Robert L. Farb
School of Government
February 1, 2010

# The "Or" Issue in Criminal Pleadings, Jury Instructions, and Verdicts; Unanimity of Jury Verdict

## I. Appellate court will review sufficiency of criminal pleading even if not challenged in trial court

When an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, it may be challenged at any time, even if it was not challenged in the trial court. *State v. Wallace,* 351 N.C. 481 (2000).

## II. Purpose of a criminal pleading

**State v. Sturdivant**, 304 N.C. 293 (1981). The court stated at page 311 that "it is not the function of an indictment to bind the hands of the State with technical rules of pleading; rather, its purposes are to identify clearly the crime being charged, thereby putting the accused on reasonable notice to defend against it and prepare for trial, and to protect the accused from being jeopardized by the State more than once for the same crime. See *State v. Gregory*, 223 N.C. 415 (1943). Thus, G.S. 15-153 provides that an indictment shall not be quashed 'by reason of any informality or refinement' if it accurately expresses the criminal charge in 'plain, intelligible, and explicit' language sufficient to permit the court to render judgment upon conviction . . . ."

## III. When the use of "or" makes criminal pleading, jury instruction, or jury verdict defective

**State v. Lyons**, 330 N.C. 298 (1991). Defendant was indicted for one count of secret assault committed on A "and" B. The trial judge instructed the jury that they could convict the defendant if they found the defendant committed the secret assault on A "and/or" B. The court described *State v. Diaz*, discussed below, as establishing a principle that a disjunctive instruction which allows the jury to find a defendant guilty if he or she commits either of two underlying acts, *either of which is in itself a separate offense*, is fatally ambiguous because it is impossible to determine whether the jury *unanimously* found that the defendant committed one particular offense. The court described *State v. Hartness*, discussed in IV. below, as establishing a principle that a disjunctive instruction does not violate the state constitution's unanimity-of-verdict requirement if that instruction only involves *alternative acts which will establish an element of an offense* (i.e., the jury need not be unanimous in finding a particular act among two or more alternative acts that constitute an element of an offense). The court ruled that the instruction was erroneous in this case because it permitted the jury to consider in one issue two possible crimes for which he could be separately convicted and punished: a secret assault on A and a secret assault on B. Thus, the jury could have returned a verdict of guilty without all twelve jurors agreeing that the defendant assaulted a particular person. And unlike the disjunctive instruction in *State v. Foust*, discussed in IV. below, ambiguity created by the disjunctive instruction in this case was not removed by examining the evidence in the trial.

**State v. Diaz**, 317 N.C. 545 (1986). The trial judge instructed jury that they could find the defendant guilty of possessing *or* transporting 10,000 or more pounds of marijuana. Ruling: the instruction was erroneous. Submitting in disjunctive two or more possible crimes to jury in a single issue is ambiguous and therefore fatally defective. (Possessing and transporting 10,000 or

more pounds of marijuana are separate offenses.) It cannot be determined whether the jury unanimously found the defendant guilty of possessing, transporting, possessing and transporting, or some jurors found that he possessed and some jurors found that he transported. Therefore, the defendant has been deprived of his state constitutional right to be convicted by a unanimous jury. [Note: The court overruled *State v. Foust*, 311 N.C. 351 (1984) and *State v. Hall*, 305 N.C. 77 (1982) to extent they differ from ruling in this case. However, in *State v. Hartness*, 326 N.C. 561 (1990) (discussed in IV. below), the court reinstated the ruling in *State v. Foust*.] See also State v. Anderson, 76 N.C. App. 434 (1985).

The court stated that a general verdict of guilty based on an instruction charging a crime in the disjunctive will not always be fatally defective. Ambiguity in the jury instruction may be removed by examining the verdict, the jury instruction, the informing of prospective jurors of the charges under G.S. 15A-1213, and the evidence in the case. The court stated that the ruling in *State v. Jones*, 242 N.C. 563 (1955), described in IV. below, applied to jury instructions as well as indictments.

**State v. McLamb**, 313 N.C. 572 (1985). A jury verdict finding that the defendant feloniously did "sell or deliver" cocaine was fatally defective since sale and delivery are separate offenses. [But note that since this ruling, the court has determined that sale and delivery are not separate offenses, *State v. Moore*, 327 N.C. 378 (1990).]

**State v. Albarty**, 238 N.C. 130 (1953). A verdict finding defendant guilty as charged in a warrant that alleged in the disjunctive ("or") four separate offenses in G.S. 14-291.1 (sale of lottery tickets; barter of lottery tickets; causing another to sell lottery tickets; causing another to barter lottery tickets—court stated that terms "barter" and "sell" are not synonymous) was invalid for uncertainty. The verdict was not sufficiently definite and specific to identify the crime of which the defendant was convicted.

**State v. Williams**, 210 N.C. 159 (1936). An indictment (under former drug statute) disjunctively charging defendant with possessing, manufacturing, having under his control, selling, prescribing, administering, *or* dispensing marijuana was defective and the motion to quash should have been granted. The indictment charged several separate offenses disjunctively and therefore was void for uncertainty. The conjunctive "and" should have been used if the state wanted to charge all the offenses. If the verdict in this case—guilty as charged—is interpreted as finding defendant guilty of some of the charges in the indictment, then it is void for uncertainty because it does not indicate for which charges the jury found the defendant guilty. If interpreted as finding the defendant guilty of all charges in the indictment, then the defendant would have been convicted of some offenses for which there was no evidence in this case. See also *State v. Helms*, 247 N.C. 740 (1958).

See G.S. 15A-924(a)(2) (criminal pleading must contain separate count for each offense charged) and 15A-924(b) (if count of indictment charges more than one offense, defendant may by timely filing of motion require State to elect single offense alleged in count on which State will proceed to trial; count may be dismissed for duplicity if State fails to make timely election).

## IV. When the use of "or" does not make criminal pleading, jury instruction, or jury verdict defective

**State v. Golphin**, 352 N.C. 364 (2000). The defendant contended that the trial court erred in a capital sentencing hearing by giving disjunctive instructions on the G.S. 15A-2000(e)(5) aggravating circumstance (murder committed in the course of a felony). The defendant argued that the instruction allowed the jury to find the aggravating circumstance to exist if the jury found

him guilty of either armed robbery of Ava Rogers' car, or guilty of robbery of Trooper Lowry's weapon and thus violated the unanimity requirement. The court disagreed, concluding that the trial court did not err by using a disjunctive instruction for the two theories under one aggravating circumstance.

**State v. Oliver**, 343 N.C. 202 (1996). Relying on State v. Hartness, 326 N.C. 561 (1990), the court ruled that jury instructions did not violate the unanimity requirement when it permitted some jurors to convict the defendant of impaired driving based on the defendant's having an alcohol concentration of 0.08 or more and other jurors to convict based on the defendant's being under the influence of an impairing substance. Impaired driving is one offense with two underlying theories supporting a conviction. See also State v. Bradley, 181 N.C. App. 557 (2007) (similar ruling).

**State v. DeCastro,** 342 N.C. 667 (1996). The trial judge's instruction during a capital sentencing hearing that the jury could find the existence of aggravating circumstance G.S. 15A-2000(e)(3) (prior violent felony conviction) based on the finding of a common law robbery conviction or a voluntary manslaughter conviction, or both, did not deny the defendant's state constitutional right to a unanimous verdict. The court ruled that as long as the crimes for which the defendant had been previously convicted were felonies and involved the use or threatened use of violence against a person, the specific crime that supported this aggravating circumstance was immaterial.

**State v. Allen,** 339 N.C. 545 (1995). The trial judge's instruction permitted the jury to find the defendant guilty either on the theory of the defendant as the principal or the theory of the defendant aiding and abetting the accomplice, who acted as the principal. Relying on State v. Hartness, 326 N.C. 561 (1990) and State v. Creason, 313 N.C. 122 (1985), the court ruled that the instruction was not fatally ambiguous. It allowed the jury to find the defendant guilty based on either of two underlying facts (theories), both of which separately support a theory of guilt for only one offense. It was distinguishable from an instruction, see State v. Lyons, 330 N.C. 298 (1991), which would allow the jury to find a defendant guilty of two underlying acts, either of which is in itself a separate offense.

**State v. Hartness**, 326 N.C. 561 (1990). The defendant was charged with one count of indecent liberties. Evidence at trial showed that defendant touched the nine-year-old victim's penis with his hands and mouth and also showed that defendant induced victim to touch defendant's penis with his hands and mouth. The trial judge instructed jury with pattern jury instruction, which uses conjunctive "or" in describing acts constituting indecent liberties. The defendant contended on appeal that jury could have split its decision about which act (defendant touching victim or victim touching defendant) constituted the offense, making it impossible to determine if jury was unanimous in its verdict. The court rejected defendant's contention and affirmed the conviction. The indecent liberties statute does not list discrete criminal activities in the disjunctive as does the drug trafficking statute [see *State v. Diaz*, 317 N.C. 545 (1986) (fatally ambiguous jury instruction when jury instructed to return guilty verdict if it found that defendant "knowingly possessed or knowingly transported marijuana" since trafficking by possession and transportation are discrete criminal offenses]. Even if some jurors found one type of prohibited act and others found another type of prohibited act, the jury as a whole would unanimously find there occurred sexual conduct within the statute—"any immoral, improper, or indecent liberties." The court reinstated the ruling in *State v. Foust*, 311 N.C. 351 (1984) (instruction in sexual offense case that sexual act meant "oral sex or anal sex" was not error when jury was instructed about unanimity in finding elements) that it had overruled in *Diaz*. Court overruled *State v. Britt*, 93 N.C. App. 126 (1989) to the extent it misapplied *Diaz*. Although court did not discuss *State v. Callahan*, 86 N.C. App. 88 (1987), its ruling may cast doubt on the ruling in that case as well. [Note: The court in

State v. Petty, 132 N.C. App. 453 (1999) recognized the implicit overruling of *Callahan* by State v. McCarty, 326 N.C. 782 (1990).]

For a ruling similar to *Hartness*, see State v. Johnston, 123 N.C. App. 292 (1996) (defendant's right to unanimous jury verdict was not violated by jury instruction on sale of two obscene magazines during a single transaction, because such a sale constitutes only one offense); State v. McCaslin, 132 N.C. App. 352 (1999) (defendant's right to unanimous verdict was not violated by DWI jury instruction that involved one charge arising from defendant's driving at time of accident and when he returned to accident later). See also the cases discussed below under "VII. Unanimity of verdict in child sexual assault cases."

**State v. Lotharp,** 356 N.C. 420 (2002), *reversing*, 148 N.C. App. 435 (2002). The court, per curiam and without an opinion, reversed the court of appeals for the reasons stated in the dissenting opinion. The dissenting opinion stated that the jury instruction on the element of a deadly weapon in a prosecution of assault with a deadly weapon inflicting serious injury was not fatally ambiguous ("the defendant's hands and feet and/or the chain were deadly weapons"). The instruction properly allowed the jury to chose between two instrumentalities as the deadly weapon: (1) hands and feet or (2) a chain.

**State v. Haddock,** 191 N.C. App. 474 (2008). The defendant was convicted of second-degree rape in a case when the victim had lost consciousness from excessive alcohol consumption. (1) The indictment alleged that the victim was "mentally disabled, mentally incapacitated and/or physically helpless." The court noted that the State v. Call, 353 N.C. 400 (2001), had criticized the use of the phrase "and/or" in indictments, although it is not necessarily fatal. The indictment in this case had followed the short-form indictment language in G.S. 15-144.1(c) except for the substitution of "and/or" for "or." The court ruled that the indictment was not fatally defective; it was sufficient to notify the defendant of the charge against him to prepare an adequate defense and to protect him from being punished a second time for the same act. The court noted that the indictment would have been clearer if the word "or" or "and" had been used. (2) The court ruled, relying on State v. Hartness, 326 N.C. 561 (1990), that there was no unanimity-of-verdict violation when the judge instructed on the victim being mentally incapacitated or physically helpless. The victim's condition (mentally incapacitated or physically helpless) constituted alternative ways of proving one rape, not separate rapes.

**State v. Hazelwood,** 187 N.C. App. 94 (2007). The defendant was convicted of felony eluding officer under G.S. 20-141.5. The court ruled, relying on State v. Funchess, 141 N.C. App. 302 (2000), the there was no violation of the defendant's state constitutional right to a unanimous jury verdict when the jury instruction did not require jury unanimity on which of several motor vehicle violations constituted the two aggravating factors to support the felony conviction. See also State v. Davis, ___ N.C. App. ___, 680 S.E.2d 239 (4 August 2009).

**State v. Funchess,** 141 N.C. App. 302 (2000). The defendant was convicted of felonious speeding to elude arrest under G.S. 20-141.5. The judge charged the jury that it may convict the defendant if jury found beyond a reasonable doubt two of the three aggravating factors alleged in the indictment: (i) speeding in excess of 15 miles over the speed limit; (ii) reckless driving; and (iii) driving while license revoked. (1) The court ruled, relying on State v. Hartness, 326 N.C. 561 (1990), that the jury need not unanimously find the same aggravating factors to convict the defendant of this offense. The various aggravating factors are not separate offenses but are merely alternate ways of committing one offense. See also *State v. Hazelwood*, 187 N.C. App. 94 (2007) (similar ruling). (2) The court ruled, relying on State v. Moore, 315 N.C. 738 (1986), that an indictment's allegation using the conjunction "and" in alleging alternative theories constituting one offense does not require proof of all theories. Thus, the use of the conjunctive "and" when

alleging the three aggravating factors in this case did not require the state to prove all three factors; only two factors were required to be proved.

**State v. Almond**, 112 N.C. App. 137 (1993). A unanimous verdict was required only as to the offense of conspiracy to obtain property by false pretenses and not to the persons with whom defendant conspired.

**State v. Williams**, 314 N.C. 337 (1985). The defendant argued that a jury instruction that the defendant must have intended "to commit rape or robbery with a dangerous weapon, or both" at the time of the breaking and entering violated his right to a unanimous verdict. Noting that the court had previously ruled that when an indictment is phrased in the conjunctive—for example, rape and robbery—the trial court may instruct the jury that it may convict for the indicted offense if it finds that the defendant committed either or both of the particular felonies alleged to support the indictment, and that in its final mandate the trial court instructed the jury that its verdict must be unanimous, the court rejected defendant's argument.

**State v. Rush**, 56 N.C. App. 787 (1982). A jury instruction on felonious breaking or entering allowed the jury to find the defendant guilty if it found that he broke *or* entered into the residence with the intent to commit a felony therein. The court rejected the defendant's argument that the instruction was erroneous because it did not require the jury to agree on which of the acts the defendant committed. The jury instruction on felonious larceny stated that the state must prove "either that [defendant] took the [property] from the building after a breaking or entering, or that the [property] was worth more than four hundred dollars." The court ruled that it was not error for the court to allow the alternative propositions to be stated together.

**State v. Lancaster,** 137 N.C. App. 37 (2000). The kidnapping indictment charged the defendant with "confining, restraining, *and* removing" the victim. The judge instructed the jury that the state must prove that the defendant confined, restrained, *or* removed the victim. Relying on State v. Surrett, 109 N.C. App. 344 (1993), the court ruled that the state must only prove that the defendant confined, restrained, *or* removed the victim. Because an indictment need only allege one statutory theory, an indictment alleging all three theories is sufficient and puts the defendant on notice that the state intends to show that the defendant committed the kidnapping based on any one of the three theories. The jury instruction therefore correctly allowed any one of the three theories to serve as a basis of the kidnapping conviction. *See also* State v. Key, 180 N.C. App. 286 (2006) [(court ruled, relying on State v. Lancaster, 137 N.C. App. 37 (2000), that when the kidnapping indictment alleged "confined, restrained, and removed," the jury instruction permitting a conviction on the jury's finding that the defendant "restrained *or* removed" the victim was not error].

**State v. Garvick**, 327 N.C. 627 (1990), *affirming per curiam*, 98 N.C. App. 556 (1990). Trial judge properly refused to submit two-pronged instruction and verdict (1) DWI by impaired substance, and (2) DWI by 0.10 or more.

**State v. Creason**, 313 N.C. 122 (1985). Indictment charged defendant with possessing LSD with intent to sell *or* deliver. Ruling: no error in indictment because it charged only *one* offense, relying on *State v. Jones*, 242 N.C. 563 (1955) and distinguishing *State v. Albarty*, 238 N.C. 130 (1953). The legislature sought to punish more severely than simple possession the possession with the *intent* to *transfer* the drug—whether by sale of delivery. The gravamen of the offense is the *intent* to *transfer*.

The verdict of possessing with intent to sell *or* deliver did not violate the requirement that a jury verdict be unanimous; see *Jones v. All American Life Insurance Company*, 312 N.C. 725

(1985) [court ruled that because plaintiff's participation in killing of insured by either of two alternatives (killing insured or procuring killing of insured) bars her from recovering insurance policy proceeds, it is only necessary that jury unanimously agree that she so participated; six could find she killed and six could find she procured killing]. The requirement of jury unanimity is satisfied by a general verdict of guilty even if six jurors found the defendant possessed LSD with intent to sell and six jurors found the defendant possessed LSD with intent to deliver. The form of the verdict did not give the jury two alternative illegal acts, only one—possessing LSD with the requisite intent (transfer to another).

In a footnote, the court stated that the issues in this case may affect many criminal statutes, including first-degree rape and sexual offense, kidnapping, breaking or entering, forgery, etc.

**State v. Belton**, 318 N.C. 141 (1986). The trial judge charged the jury that the defendants could be convicted of first-degree rapes and first-degree sex offenses if they employed a deadly weapon *or* were aided and abetted by another. Responding to the defendants' arguments that disjunctive jury charges enabled jury to render nonunanimous verdict (some finding use of deadly weapon and some finding aiding and abetting), the court ruled that this legal argument was resolved against them in *State v. Creason* and *Jones v. All American Life Insurance Company*, discussed above. See also State v. Green, 124 N.C. App. 269 (1996) (similar ruling); State v. Haywood, 144 N.C. App. 223 (2001); State v. Galloway, 145 N.C. App. 555 (2001); State v. Barkley, 144 N.C. App. 514 (2001).

**State v. McLamb**, 313 N.C. 572 (1985). A jury verdict finding that defendant conspired to "sell or deliver" was not fatally ambiguous because the jury found the defendant guilty of the single offense of conspiring to sell or deliver cocaine. A conspiracy to commit a number of crimes is only one offense; the court approvingly cited federal cases upholding conspiracy indictments charging the single offense of a conspiracy to commit several offenses that were alleged in the disjunctive. See also *State v. Overton*, 60 N.C. App. 1 (1982), which the court cited with approval (upholding verdict of conspiracy to manufacture, possess with intent to sell and deliver, *or* sell and deliver heroin).

**State v. Alford**, 339 N.C. 562 (1995). A disjunctive instruction that the jury could convict the defendant under either premeditated or felony-murder theories did not mislead jurors to reach a non-unanimous verdict. The instructions made it clear that the jury had to be unanimous on both verdict and basis for that verdict, and both verdict sheet and jury poll confirmed that the jury had found defendant guilty on both theories.

**State v. Foust**, 311 N.C. 351 (1984). [Note: this case was overruled in *State v. Diaz*, 317 N.C. 545 (1986) but then was reinstated in *State v. Hartness*, 326 N.C. 561 (1990).] The defendant was indicted for first-degree sexual offense, without specifying what sexual act was performed. The state's evidence showed two distinct sexual acts, anal intercourse and fellatio. The trial judge instructed the jury that they must return a verdict of guilty if they found that the defendant engaged in oral sex "or" anal sex with the victim. However, the judge also instructed the jury that (1) if they have a reasonable doubt as to one or more elements, they must return a verdict of not guilty, (2) they must agree on all the elements before a verdict of guilty could be reached, and (3) their verdict must be unanimous. The court stated that the instructions, read as a whole, required a verdict of not guilty if all twelve jurors were not satisfied beyond a reasonable doubt that the defendant engaged in fellatio or anal intercourse, or both; the convincing inference is that the jury unanimously agreed that the defendant engaged in both oral and anal sex. Therefore, the jury instruction did not deprive the defendant of the state constitutional right to a unanimous jury finding. [However, court recommended in future cases that judges submit separate issues of each unlawful sex act if more than one act exists.]

**State v. McDougall**, 308 N.C. 1 (1983). The defendant was convicted of felony murder by committing the underlying felonies of attempted rape and kidnapping. Although the trial judge submitted the underlying felonies in the disjunctive, there was no error because throughout the entire charge the judge instructed the jury that its verdict must be unanimous on every essential element of the offenses charged. For example, early in the charge, the judge charged the jury that "your answers must be unanimous as to each issue and sub-part thereof which you shall come to consider." After the final mandate, the judge reminded the jurors about considering each of the charges (and lesser-included charges) as separate charges and that any verdict reached in each charge must be unanimous. See also *State v. Jordan*, 305 N.C. 274 (1982) (jury instruction on first-degree burglary element that stated intent to commit rape *and/or* first degree sexual offense was not error when judge repeatedly instructed jury that its verdict must be unanimous on every essential element).

**State v. Worthington**, 84 N.C. App. 150 (1987). A jury verdict that found defendant guilty of conspiring with Dalton Woodrow Worthington, Sr. *and/or* Patricia Ann Newby to sell and deliver cocaine did not violate the defendant's right to unanimous verdict, relying on *State v. McDougall*, 308 N.C. 1 (1983) and *State v. Jordan*, 305 N.C. 274 (1982). Here, the judge carefully instructed the jurors that each of their verdicts must be unanimous, and the unanimity requirement was repeated when the judge inquired later about their progress in deliberations.

**State v. Jones**, 242 N.C. 563 (1955). A warrant charging that defendant did "build or install" a septic tank without obtaining a permit was not defective. First, the words "build" and "install," as used in the county ordinance, are synonymous. Second, even if not synonymous, their use in the alternative did not prejudice the defendant or leave him in doubt as to the offense charged, since the gist of the ordinance is the defendant's failure to obtain a permit—not whether he built or installed the septic tank. See also *State v. Kelly*, 13 N.C. App. 588 (1972) (indictment alleging possession of "hypodermic syringe *or* needle" was not fatally defective because the statute [former G.S. 90-108] set forth only one offense—unlawfully possessing various instruments for illegal drug use).

**State v. Van Doran**, 109 N.C. 864 (1891). An indictment charging that defendant unlawfully did "practice, *or* attempt to practice" medicine without a license was not defective. The court stated that "or" is only fatal when its use renders uncertain the statement of the offense, and not when one term in a statute is used only as explaining or illustrating the other or when the statute's wording makes either an attempt or procurement of an act, or the act itself, in the alternative, indictable.

## V. "And" is the preferred (but not necessarily required) word in charging criminal offense; proof of only one of two alleged ways to commit crime is sufficient

**State v. Haddock,** 171 N.C. App. 474 (2008). The defendant was convicted of second-degree rape in a case when the victim had lost consciousness from excessive alcohol consumption. (1) The indictment alleged that the victim was "mentally disabled, mentally incapacitated and/or physically helpless." The court noted that the State v. Call, 353 N.C. 400 (2001), had criticized the use of the phrase "and/or" in indictments, although it is not necessarily fatal. The indictment in this case had followed the short-form indictment language in G.S. 15-144.1(c) except for the substitution of "and/or" for "or." The court ruled that the indictment was not fatally defective; it was sufficient to notify the defendant of the charge against him to prepare an adequate defense and to protect him from being punished a second time for the same act. The court noted that the indictment would have been clearer if the word "or" or "and" had been used. (2) The court ruled,

relying on State v. Hartness, 326 N.C. 561 (1990), that there was no unanimity-of-verdict violation when the judge instructed on the victim being mentally incapacitated or physically helpless. The victim's condition (mentally incapacitated or physically helpless) constituted alternative ways of proving one rape, not separate rapes.

**State v. Funchess,** 141 N.C. App. 302 (2000). The defendant was convicted of felonious speeding to elude arrest under G.S. 20-141.5. The judge charged the jury that it may convict the defendant if jury found beyond a reasonable doubt two of the three aggravating factors alleged in the indictment: (i) speeding in excess of 15 miles over the speed limit; (ii) reckless driving; and (iii) driving while license revoked. (1) The court ruled, relying on State v. Hartness, 326 N.C. 561 (1990), that the jury need not unanimously find the same aggravating factors to convict the defendant of this offense. The various aggravating factors are not separate offenses but are merely alternate ways of committing one offense. (2) The court also ruled, relying on State v. Moore, 315 N.C. 738 (1986), that an indictment's allegation using the conjunction "and" in alleging alternative theories constituting one offense does not require proof of all theories. Thus, the use of the conjunctive "and" when alleging the three aggravating factors in this case did not require the state to prove all three factors; only two factors were required to be proved.

**State v. Swaney**, 277 N.C. 602 (1971). Armed robbery indictment alleged that defendant "endangered *and* threatened" victim while armed robbery statute reads "endangered *or* threatened." Ruling: no error. When a statute sets forth disjunctively several ways the offense may be committed, the indictment properly should connect the various ways with the conjunctive "and" and not with the disjunctive "or." The disjunctive may make uncertain what is relied on as the accusation against him. See, e.g., *State v. Helms*, 247 N.C. 740 (1958) and *State v. Hardin*, 19 N.C. 407 (1837).

**State v. Armstead,** 149 N.C. App. 652 (2002). The defendant attempted to attempted to cash a stolen check in a store by stating that the check had already been pre-approved by the store manager. The employee handling the check was not actually deceived because she knew that her manager never pre-approved checks. The defendant left the store without cashing the check. The false pretenses indictment stated, in part, "obtain *and* attempt to obtain" and that the false pretense was "calculated to deceive *and* did deceive (emphasis added)." The court ruled, relying on State v. Swaney, 277 N.C. 602 (1970), that the indictment correctly used the conjunctive "and" between "obtain" and "attempt to obtain." In addition, an indictment charging a completed offense is sufficient under G.S. 15-170 to support a conviction of an attempt to commit the charged offense. The court also ruled that the language "and did deceive" was surplusage and did not make the indictment defective.

**State v. Birdsong**, 325 N.C. 418 (1989). An indictment charged that defendant willfully failed to discharge a duty of his office (under G.S. 14-230) and then alleged with the conjunctive "and" two factual bases for the failure-to-discharge-duties element of this crime. The court noted that it was unnecessary to allege the factual underpinnings of the element; in any event, the state's alleging two factual bases required that it prove only one, not both. See also *State v. Montgomery*, 331 N.C. 559 (1992) (when indictment alleged in conjunctive two alternative ways to commit offense ["from the person and presence of (victim)"], state only must prove one of the alternatives; *State v. Parker*, 143 N.C. App. 680 (2001) (similar ruling); *State v. Pigott*, 331 N.C. 199 (1992) (having alleged three felonies as purposes of restraint in kidnapping charge, state could rely on all three felonies alleged in indictment, alternatively or conjunctively, to sustain kidnapping conviction; state only needed to prove only one felony to sustain conviction, however, and did not have to make election of which one before case was submitted to jury).

**State v. Dietz**, 289 N.C. 488 (1976). An indictment charged that defendant did "sell *and* deliver" marijuana. The court stated that the two acts (i.e., sale and delivery) could have been charged as separate offenses [which is no longer the law, see *State v. Moore*, 327 N.C. 378 (1990)], but the fact that the state elected to subject the defendant to one criminal penalty on one count did not prejudice him. The court also rejected defendant's argument that because the state charged both offenses, the state thereby assumed the burden of proving both sale and delivery in order to convict. See also *State v. O'Keefe*, 263 N.C. 53 (1964). See G.S. 15A-924(a)(2) and 15A-924(b), discussed above.

**State v. Gray**, 292 N.C. 270 (1977). A first-degree rape indictment alleged that the victim's resistance was overcome "by use of a deadly weapon *and* by the infliction of serious bodily injury." The statute sets forth these two ways with the disjunctive "or." Ruling: no error, relying on *Swaney*.

The judge instructed the jury only on theory of use of a deadly weapon because the evidence was insufficient to submit the theory of infliction of serious injury. Ruling: no error. Court stated that when "an indictment sets forth conjunctively two means by which the crime may have been committed, there is no fatal variance between indictment and proof when the State offers evidence supporting only one of the means charged." See also *State v. Moore*, 315 N.C. 738 (1986) (when indictment alleges three purposes for kidnapping, state only must prove one purpose).

**State v. Mercer**, 89 N.C. App. 714 (1988). When the indictment charged possessing cocaine with intent to sell *and* deliver, it was proper for jury to return verdict of possessing cocaine with intent to sell *or* deliver.

## VI. Appellate reversal is required when verdict may have rested on theory for which there was insufficient evidence, or jury's finding is not specific

**State v. Pakulski**, 319 N.C. 562 (1987). Defendant was convicted of felony murder based on two felonies, armed robbery and felonious breaking or entering. Court determined that evidence was insufficient to support instruction on felonious breaking or entering because a deadly weapon was not used or possessed during its commission. Court ruled that a new trial was required because both felonies were submitted in the disjunctive, and it was impossible to determine from trial record whether jury improperly based their verdict on felonious breaking or entering (the verdict form did not reflect the theory or theories on which jury based their finding of guilty of felony murder).

**State v. Moore**, 315 N.C. 738 (1986). When three underlying purposes for kidnapping were submitted to jury and one of those purposes was not supported by the evidence, a new trial must be ordered when jury did not indicate which of the three purposes it found to exist.

**State v. Belton**, 318 N.C. 141 (1986). The defendant's convictions for *both* first-degree kidnapping (based on aggravating element of sexual assault) and first-degree rape cannot stand based on the fact that defendant raped victim a second time (for which defendant was not indicted) when neither the judge's instruction nor jury's verdict indicated that jury made that finding.

## VII. Unanimity of verdict in child sexual assault cases

*North Carolina Supreme Court cases*

**State v. Massey,** 361 N.C. 406 (2007), *reversing*, 174 N.C. App. 216 (2005). The defendant was convicted of five counts of first-degree statutory sexual offense, ten counts of sexual acts with a minor when defendant assumed position of parent, and four counts of indecent liberties. The court ruled, relying on State v. Markeith Lawrence, 360 N.C. 368 (2006), and State v. Gary Lawrence, 360 N.C. 393 (2006), that there was no violation of the defendant's right to a unanimous verdict when there were a greater number of acts of sexual misconduct than the number of charged offenses and convictions

**State v. Markeith Lawrence,** 360 N.C. 368 (2006), *reversing in part*, 170 N.C. App. 200 (2005). The defendant was convicted of six counts of first-degree statutory sexual offense, five counts of first-degree statutory rape, and three counts of taking indecent liberties (The first-degree statutory sexual offense convictions were not before the North Carolina Supreme Court for its review.) The court ruled, reversing the ruling of the court of appeals, that the defendant's convictions of first-degree statutory rape and indecent liberties did not violate the defendant's constitutional right to a unanimous jury verdict. (1) The defendant was charged in three identically-worded indecent liberties indictments that lacked specific details distinguishing one offense from another. The offense dates for each indictment were also identical (May 1, 1999, through December 6, 2000). The victim testified about three specific incidents of indecent liberties on three different occasions in the summer of 1999. Relying on State v. Hartness, 326 N.C. 561 (1990), and State v. Lyons, 330 N.C. 298 (1991), the court ruled that the defendant's constitutional right to a unanimous jury verdict was not violated, even though a friend of the victim testified about a fourth act of indecent liberties by the defendant with the victim. The court stated that this fourth incident had no effect on jury unanimity because according to *Lyons*, *Hartness* ruled that while one juror might have found some incidents of misconduct constituting indecent liberties and another juror might have found different incidents of misconduct constituting indecent liberties, the jury as a whole found that improper sexual conduct occurred. (2) The defendant was charged in five identically-worded indictments with first-degree statutory rape that lacked specific details distinguishing one offense from another. The offense dates for each indictment alleged the same time frame. The victim testified that she had sexual intercourse with the defendant thirty-two times during the years 1999 and 2000. During her testimony, she recounted five specific instances in which the defendant penetrated her vagina with his penis. Relying on the reasoning in State v. Wiggins, 161 N.C. App. 583 (2003), the court ruled that the defendant's constitutional right to a unanimous jury verdict was not violated.

**State v. Gary Lawrence,** 360 N.C. 393 (2006), *reversing in part*, 165 N.C. App. 548 (2004). The North Carolina Court of Appeals in this case had reversed seven of the defendant's convictions of second-degree sexual offense because the defendant's constitutional right to a unanimous jury verdict had been violated. The North Carolina Supreme Court, per curiam and without an opinion, stated that for the reasons set out in State v. Markeith Lawrence, 360 N.C. 368 (2006), the ruling of the North Carolina Court of Appeals is reversed.

**State v. Hartness**, 326 N.C. 561 (1990). The defendant was charged with one count of indecent liberties. Evidence at trial showed that defendant touched the nine-year-old victim's penis with his hands and mouth and also showed that defendant induced victim to touch defendant's penis with his hands and mouth. The trial judge instructed jury with pattern jury instruction, which uses conjunctive "or" in describing acts constituting indecent liberties. The defendant contended on appeal that jury could have split its decision about which act (defendant touching victim or victim

touching defendant) constituted the offense, making it impossible to determine if jury was unanimous in its verdict. The court rejected defendant's contention and affirmed the conviction. The indecent liberties statute does not list discrete criminal activities in the disjunctive as does the drug trafficking statute [see *State v. Diaz*, 317 N.C. 545 (1986) (fatally ambiguous jury instruction when jury instructed to return guilty verdict if it found that defendant "knowingly possessed or knowingly transported marijuana" since trafficking by possession and transportation are discrete criminal offenses]. Even if some jurors found one type of prohibited act and others found another type of prohibited act, the jury as a whole would unanimously find there occurred sexual conduct within the statute—"any immoral, improper, or indecent liberties." The court reinstated the ruling in *State v. Foust*, 311 N.C. 351 (1984) (instruction in sexual offense case that sexual act meant "oral sex or anal sex" was not error when jury was instructed about unanimity in finding elements) that it had overruled in *Diaz*. Court overruled *State v. Britt*, 93 N.C. App. 126 (1989) to the extent it misapplied *Diaz*. Although court did not discuss *State v. Callahan*, 86 N.C. App. 88 (1987), its ruling may cast doubt on the ruling in that case as well. [Note: The court in State v. Petty, 132 N.C. App. 453 (1999) recognized the implicit overruling of *Callahan* by State v. McCarty, 326 N.C. 782 (1990).]

For a ruling similar to *Hartness*, see State v. Johnston, 123 N.C. App. 292 (1996) (defendant's right to unanimous jury verdict was not violated by jury instruction on sale of two obscene magazines during a single transaction, because such a sale constitutes only one offense); State v. McCaslin, 132 N.C. App. 352 (1999) (defendant's right to unanimous verdict was not violated by DWI jury instruction that involved one charge arising from defendant's driving at time of accident and when he returned to accident later).

**State v. McCarty**, 326 N.C. 782 (1990). Following *State v. Hartness*, discussed above, the court ruled that judge did not err in charging jury that they may convict defendant of (1) first-degree sexual offense based on act of fellatio or act of digital penetration of vagina; and (2) indecent liberties based (i) on an immoral or indecent touching by defendant, or (ii) inducement by defendant of immoral or indecent touching by child.

*North Carolina Court of Appeals cases*

**State v. Cousart,** 182 N.C. App. 150 (2007). The defendant was convicted of contributing to the delinquency of a minor. The jury instruction did not require that the jury be unanimous in finding one of the three criminal acts (driving without a license; breaking into a motor vehicle; larceny) the juvenile could have been adjudicated delinquent. The court ruled, relying on State v. Hartness, 326 N.C. 561, 391 S.E.2d 177 (1990), that the defendant's right to a unanimous verdict was not violated. The court stated that the gravamen of the crime is the defendant's conduct, and the jury need only be unanimous that the juvenile committed an act for which he could be adjudicated delinquent, but need not be unanimous on the specific act.

**State v. Wallace,** 179 N.C. App. 710 (2006). The defendant was convicted of three counts of statutory sexual offense. There was evidence of more sexual acts than charged offenses. The court ruled, relying on State v. Markeith Lawrence, 360 N.C. 368 (2006), that the defendant's right to a unanimous verdict was not violated.

**State v. Bates,** 179 N.C. App. 628 (2006). The defendant was convicted of six counts of first-degree sexual offense and seven counts of indecent liberties, as well as other offenses. In a previous appeal of these convictions, 172 N.C. App. 27 (2005), the court vacated all thirteen convictions because it ruled that the defendant had been denied his right to a unanimous jury verdict. On the state's petition for review, the North Carolina Supreme Court remanded the case for reconsideration in light of its ruling in State v. Markeith Lawrence, 360 N.C. 368 ( 2006). (1)

The court ruled, relying on State v. Brigman, 178 N.C. App. 78 (2006) (relying on *Markeith Lawrence* to uphold convictions), that the defendant's right to a unanimous verdict was not violated when the defendant was tried for ten counts of indecent liberties, evidence was presented of ten incidents of indecent liberties, and the jury returned seven guilty verdicts. The court stated that the fact that the jury may have considered evidence of all ten counts to reach a unanimous verdict that the defendant was guilty of seven counts did not, under *Markeith Lawrence*, violate the right to a unanimous verdict. (2) The court ruled, relying on the post-*Markeith Lawrence* unpublished Court of Appeals opinion in State v. Spencer (No. COA05-623, 6 June 2006), that the defendant's right to a unanimous verdict was not violated when the defendant was tried for eleven counts of first-degree sexual offense, evidence was presented of six to ten incidents of first-degree sexual offense, and the jury returned six guilty verdicts. The court considered four factors in determining that the defendant's right to a unanimous verdict was not violated: (i) the evidence; (ii) the indictments; (iii) the jury instructions; and (iv) the verdict sheets. The court stated while the fact that more counts were charged than supported by the evidence created an opportunity for confusion, it did not necessarily make it impossible to match the jury's verdict to the evidence. The court noted that the trial judge had instructed the jury that all twelve jurors must unanimously agree as to each charge, which adequately ensured that the jury would match its unanimous verdicts with the charges. After analyzing the verdict sheets, the court concluded that it was possible to match the jury's guilty verdicts with specific incidents presented by the evidence.

**State v. Fuller,** 179 N.C. App. 61 (2006). The defendant was convicted of two counts of indecent liberties and three counts of first-degree rape involving his ten-year-old son. Based on State v. Lawrence, 360 N.C. 368 (2006), the court ruled that the defendant's right to a unanimous jury verdict for the two convictions of indecent liberties was not violated even though there was evidence at trial of more than two acts of indecent liberties. Based on State v. Lawrence, 360 N.C. 368 (2006), the court ruled that the defendant's right to a unanimous jury verdict for the three convictions of first-degree rape was not violated when the victim testified to three specific acts of rape and the verdict sheets included specific dates for the acts, even though evidence suggested that other rapes may have occurred.

**State v. Bullock,** 178 N.C. App. 460 (2006). The defendant was convicted of eleven counts of rape of his pre-teen daughter. She testified about a specific act of vaginal intercourse that occurred in late 2000. The defendant was indicted and convicted of this rape in an indictment alleging the dates from October through December 2000. She also testified that the defendant continued to have vaginal intercourse with her "more than two times a week" from that first act in late 2000 until at least the Spring of 2002—commonly known as "generic testimony" because she did not describe any particular act of vaginal intercourse during this time period. The defendant was indicted for and convicted of ten rapes based on the generic testimony, one each for the months of January through October 2001. The defendant argued that his constitutional right to a unanimous verdict was violated because the state presented evidence of more acts of rape than charges of rape. The court rejected this argument, based on the ruling in State v. Markeith Lawrence, 360 N.C. 368, 627 S.E.2d 609 (7 April 2006), *reversing in part*, 170 N.C. App. 200, 612 S.E.2d 678 (2005), and the North Carolina Supreme Court's statement in *Markeith Lawrence* that it found persuasive the reasoning of State v. Wiggins, 161 N.C. App. 583, 589 S.E.2d 402 (2003) (upholding convictions of five counts of statutory rape in which the victim testified to four specific acts of rape and offered generic testimony about many other acts of rape). The court also ruled as no longer binding precedent prior rulings of the Court of Appeals that generic testimony can only support one additional conviction beyond those convictions representing specific act testimony. These prior rulings were State v. Gary Lawrence, 165 N.C. App. 548, 599 S.E.2d 87 (2004), *reversed in part*, 360 N.C. 393, 627 S.E.2d 615 (7 April 2006), and State v. Bates, 172

N.C. App. 27, 616 S.E.2d 280 (1 November 2005). The court noted that the Court of Appeals ruling in *Gary Lawrence* was reversed by the North Carolina Supreme Court and *Bates* rested on the Court of Appeals ruling in *Gary Lawrence*. Instead, the court ruled that the binding precedent is State v. Wiggins, cited above. The court stated that there was no language in *Wiggins* that would limit to one the number of convictions based on generic testimony. The court ruled—considering six factors set out by the Supreme Court in *Markeith Lawrence*—that the defendant's ten convictions (one for each month over a ten-month period) based on the victim generic testimony did not violate the defendant's right to a unanimous verdict.

**State v. Brigman,** 178 N.C. App. 78 (2006). The defendant was convicted of twenty-seven counts of indecent liberties and eighteen counts of first-degree sexual offense, although there was evidence of many more sexual acts than charges. None of the verdict sheets set out the specific act that the jury had to find to convict. The trial judge instructed the jury that a verdict must be unanimous, and separate verdict sheets were submitted to the jury. The court ruled, relying on State v. Markeith Lawrence, 360 N.C. 368 (2006), and State v. Gary Lawrence, 360 N.C. 393 (2006), the defendant's right to a unanimous verdict on each charge was not violated.

**State v. Brewer,** 171 N.C. App. 686 (2005). The court ruled that the defendant's right to unanimous jury verdicts concerning his convictions of three counts of first-degree sexual offense and three counts of indecent liberties was not violated, considering the indictments, evidence, jury instructions, and verdict sheets. (See the court's discussion of the detailed facts in this case.)

**State v. Wiggins,** 161 N.C. App. 583 (2003). The defendant was convicted of five counts of statutory rape and two counts of statutory sexual offense of a child, his daughter, who was between 13 and 15 years old when the offenses occurred. The indictments alleged that each offense occurred between May 1, 1998, and September 30, 1998, and that the defendant was more than four years older than the victim. The court ruled, distinguishing State v. Holden, 160 N.C. App. 503 (2003), that the charges were sufficiently differentiated so that the defendant's right to unanimous verdicts was not violated. The lack of specificity in the verdict sheets needed for unanimous verdicts was cured by the evidence presented at trial—see the court's discussion of the evidence in its opinion.

**State v. Petty,** 132 N.C. App. 453 (1999). The jury instruction for first-degree sexual offense provided that the jury could convict the defendant if it found that the defendant committed either cunnilingus or inserted an object into the minor victim's genital area. The court rejected the defendant's argument that this instruction violated the state constitutional requirement that a jury's verdict must be unanimous. Relying on State v. Hartness, 326 N.C. 561 (1990), State v. McCarty, 326 N.C. 782 (1990), and other cases, the court ruled that the single wrong of engaging in a sexual act with a minor may be proved by a finding of various alternatives, including cunnilingus and digital penetration—which are not disparate crimes, but merely alternative ways of showing the commission of one crime during a single transaction. See also State v. Youngs, 141 N.C. App. 220 (2000) (similar ruling). The court noted, however, that alternative sexual acts committed in separate transactions may properly form the basis for charging the defendant with separate crimes; the court cited State v. Dudley, 319 N.C. 656 (1987) (court upholds two rape convictions with same victim) and State v. Small, 31 N.C. App. 556 (1976) (similar ruling).

## VIII. Federal due process does not require unanimity on alternative ways to commit first-degree murder

**Schad v. Arizona**, 501 U.S. 624, 111 S. Ct. 2491, 115 L.Ed.2d 555 (1991). A jury instruction on first-degree murder told jurors that first-degree murder is homicide committed (1) by

premeditation, or (2) in an attempt to commit robbery, and jurors must unanimously agree on the verdict of first-degree murder. The jurors were *not* instructed that they must unanimously agree on one or both ways to commit first-degree murder. The Court ruled that due process only requires that jurors be unanimous in reaching a verdict for a specific crime—not the alternative ways of committing that crime.