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Units of Prosecution: Charging Multiple Counts for the Same Conduct

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It has long been held that the allowable unit of prosecution for an offense is within the discretion of the legislature.[1] "[W]hen the legislature does not clearly express legislative intent, the court must determine the allowable unit of prosecution. In doing so, any ambiguity should be resolved in favor of lenity,"[2] meaning "doubt will be resolved against turning a single transaction into multiple offenses."[3]

North Carolina courts have resolved issues related to units of prosecution in some contexts—including kidnapping, possession of firearms, and theft crimes—while there are questions that remain unanswered in other contexts. Some answers are clearer and more direct than others. This bulletin reviews case law on permissible units of prosecution for certain offenses against the person, possession offenses, and theft offenses. This bulletin also provides some insight as to how courts have resolved issues related to permissible units of prosecution, including statutory construction and the rule of lenity.

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1. *See, e.g.*, Bell v. United States, 349 U.S. 81 (1955).
2. State v. Smith, 323 N.C. 439, 441 (1988) (citing *Bell*, 349 U.S. 81).
3. *Id.* at 442 (quoting *Bell*, 349 U.S. at 84).

Offenses Against the Person

Kidnapping

The North Carolina Court of Appeals has held that 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."[4] In *State v. White*, the defendant was charged with three counts of kidnapping for the events that occurred over the course of the night of the incident. The first count of kidnapping charged the defendant with "confining the victim in his vehicle at [an] intersection . . . for the purpose of facilitating the commission of robbery and not releasing her in a safe place."[5] The second count of kidnapping charged the defendant with "removing the victim from the intersection to a park for the purpose of facilitating the commission of rape or sexual offenses and sexually assaulting the victim and not releasing her in a safe place."[6] The third count of kidnapping charged the defendant with "removing the victim from the park to [another person's] residence for the purpose of facilitating the commission of rape or sexual offenses and sexually assaulting the victim and not releasing her in a safe place."[7]

The kidnapping statute, Chapter 14, Section 39 of the North Carolina General Statutes (hereinafter G.S.), states in pertinent part:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person ... shall be guilty of kidnapping . . .

The court of appeals noted in *White* that the statute contained no express language delineating each act of confinement, restraint, or removal during a kidnapping as a separate unit of prosecution. The court also reasoned:

> If we interpret G.S. 14-39 to mean that each place of confinement or each act of asportation occurring during a kidnapping constitutes a separate unit of prosecution, the State would then be authorized to divide a single act of confinement into as many counts of kidnapping as the prosecutor could devise. For example, in the instant case, the State could have charged defendant with several additional counts of kidnapping, including one for restraining the victim in her vehicle, one for moving her from her vehicle to defendant's vehicle, one for transporting her to the first park, and so on.[8]

The court thus held that "the offense of kidnapping should encompass the entire period of a victim's confinement from the time of the initial act of restraint or confinement until the victim's free will is regained."[9]

4. State v. White, 127 N.C. App. 565, 571 (1997).
5. *Id.* at 569.
6. *Id.*
7. *Id.*
8. *Id.* at 570–71.
9. *Id*. at 571.

Human Trafficking

The court of appeals has rejected the assertion that human trafficking is a continual offense and that an offender may only be charged with one crime for each victim. In *State v. Applewhite*, the defendant was indicted on seventeen charges of human trafficking against six victims and was found guilty of twelve of those seventeen charges.[10] On appeal, the defendant argued that the General Assembly did not intend to punish an offender multiple times for the same continuing crime by "allowing a prosecutor to charge countless offenses for each separate act an offender took in order to hold a victim in sexual servitude."[11] The defendant argued that the convictions were part of one continuing transaction, and he should have been charged with only one crime for each victim.

G.S. 14-43.11(a) provides:

> A person commits the offense of human trafficking when that person (i) knowingly or in reckless disregard of the consequences of the action recruits, entices, harbors, transports, provides, or obtains by any means another person with the intent that the other person be held in involuntary servitude or sexual servitude or (ii) willfully or in reckless disregard of the consequences of the action causes a minor to be held in involuntary servitude or sexual servitude.

G.S. 14-43.11(c) provides that each violation of the statute "constitutes a separate offense and shall not merge with any other offense."

While the court of appeals in *Applewhite* rejected the assertion that human trafficking is a continual offense and that an offender may only be charged with one crime for each victim, the court did not attempt to specify what facts must coalesce to constitute a separate violation under the statute. G.S. 14-43.11(c) provides that each violation constitutes a separate offense and shall not merge with any other offense, but it does not illustrate how or when a violation constitutes a "separate offense" and does not provide the conditions under which one violation ends and another begins.

Judge Arrowood concurred in part and dissented in part, expressing his view that it was improper to convict the defendant of multiple counts per victim of human trafficking. He explained that the record did not "shed light as to why [the] defendant was, or should [have been], convicted of 12 counts of human trafficking."[12] He further asserted that "the indictments [did] not give any indication as to which of the multiple actions prohibited under [G.S.] 14-43.11—recruiting, enticing, harboring, transporting, providing, or obtaining—[were] covered by each indictment or when any specific act of trafficking commenced or concluded,"[13] and that the indictments were not drafted in a way that differentiated the separate and distinct counts of human trafficking upon which the defendant was ultimately convicted. Judge Arrowood insisted that "the majority's opinion provides the State an unfettered license to prosecute a defendant on as many counts as it wishes without actually distinguishing the counts."[14] His conclusion, which echoed the one reached in *White*, suggested that "the offense of human trafficking should

10. 281 N.C. App. 66 (2021).
11. *Id.* at 76.
12. *Id.* at 95.
13. *Id.*
14. *Id.* at 97.

encompass the entire period of a victim's . . . involuntary or sexual servitude[,] from the time of the initial act of recruiting, enticing, harboring, transporting, providing, or obtaining . . . until the victim's free will is regained."[15]

Applewhite is currently on appeal to the North Carolina Supreme Court based on Judge Arrowood's dissent.

Sex Crimes

The court of appeals has held that "[e]ven when multiple sex acts occur in a 'single transaction' or a short span of time, each act is a distinct and separate offense."[16] Distinct sexual acts perpetrated during the same incident can thus support multiple indictments and convictions for a sexual offense.

In *State v. Scott*, the defendant was found guilty of two counts of sexual activity by a substitute parent. The defendant argued that he was "being punished twice for a single offense because the sexual acts upon which his convictions were based were perpetrated during the same incident and that the indictment was thus 'multiplicious.'"[17]

The court of appeals held that the indictment was not "multiplicious" because it charged the defendant with multiple counts of the same crime. The indictment charged, the judge instructed, and the jury specifically found that the defendant committed separate, delineated sexual acts. According to the court, "[w]hile the crime [was] the same in each count, each count represent[ed] a different charge—a separate instance of commission of the crime based on a distinct predicate act."[18] The first count, of which he was acquitted, was based on vaginal intercourse. The two counts of which he was found guilty were based on cunnilingus and fellatio, respectively. The court thus upheld the defendant's convictions.

This interpretation is the trend in cases involving sex crimes. Similar holdings have been reached with respect to other sex crimes, including first-degree sexual offense, indecent liberties, and rape.[19]

Assault

The North Carolina Supreme Court has recently decided *State v. Dew*, giving some guidance for this issue as it applies to assault offenses.[20] For multiple acts to constitute separate assaults, there must be a "distinct interruption" in the original assault followed by a second or subsequent assault.[21] Even when a victim sustains various injuries through several acts of violence, the perpetrator may still be convicted of only one count of assault if there is no distinct interruption in the perpetrator's actions.

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15. *Id.* (quoting State v. White, 127 N.C. App. 565, 571 (1997) (internal quotation marks omitted)).
16. State v. Gobal, 186 N.C. App. 308, 322 n.7 (2007).
17. 278 N.C. App. 585, 595 (2021).
18. *Id.*
19. *See* State v. Williams, 201 N.C. App. 161 (2009) (upholding the defendant's convictions of two counts of first-degree sexual offense for inserting his fingers in the victim's vagina and in her rectum during a single incident); State v. James, 182 N.C. App. 698 (2007) (upholding defendant's convictions of three counts of indecent liberties for touching and sucking victim's breasts, performing oral sex on her, and having intercourse with her); State v. Dudley, 319 N.C. 656 (1987) (upholding two rape convictions in which the defendant's acts of forcible intercourse with one victim were interrupted by his attempted rape of a second victim).
20. 379 N.C. 64 (2021).
21. *See Williams*, 201 N.C. App. at 182; State v. Littlejohn, 158 N.C. App. 628, 635 (2003).

While the distinct interruption test is used frequently in physical assault cases, the cases are not always easy to reconcile. Thus, the supreme court used *Dew* as an opportunity to provide examples to further explain what can qualify as a distinct interruption. This nonexclusive list of examples includes: (1) "an intervening event," (2) "a lapse of time in which a reasonable person could calm down," (3) "an interruption in the momentum of the attack," (4) "a change in location," or (5) "some other clear break delineating the end of one assault and the beginning of another."[22]

The distinct interruption approach "look[s] beyond the number of physical contacts with the victim to determine whether more than one assault has occurred such that the State can appropriately charge a defendant with multiple assaults."[23] As the court notes, to allow otherwise would open the door "for the State to be able to charge someone with a separate assault for every punch thrown in a fight."[24]

In *Dew*, the defendant beat the victim for hours inside a trailer and subsequently beat the victim in a car while driving home. The assaults were separated by an intervening event interrupting the momentum of the attack—cleaning the mattress and packing the car. The assaults also were distinct in time and location. The court thus concluded that the jury could find that the beating in the trailer and the beating in the car were distinct assaults.

Additionally, the defendant was charged with at least two assaults for conduct occurring only inside the trailer: assault on a female involving a headbutt to the forehead and assault with a deadly weapon inflicting serious injury resulting in a fractured nose. Because the State did not present evidence showing that a distinct interruption occurred in the trailer, the court concluded that the evidence showed that there was only a single assault inside the trailer as the attack was continuous and ongoing.[25]

There is also a statutory prohibition on multiple assaults. Several North Carolina assault provisions state that conduct is punished at a certain level unless it is covered under a different provision that provides for increased punishment. For example, under G.S. 14-32.4(b), conduct constituting assault by strangulation is a Class H felony "unless that conduct is covered under some other provision of law providing greater punishment." This clause indicates that more extensive or severe injuries, whether caused by strangulation or another type of assault, might be charged as assault inflicting serious bodily injury, a Class F felony under G.S. 14-32.4(a); assault inflicting serious injury with a deadly weapon, a Class E felony under G.S. 14.32(b); or attempted first-degree murder, a Class B2 felony under G.S. 14-17 and G.S. 14-2.5.

Courts have interpreted this language to mean that if a greater offense is charged, the defendant may not also be punished for the lesser offense for the same conduct.[26]

22. *Dew*, 379 N.C. at 72.

23. *Id.* at 70–71.

24. *Id.* at 70.

25. For further discussion, see Brittany Bromell, *State v. Dew: Multiple Assault Offenses and Distinct Interruptions*, N.C. Crim. L., UNC Sch. of Gov't Blog (Jan. 4, 2022).

26. *See Williams*, 201 N.C. App. 161, 173 ("the language '[u]nless the conduct is covered under some other provision of law providing greater punishment' indicated legislative intent to punish certain offenses at a certain level, but that if the same conduct was punishable under a different statute carrying a higher penalty, defendant could only be sentenced for that higher offense"); State v. Braxton, 183 N.C. App. 36, 43 (2007) (evidence showing "that a defendant strangled his or her victim to the point of death or close to it, . . . [is conduct that] is provided for by other criminal offenses in our State's statutes").

While this limiting provision does not bar a finding of multiple assaults when there is a distinct interruption, it does prevent charging each individual instance of assault under a separate statute for the same conduct. Even if two different assault statutes "require proof of different elements, so as to be distinct crimes for purposes of double jeopardy under *Blockburger* [*v. United States*[27]], the insertion of the limiting language in the statute indicates the intent of the legislature that a defendant only be sentenced for the higher of two offenses."[28]

Discharging a Firearm into Occupied Property

Our appellate courts have used the three-factor test set out in *State v Rambert* in determining whether the defendant committed a single assault or multiple assaults when the offense charged was discharging a firearm into occupied property. Those factors are (1) whether the acts were the result of separate thought processes, (2) whether the acts were distinct in time, and (3) whether the acts resulted in different injuries.[29]

In *Rambert*, the defendant was in the backseat of a car that parked next to a man in another car. The defendant and the man got into an argument, after which the defendant produced a gun and fired a bullet through the front windshield of the man's car. The man then drove forward, and the defendant fired again and struck the passenger door of the man's car. The defendant chased the man and fired a third shot, which lodged in the rear bumper of the man's car. The defendant was charged with and convicted of three counts of discharging a firearm into occupied property.

The state supreme court upheld the convictions, noting that the defendant committed three separate and distinct acts. The court reasoned that "[e]ach shot fired from a pistol, as opposed to a machine gun or other automatic weapon, required that [the] defendant employ his thought processes each time he fired the weapon. Each act was distinct in time, and each bullet hit the vehicle in a different place."[30]

The *Rambert* factors were also used in upholding a defendant's conviction for seven counts of discharging a firearm into occupied property. In *State v. Morrison*, the court held that "testimony was proper and sufficient for the jury to determine that the rifle [the d]efendant used was semi-automatic—therefore requiring [the d]efendant to pull the trigger each time he chose to fire another shot into [a] fleeing truck."[31]

Some courts have applied the *Rambert* factors rather than the distinct interruption test in physical assault cases, which has resulted in defendants being charged with and convicted of multiple assault offenses for multiple physical acts.[32] However, the state supreme court concluded in *State v. Dew* that the *Rambert* factors are not appropriate for an assault analysis and thus declined to extend *Rambert* to assault cases generally.[33]

27. 284 U.S. 299 (1982).
28. *Williams*, 201 N.C. App. at 174.
29. 341 N.C. 173 (1995).
30. *Id.* at 176–77.
31. 272 N.C. App. 656, 668 (2020).
32. *See* State v. Harding, 258 N.C. App. 306 (2018).
33. 379 N.C. 64, 72 (2021).

Possession Offenses

Possession of Firearms

North Carolina's Felony Firearms Act provides that it is "unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm or any weapon of mass death and destruction."[34] The state appeals court in *State v. Garris* determined that a review of the applicable firearms statute "shows no indication that the North Carolina Legislature intended for [G.S.] 14-415.1(a) to impose multiple penalties for a defendant's simultaneous possession of multiple firearms."[35]

The court in *State v. Wiggins* similarly reasoned that "[t]he extent to which a defendant is guilty of single or multiple offenses hinges upon the extent to which the weapons in question were acquired and possessed at different times."[36] In this case, the defendant acquired the weapons at issue simultaneously and utilized those weapons over the course of a two-hour period within a relatively limited location during the commission of a series of similar offenses. In light of that set of facts, the court concluded that the defendant's "possession of a firearm during the sequence of events that included [a murder and two assaults] constituted a single possessory offense rather than three separate possessory offenses."[37]

In *State v. Lee*, the court declined to apply *Garris* to a case in which the defendant robbed multiple convenience stores, using the same gun, over the course of five weeks. The court affirmed the defendant's convictions of multiple counts of possession of a firearm by a felon, stating: "If the evidence shows that the defendant possessed a weapon on different days and in different locations, the holding from *Wiggins* is not controlling, and the defendant can be charged with multiple possession offenses."[38] Each distinct act of possession over time and place permits a separate conviction.[39]

Drug Offenses

Possession of multiple caches of drugs can result in only one possession conviction when the State's evidence demonstrates that all caches arose from one continuous act of possession. In *State v. Moncree*, an officer found marijuana in the defendant's car during a traffic stop.[40] After the defendant was arrested and taken to the local sheriff's department, another officer found marijuana in the defendant's shoe. The defendant was charged with and convicted of two counts of misdemeanor possession of marijuana and one count of felony possession of marijuana on the premises of a local confinement facility in violation of G.S. 90-95(e)(9). In vacating two of the three convictions, the court of appeals reasoned that the defendant possessed both the marijuana in the automobile and the marijuana in his shoe simultaneously. The State presented no evidence showing that the defendant came into possession of the marijuana in his shoe after he was arrested. The court thus held that the defendant should have been charged with only the one count of felony possession of marijuana.

34. G.S. 14–415.1(a).
35. 191 N.C. App. 276, 285 (2008).
36. 210 N.C. App. 128, 138 (2011).
37. *Id.* at 137–38.
38. 213 N.C. App. 392, 399 (2011).
39. For further discussion, see Jeff Welty, *Multiple Counts of Possession of a Firearm by a Felon*, N.C. Crim. L., UNC Sch. of Gov't Blog (July 25, 2011).
40. 188 N.C. App. 221 (2008).

Our courts have also held that, under certain circumstances, multiple caches of drugs can be combined to reach the possession or trafficking threshold. This is so even when the caches are in distinct locations. If the defendant has one bag of cocaine in his dresser and another in his truck parked in the driveway, these quantities may be added together. In *State v. Hazel*, the court held that it was proper for "heroin recovered from [the d]efendant's person to be combined with the heroin recovered from [his] apartment for the purposes of charging [him] with trafficking."[41] The court concluded that the defendant possessed both caches of drugs "simultaneously" and apparently for the same purpose of distribution, and the evidence suggested that the drugs recovered from the defendant were taken from the larger cache in his apartment. The court also noted that whether quantities may be combined will depend on the particular circumstances of each case.

The court in *State v. Johnson* likewise held that it was proper to combine drugs found in the defendant's socks and shoes with drugs found in the vehicle in which he had recently been a backseat passenger.[42]

There may be an exception to the above rules when the evidence suggests that some caches are for personal use while others are for distribution. In *State v. Rozier*, the defendants sold 5 ounces of cocaine to an undercover officer and were arrested moments later while still in possession of two small vials of cocaine.[43] They were convicted of felony possession of the five ounces and misdemeanor possession of the vials. On appeal, they contested the misdemeanor convictions, arguing that "possession of the two differing amounts of cocaine constituted a single continuing offense."[44]

The court of appeals disagreed. It stated that "[t]he circumstances of each case will determine whether separate offenses may properly be charged."[45] The court further pronounced that "if all the cocaine had been found on defendants' persons at the same time, only one offense could be charged," but it noted that there was a small, temporal gap between the defendants' possession of the 5 ounces and their arrest.[46] The court also noted that the larger quantity had been possessed for sale while the vials were for personal use and thus affirmed both convictions.

The court emphasized the existence of a temporal gap between the offenses, but the gap was trivially small, and it appears that the defendants possessed both the 5 ounces and the vials at the same time. It may therefore be reasonable to focus on the other justification presented in *Rozier* for treating the caches separately: that they were possessed for distinct purposes. If a defendant possessed, for example, 27 grams of cocaine packaged for sale and 2 grams packaged for personal use, this aspect of *Rozier* could perhaps support a defense argument that the proper charges are possession with intent to sell or deliver (PWISD) and simple possession rather than trafficking by possession.

These opinions place a heavy emphasis on the *simultaneous* possession of multiple caches of drugs. When a defendant makes several sales over multiple days, there is a realistic possibility that the defendant re-stocked between sales and did not possess all the drugs at once. Therefore, the quantities sold over time probably can't be aggregated.[47]

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41. 226 N.C. App. 336, 345 (2013).
42. 217 N.C. App. 605 (2011).
43. 69 N.C. App. 38 (1984).
44. *Id.* at 54.
45. *Id.* at 55.
46. *Id.*
47. For further discussion, see Jeff Welty, *Combining Drug Quantities*, N.C. Crim. L., UNC Sch. of Gov't Blog (Feb. 9, 2015).

Our courts have upheld multiple convictions for possession of controlled substances when the evidence showed that the defendant simultaneously possessed different types of controlled substances. In *State v. Williams*, the defendant was convicted of two counts of possession with intent to manufacture, sell, or deliver a controlled substance.[48] The defendant's probation officer discovered a bag containing a white, powdery substance, which laboratory results determined contained two separate Schedule I substances, Methylone and 4-Methylethcathinone. The defendant argued on appeal that conviction for both offenses was improper because both substances were mixed together in the same bag.

G.S. 90-89(5) defines the relevant class of Schedule I substances as "any material, compound, mixture, or preparation that contains any quantity of the [listed] substances." The defendant argued that based on the language of the statute, specifically the use of the word "mixture," the Methylone and 4-Methylethcathinone should have constituted a single Schedule I controlled substance because they were found in the same mixture. In rejecting this argument and upholding both convictions, the court emphasized the language of the statute, stating that possession of "any quantity" of a listed substance is "sufficient to charge a defendant with possession of the particular substance and to support a conviction for possession of the substance."[49]

Relatedly, the offense of keeping and maintaining a dwelling or vehicle for the use of a controlled substance as proscribed by G.S. 90-108(a)(7) has been expressly classified as a continuous offense by our courts.[50]

Obscenity

In *State v. Smith*,[51] defendant Schoch was convicted of five counts of obscenity under G.S. 14-190.1 for three magazines and two films he sold to undercover officers. Defendant Smith was convicted of three counts under the same statute for two magazines and one film he sold to the officers. The sale of the materials occurred in two separate transactions.

The court of appeals upheld the convictions, but the supreme court reversed the decision, holding that "a single sale in contravention of [G.S.] 14-190.1 does not spawn multiple indictments."[52] The court noted that G.S. 14-190.1 makes it unlawful to "intentionally disseminate obscenity." One "disseminates obscenity" within the meaning of the statute by selling, delivering, providing, or by offering or agreeing to sell, deliver, or provide, "any obscene writing, picture, record or other representation or embodiment of the obscene."[53] According to the court, "[t]he statute makes no differentiation of offenses based upon the quantity of the obscene items disseminated."[54]

48. 252 N.C. App. 231 (2017).

49. *Id.* at 234. *See also* State v. Hall, 203 N.C. App. 712 (2010) (the defendant asserted that she could not be sentenced for both ecstasy and ketamine possession because controlling statutes forbid the State from charging separate offenses when a mixture of substances is involved; the court rejected this argument).

50. *See* State v. Grady, 136 N.C. App. 394 (2000); State v. Calvino, 179 N.C. App. 219 (2006).

51. 323 N.C. 439 (1988).

52. *Id.* at 444 (quoting Judge Wells's dissent in the lower court's opinion, 89 N.C. App. 19, 25 (1988)).

53. *Id.* at 441 (quoting the statute).

54. *Id.*

Defendant Schoch sold one magazine and one film to an officer and two magazines and one film to another officer. The court thus held that Schoch was guilty of two counts of disseminating obscenity. Defendant Smith participated in one of those transactions, and the court held that he was guilty of only one count of disseminating obscenity.

Child Pornography

In *State v. Howell*, the defendant was convicted of forty-three counts of third-degree sexual exploitation of a minor.[55] The defendant argued that the applicable statutory definitions did not support the multiple charges against him. Rather, he asserted that "the possession of photos on a single hard drive constitutes only one offense or, in the alternative, no more than five separate counts, one for each downloaded zip file."[56]

The defendant was convicted of violating G.S. 14-190.17A(a), which provides that "a person commits the offense of third-degree sexual exploitation of a minor if, knowing the character or content of the material, he possesses material that contains a visual representation of a minor engaging in sexual activity." G.S. 14-190.13 defines "material" as "pictures, drawings, video recordings, films or other visual depictions or representations but not material consisting entirely of written words."

The defendant suggested that because the definition of "material" specifies items in the plural, the photographs found on his computer constitute only a single charge. The defendant argued alternatively that the evidence supported, at most, five counts, as there were five downloads of one zip file each. The State's evidence regarding the downloads showed five zip files on the defendant's hard drive, each containing multiple compressed files with child pornography images. The defendant argued that each of the five downloaded zip files is the technological equivalent of a digital magazine and that each zip file should be treated as only one item, rather than allowing separate charges for each photo.

The court rejected the defendant's argument, holding that "even if there were only five 'downloads,' the State's evidence tended to show that each of the two hundred individual photographs on [the] defendant's computer, found within the five zip directories, had been opened on [the] defendant's computer."[57] Because each of the images had been opened and saved on the defendant's hard drive (regardless of what "directory" they were in), the court held that the evidence supported the conclusion that the defendant "possessed" each of the forty-three images.

In differentiating the holding here from the holding in *State v. Smith*, discussed above under "Obscenity," that a single sale of multiple pornographic magazines could not yield multiple convictions, the court focused on the legislative intent in addressing "two distinct societal problems." The court reasoned that "[c]hild pornography laws . . . are designed to prevent the victimization of individual children, and to protect minors from the physiological and psychological injuries resulting from sexual exploitation and abuse. . . . [T]he General Assembly thus wrote [G.S.] 14-190.17A(a) to support a charge for each image."[58]

55. 169 N.C. App. 58 (2005).
56. *Id.* at 61.
57. *Id.* at 64.
58. *Id.* at 63–64 (citations, internal quotation marks omitted).

Property Offenses

Larceny and Other Theft Offenses

The "single taking" rule prevents a defendant from being charged or convicted multiple times for a single continuous act or transaction.[59] In larceny cases, the single taking rule works to punish a defendant for only one count of larceny regardless of how many items were taken at one time, rather than charging the defendant for each item that was taken in a single incident.

In *State v. Froneberger*, the defendant was convicted of four counts of felonious larceny for taking several items of silver belonging to his mother and pawning it on four separate occasions.[60] The court of appeals held that there was no "evidence that the silver was stolen on more than one occasion," and thus the defendant could be convicted of only one count of larceny.[61]

In *State v. Mettler*, the defendant entered the victims' home through a window, taking $150 from the wife's purse and taking the keys to the husband's truck and driving off in it.[62] The defendant was found guilty of both felonious larceny after breaking or entering and larceny of a motor vehicle. The court of appeals held that the evidence showed that both larcenies were part of a single, continuous transaction and that the trial court erred in sentencing the defendant for two separate larcenies.

Conversely, in cases where there is a temporal break in the thefts committed by the defendant, the courts are less likely to apply the single taking rule.[63]

Obtaining Property by False Pretenses

The application of the rule is similar in false pretenses cases. In *State v. Buchanan*, the defendant was indicted for two counts of false pretenses for signing a "Check Fraud/Forgery Affidavit" with his bank, disputing three checks written off his account totaling $900.[64] The evidence showed that the defendant had pre-signed the three checks, given them to the mother of his daughter, and authorized her to use them in the care of their daughter. Based on the defendant's representation in the affidavit, the bank gave the defendant temporary credit for one of the three checks, a $600 check, but denied him credit for the two other checks, a $200 check and a $100 check. The defendant was tried and convicted of obtaining property by false pretenses for a $600 provisional credit placed in his bank account and separately of attempting to obtain property by false pretenses for the $100 and $200 checks. The defendant argued on appeal that the jury instructions violated the single taking rule. The court agreed, noting that the defendant submitted one affidavit, disputing three checks, and that the submission of the one affidavit is the one act, or one false representation, for which the defendant was charged. Thus, the court held, there was only a single act or taking under the single taking rule. Note that the defendant

59. State v. Adams, 331 N.C. 317, 333 (1992).
60. 81 N.C. App. 398 (1986).
61. *Id.* at 401.
62. 255 N.C. App. 215 (2017) (unpublished).
63. *See* State v. Robinson, 342 N.C. 74 (1995) (takings of the victim's wallet and car were separate: the defendant shot the victim and took the victim's wallet; left the scene, went to a park, and walked around the neighborhood; and later returned and took the victim's car); State v. Barton, 335 N.C. 741 (1994) (the armed robbery of the victim—resulting in the taking of his wallet and automobile—and the subsequent taking of the victim's firearm from his automobile constituted separate takings).
64. 262 N.C. App. 303 (2018).

benefited here because he signed only one affidavit, so there was only one false representation within the meaning of the statute. If this defendant had instead signed a separate affidavit for each dispute, the separate convictions may have been upheld.

Financial Transaction Card Theft

Our courts have consistently declined to apply the single taking rule to financial transaction card theft cases based on the language of G.S. 14–113.9(a)(1). In *State v. Rawlins*, the defendant used the credit cards of two victims to purchase items from Wal-Mart in three separate transactions and was later convicted of three counts of financial transaction card theft.[65] The defendant argued on appeal that the single taking rule applicable in larceny cases should be applicable to financial transaction card theft. The court declined to apply the rule in this instance, reasoning:

> [T]he statute explicitly uses the word "a" and references "card" in the singular. Thus, the taking, obtaining or withholding of a single card—without the cardholder's consent and with the intent to use that card—could give rise to a single count of financial transaction card theft in violation of the statute. Accordingly, the single taking rule does not apply to financial transaction card theft.[66]

The court came to a similar conclusion in *State v. Bright* when a defendant stole twelve credit cards from three individuals.[67] The defendant broke into one victim's car at a gas station and stole her purse, which contained four credit cards. The following day, the defendant broke into another victim's car and stole her purse, which contained seven of her own credit cards and one of her husband's credit cards. The defendant argued on appeal that the evidence only showed two separate takings and, therefore, the trial court erred in failing to dismiss all but two of the counts of credit card theft. The court upheld the convictions of all twelve counts, declining to apply the single taking rule.

Statutory Construction and Lenity

Statutory Construction

Units of prosecution for most offenses are not clearly defined, and many have yet to be resolved by case law. For statutory offenses that do not explicitly address the allowable unit of prosecution for that offense, the courts have utilized general principles of statutory construction.

One approach has been to determine legislative intent by the use of the articles "any" versus "a" or "an." In holding that a single sale of multiple pornographic magazines could not yield multiple convictions, the court in *State v. Smith* reasoned that the obscenity statute makes it illegal to sell "*any* obscene writing, picture, record or other representation or embodiment of the obscene."[68] The court reasoned that using "any" rather than "a" failed to indicate a "clear expression of legislative intent to punish separately and cumulatively for *each and every* obscene

65. 166 N.C. App. 160 (2004).
66. *Id.* at 165.
67. 209 N.C. App. 754 (2011) (unpublished).
68. 323 N.C. 439, 441 (1988) (emphasis added) (quoting G.S. 14-190.1(a)(1)).

item disseminated."[69] By contrast, the court in *State v. Howell* explained that "the legislature chose to use the term '*a*' visual depiction [in the child pornography statute,] thus indicating a different intent."[70]

The court in *State v. Rawlins* rejected the defendant's argument that the single taking rule applicable in larceny cases should be applicable to financial transaction card theft.[71] The court reasoned:

> [T]he statute explicitly uses the word "a" and references "card" in the singular. Thus, the taking, obtaining or withholding of a single card—without the cardholder's consent and with the intent to use that card—could give rise to a single count of financial transaction card theft in violation of the statute.[72]

As another example, the hit and run law, as proscribed by G.S. 20-166(a)(2), refers to serious bodily injury or death to "any" person. G.S. 20-166(a1)(2) refers to a crash that results in "injury." It is arguable that neither provision clearly defines the precise unit of prosecution. The court of appeals in *State v. Cash* affirmed a defendant's conviction for two counts of hit and run causing injury based on the defendant leaving the scene of a single crash.[73] The defendant did not argue on appeal that multiple convictions based on a single act of leaving were improper, however, so the court did not analyze the issue.[74]

Not all criminal statutes contain material articles like "any," "a," or "an." Some offenses, such as those against a person, refer to a course of conduct rather than a number of objects. Consider the offense of making harassing phone calls as proscribed by G.S. 14-196(a)(3). Under this statute, it is unlawful for any person "to telephone another repeatedly, whether or not conversation ensues, for the purpose of abusing, annoying, threatening, terrifying, harassing or embarrassing any person at the called number."

In *State v. Boone*, the defendant was charged with and convicted of six counts of making harassing phone calls, after having made more than fifty calls to an apartment on six different dates.[75] The opinion gives no indication as to how or why the State chose to charge six counts of the offense, but it likely reflects the six different days on which those calls were repeatedly made.

By contrast, in *State v. Camp*, the defendant was alleged to have made more than five hundred phone calls to a police department over the course of two months but was charged with only one count of the offense.[76] Neither of the reviewing courts in *Boone* and *Camp* commented on the allowable unit of prosecution for the offense.

In the embezzlement context, our appellate courts have expressed that it is up to the prosecutor to decide whether to aggregate multiple takings into a single felony or charge them individually at a lower level. In *State v. Rupe,* the defendant was indicted on forty counts of embezzlement that occurred within a continuous series of actions over a period of years.[77]

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69. *Id.* at 442 (quoting Judge Wells's dissent in the court of appeals' opinion, 89 N.C. App. 19, 24 (1988)).
70. 169 N.C. App. 58, 63 (2005) (emphasis added).
71. 166 N.C. App. 160.
72. *Id.* at 165.
73. 234 N.C. App. 116 (2014) (unpublished).
74. For further discussion, see Shea Denning, *May a Separate Count of Hit and Run Be Charged for Each Person Injured?*, N.C. Crim. L., UNC Sch. of Gov't Blog (June 5, 2014).
75. 79 N.C. App. 746 (1986).
76. 59 N.C. App. 38 (1982).
77. 109 N.C. App. 601 (1993).

Conversely, in *State v. Mullaney*, the court concluded that a factual basis existed for the defendant's plea to a single count of embezzlement notwithstanding evidence that the defendant converted at least 141 different checks between January 1993 and February 1996 and that "[e]ach act of converting a forged check into his own account could have resulted in a separate indictment against the defendant."[78]

The lack of statutory and case law guidance on the threshold for the unit of prosecution constituting a separate charge allows for prosecutorial discretion in charging multiple counts for the same conduct, which can result in drastically different results across similar cases.

Lenity

When rules of statutory construction do not aid in a resolution, "any ambiguity should be resolved in favor of lenity,"[79] meaning "doubt will be resolved against turning a single transaction into multiple offenses."[80] In other words, "the presumption is against multiple punishments in the absence of a contrary legislative intent."[81]

This rule has often been applied in cases regarding possession of firearms. In applying this rule, the court in *State v. Garris* reasoned:

> The use of "any firearm" in North Carolina's statute is ambiguous in that it could be construed as referring to a single firearm or multiple firearms. If construed as any single firearm, the statute would allow for multiple convictions for possession if multiple firearms were possessed, even if they were possessed simultaneously. Alternatively, if construed as any group of firearms, the statute would allow for only one conviction where multiple firearms were possessed simultaneously. . . . Thus, under this statute it is unclear whether a defendant may be convicted for each firearm he possesses if he possesses multiple firearms simultaneously.[82]

The court ultimately concluded that "the applicable firearms statute show[ed] no indication that the North Carolina Legislature intended . . . to impose multiple penalties for a defendant's simultaneous possession of multiple firearms."[83] Because the defendant was convicted twice for possession of a firearm by a felon based on his simultaneous possession of two firearms, the court upheld the first conviction and reversed the second.

Following the same rationale, the state supreme court concluded that—under the rule of lenity—a defendant could only lawfully be convicted on one count of possession of a firearm on educational property when he was discovered on the grounds of a school in simultaneous possession of five guns.[84]

78. 129 N.C. App. 506, 511 (1998).
79. State v. Smith, 323 N.C. 439, 441 (1988).
80. *Id.* at 442.
81. State v. Boykin, 78 N.C. App. 572, 577 (1985).
82. 191 N.C. App. 276, 283 (2008).
83. *Id.* at 285.
84. State v. Conley, 374 N.C. 209 (2020).

Conclusion

The list of offenses described here is not intended to be exhaustive. There remain many offenses for which the allowable unit of prosecution has not been suggested, provided, or decided. As cases move through our court system, we are likely to see more guidance on units of prosecution for other offenses from the appellate division in addition to any actions the North Carolina General Assembly might take to make the answers clearer as to permissible units of prosecution.