

# Defending Higher Level Felonies

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## Forcible Felonies

- Robbery
- Deadly Weapon Assaults and Attempted Murder
- Sexual Assaults
- Burglary
- Kidnapping
- Related Inchoate Crimes and Conspiracy

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## Same as everything else?

- Investigation and Client Rapport
- Discovery Motions and Litigation
- Pretrial Motions – Motions in Limine, Suppression, Notices of Defenses, Experts, etc.

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## Same as everything else?

- Expert Assistance and Rule 702 Challenges
- Jury Selection Preparation
- Witness Preparation
- Trial Prep.
- Sentencing Prep.

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## Know the Law!



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## Our Focus:

- Pleadings
- Inchoate Liability and General Crimes
- Jury Instructions
- Defenses

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## Why do Pleadings matter?

- Fatal flaw fails to confer jurisdiction
  - *E.G.*— fails to state an element, fails to name an assault victim, fails to name the defendant
- Typically no jeopardy problem, because no jurisdiction in the first place
- BUT, where the indictment is flawed as to the greater offense, it may properly charge a lesser, and no need for mistrial or dismissal

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ADMINISTRATION OF JUSTICE BULLETIN NUMBER 2008-03 | JULY

### The Criminal Indictment: Fatal Defect, Fatal Variance, and Amendment

Jessica Smith

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### Arrest Warrant and Indictment Forms

John E. Kelly

John E. Kelly

A 315C

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## Examples

- *State v. Murrell*, 370 N.C. 187 (2017) – Indictment for armed robbery that failed to allege any dangerous weapon; properly charged common law robbery (must name weapon, or state the weapon is a deadly one, or allege such facts as would necessarily demonstrate deadly nature of weapon) (same rule for assault cases)
- *State v. Hill*, 262 N.C. App. 113 (2018) – Indictment for kidnapping alleged restraint for purpose of committing misdemeanor assault; failed to allege felony; properly charged misdemeanor false imprisonment
- *State v. Schalow*, 251 N.C. App. 334 (2016); *disc. review improvidently granted*, 370 N.C. 525 (2018) – Indictment for first-degree attempted murder that failed to allege malice properly charged attempted manslaughter

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## Variance Issues

- Valid indictment may still be challenged where evidence does not conform to allegation in charging document
- Inessential or unnecessary language in a charging document is surplusage and will not support a variance
- Language of charging document speaking to essential elements of the crime supports a fatal variance
- Waived if not raised at trial. May require a separate motion?

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## Variance Issues

- *State v. McRae*, 231 N.C. App. 602 (2014) – State need not allege specific felony for 1<sup>st</sup> degree kidnapping, but when it does, it's bound by it and cannot amend.
  - Same rule for burglary, breaking or entering
- *State v. Faircloth*, 297 N.C. 100 (1979) – State bound by allegation of purpose of kidnapping in indictment; variance where allegation was for purposes of facilitating flight from felony and proof showed purpose of facilitating rape
- *State v. Skinner*, 162 N.C. App. 434 (2004) – Where D. charged with assault with his hands as a deadly weapon, fatal variance where proof showed blunt object used

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## Common Assault Issues

- Assault indictments must name a victim; error to allow amendment to change the name; fatal variance where proof doesn't match victim named in indictment
- Assault indictments often accompany attempted murder. Why?
  - AWDWISI; AWDWIKISI not lesser-included, and a D. may be convicted of both one of these and attempted murder for the same act. *State v. Rogers*, 219 N.C. App. 296 (2012)
- Not so for multiple different assaults– “unless greater punishment provided...”

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## Common Robbery Issues

- ▶ Often charged with assault, and D. may be convicted of both for same conduct
- ▶ Lesser offense included: Common law robbery, AWDW, larceny. Note attempted CL robbery is a lesser of attempted armed robbery, but not for armed robbery.
  - ▶ *State v. White*, 322 N.C. 506 (1988)
- ▶ Rob one store with multiple people? One robbery. *St. v. Ballard*, 280 N.C. 479 (1972)
- ▶ Rob multiple people in one store? Multiple robberies. *St. v. Beaty*, 306 N.C. 491 (1982)

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## Common Robbery Issues

- ▶ Beware the Dangerous Weapon Presumption:
  - ▶ Mandatory presumption that weapon was dangerous where victim testifies that they thought D. had a dangerous weapon. Where it applies, no common law instruction
  - ▶ Becomes a permissive presumption if there is evidence that the weapon was not, in fact, dangerous (i.e., BB gun, inoperable weapon, etc.). Becomes a question for the jury
  - ▶ No evidence of dangerousness, or all evidence shows not dangerous? Only common law robbery goes to the jury
- ▶ *State v. Allen*, 317 N.C. 119 (1986)

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## Conspiracy Liability

- ▶ Complete with agreement between two or more people with intent to carry out; no overt act requirement in NC
- ▶ No firm test for whether single or multiple conspiracy:
  - ▶ Look at agreement and analyze with time intervals, participants, objectives, and number of meetings
- ▶ See *State v. Stimpson*, 256 N.C. App. 364 (2017) for a terrible case on this

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## Conspiracy Liability

- ▶ Organized Plan? More likely one conspiracy, regardless of number of crimes
- ▶ Ad hoc crimes? More likely to support multiple conspiracies.
- ▶ "Unless otherwise provided by law", one class lower than substantive offense
- ▶ Conspiracy to Traffic Drugs, Exploit Elder Adults, Commit Residential Mortgage Fraud or Forgery, and B/E of jail to injure prisoner all examples of where conspiracy is punished at same level as underlying

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## Pleading and Proving Conspiracy

- ▶ Must allege agreement to do unlawful act
- ▶ Need not name co-conspirators. *St. v. Gallimore*, 272 N.C. 628 (1968)
- ▶ If named, State is generally stuck with proving agreement with those named people (and not other unnamed people) at trial. *St. v. Pringle*, 204 N.C. App. 562 (2010)
- ▶ May cover a lesser-included offense (where not punished at the same level)

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## Attempt Liability

- ▶ Specific intent to commit crime, overt act in furtherance of the crime (beyond mere preparation), that falls short
- ▶ “Unless otherwise provided” – usually one level lower than substantive crime
- ▶ Not so for Armed Robbery, Indecent Liberties, Obtaining Property by False Pretenses, Safecracking, Discharging Weapon into Occupied Property (all the same level as substantive offense)

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## Attempt Liability

- ▶ Indictment for substantive offense includes attempt as lesser included
- ▶ No such thing as attempted second-degree murder, and no such thing as attempted felony murder
- ▶ Probably not any such thing as attempted assault—but there is attempted AWDWISI, apparently (*St. v. Floyd*, 369 N.C. 329 (2016))

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## Accessory Liability

- ▶ Before the Fact? Treated as a principal
- ▶ Think, aiding and abetting, but not present at time of crime
- ▶ Solicitation is a lesser included to accessory before the fact
- ▶ Can be convicted of conspiracy and accessory before the fact
- ▶ Cannot convict if all principals are acquitted. *St. v. Wilson*, 338 N.C. 244 (1994)

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## Accessory Liability

- After the Fact? Two levels lower (usually)
  - Not a lesser-included offense of the substantive crime
- May be tried for crime and accessory after the fact but can't be convicted for both
- Acquittal of named principal bars conviction for accessory after the fact. *St. v. Robey*, 91 N.C. App. 198 (1988)
- Failure to report or cooperate is generally not accessory after. *St. v. Potter*, 221 N.C. 153 (1953) (but see *Ditenhafer*)

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## Acting in Concert

- Punished as a principal
- Mere Presence Defense:
  - "Mere presence at the scene of the crime is not itself a crime, absent at least some sharing of criminal intent." *State v. Williams*, 299 N.C. 652 (1980)
  - See NCPJI 202.10 (Acting in Concert), footnote 6

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## North Carolina Criminal Law

A UNC School of Government Blog

**Pleading General Crimes and Theories of Liability**

Posted on Dec. 17, 2013, 10:19 am by Phil Dixon

Questions frequently arise about the requirements to charge the various types of general crimes like attempt, conspiracy, and accessory. A related question is whether the theory of liability, such as acting in concert or aiding and abetting, must be specifically pled. For


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## Ginsburg the Cat



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## Jury Instructions

"If a request is made for a jury instruction which is correct in itself and supported by the evidence, the trial court must give the instruction at least in substance." *State v. Harvell*, 334 N.C. 356 (1993)

**Standard:** Evidence viewed in the light most favorable to the defendant; substantial, relevant evidence that a reasonable mind could accept as supporting the claim

Δ gets all factual inferences in his or her favor

Special instruction requests must be in writing, and you must object if the court refuses your requested instruction

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307.11 Accident (Defense in Cases Other Than Homicide). (6/2003)

308.10 Self-Defense, Retreat—Including Homicide (to Be Used Following Self-Defense Instructions Where Retreat Is in Issue). (6/2017)

308.40 Self-Defense—Assaults Not Involving Deadly Force. (6/2012)

308.41 Detention of Offenders by Private Persons. G.S. 15A-404. (6/2009)

308.45 Self-Defense—All Assaults Involving Deadly Force. (6/2017)

308.45A Self-Defense Example with 208.10—All Assaults Involving Deadly Force. (6/2012)

308.47 Assault in Lawful Defense of a [Family Member] [Third Person]—(Defense to Assaults Not Involving Deadly Force). (6/2012)

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308.50 Assault in Lawful Defense of a [Family Member] [Third Person]—(Defense to All Assaults Involving Deadly Force). (6/2012)

308.60 Killing in Lawful Defense of a [Family Member] [Third Person]—(Defense to Homicide). (6/2012)

308.70 Self-Defense to Sexual Assault—Homicide. (6/2012)

308.80 Defense of [Habitation] [Workplace] [Motor Vehicle]—Homicide and Assault. G.S. 14-51.1. (6/2012)

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## Jury Instructions

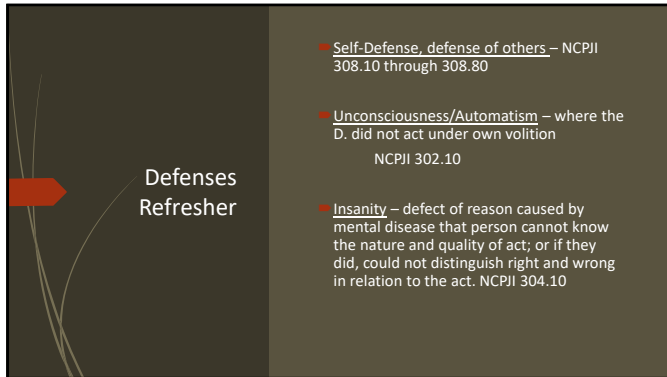
- Where the trial court fails to instruct the jury on a charged offense at all, that charge (and any lesser included offenses) are dismissed *State v. Williams*, 318 N.C. 624 (1986)
- You must be prepared to argue for your instructions, object when the court refuses to give them, and listen to the instructions when given to the jury—the judge doesn't always give the instructions they plan to
- Don't be afraid to alert the judge if he or she misses something

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## Ideas for Special Instructions

- Definition of "knowingly" or "willfully"
- Immune, interested, or informant witnesses
- Defenses!
- Evidence issues – lost or destroyed evidence, failure of agency or analyst to secure accreditation, opinion versus expert testimony, limited purpose of evidence, etc.
- Look to other states and the federal system for samples and ideas 5<sup>th</sup>, 7<sup>th</sup>, and 11<sup>th</sup> Circuits (at least) all have their pattern instructions online, for free

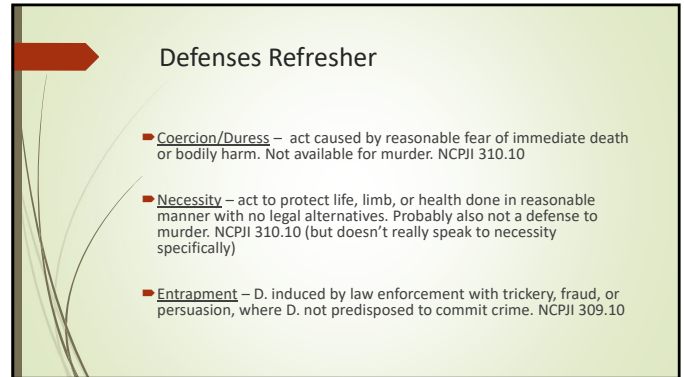
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Defenses Refresher

- Self-Defense, defense of others – NCPJI 308.10 through 308.80
- Unconsciousness/Automatism – where the D. did not act under own volition  
NCPJI 302.10
- Insanity – defect of reason caused by mental disease that person cannot know the nature and quality of act; or if they did, could not distinguish right and wrong in relation to the act. NCPJI 304.10

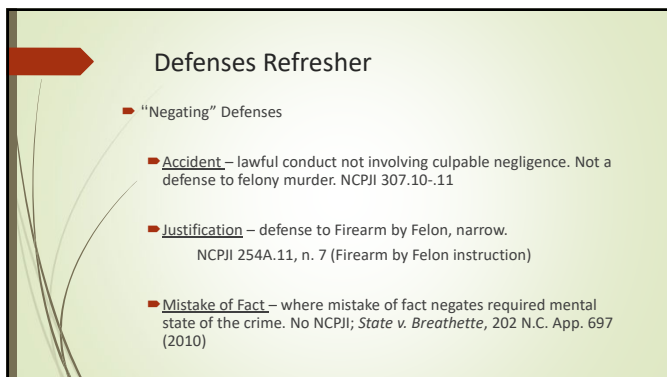
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Defenses Refresher

- Coercion/Duress – act caused by reasonable fear of immediate death or bodily harm. Not available for murder. NCPJI 310.10
- Necessity – act to protect life, limb, or health done in reasonable manner with no legal alternatives. Probably also not a defense to murder. NCPJI 310.10 (but doesn't really speak to necessity specifically)
- Entrapment – D. induced by law enforcement with trickery, fraud, or persuasion, where D. not predisposed to commit crime. NCPJI 309.10

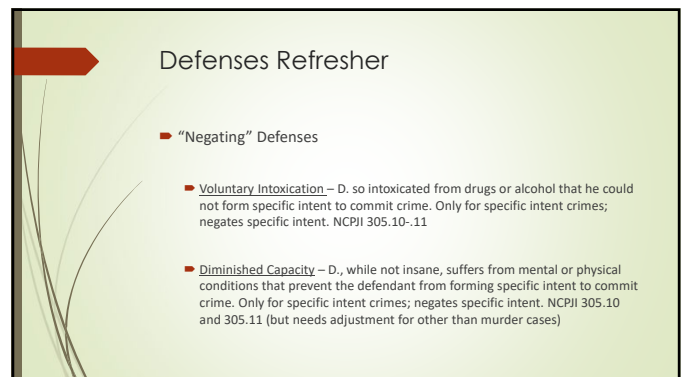
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Defenses Refresher

- “Negating” Defenses
  - Accident – lawful conduct not involving culpable negligence. Not a defense to felony murder. NCPJI 307.10-.11
  - Justification – defense to Firearm by Felon, narrow.  
NCPJI 254A.11, n. 7 (Firearm by Felon instruction)
  - Mistake of Fact – where mistake of fact negates required mental state of the crime. No NCPJI; *State v. Breathette*, 202 N.C. App. 697 (2010)

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Defenses Refresher

- “Negating” Defenses
  - Voluntary Intoxication – D. so intoxicated from drugs or alcohol that he could not form specific intent to commit crime. Only for specific intent crimes; negates specific intent. NCPJI 305.10-.11
  - Diminished Capacity – D., while not insane, suffers from mental or physical conditions that prevent the defendant from forming specific intent to commit crime. Only for specific intent crimes; negates specific intent. NCPJI 305.10 and 305.11 (but needs adjustment for other than murder cases)

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(c) Notice of Defenses, Expert Witnesses, and Witness Lists. – If the court grants any relief sought by the defendant under G.S. 15A-903, or if disclosure is voluntarily made by the State pursuant to G.S. 15A-902(a), the court must, upon motion of the State, order the defendant to:

(1) Give notice to the State of the intent to offer at trial a defense of alibi, duress, entrapment, insanity, mental infirmity, diminished capacity, self-defense, accident, automatism, involuntary intoxication, or voluntary intoxication. Notice of defense as described in this subdivision is inadmissible against the defendant. Notice of defense must be given within 20 working days after the date the case is set for trial pursuant to G.S. 7A-49.4, or such other later time as set by the court.

a. As to the defense of alibi, the court may order, upon motion by the State, the disclosure of the identity of alibi witnesses no later than two weeks before trial. If disclosure is ordered, upon a showing of good cause, the court shall order the State to disclose any rebuttal alibi witnesses no later than one week before trial. If the parties agree, the court may specify different time periods for this exchange so long as the exchange occurs within a reasonable time prior to trial.

b. As to only the defenses of duress, entrapment, insanity, automatism, or involuntary intoxication, notice by the defendant shall contain specific information as to the nature and extent of the defense.

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*"That's all Folks!"*

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