PITFALLS IN CRIMINAL JUDGMENTS: MULTIPLE CONVICTIONS

Special Superior Court Judge Shannon R. Joseph

(prepared for June 2011 conference)

I. OVERVIEW

A. Although it may be proper to submit for jury consideration multiple charges arising out of the same conduct, there are situations when it is error to enter judgment of convictions on all charges. First, the merger doctrine, which arises from the Double Jeopardy Clause, prohibits multiple punishments for the same offense unless authorized by the legislature. Second, there are legislative limitations on multiple punishments for conduct constituting certain crimes.

B. There are times when the verdict form should specify theories or methods of proof--not just Guilty/Not Guilty--to avoid confusion or risk of improperly entering judgment on multiple convictions.

C. Consolidation of judgment on multiple offenses involving the same conduct does not solve a double jeopardy or statutory authorization problem, and will not render any error harmless.

D. Multiple charges based on the same conduct may also present the risk of impermissible, mutually exclusive verdicts. A careful jury charge may avoid this problem. Entering judgment of mutually exclusive offenses based on the same conduct likewise is not permitted when the defendant pleads guilty.

II. DOUBLE JEOPARDY OR "MERGER"

A. The Double Jeopardy Clause prohibits: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple convictions for the same offense. From this prohibition, the common law doctrine of merger evolved.

B. "The common law doctrine of merger is a judicial tool to prevent the subsequent prosecution of a defendant for a lesser included offense once he has been acquitted or convicted of the greater. It is primarily a device to prevent the defendant from being placed twice in jeopardy for the same offense." *State v. Rich*, 130 N.C. App. 113 (1998).

C. "Same elements" test The United States Supreme Court laid down the test for whether two charges based on the same conduct may constitute the same offense, thereby violating the Double Jeopardy Clause, in *Blockburger v. United States*, 284 U.S. 299 (1932).

1. "The applicable rule is 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**." *State v. Ezell*, 159 N.C. App. 103 (2003) (emphasis added).

2. This is a definitional test when essentially the same conduct is used to support multiple charges: the elements of the crimes are compared, not the evidence. The evidence supporting the elements of both crimes can overlap without violating the prohibition on double jeopardy.

D. Legislative intent rebuts presumption of double jeopardy Even if the crimes have the same elements under the *Blockburger* test, there is no double jeopardy violation when both crimes are tried **in a single prosecution** and **the legislature intended for both offenses to be separately punished**. *Missouri v. Hunter*, 459 U.S. 359 (1983).

1. "Where multiple punishment is involved, the Double Jeopardy Clause acts as a restraint on the prosecutor and the courts, not the legislature." *State v. Gardner*, 315 N.C. 444 (1986) (holding that convictions in single trial for breaking or entering and felony larceny based on that breaking or entering do not constitute double jeopardy) (citing *Brown v. Ohio*, 432 U.S. 161 (1977)).

2. "With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishments than the legislature intended." *State v. Gardner*, 315 N.C. 444 (1986). That is, even if the elements of the two crimes are identical so that neither requires proof of a fact that the other does not, the defendant may, in a single trial, be convicted of and punished for both crimes if it is found that the legislature so intended.

3. Legislative intent to impose multiple punishments generally must be clear, as "our case law favors the imposition of a single punishment unless otherwise clearly provided by statute. 'In construing a criminal statute, the presumption is against multiple punishments in the absence of a contrary legislative intent.'" *State v. Demontrise Davis*, 198 N.C. App. 443 (2009) (quoted case omitted).

4. One example of clear legislative intent to impose multiple punishments is the statute prescribing the punishment for felony child abuse, N.C. Gen. Stat. § 14-318.4(b). It clearly specifies that punishment for felony child abuse is "additional to other civil and criminal provisions and is not intended to repeal or preclude any other sanctions or remedies."

5. Even without express statutory language, however, the North Carolina Supreme Court found legislative intent to punish crimes separately when the legislature has "acquiesced" to the courts' history of imposing multiple

punishments. *See State v. Gardner,* 315 N.C. 444 (1986) ("Had conviction and punishment of both crimes in a single trial not been intended by our legislature, it could have addressed the matter during the course of these many years.").

E. Method of Proof May Require Special Attention To Charge and Verdict Form

1. First Degree Murder-- Felony Murder

a. A murder is a felony murder when it is "committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon." N.C. Gen. Stat. § 14-17.

b. A "defendant may not be punished both for felony murder and for the underlying, 'predicate' felony, even in a single prosecution." *State v. Gardner*, 315 N.C. 444 (1986). "The underlying felony supporting a conviction for felony murder merges into the murder conviction." *State v. Barlowe,* 337 N.C. 371 (1994). "The underlying felony provides no basis for an additional sentence, and any judgment imposed thereon must be arrested." *Id.; see also State v. Dudley,* 151 N.C. App. 711, 566 S.E.2d 843 (2002) (defendant improperly sentenced for first-degree felony murder and both potential underlying felonies; remanded with instructions to arrest judgment on one felony "in such a manner that would not subject defendant to a greater punishment").

c. Jury Charge and Verdict Form Where the felony murder charge is supported by more than one felony, the better practice is to submit alternate inquiries on the verdict form based on each underlying felony, requiring the jury to answer all that may apply. Similarly, if the defendant is charged with first-degree murder based on premeditation and felony murder (or on other theories or methods of proof), the jury should be asked to answer whether it finds the defendant guilty of one or both (or all)—*e.g.*, guilty of first degree murder by reason of premeditation and deliberation; guilty by reason of perpetrating the felony of ___ (*specify felony*). Of course, when the jury finds premeditated first-degree murder, judgment need not be arrested on the underlying felonies.

2. Kidnapping

a. Underlying Felony Used To Elevate Offense To First-Degree

1. To elevate kidnapping to first-degree kidnapping, there must be evidence *either* that the defendant either did not release the victim in a safe place *or* physically injured or sexually assaulted the victim. N.C. Gen. Stat. § 14-39.

2. When the defendant's conduct that supports elevation to first-degree kidnapping (*e.g.*, by physical injury or sexual assault) also forms the basis of a second conviction (for assault, rape, or another offense), double jeopardy problems arise. *See, e.g., State v. Daniels*, 189 N.C. App. 705 (2008) (finding error where trial court permitted the same sexual assault to serve as the basis for defendant's convictions of first-degree kidnapping and first-degree rape, and remanding for resentencing).

3. When the underlying conviction forms the basis for elevating the kidnapping to first-degree, the trial court can (1) arrest judgment on the first-degree kidnapping conviction and sentence the defendant for second-degree kidnapping, or (2) arrest judgment on the underlying felony and sentence the defendant on the first-degree kidnapping conviction." *State v. Daniels*, 189 N.C. App. 705 (2008).

4. If, however, the defendant committed a separate assault or sexual offense that is used to elevate to first-degree kidnapping, there is no bar.

5. Jury Charge and Verdict Form A tailored jury instruction and/or verdict form can guard against an ambiguous verdict that must be construed in favor of the defendant. To illustrate, in *State v. Williams*, 689 S.E.2d 412 (N.C. Ct. App. 2009), the appellate court found that convictions for first-degree sexual offense and kidnapping against one victim were proper where the jury had been instructed that it must find that victim was seriously injured to convict defendant of first-degree kidnapping, and the kidnapping instruction did not mention the sexual assault. Likewise, in the same case, entry of judgment on both first-degree sexual offense and kidnapping against another victim was proper where the jury was instructed that it must find the victim was seriously injured or not released in a safe place to find first-degree kidnapping, but omitted reference to sexual assault as a possible ground for first-degree kidnapping. *Id.*

b. Technical Asportation Not Sufficient For Separate Charge of Kidnapping[1]

    1. A necessary element of kidnapping is that the victim be confined, restrained or removed from one place to another. N.C. Gen. Stat. § 14-39. North Carolina courts have recognized that that certain other felonies—often forcible rape or armed robbery—cannot be committed without some restraint of the victim. *State v. Fulcher*, 294 N.C. 503 (1978).

[1] This is not a double jeopardy issue, but is included here for ease of reference.

2. Asportation that is "an inherent and integral part" of the underlying felony offense is considered a "mere technical asportation" and is legally insufficient to convict the defendant of a separate charge of kidnapping. *State v. Erwin*, 304 N.C. 93 (1981).

3. "If the asportation is a separate act independent of the originally committed criminal act, a trial court must consider additional factors such as whether the asportation facilitated the defendant's ability to commit a felony offense, or whether the asportation exposed the victim to a greater degree of danger than that which is inherent in the concurrently committed felony offense." *State v. Ripley*, 360 N.C. 333 (2006) (forcing an employee into another room at gunpoint to look for safe key and surveillance video during armed robbery is *not* sufficient to support kidnapping); *see also State v. Payton*, 198 N.C. App. 320 (2009) (vacating kidnapping convictions and reasoning that, if ordering home occupants to confine themselves in the bathroom during a robbery with a dangerous weapon "support[s] a conviction for kidnapping, then essentially any non-violent movement of a victim could result in a kidnapping conviction, which we do not believe was the intent of the legislature in enacting the kidnapping statute.").

4. This issue does not apply when the other felony has not been charged. *State v. Yarborough*, 198 N.C. App. 22 (2009) (rejecting defendant's argument that the restraint was only that inherent to robbery and was insufficient to amount to kidnapping when defendant was not charged with robbery).

III. LEGISLATIVE LIMITATION ON MULTIPLE PUNISHMENTS

A. Even when multiple offenses do not share elements, and therefore are separate offenses pursuant to the double jeopardy *Blockburger* analysis, there may not be legislative authorization for the court to impose multiple punishments based on essentially the same conduct. This situation arises principally in two contexts.

1. First, even when a statute does not by its terms exclude prosecution for other offenses, examination of the circumstances surrounding enactment of the statute may indicate that the General Assembly did not intend duplicative punishment for certain offenses. For example, the North Carolina Supreme Court concluded that the General Assembly did not intend to punish a defendant for larceny of property and for possession of the same stolen property even though the two are separate and distinct offenses. *State v. Perry*, 305 N.C. 225 (1982), *overruled in part on other grounds by State v. Mumford*, 364 N.C. 394 (2010). The court reasoned that, when the legislature proscribed possession of stolen property, it was trying to "plug a loophole" in which defendants could escape punishment because of problems in proving larceny or receiving stolen property. *Id.*

2. Second, statutory language may expressly specify that one punishment for certain conduct is intended. Most often, this limitation takes the form of language authorizing a punishment level for an offense "unless the conduct is covered under some other provision of law providing greater punishment." This limitation may be found in many assault statutes, among other contexts. *See, e.g.* N.C. Gen. Stat. § 14-32.4 (stating that "[u]nless the conduct is covered under some other provision of law providing greater punishment, any person who assaults another and inflicts physical injury by strangulation is guilty of a Class H felony."); *see also* N.C. Gen. Stat. § 50B-4.1(f) (Repeat Violation of a Domestic Violence Protective Order) (statute applies "[u]nless covered under some other provision of law providing greater punishment"); *also* N.C. Gen. Stat. § 14-32.2(b) ("unless covered" limitation in patient abuse cases).

B. Application of the statutory limitation

1. Where the "unless covered" statutory language has appeared, North Carolina appellate courts typically have limited the convictions allowed. *See State v. James Michael Davis*, 364 N.C. 297, 698 S.E.2d 65 (2010) ("unless covered" language in N.C. Gen. Stat. § 20-141.4(b) mandates that a defendant may not be convicted of class E felony death by vehicle *and* class B2 felony of second degree murder, or class F felony serious injury by vehicle *and* class E assault with a deadly weapon inflicting serious injury).

2. Some other appellate cases rejected defendants' arguments that the "unless covered" language prohibited other greater convictions. *See State v. Hines*, 166 N.C. App. 202 (2004) (affirming convictions for Class F aggravated assault on handicapped person *and* Class D armed robbery reasoning that statutory limitation applied only to assault offenses); *cf. State v. Coria*, 131 N.C. App. 449 (1998) (affirming convictions for Class F assault with a deadly weapon on a law enforcement officer *and* Class E assault with a deadly weapon with intent to kill, reasoning that the *Blockburger* test permitted it and not addressing the "unless covered" statutory language).

3. Thus, although application of the scope of the "unless covered" limitation has not been uniform, the trial court should exercise caution in entering multiple convictions based on the same conduct where such language appears in the statute.

4. When distinct conduct, even in a sequence, supports the different charges, the statutory limitation on punishments does not apply. *See State v. Spellman*, 167 N.C. App. 374 (2004) (both convictions permitted where facts underlying jury's verdict of guilty of assault with a deadly weapon on a government official were distinct from the facts underlying the verdict of guilty of assault with a deadly weapon).

IV. ARREST JUDGMENT AFTER VERDICT RETURNED

A. Where double jeopardy or statutory limitation precludes multiple convictions based on the same conduct, the trial court should arrest judgment on all but one charge.

B. Arresting judgment is not the same as acquittal and does not void the underlying verdict. In cases involving double jeopardy or statutory authorization problems, the arrested convictions remain on the docket and judgment can be entered if the conviction on which judgment is entered is later reversed. *See State v. Pakulski*, 326 N.C. 434, 390 S.E.2d 129 (1990) (discussing history of arrest of judgment, proper contexts, and effects, and applying principle in felony murder case).

For instance, in *State v. James Michael Davis*, 364 N.C. 297 (2010), the trial court entered judgment for felony death by vehicle and felony serious injury by vehicle in addition to judgments of second-degree murder and assault with a deadly weapon, but arrested judgment on the impaired driving conviction. When the supreme court vacated the judgments for felony death by vehicle and felony serious injury by vehicle because of the "unless covered" limitation, the supreme court reinstated the impaired driving conviction and remanded the case for resentencing.

V. APPEAL: NOT HARMLESS ERROR

A. Separate convictions, even though consolidated for a single judgment, "have potentially severe adverse collateral consequences." *State v. Speckman*, 326 N.C. 576, 580, 391 S.E.2d 165, 168 (1990) (citation omitted). "Therefore, consolidating the two convictions and entering a single judgment [does] not reduce the trial court's error to harmless error." *Id.* The United State Supreme Court explained: "For example, the presence of two convictions on the record may delay the defendant's eligibility for parole or result in an increased sentence under a recidivist statute for a future offense. Moreover, the second conviction may be used to impeach the defendant's credibility and certainly carries the societal stigma accompanying any criminal conviction. Thus, the second conviction, even if it results in no greater sentence, is an impermissible punishment." *Ball v. United States*, 470 U.S. 856 (1985).

B. Generally, the defendant must lodge a double jeopardy objection/motion to preserve the issue for appellate review, although appellate courts have not infrequently reached the issue even without objection at trial.

C. When the issue is legislative authorization for the challenged sentence, however, objection at trial is not necessary to preserve the issue. *See State v. James Michael Davis*, 364 N.C. 297, 698 S.E.2d 65 (2010) (noting that "when a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal . . . is preserved, notwithstanding defendant's failure to object at trial").

VI. MUTUALLY EXCLUSIVE CONVICTIONS

A. Verdicts are mutually exclusive when a verdict purports to establish that the defendant is guilty of two separate and distinct criminal offenses, the nature of which is such that *guilt of one necessarily excludes guilt of the other*. *State v. Mumford*, 364 N.C. 394 (2010). A defendant is entitled to relief when there is an inconsistent and contradictory (that is, a mutually exclusive) verdict. *Id.*

B. In contrast, inconsistent verdicts often arise when the jury convicts on the greater offense while acquitting the defendant on the lesser offense. Such verdicts are "inconsistent because they represent[] an apparent flaw in the jury's logic—presumably, a finding of guilt in the greater offense would establish guilt in the lesser offense." *Id.* Such a flawed verdict *is* permissible if there is sufficient evidence to support the guilty verdict.

C. Special Attention to Jury Charge and Verdict Form When offenses are mutually exclusive, the trial judge should instruct the jury that it can find the defendant guilty of either one offense, or the other, but not both. Including this type instruction on the verdict form also may be good practice. *See, e.g., State v. Melvin*, 707 S.E.2d 629, 2010 N.C. LEXIS 1077 (N.C. May 11, 2010) (trial court erred by not instructing jury that it cannot convict defendant of both first-degree murder and accessory after the fact to murder).

D. Remedy Where the jury returns a verdict of mutually exclusive convictions, the remedy typically is a new trial on those charges. *See State v. Hames*, 170 N.C. App. 312, 612 S.E.2d 408 (2005) (pre-*Mumford*; defendant was entitled to a new trial).

A new trial, however, is not always ordered. In *State v. Hall*, 104 N.C. App. 375, 386, 410 S.E.2d 76, 82 (1991) (pre-*Mumford*), for example, the defendants were charged with three counts of conspiracy to traffick in cocaine, for three time periods-- the first count covered time period A, the second count covered time period B, and the third count covered time period A and B combined. The jury convicted the defendants of all counts. The trial court arrested judgment on the third count, covering the combined time period, and sentenced the defendants for the remaining two convictions. The appellate court concluded that the three trafficking offenses were mutually exclusive: "either one agreement was made or two agreements were made. Both views cannot exist at the same time." *Id.* The appellate court reasoned that the defendant would not be prejudiced if the trial court vacated the judgment for the mutually exclusive offense that carries the more serious punishment. Thus, it vacated the judgments on the first and second counts, and remanded with instructions to enter judgment and sentence based on the third count involving the combined time period. *See also State v. Melvin*, 707 S.E.2d 629, 2010 N.C. LEXIS 1077 (N.C. May 11, 2010) (finding on plain error review that although trial court erred by not instructing jury that it cannot convict defendant of both first-degree murder and accessory after the fact to murder, there

was no prejudice where defendant did not object to the instruction and the trial court had vacated accessory after the fact conviction).

E. Applies to Guilty Pleas Even when the defendant pleads guilty, the trial court must guard against entering judgment on mutually exclusive offenses. In *State v. Keller*, 198 N.C. App. 639 (2009), the defendant pleaded guilty to second-degree murder, first-degree kidnapping, conspiracy to commit robbery with a dangerous weapon, and accessory after the fact to first-degree murder. Among other issues, the appellate court concluded that the defendant could not be convicted of both second-degree murder of the victim as a principal *and* accessory after the fact to first-degree murder of the same victim. The court reasoned that an accessory after the fact of the felony may not render assistance to the principal if he himself is the principal. Accordingly, the offenses were mutually exclusive. The appellate court vacated the guilty plea on both charges, and one other charge for different reasons, and remanded the case "for such proceedings as the state may elect to pursue." *Id. See also State v. Melvin*, 707 S.E.2d 629, 2010 N.C. LEXIS 1077 (N.C. May 11, 2010) (trial court erred by not instructing jury that it cannot convict defendant of both first-degree murder and accessory after the fact to murder).

VII. COMMON SCENARIOS

The examples below are not exhaustive and involve single prosecutions resulting in multiple convictions based on essentially the same conduct. Remember that when distinct conduct supports a conviction, the issues discussed in this paper do not apply. In those circumstances, consider whether a tailored instruction or verdict form would be helpful to guard against an ambiguous verdict that must be construed in favor of the defendant.

Vehicular Offenses

Not allowed:

- involuntary manslaughter *with* felony death by vehicle arising out of the death. *State v. Demontrise Davis*, 198 N.C. App. 443, 452 (2009) (statutory limitation in N.C. Gen. Stat. § 20-141.4(c) against "Double Prosecutions" prohibits manslaughter and felony death by vehicle charges).

- felony death by vehicle *with* second degree murder. *State v. James Michael Davis*, 364 N.C. 297, 698 S.E.2d 65 (2010)) (statutory limitation in N.C. Gen. Stat. § 20-141.4(b) shows legislative intent to punish greater offense only).

- felony death by vehicle *with* driving while impaired. *State v. Demontrise Davis*, 198 N.C. App. 443, 452 (2009) (impaired driving is a lesser included).

- habitual impaired driving *with* driving while impaired. *See State v. Haith*, 2003 N.C. App. LEXIS 1237 (N.C. App. July 1, 2003) (unpublished) (lesser included).

Allowed:

- driving while impaired *and* involuntary manslaughter based on vehicular homicide committed while driving impaired. *State v. Demontrise Davis*, 198 N.C. App. 443, 452 (2009).

- driving while impaired *and* second degree murder based on vehicular homicide committed while driving impaired *State v. Armstrong*, 691 S.E.2d 433 (N.C. Ct. App. 2010), *disc. review denied*, 2010 N.C. LEXIS 1152 (N.C. 2010).

- maybe allowed: repeat felony death by vehicle *with* other crimes listed above. (punishment for repeat felony death by vehicle is not specified in N.C. Gen. Stat. § 20-141.4(b), which favors punishing greater offense if present, but in § 20-141(a6).

Assaults

Not allowed:

- attempted voluntary manslaughter *with* a felonious assault that includes an intent-to-kill element. *State v. Yang*, 174 N.C. App. 755 (2005) (attempted voluntary manslaughter requires finding of intent to kill and is a lesser included offense).

- assault with a deadly weapon inflicting serious injury *with* assault inflicting serious bodily injury. *State v. Ezell*, 159 N.C. App. 103 (2003) (legislative limitation).

- felony serious injury by vehicle *with* class E assault with a deadly weapon inflicting serious injury. *See State v. James Michael Davis*, 364 N.C. 297, 698 S.E.2d 65 (2010) (statutory limitation).

Allowed:

- assault with a deadly weapon with intent to kill inflicting serious injury *and*

    - attempted first degree murder. *State v. Tirado*, 358 N.C. 551, 599 S.E.2d 515 (2004) (no double jeopardy, each offense contains one element not included in the other);

    - malicious assault and battery in a secret manner with intent to kill. *State v. Woodberry*, 126 N.C. App. 78, 485 S.E.2d 59 (1997) (same);

    - discharging a firearm into occupied property. *State v. Allah*, 168 N.C. App. 190, 607 S.E.2d 311 (2005) (same);

    - first degree kidnapping. *State v. Smith*, 160 N.C. App. 107, 584 S.E.2d 830 (2003) (concluding that the serious bodily injury required to support the assault charge is greater than the physical injury required to support first-degree kidnapping, so no double jeopardy).

- simple assault *and* sexual battery. *State v. Corbett*, 196 N.C. App. 508 (2009) (assault not a lesser included of sexual battery, so no double jeopardy).

- assault with a deadly weapon inflicting serious injury *and* felony child abuse. *State v. Carter*, 153 N.C. App. 756 (2002) ("two offenses with which defendant was charged require proof of elements not included in the definition of the other offense"); *see also* N.C. Gen. Stat. § 14-318.4(b) (specifying that felony child abuse punishment is "additional" to other criminal provisions).

Sex Offenses

Not allowed:

- first degree rape/sexual offense based on theory of forcible rape *with* first degree rape/sexual offense based on theory of statutory rape. *State v. Ridgeway*, 185 N.C. App 423 (2007) (alternate theories or methods to prove the crime when based on same conduct cannot result in multiple convictions; must arrest judgment on one count of each).

- rape *with* first degree kidnapping where the rape is the factor that elevates the kidnapping to first-degree. *See State v. Young*, 319 N.C. 661 (1987) (double jeopardy avoided by arresting judgment on rape conviction).

Allowed:

- statutory rape *and* incest *and* taking indecent liberties with a child. *State v. Etheridge*, 319 N.C. 34 (1987) (same for crime against nature, taking indecent liberties with a child, and sexual offense in the second degree).

Theft

Not allowed:

- larceny *with* receiving or possessing the stolen property. *E.g.*, *State v. Grier*, 2011 N.C. App. LEXIS 985 (N.C. Ct. App. May 17, 2011); *see also State v. Perry*, 305 N.C. 225 (1982) (legislature did not intend to punish an individual for larceny of property and the possession of the same property which he stole), *overruled in part on other grounds*, *State v. Mumford*, 364 N.C. 394 (2010).

- embezzlement *with* obtaining property by false pretenses. *State v. Speckman*, 326 N.C. 576 (1990) (verdicts are mutually exclusive-- embezzled property is acquired lawfully by trust relationship, property obtained by false pretenses is acquired by unlawful means).

- embezzlement *with* larceny. *See State v. Weaver*, 359 N.C. 246 (2005) (embezzled property is acquired lawfully by trust relationship, property obtained by false pretenses is acquired by wrongful means).

Controlled Substances

- **Allowed:** drug trafficking by possession *or* possession with intent to sell and deliver *and* felonious possession of a controlled substance. *See State v. Pipkins*, 337 N.C. 431 (1994) (legislature intended to proscribe and punish offenses separately); *State v. Springs*, 200 N.C. App. 288 (2009) (same).