduced into evidence, and her testimony primarily consisted of describing the victims' injuries as depicted in 28 autopsy photographs. She described the type of wounds, the pain they would have inflicted, whether they would have been fatal, and testified to each victim's cause of death. With regard to one victim who had been sexually assaulted, the expert explained, through use of photographs, that the victim had been asphyxiated, how long it would have taken for her to lose consciousness, and that the blood seen in her vagina could have been menstrual blood or the result of attempted penetration. The expert's testimony as to the impact of the various trauma suffered by the victims was based primarily on her inspection of the photographs that were admitted into evidence and her independent experience as a pathologist. Although the expert referred to the non-testifying pathologist's reports, she did not recite findings from them. To the extent that she did, no prejudice resulted given her extensive testimony based strictly on her own personal knowledge as a pathologist, including the effect of the victims' various injuries and their cause of death. Finally, the court concluded, even if any error occurred, it was harmless beyond a reasonable doubt. (2) The court noted in a footnote that the autopsy photographs were properly admitted as the basis of the testifying expert's opinion and therefore admission of them did not violate the defendant's confrontation rights.

Authentication

State v. Hartley, __ N.C. App. __, __ S.E.2d ___ (May 17, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05NjQtMS5wZGY=). A rectal swab taken from the victim was properly authenticated. An officer processed evidence at the crime scene, was present for the victim's autopsy, and obtained evidence from the doctor who performed the autopsy, including the rectal swabs, on 24 June 2004. The swabs were then placed in the custody of the

Sheriff's Office. They were submitted to the SBI for analysis and later returned to the Sheriff's Office where they were kept until the time of trial. The court rejected the defendant's argument that the chain of custody was insufficient because the swabs were taken on 19 June 2004, but were not picked up by the officer until 24 June 2004, concluding that there was no reason to believe that the evidence was altered and the possibility that it was tampered with is remote.

404(b) Evidence

State v. Twitty, __ N.C. App. __, __ S.E.2d ___ (May 17, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMzIwLTEucGRm). In a case in which the defendant was charged with obtaining property by false pretenses by lying to church members about his situation, the trial court did not abuse its discretion by admitting 404(b) evidence of the defendant's similar conduct with regard to other churches, occurring after the incident in question. The evidence was properly admitting to show common scheme or plan and was admissible even though it occurred after the incident in question.

Motion to Strike

State v. McCain, __ N.C. App. __, __ S.E.2d ___ (May 17, 2011) (No. COA10-647) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC02NDctMS5wZGY=). The trial court did not abuse its discretion by denying the defendant's untimely motion to strike.

Arrest, Search & Investigation

***Miranda* Issues**

State v. Hartley, __ N.C. App. __, __ S.E.2d ___ (May 17, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05NjQtMS5wZGY=). The defendant was not in custody when he confessed to three homicides. Officers approached the defendant as he was walking on the road, confirmed his identity and that he was okay, told him that three people had been injured at his residence, and asked him if he knew anything about the situation. After the defendant stated that he did not know about it, an officer conducted a pat down of the defendant. The defendant's clothes were damp and his hands were shaking. An officer told the defendant that the officer would like to talk to him about what happened and asked if the defendant would come to the fire department, which was being used as an investigation command post. The officer did not handcuff the defendant and told him that he was not under arrest. The defendant agreed to go with the officers, riding in the front passenger seat of the police car. The officers entered a code to access the fire department and the defendant followed them to a classroom where he sat at one table while two officers sat across from him at a different table. Officers asked the defendant if he wanted anything to eat or drink or to use the restroom and informed him that he was not under arrest. An officer noticed cuts on the defendant's hands and when asked about them, the defendant stated that he did not know how he got them. Although the officer decided that she would not allow the defendant to leave, she did not tell the defendant that; rather, she said that forensic evidence would likely lead to apprehension of the perpetrator. When she asked the defendant if there was anything else that he wanted to tell her, he confessed to the murders. Due to a concern for public safety, the officer asked where the murder weapon was located and the defendant told her where it was. The officer then left the room to inform others about the confession while another officer remained with the defendant. The defendant then was arrested and given *Miranda* warnings. He was not handcuffed and he remained seated at the same table. He waived his rights and restated his confession. The court concluded that the defendant was not

in custody when he gave his initial confession, noting that he was twice told that he was not under arrest; he voluntarily went to the fire department; he was never handcuffed; he rode in the front of the vehicle; officers asked him if he needed food, water, or use of the restroom; the defendant was never misled or deceived; the defendant was not questioned for a long period of time; and the officers kept their distance during the interview and did not use physical intimidation. The court rejected the defendant's argument that the pat-down and the officer's subjective intent to detain him created a custodial situation. The court also rejected the defendant's argument that the interrogation was an impermissible two-stage interrogation under *Missouri v. Seibert*, 542 U.S. 600 (2004), concluding that the case was distinguishable from *Seibert* because the defendant was not in custody when he made his first confession.

Search Warrants

State v. McCain, __ N.C. App. __, __ S.E.2d ___ (May 17, 2011) (No. COA10-534) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC01MzQtMS5wZGY=). The court held in this drug case, the search warrant was supported by probable cause. In his affidavit, the Investigator stated that he had received information within the past 30 days from confidential reliable informants ("CRIs") that the defendant was selling narcotics from his residence; during June and July of 2008, the sheriff's department had received information from anonymous callers and CRIs that drugs were being sold at the defendant's residence; in July 2008, the Investigator met with a "concerned citizen" who stated that the defendant was supplying drugs to his sister who was addicted to "crack" cocaine; the defendant's residence had been "synonymous with the constant sale and delivery of illegally controlled substances" as the defendant had been the subject of past charges and arrests for possession with intent to sell and deliver illegal controlled substances; and the defendant's criminal background check revealed a "prior history" of possession of narcotics. Given the specific information from multiple sources that there was ongoing drug activity at the defendant's residence combined with the defendant's past criminal involvement with illegal drugs, sufficient probable cause was presented the affidavit. The court further concluded that the information from the informants properly was considered, noting that the CRIs had been "certified" because information provided by them had resulted in arrests and convictions in the past, they were familiar with the appearance, packaging, and effects of cocaine, they provided statements against penal interest, the Investigator had met personally with the concerned citizen, and the CRIs, callers, and the concerned citizen had all given consistent information that during the months of June and July 2008, illegal drugs were being sold at the defendant's residence.

Criminal Offenses

Frauds

State v. Twitty, __ N.C. App. __, __ S.E.2d ___ (May 17, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMzIwLTEucGRm). There was sufficient evidence to support a false pretenses conviction when the defendant falsely told a church congregation that his wife had died and that he was broke to elicit sympathy and obtain property.

Drug Offenses

State v. McCain, __ N.C. App. __, __ S.E.2d ___ (May 17, 2011) (No. COA10-534) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC01MzQtMS5wZGY=). The trial court erred by submitting to the jury the charge of possession with intent to manufacture cocaine because it is

not a lesser-included offense of the charged crime of trafficking by possession of cocaine. However, possession of cocaine is a lesser of the charged offense; because the jury convicted on possession with intent to manufacture, the court remanded for entry of judgment on possession of cocaine.

State v. Slaughter, __ N.C. App. __, __ S.E.2d ___ (May 17, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC04NDQtMS5wZGY=). (1) Over a dissent, the court held that there was sufficient evidence of constructive possession of marijuana. The defendant did not have exclusive control over the place where the contraband was found and there was no evidence that he owned any items found in proximity to the contraband, was the only person who could have placed the contraband where it was found, acted nervously, resided in or regularly visited the premises where the contraband was found, or possessed a large amount of cash. The primary evidence was his proximity to the contraband. Specifically, he was in a 150-square-foot room surrounded by bags of marijuana, marijuana residue, stacks of cash, bags of cash, handguns, blunts, rolling papers, a grinder, and packaging paraphernalia. Many of these items were in plain view of officers when they entered the room, including several baggies of marijuana, marijuana residue, several stacks of cash, at least one handgun, and plastic baggies. In addition, almost all of the officers testified that a strong smell of marijuana pervaded the premises. (2) Over a dissent, the court held that for the same reasons, there was sufficient evidence that the defendant constructively possessed drug paraphernalia (officers recovered scales, Ziploc-style baggies, cigars, cigar wrappers, and a grinder in close proximity to a substantial amount of marijuana and to each other).

Motor Vehicle Offenses

State v. Jackson, __ N.C. App. __, __ S.E.2d ___ (May 17, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTgyLTEucGRm). In a felony speeding to elude case there was sufficient evidence that the defendant drove recklessly. An officer testified that the defendant drove 82 mph in a 55 mph zone and that he was weaving around traffic; also a jury could infer from his testimony that the defendant crossed the solid double yellow line.