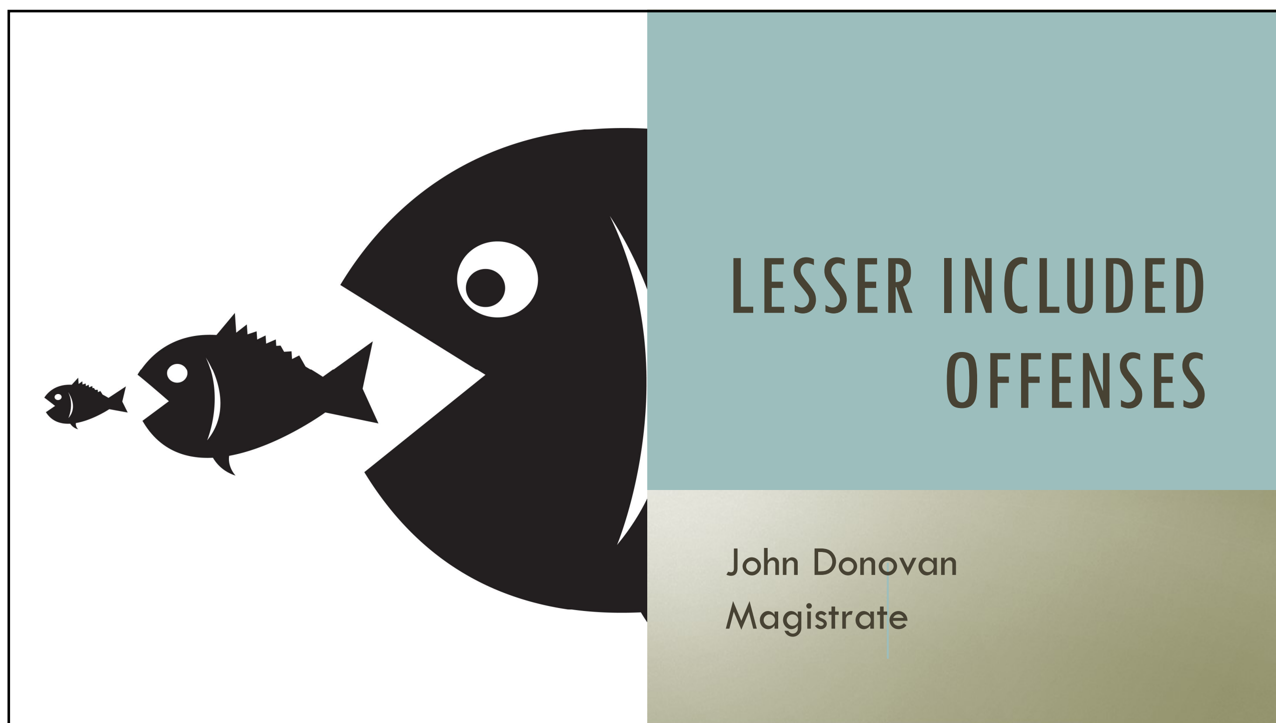

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TOPICS FOR TODAY

Lesser-included offenses

Why they matter

Legislative intent exceptions

Important examples

How to handle them

Multiple offense counts

Habitual offenses

Spiritual enlightenment

2

WHAT IS A LESSER-INCLUDED OFFENSE?

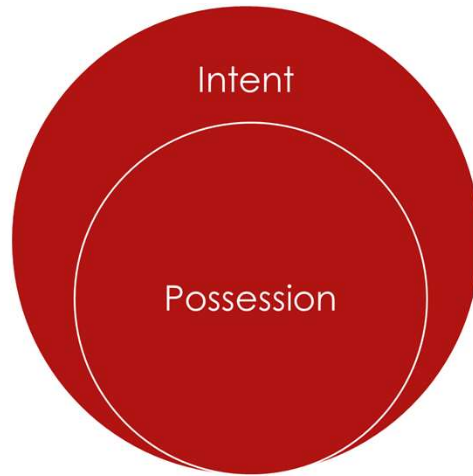
3

ALL ESSENTIAL ELEMENTS OF THE LESSER CRIME MUST BE INCLUDED IN THE GREATER CRIME

STATE V. ROBINSON, 368 N.C. 402 (2015)

4

THE LESSER-INCLUDED CRIME MUST BE ENTIRELY CONTAINED IN THE GREATER CRIME



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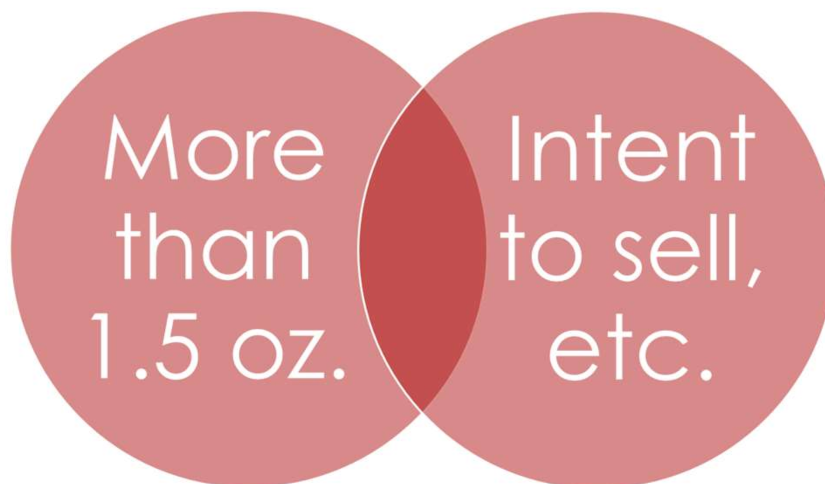
DIFFERENT ELEMENTS?



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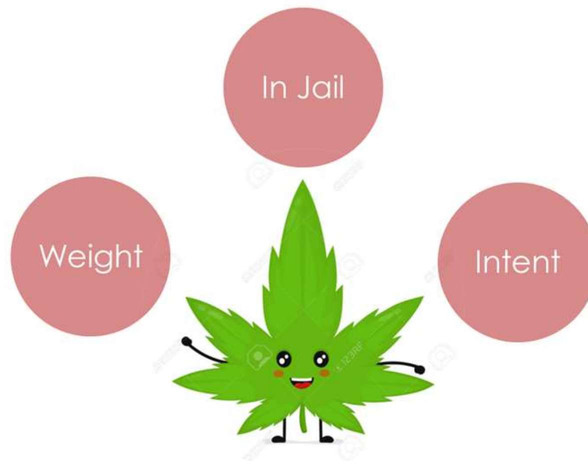
NON-OVERLAPPING ELEMENTS



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WHY IS IT IMPORTANT NOT TO PUNISH LESSER-INCLUDED OFFENSES?

The Fifth Amendment to the United States Constitution provides that "[n]o person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The Double Jeopardy Clause applies to states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 794, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969). North Carolina's Constitution does not expressly prohibit double jeopardy, but this principle "has been regarded as an integral part" of the Law of the Land Clause of Article I, Section 19. *State v. Ballard*, 280 N.C. 479, 482, 186 S.E.2d 372, 373 (1972) (citations omitted). Under our state and federal constitutions, "if what purports to be two offenses actually is one..., double jeopardy prohibits successive prosecutions." *State v. Gardner*, 315 N.C. 444, 454, 340 S.E.2d 701, 709 (1986) (*citing Brown v. Ohio*, 432 U.S. 161, 166, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977)).

State v. Noffsinger, 286 N.C. App. 729, 731 (2022)

8

THE BLOCKBURGER TEST

In *Blockburger v. United States*, the United States Supreme Court declared that "the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." 284 U.S. 299, 304 (1932). If one offense is a lesser included offense of the other, successive prosecution is prohibited under the *Blockburger* test because the lesser offense does not require any proof of fact beyond that of the greater offense. *Brown*, 432 U.S. at 168. "It is not enough to show that one crime requires proof of a fact that the other does not. Each offense must include an element not common to the other." *State v. Strohauer*, 84 N.C. App. 68, 73 (1987) (citations omitted).

- *State v. Noffsinger*, 286 N.C. App. 729, 732 (2022)

9

BUT LEGISLATIVE INTENT BEATS BLOCKBURGER TEST

In *Blockburger v. United States*, the U.S. Supreme Court held that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306, 309 (1932). In *Missouri v. Hunter*, the U.S. Supreme Court clarified that the *Blockburger* test is a rule of statutory construction and should not control when there is a clear indication of contrary legislative intent. 459 U.S. 359, 367, 103 S. Ct. 673, 74 L. Ed. 2d 535, 543 (1983). In *State v. Gardner*, the North Carolina Supreme Court explained that

> The presumption raised by the *Blockburger* test is only a federal rule for determining legislative intent as to violations of federal criminal laws and is neither binding on state courts nor conclusive. When utilized, it may be rebutted by a clear indication of legislative intent; and, when such intent is found, it must be respected, regardless of the outcome of the application of the *Blockburger* test. 315 N.C. 444, 455 (1986); *see also State v. Bailey*, 157 N.C. App. 80, 87 (2003)

State v. Baldwin, 240 N.C. App. 413, 425 (2015)

10

POSSESSION (WITH OR WITHOUT INTENT) AND TRAFFICKING BY POSSESSION: A LEGISLATIVE EXCEPTION TO THE LESSER INCLUDED RULE!

A person may be convicted and punished for both possession of a controlled substance under G.S. 90-95(a)(3) and trafficking by possessing a controlled substance even though the offenses are based on the same controlled substance.

- *State v. Pipkins*, 337 N.C. 431 (1994)

Where a legislature clearly expresses its intent to proscribe and punish exactly the same conduct under two separate statutes, a trial court in a single trial may impose cumulative punishments under the statutes.

- *State v. Pipkins*, 337 N.C. 431, 432 (1994)

11

POSSESSION AND PWIMSD

Clearly expressed legislative intent allows punishment for both Possession and PWIMSD

"A defendant is not subjected to double punishment if she is sentenced and convicted of both possession of a controlled substance and possession of a controlled substance with intent to sell or deliver the same contraband."

- *State v. Springs*, 200 N.C. App. 288, 295 (2009), *citing State v. Pipkins*, 337 N.C. 431, 434 (1994)

12

DRUG MIXTURES OR COMPOUNDS

A defendant may be convicted and sentenced for both possession of ecstasy and possession of ketamine when both controlled substances are contained in a single pill.

- *State v. Hall*, 203 N.C. App. 712, 692 S.E.2d 446, 450–51 (2010)

Does not violate double jeopardy because "each provision requires proof of a fact which the other does not".

- *State v. Hall*, 203 N.C. App. 712, 712, 692 S.E.2d 446, 448 (2010)

13

ASSAULT ON A FEMALE14-33(C)(2)

Victim = Female
Defendant = Male ≥ 18

Assault

14

MISDEMEANOR CRIME OF DOMESTIC VIOLENCE

ASSAULT ON A FEMALE 14-33(c)(2)	(M) CRIME OF DOMESTIC VIOLENCE 14-32.5
Victim = female	N/A
Defendant = male at least 18	N/A
Assault, assault and battery, or affray	"Uses or attempts to use physical force"
N/A	"Threatens the use of a deadly weapon"
N/A	D is current or former spouse, parent, guardian of victim
N/A	D is "similarly situated" to spouse, parent, guardian of victim
N/A	Child in common with victim
N/A	Cohabiting or cohabited as spouse, parent, or guardian of victim
N/A	Current or recent former dating relationship with victim

15

SO CAN / SHOULD YOU CHARGE BOTH AOF AND MCDV?

Under 14-33(c), AOF may be charged and punished "unless the conduct is covered under some other provision of law providing greater punishment"

MCDV is also an A1 misdemeanor, so it is not a "provision of law providing greater punishment"

MCDV and AOF each require proof of essential elements not included in the other, so neither is a lesser-included offense of the other

16

WHAT DOES IT MEAN IF CHARGES HAVE DIFFERENT ESSENTIAL ELEMENTS?

The legislature is focusing finite law enforcement efforts on different behaviors and problems

The legislature is focusing on different areas of community life

The legislature is attempting to advance different public policy goals

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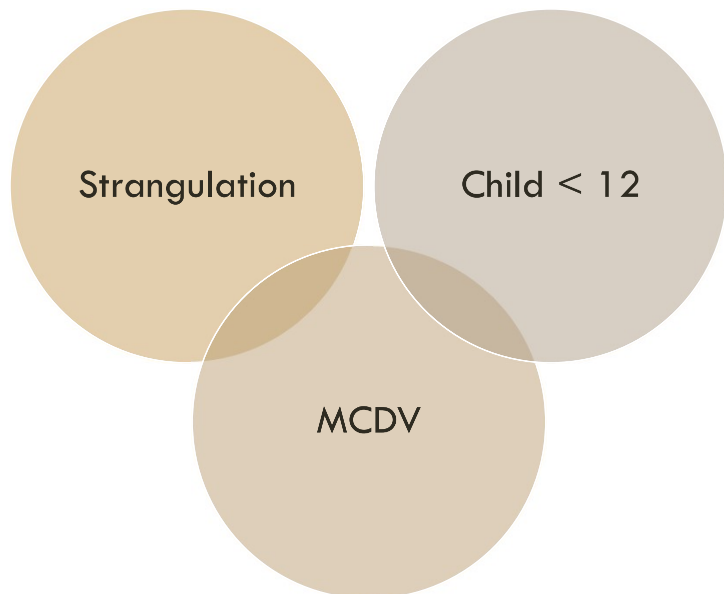
DIFFERENT ELEMENTS MEAN DIFFERENT PROBLEMS



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CAN DEFENDANT BE PUNISHED FOR BOTH MCDV AND AOF BASED ON THE SAME CONDUCT?

There are many cases where a defendant is convicted of two different assault charges arising out of what appellate courts ultimately conclude is the same assaultive 'transaction'.

- *See, e.g.*, Smith's Criminal Case Compendium, https://www.sog.unc.edu/sccc/44356

Appellate courts have commonly ordered that judgment be arrested (no additional punishment imposed) on the lesser charge.

This reflects the legislative intent that defendant not be punished for an assault under a lesser charge if "the conduct is covered under some other provision of law providing greater punishment"

BUT – it remains an unsettled issue whether defendants may be punished for two charges AT THE SAME PUNISHMENT CLASS arising out of the same conduct.

19

IS IT FAIR THAT ONLY MEN CAN BE CONVICTED OF AOF?

Legislatures have authority to allocate law enforcement resources to address specific public policy goals

The NC General Assembly has decided that assaults on women by men at least 18 years old create a greater risk of injury and other harms

Given general differences in size and strength, Equal Protection clause allows increased punishment substantially related to legislative objectives

- *State v. Gurganus*, 39 N.C. App. 395 (1979)

20

WHAT DOES IT MEAN TO ARREST JUDGMENT ON A DUPLICATIVE CHARGE?

Arrest of judgment in this context works to remedy double jeopardy where charges are duplicative, or to prevent cumulative punishment where legislative intent aims to prevent it.

In this context, arresting judgment allows conviction of a charge to stand, but prevents the defendant from being punished for the conviction.

- Based on legislative intent, courts must arrest judgment on either a Larceny or Possession of Stolen Goods conviction arising out of the same larcenous taking.
  - *State v. Perry*, 305 N.C. 225, 231–37 (1982)
- Judgment must be arrested on either a 1st Degree Kidnapping conviction where the kidnapping degree is elevated by a sexual assault, or on the sexual assault conviction itself.
  - *State v. Freeland*, 316 N.C. 13 (1986)

Both convictions remain intact, so the arrested judgment may be entered if the other conviction is overturned.

21

MCDV IS ITS OWN ANIMAL

NCGS §14-32.5, the MCDV statute, does NOT contain language proscribing punishment when "the conduct is covered under some other provision of law providing greater punishment".

No clear legislative intent that MCDV not be charged and punished along with more serious assault charges.

It seems lawful to charge both MCDV and AOF, or MCDV and Assault by Strangulation. Whether a trial court would or should arrest judgment remains an open question.

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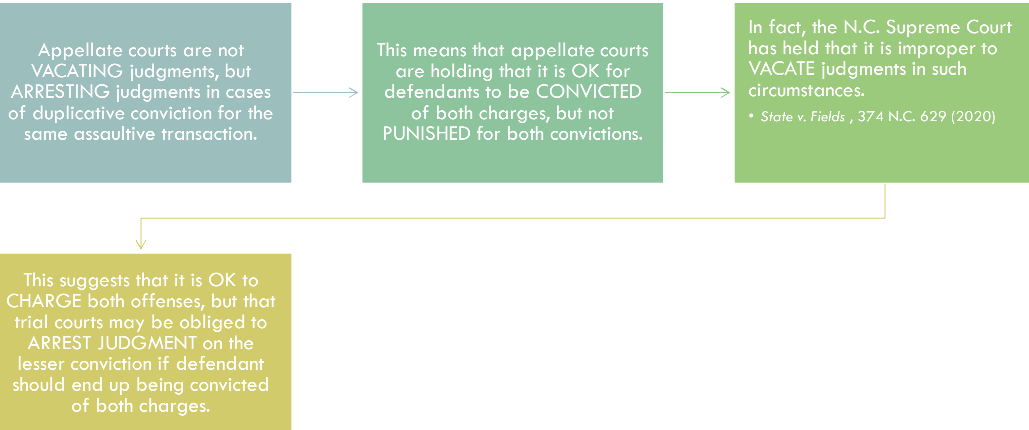
SO WHAT SHOULD WE DO?



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ARREST OF JUDGMENT IS A POST-CONVICTION REMEDY

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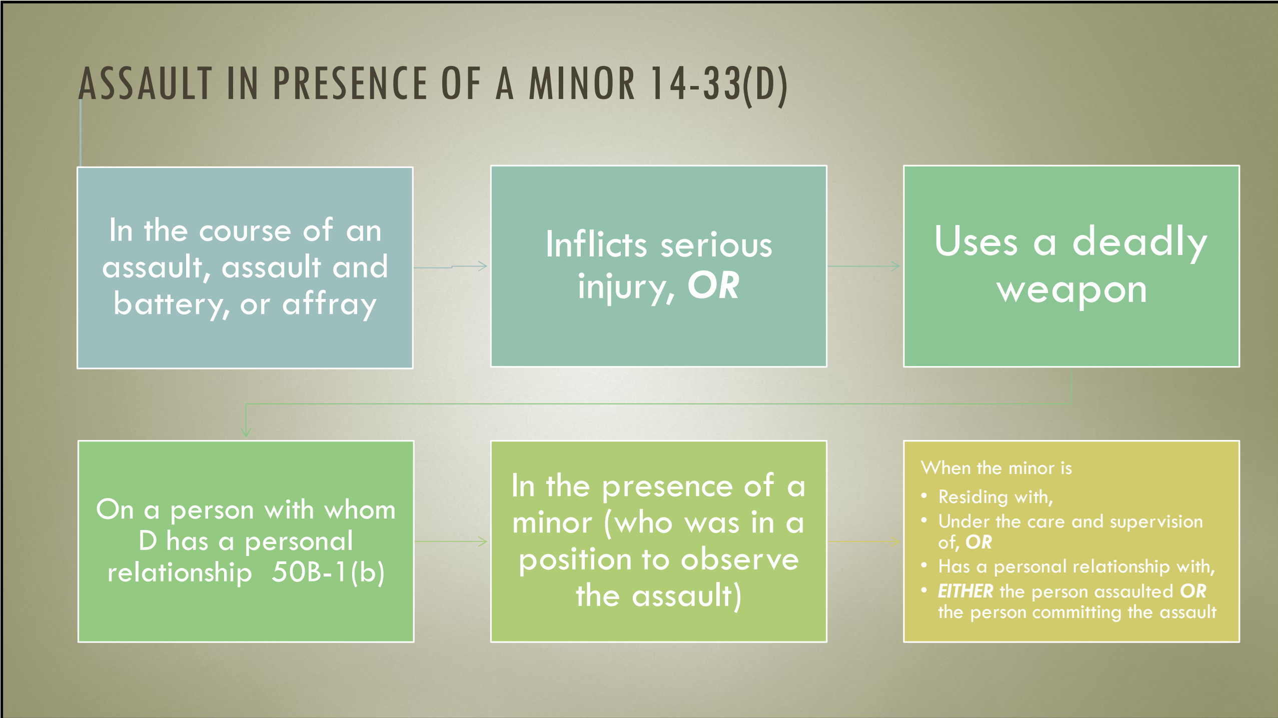

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50B-1 PERSONAL RELATIONSHIP

Current or former spouses

Opposite sex who are living together or have lived together

Related as parents and children, grandparents and grandchildren, or people acting *in loco parentis*

Have a child in common

Current or former household members

Persons [of the opposite sex] who are in a dating relationship or have been in a dating relationship

26

ASSAULTS AND PREGNANCY

New law 14-33(c)(2a) makes it an A1 misdemeanor to assault a pregnant woman

Prior 14-23.6, Battery on an Unborn Child, makes it a crime to commit a battery on a pregnant woman

- 14-23.8 states that a defendant need not know the victim is pregnant, or have any intent to cause bodily injury to the unborn child

New 14-33(c)(2a) does not require that the defendant know that the victim is pregnant if the assault occurs "in the course of [an] assault, assault and battery, or affray"

Note that there is no gender requirement for defendant in either statute

It appears that a defendant may be convicted and punished for both offenses, on the grounds that the statutes define different victims and hence punish different crimes

27

HOW MANY COUNTS OF ASSAULT?

In an assault case where a defendant allegedly assaults the victim over a period of time, how many counts should be charged?

In *State v. Dew*, 379 N.C. 64 (2021), the N.C. Supreme Court held a defendant may be charged with multiple counts of assault only where there is substantial evidence of a "distinct interruption" between assaults.

The *Dew* court defined a "distinct interruption" to include an "intervening event, a lapse of time in which a reasonable person could calm down, an interruption in the momentum of the attack, a change in location, or some other clear break delineating the end of one assault and the beginning of another."

In *Dew*, the court found two counts of assault, interrupted by a break during which the defendant cleaned a trailer and packed a car.

In *State v. Robinson*, 381 N.C. 207 (2022), the court found only one instance of assault where the defendant choked and punched the victim in rapid succession and without interruption.

28

WHAT IS A "DISTINCT INTERRUPTION"?

An intervening event;

A lapse of time in which a reasonable person could calm down;

An interruption in the momentum of the attack;

A change in location;

Some other clear break delineating the end of one assault and the beginning of another.

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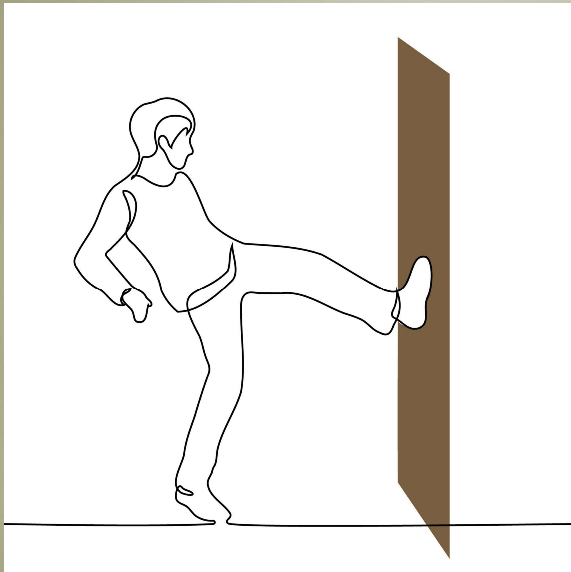

THE CLASSIC

30

THE TAKE-HOME MESSAGE ON ASSAULTS

- It is legally permissible to charge all non-lesser-included offenses unless the legislature clearly forbids it.
- If one offense includes an essential element that is not included in another, neither is a lesser-included offense of the other.
- If two assault offenses are the same level and neither is a lesser-included of the other, both may be charged.
- Whether the defendant may be PUNISHED for both charges after conviction is a matter for trial courts to determine.

31

THE 'OK, HERE GOES!' MODEL

Fresh intent means a fresh crime

32

THE RULE OF LENITY – HOW MANY COUNTS?

The Rule of Lenity counsels that ambiguity in application of criminal statutes should be resolved to the benefit of the defendant. Unless the legislature expresses a clear preference, "doubt will be resolved against turning a single transaction into multiple offenses."

- *State v. Smith*, 323 N.C. 439,441 (1988) (*citing Bell v. United States*, 349 U.S. 81(1955))

33

ASK YOURSELF – WHAT IS THE 'GRAVAMEN' OF THE OFFENSE?

OPFP – it's the pretense

Larceny – it's the taking (however many items)

PFF – it's the felon's access to guns (however many)

BUT for Discharging a Firearm Into Occupied Vehicle, each pull of the trigger is treated as a separate offense

State v. Rambert, 341 N.C. 173 (1995)

34

PARTICULAR EXAMPLES

Kidnapping "is a single continuing offense, lasting from the time of the initial unlawful confinement, restraint or removal until the victim regains his or her free will"

- *State v. White*, 127 N.C. App. 565, 571 (1997)

For Discharging a Firearm Into Occupied Property, courts treat each discharge of a firearm as a separate offense.

- *See State v. Rambert*, 341 N.C. 173 (1995)

Courts treat possession of multiple firearms at the same time as a single count of Possession of Firearm by Felon.

- *See State v. Garris*,191 N.C. App. 276, 285 (2008)

Multiple caches of drugs treated as a single count if they arise from "one continuous act of possession" simultaneously and for the same purpose.

- *See State v. Moncree*, 188 N.C. App. 221 (2008); *State v. Hazel*, 226 N.C. App. 336, 345 (2013)

35

MAINTAINING A DWELLING, VEHICLE, ETC., FOR KEEPING OR SELLING CONTROLLED SUBSTANCES, 90-108(A)(7)

After *State v. Rogers*, 371 N.C. 397(2018), there is no requirement that the dwelling or vehicle be maintained "for a duration of time", or that evidence of drugs be found on more than one occasion.

But merely having drugs in a car or dwelling is not enough to justify a conviction. The totality of the evidence and "all reasonable inferences" from it must indicate drugs are being stored or sold in the dwelling or vehicle (crumply cash, scales, phones, baggies or other packaging, residue, guns, hidden compartments in vehicle or dwelling).

Rogers sets out a more permissive standard for proving this offense, but there must still be evidence beyond mere incidental possession in a car or residence consistent with personal use.

- *See State v. Miller*, 264 N.C. App. 517 (2019) (No other evidence of drugs, paraphernalia, cash, weapons, other implements of drug trade).

Evidence of a single drug sale in a vehicle or dwelling, in combination with other evidence of an ongoing drug sale enterprise, can justify conviction.

- *State v. Dunston*, 256 N.C. App. 103, 106 (2017), *aff'd per curiam*, 371 N.C. 76 (2018)

36

N.C. CRIMES WILL OFTEN INDICATE LESSER-INCLUDED OFFENSES

- Driving After Consuming < 21 is not a lesser-included offense of DWI
- Unauthorized Use of a Motor Vehicle is not a lesser-included offense of Possession of Stolen Goods
  - *But it can be a lesser-included offense of Larceny of a Motor Vehicle*
- Conspiracy to commit a crime is not a lesser-included offense of the completed crime
  - *Conspiracy is its own offense – the agreement IS the offense*
- Attempted RWDW is a lesser-included offense of RWDW (but carries the same punishment by statute)
- By statute (14-159.14), trespasses are lesser-included offenses of B/E
- By statute (90-113.22A), Poss. MJ Paraphernalia is a lesser-included of PDP
- By statute (90-98), attempt or conspiracy to commit a drug offense under Chapter 90 is punished as if the substantive offense were completed.

37

HABITUAL AND AGGRAVATED CRIMES

14-33.2 Habitual Misdemeanor Assault

- Commits one of the many misdemeanor assaults under 14-33 *AND*
- Causes physical injury *or*
- Commits Assault by Pointing a Gun under 14-34 *and*
- Has two or more prior (M) or (F) assault convictions *and*
- The earlier of the two convictions occurred no more than 15 years before the date of offense in the new assault offense

The ‘triggering’ or ‘predicate’ offense is an element of the more serious offense, and should not also be charged

This charge is an aggravated offense, not a sentencing status

Cannot punish both Habitual (M) Assault and AISBI, since (M) Assault is a lesser-included of Habitual (M) Assault and AISBI provides greater punishment

38

HABITUAL (M) LARCENY 14-72(A)

Commits a larceny *AND*

Has four prior larceny convictions.

This offense is an aggravated crime of which the 'triggering' or 'predicate' larceny is a lesser-included offense.

The triggering larceny should not be charged along with the Habitual Larceny

39

Repeat Violation of a DVPO 50B-4.1(f)

- DVPO violation *and*
- Two prior convictions (additional element of the offense)

Repeat Stalking 14-277.3A

- Stalking *and*
- Prior stalking conviction (additional element)

Felony and Aggravated Felony Serious Injury by Vehicle 20-141.4

- Serious Injury proximately caused by DWI (w/ or w/out prior DWI)
- By statute, only the crime providing the greatest punishment for the conduct may be punished

YOU GET THE IDEA

40

HABITUAL IMPAIRED DRIVING

Commits the offense of DWI *and*

Within ten years of the date of the offense has had three or more [prior] convictions for Impaired Driving.

This statute creates a substantive felony offense. The three prior convictions are an element.

(M) DWI should not be charged in addition to Habitual DWI, since DWI is a lesser-included offense.

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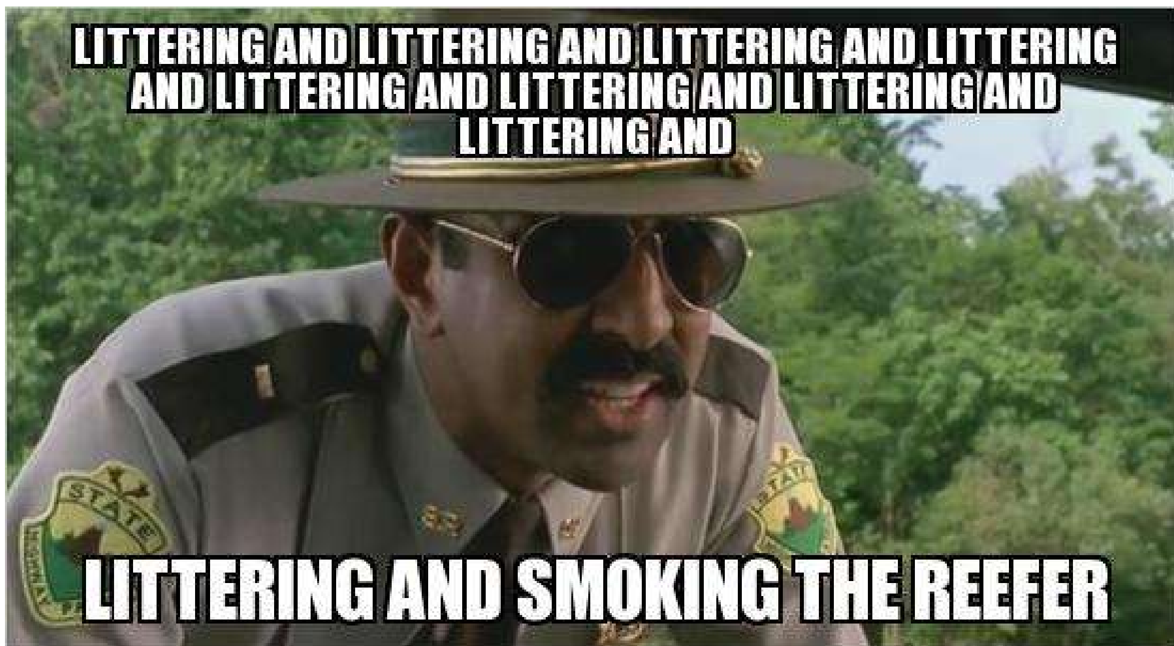

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THE BIG TAKE-HOME MESSAGE

Double Jeopardy protections discourage punishing defendants for lesser-included and greater offenses.

Expressed legislative intent may dictate if certain charges may be charged and/or punished simultaneously.

While it may be legally permissible to charge multiple offenses arising out of the same criminal ‘transaction’, DAs may elect not to proceed on all charges, and trial courts may decide to arrest judgment on some counts if the defendant is convicted of all charges.

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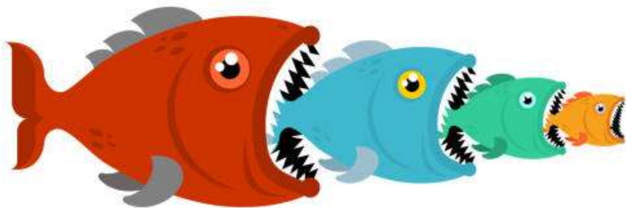

THANK YOU!
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