

INDICTMENTS

Rape and Sexual Offense Indictments Were Not Fatally Defective When They Identified Victim Solely By Her Initials, “RTB”

State v. McKoy, ___ N.C. App. ___, ___ S.E.2d ___ (5 May 2009).

The court ruled that rape and sexual offense indictments were not fatally defective when they identified the victim solely by her initials, “RTB.” The indictments tracked the statutory language of rape and sexual offense statutes and G.S. 15-144.1 and 15-144.2. The court noted that the record on appeal demonstrates that the defendant had notice of the identity of the victim. The arrest warrants served on the defendant listed the victim by her initials, “R.T.B.,” with periods after each letter. The defendant admitted to law enforcement that he knew R.T.B. The defendant did not argue on appeal that he had difficulty preparing his case because of the use of “RTB” instead of the victim’s full name. Thus, it appears that the defendant was not confused concerning the identity of the victim, and therefore the use of “RTB” in the indictments provided the defendant with sufficient notice to prepare his defense. The defendant did not argue on appeal that the use of “RTB” placed him at risk of being subjected to double jeopardy. In any event, the victim testified at trial and identified herself in court. Thus, the defendant was protected from double jeopardy.

Indictment Charging Injury to Real Property, Which Incorrectly Described Lessee of Real Property As Its Owner, Did Not Create Fatal Variance With Evidence Presented at Trial

State v. Lilly, ___ N.C. App. ___, 673 S.E.2d 718 (17 March 2009).

The court ruled that an indictment charging injury to real property, which incorrectly described the lessee of the real property as its owner, did not create a fatal variance with the evidence presented at trial. The court relied on the case law concerning larceny indictments, such as the ruling in *State v. Liddell*, 39 N.C. App. 373 (1979) (no fatal variance when indictment named owner of stolen

property and evidence disclosed that person, although not the owner, lawfully possessed the property when the larceny was committed).

Variance Between Period of Time Alleged in Statutory Rape Indictments Within Which Rapes Occurred and Evidence Introduced at Trial Was Not Material and Did Not Deprive Defendant of Opportunity to Adequately Present Defense

State v. Hueto, ___ N.C. App. ___, 671 S.E.2d 62 (20 January 2009).

The defendant was indicted on six counts of statutory rape for having sex with the victim: two counts each for the months of June, August, and September 2004. The court ruled, assuming that the victim's testimony was insufficient to prove that the defendant had sex with her twice in August, the state nevertheless presented sufficient evidence that the defendant had sex with her at least six times between June 2004 and August 12, 2004, including at least four times in July. The variance between the period of time alleged in the indictment within which the offenses occurred and the state's evidence at trial was not material and did not deprive the defendant of the opportunity to adequately present his defense.

(1) Indictment Charging Larceny of Church Was Fatally Defective Because It Did Not Indicate That Church Was Legal Entity Capable of Owning Property

State v. Patterson, ___ N.C. App. ___, 671 S.E.2d 357 (6 January 2009).

The defendant was convicted of felonious breaking or entering of a church, larceny of property pursuant to the breaking or entering, and felonious possession of stolen goods pursuant to the breaking or entering. The trial judge arrested judgment for the conviction of possession of stolen goods. (1) The court ruled, relying on *State v. Thornton*, 251 N.C. 658 (196), and *State v. Cathey*, 162 N.C. App. 350 (2004), that the indictment charging larceny of the church (alleged as "First Baptist Church of Robbinsville") was fatally defective because it did not indicate that the church was a legal entity capable of owning property. The court

noted that this ruling did not apply to the offense of possession of stolen goods.

(1) Although Phrase “And/Or” Should Not Be Used in Indictments, Rape Indictment Was Not Fatally Defective

State v. Haddock, ___ N.C. App. ___, 664 S.E.2d 339 (5 August 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.

(4) Indictment Was Not Defective When Grand Jury Foreperson Did Not Place Check by Witness Who Testified Before Grand Jury

State v. Sinclair, ___ N.C. App. ___, 663 S.E.2d 866 (5 August 2008).

The defendant was convicted of possession of cocaine; resisting, delaying, or obstructing an officer; and being an habitual felon. A detective and other officers approached the defendant and others at a local hangout known for drug activity. The detective on prior dates had searched the defendant for drugs. The defendant asked the detective whether he wanted to search him, and the detective responded affirmatively and walked toward the defendant. The defendant quickly shoved

both of his hands in his front pockets and then removed them. The defendant made his hands into fists as the detective got closer. The defendant said he had to leave and took off running across an adjacent vacant lot. The officers chased the defendant through the lot. The defendant eventually stopped and laid down. A search revealed a pack of cigarettes and \$170.00 in cash. An officer getting out of a vehicle saw the chase and how the grass had been bent where the chase had taken place. This officer followed the path and found a clear, plastic bag on top of the bent grass. The bag was clean and undisturbed, and cocaine was found inside. (4) The court ruled, relying on *State v. Gary*, 78 N.C. App. 29 (1985), that the habitual felon indictment was not fatally defective when the grand jury foreperson did not place a check by the witness who testified before the grand jury.

(2) State Was Properly Permitted to Amend Indictments During Trial to Amend Dates of Offenses

State v. Riffe, ___ N.C. App. ___, 661 S.E.2d 899 (17 June 2008).

The defendant was convicted of twelve counts of third-degree sexual exploitation of a minor under G.S. 14-190.17A. (2) The indictments alleged the date of each offense as August 30, 2004. Defense counsel cross-examined all witnesses whether the defendant possessed the hard drive on that date. Each witness conceded that on that date the computer was in the possession of a law enforcement agency, not the defendant. During the trial, the trial judge allowed the state to amend the dates in the indictments. The court ruled that the trial judge did not err. The court noted that time was not an element of the offenses, and a variance about time is material when it deprives the defendant of an opportunity to adequately present a defense. The court noted that the defendant did not present an alibi defense.

(1) Armed Robbery Indictment Was Deficient Because It Failed to Allege That Implement Was Dangerous

State v. Marshall, 188 N.C. App. 744, 656 S.E.2d 709 (19 February 2008).

The defendant was convicted of two counts of armed robbery involving separate robberies. (1) The court ruled that one of the armed robbery indictments was deficient because it failed to alleged that the implement used in the robbery was dangerous. The pertinent part of the indictment alleged “having in possession and threatening the use of an implement, to wit, keeping his hand in his coat demanding money.”

(1) Trial Judge Did Not Err in Allowing State to Amend Indictment Alleging Possession of Firearm by Felon

State v. Coltrane, 188 N.C. App. 498, 656 S.E.2d 322 (5 February 2008).

The defendant was convicted of possession of a firearm by felon. (1) The court ruled, relying on *State v. Lewis, 162 N.C. App. 277 (2004)*, that the trial judge did not err in allowing the state to amend the indictment to correct the date of offense (from December 9, 2004, to April 25, 2005) and the county in which the defendant was convicted of the underlying felony.

Indictment Sufficiently Alleged Felonious Breaking or Entering

State v. Jones, 188 N.C. App. 562, 655 S.E.2d 915 (5 February 2008).

The indictment for felonious breaking or entering alleged in pertinent part that the defendant did break and enter a building occupied by Lindsay Hardison, used as a residence. The evidence showed that the defendant broke into a freestanding garage located about 15 feet from the victim’s home. The court ruled that the indictment was sufficient to charge the offense. The victim’s occupation of the building was not an element of the offense, and the variance in the indictment and the evidence was not material and therefore not fatal. Also, the word “residence” in the indictment was surplusage.

Trial Judge Did Not Err in Allowing State to Amend Indictment to Correct Statutory Citation to Sexual Offenses Alleged in Indictments—Ruling of Court of Appeals Is Reversed

State v. Hill, 362 N.C. 169, 655 S.E.2d 831 (25 January 2008), reversing ruling for reasons given in dissenting opinion, 185 N.C. App. 216, 647 S.E.2d 475 (7 August 2007). The defendant was convicted of five counts of first-degree statutory sexual offense under G.S. 14-27.4(a)(1) (victim under 13 years old). The allegations in the indictments conformed with the short-form indictment language authorized in G.S. 15-144.2(b) to charge first-degree statutory sexual offense under G.S. 14-27.4(a)(1). However, the indictments stated that the offenses were committed in violation of G.S. 14-27.7A (statutory rape or sexual offense of person who is 13, 14, or 15 years old). The trial judge granted the state's motion at the close of the state's case to amend the indictments to allege a violation of G.S. 14-27.4. The majority opinion of the North Carolina Court of Appeals ruled that the trial judge erred in allowing the state to amend the indictments. The dissenting opinion stated that the trial judge did not err: the trial judge properly allowed the state to cure a mere clerical defect and the amendment did not fundamentally change the nature of the charges against the defendant. The North Carolina Supreme Court ruled, per curiam and without an opinion, that the judgment of the North Carolina Court of Appeals is reversed for the reasons given in the dissenting opinion.

When Felony Stalking Indictment Had Improperly Alleged Prior Stalking Conviction in Same Count as Stalking Offense and State Moved to Amend Indictment to Transfer Allegation of Prior Stalking Conviction to Separate Count to Comply With G.S. 15A-928, Trial Judge Did Not Err in Allowing Amendment

State v. Stephens, 188 N.C. App. 286, 655 S.E.2d 435 (15 January 2008).

The defendant was convicted of felony stalking. The indictment originally did not

comply with G.S. 15A-928 because it alleged the prior stalking conviction in the same count as the stalking offense. The court ruled, distinguishing *State v. Moses*, 154 N.C. App. 332 (2002), and *State v. Sullivan*, 111 N.C. App. 441 (1993), that the trial judge did not err in granting the state's motion to amend the indictment to transfer the allegation of the prior stalking conviction to a separate count in the indictment.

State Was Properly Permitted to Amend Robbery Indictments to Delete Amount of Money Alleged to Have Been Taken

State v. McCallum, 187 N.C. App. 628, 653 S.E.2d 915 (18 December 2007).

The court ruled that state was properly permitted to amend armed robbery indictments to delete the amount of money alleged to have been taken. The amendments left the allegations as the defendant took an unspecified amount of "U.S. Currency." The court relied on cases that have ruled that the kind and value of the property taken is not material for the offense of armed robbery. Thus, the amendments did not constitute substantial alterations of the indictments.

No Reversal of Conviction When There Was a Variance Between Indictment's Allegation and Proof of County Where Offense Was Committed

State v. Spencer, 187 N.C. App. 605, 654 S.E.2d 69 (18 December 2007).

The indictment charged that the defendant committed felony larceny in Cleveland County. The evidence at trial in Cleveland County Superior Court proved that the offense was committed in Gaston County. The court ruled that the defendant was not entitled to a reversal of his conviction. First, the defendant waived any question of venue because he failed to make a pretrial motion to dismiss for improper venue; see G.S. 15A-631 and *State v. Brown*, 85 N.C. App. 583 (1987). Second, the variance in this case between the indictment and proof at trial was not fatal; see *State v. Brown*, *supra*.

(2) After Granting Defendant’s Pretrial Motion to Suppress Evidence, Trial Judge Erred in Dismissing Indictments; State Had Right to Try Defendant Without Suppressed Evidence If It Chose to Do So

State v. Edwards, ___ N.C. App. ___, 649 S.E.2d 646 (4 September 2007).

The trial judge granted the defendant’s pretrial motion to suppress evidence on the ground that probable cause did not exist to issue a search warrant to search the defendant’s home for illegal drugs. The judge then dismissed the indictments against the defendant. The state appealed. (2) The court ruled that the trial judge erred in dismissing the indictments against the defendant after granting the defendant’s pretrial motion to suppress evidence. The state had a right to try the defendant without the suppressed evidence if it chose to do so.

No Error In Allowing State to Amend Indictment to Change Name of Victim

State v. Hewson, 182 N.C. App. 196, 642 S.E.2d 459 (20 March 2007).

The court ruled, relying on *State v. Bailey*, 97 N.C. App. 472, 313 S.E.2d 556 (1990) (amendment permitted to change name from “Pettress Cebon” to “Cebon Pettress”), and other cases, and distinguishing *State v. Abrahams*, 338 N.C. 315, 451 S.E.2d 131 (1994) (error to allow amendment to change name from “Carlose Antoine Latter” to “Joice Hardin”), and other cases, that the trial judge did not err in allowing the state to amend the indictment to change the victim’s name from “Gail Hewson Tice” to “Gail Tice Hewson.”

(1) Homicide -- Attempted Murder -- Indictment – Sufficiency

State v. Watkins, 181 NC App 502 (04-295-2) (6 February 2007).

Attempted murder and assault with a deadly weapon. (1) An indictment for “attempted murder” without allegations of specific intent, premeditation, or deliberation was not defective.

Work-Release Escape Indictment’s Improper Statutory Citation to Non-Work-Release Escape Under G.S. 148-45(b) Was Irrelevant When Indictment’s Allegations Correctly Charged Offense Under G.S. 148-45(g)

State v. Lockhart, 181 N.C. App. 316, 639 S.E.2d 5 (2 January 2007).

The defendant was convicted under G.S. 148-45(g) of escape by failing to return to the prison unit while on work release. The indictment alleged the statutory citation as G.S. 148-45(b), escape from a prison unit. The court ruled, relying on *State v. Allen*, 112 N.C. App. 419, 435 S.E.2d 802 (1993), and other cases, that the defendant was properly charged. An indictment’s incorrect statutory citation is immaterial when the charging language properly alleges the correct offense.

(1) Indictment for Eluding Arrest (G.S. 20-141.5) Need Not Allege Duty Officer Was Lawfully Performing When Defendant Committed Offense

State v. Teel, 180 N.C. App. 446, 637 S.E.2d 288 (5 December 2006).

The defendant was indicted for felony eluding arrest (G.S. 20-141.5) based on the factors of reckless driving and speeding in excess of fifteen miles per hour over the speed limit; reckless driving (G.S. 20-140(b)); and resisting a public officer (G.S. 14-223). He was convicted of misdemeanor eluding arrest and reckless driving and found not guilty of resisting a public officer. (1) The court ruled,

distinguishing *State v. Kirby*, 15 N.C. App. 480, 190 S.E.2d 320 (1972) (charge of resisting public officer must describe duty the officer was discharging or attempting to discharge), that an indictment for eluding arrest (G.S. 20-141.5) need not allege the duty the officer was lawfully performing when the defendant committed the offense.

(3) When Kidnapping Indictment Alleged “Confined, Restrained, and Removed,” Jury Instruction Permitting Conviction on Finding That Defendant “Restrained or Removed” Victim Was Not Error

State v. Key, 180 N.C. App. 286, 636 S.E.2d 816 (21 November 2006).

The defendant was convicted of two counts of first-degree rape, one count of second-degree kidnapping, one count of attempted second-degree burglary, and one count of first-degree burglary. The defendant broke into the victim’s home and threatened her with a knife in the bedroom. He forced her at knife point to go into the kitchen where he taped her eyes shut, took the phone off the hook, and told her to go into the family room and remove her clothing. The defendant vaginally penetrated the victim on a couch while she faced the defendant, withdrew his penis, turned her on her side, and then vaginally penetrated her from behind. (3) The court ruled, relying on *State v. Lancaster*, 137 N.C. App. 37, 527 S.E.2d 61 (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.

(2) Trial Judge Did Not Err in Allowing State to Amend Dates Specified in Indictments Charging Statutory Rape and Sexual Offense

State v. Whitman, 179 N.C. App. 657, 635 S.E.2d 906 (17 October 2006).

The defendant was convicted of statutory rape, statutory sexual offense, indecent liberties, and incest. (2) The court ruled that the trial judge did not err in allowing

the state to amend the dates specified in the indictments charging statutory rape and sexual offense (from “January 1998 through June 1998” to “July 1998 through December 1998”). The amendment did not substantially alter the offense because the victim would have been 15 under both the original and amended dates. Also, the amendment did not impair the defendant’s ability to prepare an alibi defense because an incest indictment tried with these charges covered the entire 1998 calendar year, and the defendant would have to address all of 1998. See also *State v. Wallace*, 179 N.C. App. 710, 635 S.E.2d 455 (17 October 2006) (no error in amending date of statutory sexual offense indictment from “November 2001” to “June through August 2001”; defendant did not present an alibi defense that was adversely affected by the change in dates).

Homicide -- Indictment for Murder -- Acting in Concert Theory -- Conviction as Accessory Indictment Sufficient

State v. Westbrooks, 345 N.C. 43 (1996) 478 S.E.2d 483

An indictment for acting in concert to commit murder supported a verdict of first-degree murder on an accessory-before-the-fact theory. An indictment must allege all of the essential elements of the crime sought to be charged but allegations beyond the essential elements are irrelevant and may be treated as surplusage. Moreover, the purposes of an indictment include giving notice of the charge against defendants so that they may prepare their defense and be in a position to plead double jeopardy

Criminal Law--Felony fleeing to elude arrest-Indictment--Specific duty officer performing not required

State v. Teel, 180 NCA 446 (2006)

The trial court did not err by denying defendant's motion to dismiss the charge of felony fleeing to elude arrest based on the indictment failing to describe the lawful duties the officers were performing at the time of defendant's flight because, unlike the offense of resisting an officer in the performance of his duties

under N.C.G.S. § 14-223, the offense of fleeing to elude arrest under N.C.G.S. § 20-141.5 is not dependent upon the specific duty the officer was performing at the time of the offense.

Indictment and Information-County in which crime occurred-Venue rather than jurisdiction

State v. Pulley, 180 NCA 54 (2006)

Jurisdiction to hear a case is statewide; the proper county in which to bring the case is an issue of venue. There was no plain error in the instructions where an indictment alleged that an offense was committed in Caswell County and the court instructed the jury that the State must prove that the alleged homicide was committed in North Carolina.

Sexual Offenses-Indictment-Amendment-Dates-No error

State v. Smith, 180 NCA 86 (2006)

There was no error in allowing the State to amend the dates alleged on indictments for defendant's sexual misconduct with his daughter where defendant was neither misled nor surprised at the nature of the charges, and did not raise an alibi defense.

Sexual Offenses-Amendment of indictment-Child victim-Dates of offenses changed

State v. Wallace, 179 NCA 710 (2006)

There was no error in allowing amendment of an indictment for sexual offenses against a child to change the dates of the alleged offenses. Time was not an essential element of the offenses charged, the amendment did not substantially alter the charges, and defendant had sufficient notice.

Indictment and Information--Amendment of dates--Time not of the essence--failure to show inability to prepare alibi defense--Failure to show prejudice for motion for continuance

State v. Whitman, 179 NCA 657 (2006)

The trial court did not err by allowing the State, on the first day of trial, to amend the offense dates reflected on the indictment for statutory rape and statutory sex offense from January 1998 through June 1988 to July 1998 through December 1998, and by denying defendant's subsequent motion for a continuance, because: (1) although both charges required the State to prove the victim was fifteen years of age or younger at the time of the offense, the victim did not turn sixteen until 16 February 1999 which was after both sets of dates; (2) under either version of the indictment, time was not of the essence to the State's case, and thus, the amendment did not substantially alter the charge set forth in the original indictment; (3) the amendment did not impair defendant's ability to prepare an alibi defense when he was already put on notice by the eighteen-month span covered by the incest indictment that he was going to have to address all of 1998; (4) defendant's argument that he had no reason to present an alibi defense to the incest charge based on the fact that he admitted to having incestuous sex with the victim in 2002 ignores the fact that the State's incest indictment, the jury instructions, and the verdict sheet all required the jury to decide whether incest had occurred during the period of January 1998 through June 1999; and (5) defendant failed to establish prejudice as a result of the denial of his motion for a continuance, and the transcript reveals defendant did in fact present alibi evidence tending to show that he had few opportunities to engage in sexual activity with the victim in 1998.

Sexual Offenses-Sexual act with thirteen-year-old-Variance between indictment and evidence-Time of offense

State v. Brown, 178 NCA 189 (2006)

There was not a fatal variance between the indictment and the evidence in a trial for a sexual act with a thirteen-year-old where defendant contended that the

evidence showed that the victim was twelve years old during some of the time specified in the indictment, but the victim testified that she was thirteen when one of the offenses occurred. The trial court properly instructed the jury about what it must find to convict and defendant did not contend that he was deprived of the opportunity to present an adequate defense due to the variation.

Forgery--sufficiency of indictments

State v. King, 178 NCA 122 (2006)

The trial court did not err by concluding the thirteen forgery indictments were not fatally defective, because: (1) the indictments set forth all of the elements of the offense; (2) the indictments do not have to state the manner in which defendant forged the withdrawal form; (3) the indictments informed defendant of the date and time of each offense, the amount of money involved, and where the offense occurred; and (4) the indictments gave defendant notice of the charge against her and enabled the court to know what judgment to pronounce in case of conviction.

Drugs_indictment_3,4 methylenedioxymethamphetamine correct name is a must

State v. Ahmadi-Turshizi, 175 NCA 783 (2006)

Defendant's convictions for offenses involving methylenedioxymethamphetamine (MDMA) were vacated where the indictment did not include "3,4," as it was listed in N.C.G.S. § 90-89. Schedule I does not include any substance which contains any quantity of "methylenedioxymethamphetamine."

Firearms and Other Weapons--possession of firearm by convicted felon--failure of indictment to allege date of prior felony conviction

State v. Inman, 174 NCA 567 (2005)

The trial court did not lack jurisdiction to try defendant for the charge of possession of a firearm by a convicted felon even though the indictment charging defendant with this offense failed to allege the date of the prior felony conviction, because: (1) the provision of N.C.G.S. § 14-415.1(c) that requires the indictment to state the conviction date for the prior offense is merely directory; and (2) the omission was not material and does not affect a substantial right, and this conclusion is especially appropriate in this case when defendant stipulated to the prior conviction at trial and challenged only whether he was in possession of a firearm.

Larceny_indictment--corporation--entity capable of owning property

State v. Cave, 174 NCA 580 (2005)

An indictment was sufficient to charge defendant with larceny and possession of stolen items even though defendant contends the named owner-entity "N.C. FYE, Inc." does not import an entity capable of owning property, because: (1) the fact of incorporation need not be alleged where the corporate name is correctly set out in the indictment; and (2) the abbreviation "Inc." imports the entity's ability to own property. Better: have indictment allege, after the description of the owner, the words: "a legal entity capable of owning property."

Indictment and Information--variance between allegation and proof as to time-- child sex abuse--statute of limitations not involved

State v. Massey, 174 NCA 216 (2005)

The trial court did not improperly instruct the jury on theories of guilt not alleged in indictments for sexual offenses against a child when the date and time periods in the instructions were not specified in the indictments because: (1) the fact that a crime was committed on a date other than that which is alleged in the indictment is not a fatal variance between allegation and proof where no statute of limitations is involved such as in child sex abuse cases; and (2) the trial court did not instruct on a different theory or under a different statute, and the indictments gave defendant sufficient notice of the charges against him.

Motor Vehicles--misdemeanor death by vehicle--sufficiency of indictment

State v. Hall, 173 NCA 735 (2005)

The trial court did not err in a misdemeanor death by vehicle case by concluding that the warrant issued in this case was not fatally defective even though it did not allege that the primary towing attachment on defendant's truck was a ball hitch, because: (1) the magistrate's order charging defendant with the offense of misdemeanor death by vehicle provided that the charge was based on defendant's failure to secure the trailer to his vehicle with safety chains or cables as required by N.C.G.S. § 20-123(b); and (2) the order was sufficient to apprise defendant of the charge against him and allow him to prepare a defense against the charge as he was directed to N.C.G.S. § 20-123 which provided the circumstances under which safety chains or cables were required.

Burglary and Unlawful Breaking or Entering; Indictment and Information--breaking or entering--intent--amended at close of evidence

State v. Silas, 360 NC 377 (2006) Modified & affirmed 168 NCA 627 (2005)

There is no requirement that an indictment for felonious breaking or entering contain specific allegations of the intended felony. However, if an indictment does specifically allege the intended felony, N.C.G.S. § 15A-923(e) mandates that such allegations may not be amended. Here, an indictment for breaking or entering with intent to commit murder was orally changed by the prosecutor at the end of all of the evidence to allege an intent to commit an assault. The trial court gave the State a second bite of the apple when there was no further opportunity for defendant to prepare or present contrary evidence.

Indecent Liberties--multiplicitous indictments--absence of prejudice

State v. Bates, 172 NCA 27 (2005)

Indictments charging defendant with indecent liberties and the alternate crime of lewd and lascivious conduct for each violation of N.C.G.S. § 14-202.1 were multiplicitous, but defendant was not prejudiced because judgment was arrested on each count of defendant's convictions for lewd and lascivious conduct.

Indictment and Information--amendment--date of murder

State v. Wissink, 172 NCA 829 (2005)

The trial court did not err by allowing the State to amend a murder indictment on the morning of trial to show that the murder occurred on 27 June 2000 instead of on or about 26 June 2000 as alleged in the original indictment, because: (1) an amendment may properly be made to an indictment to correct the date of the offense since it does not substantially alter the charge set forth in the indictment; and (2) the date of the offense has no bearing on defendant's sentence, nor did it enhance defendant's sentence in any way, so that the Blakely decision was not implicated.

Drugs--felonious possession of a controlled substance--improper indictment

State v. Ledwell, 171 NCA 328 (2005)

The trial court lacked jurisdiction to convict defendant of felonious possession of a controlled substance because the indictment which alleged possession of methylenedioxyamphetamine failed to allege a substance listed in Schedule 1 of N.C.G.S. § 90-89.

Indictment and Information--amendment--no substantial alteration of charge--attempted robbery with dangerous weapon to robbery with dangerous weapon

State v. Trusell, 170 NCA 33 (2005)

The trial court did not err by amending an indictment for attempted robbery with a dangerous weapon (ARDW) to robbery with a dangerous weapon (RDW), because: (1) both crimes are governed by N.C.G.S. § 14-87(a); (2) our Court of Appeals and Supreme Court have found the elements of ARDW to be the same as RDW; (3) the indictment sufficiently apprised defendant of the charge against him with enough certainty to enable him to prepare his defense and to protect him from subsequent prosecution for the same offense since a showing of a taking is not a necessary element of the crime of RDW; (4) an amendment to the indictment did not deprive the court of knowledge as to the judgment to pronounce in the event of conviction since the classifications and punishments of the crimes of ARDW and RDW are identical; and (5) the indictment did not substantially alter the charge.

Indictment and Information--superior court--misdemeanor offenses--failure to include offenses in indictment

State v. Price, 170 NCA 57 (2005)

The trial court did not have jurisdiction over the misdemeanor charges against defendant for harboring a fugitive, possession of one half ounce of marijuana, possession of drug paraphernalia, resisting a public officer, and maintaining a dwelling place to keep controlled substances, and the judgments entered on those charges are vacated because: (1) although defendant's misdemeanor charges could properly be joined with the felony charges pending in superior court under N.C.G.S. § 15A-926 as they arose from the same series of acts or transactions as the felony charges, charges must be before the superior court on presentment, information, or indictment; and (2) these misdemeanor charges were never included in an indictment and were before the superior court on warrants only.

Motor Vehicles--habitual DWI--indictment--date of prior conviction--amendment--Rule of Lenity

State v. Winslow, 169 NCA 137 (2005)

The indictment used to charge defendant with habitual DWI was not fatally

defective even though it originally alleged that one of defendant's prior DWI convictions occurred on 1 April 1993, which was actually the date of the offense and eight days outside the seven-year limitation of the habitual DWI statute, N.C.G.S. § 20-138.5(a), where the trial court allowed the prosecutor's motion to amend the indictment to reflect the date of conviction on 11 August 1993. The Rule of Lenity did not require that the date of the offense rather than the date of conviction be used in the interpretation of the DWI statute because the statute clearly refers to prior convictions, and there is no ambiguity in the statute.

Indictment and Information--amendment--habitual driving while impaired--no substantial alteration

State v. Winslow, 169 NCA 137 (2005)

The trial court did not err in a habitual driving while impaired case by allowing the State to amend the indictment after the State rested, because: (1) permitting the State to amend the indictment in the instant case to reflect the date of conviction rather than the date of the offense did not impair defendant's ability to defend the charge of habitual DWI; (2) time was not of the essence as the indictment specified defendant was being charged with habitual DWI; (3) defendant never denied having been convicted of the 1993 DWI, he had notice of the 1993 DWI, and he had ample time to prepare for trial; and (4) the amendment to the indictment did not substantially alter the charge set forth in the indictment.

Indictment and Information--amendment--intent of breaking and entering

State v. Silas, 168 NCA 627 (2005) Modified & affirmed State v. Silas, 360 NC 377 (2006)

Judgment was arrested on defendant's conviction for felonious breaking and entering where the original indictment alleged that defendant entered a residence to commit murder and an amendment at the close of all of the evidence alleged an intent to commit an assault with a deadly weapon inflicting serious injury or assault with a deadly weapon with intent to kill inflicting serious injury. Research does not reveal a case specifically stating that these assaults are lesser included

offenses of first degree murder; in order to convict on a charge of assault and battery or assault with a deadly weapon in a murder case, the murder indictment should include the elements of assault or it should contain a separate count of assault. However, this indictment sufficiently charged defendant with misdemeanor breaking and entering, and the case is remanded for entry of such a judgment.

Robbery–indictment–victim capable of owning property–not a required element–larceny distinguished

State v. Thompson, 359 NC 77 (2004)

The trial court did not err by not dismissing an indictment for robbery with a dangerous weapon because the indictment did not include the element that the victim, Domino's Pizza, was a legal entity capable of owning property. While an indictment for larceny must allege that an entity listed as the victim be capable of owning property, armed robbery is a separate and distinct crime and an armed robbery indictment is not fatally defective simply because it does not correctly identify the owner of the property taken. The property description here was sufficient to demonstrate that the property did not belong to defendant.

Sexual Offenses–failing to register as a sex offender–indictment--elements of offense

State v. Harrison, 165 NCA 332 (2004)

An indictment against a homeless defendant for failing to register as a sex offender was sufficient where it clearly stated the elements of the offense. The argument that the indictment failed by not identifying the specific dates defendant moved and his new addresses is without merit.

Indictment and Information–indictment and instruction–fatal variance

State v. Hines, 166 NCA 202 (2004)

There was a fatal variance between an indictment for aggravated assault on a handicapped person and the instruction where the instruction permitted the jury to convict on a criminal negligence theory which was not alleged in the indictment. This substantially affected defendant's ability to prepare a defense.

Kidnapping–indictment–unlawful removal–instruction too broad–plain error

State v. Smith, 162 NCA 46 (2004)

There was plain error where a kidnapping indictment alleged unlawful removal but the court's instructions were that the jury could find defendant guilty if he unlawfully confined, restrained, or removed the victim. The error likely tilted the scale in light of the jury's request for more instructions on kidnapping, the conflicting evidence on unlawful removal, and the stronger evidence of confinement or restraint.

Kidnapping–indictment and instruction–began in one county, ended in another

State v. Smith, 162 NCA 46 (2004)

There was no error in the denial of a kidnapping victim's request for an instruction that the State was required to prove that the kidnapping occurred in Wilson County, as alleged in the indictment. Kidnapping is an ongoing offense; while the State's evidence may have suggested that the offense began in Wake County, it ended in Wilson County when the victim regained her freedom. There was no risk that the jury could convict defendant of a different kidnapping.

Larceny--indictment--owner of property--substantial alteration

State v. Cathey, 162 NCA 350 (2004)

The trial court erred by allowing the State to amend a fatally defective larceny indictment that listed the owner of the property as “Faith Temple Church of God” instead of “Faith Temple Church—High Point, Incorporated,” because: (1) a bill of indictment is fatally defective if it does not allege that an incorporated legal entity is a corporation or the name of the legal entity does not import that it is a corporation; and (2) the owner of the property in question is an essential element of larceny.

Sexual Offenses--first-degree--indecent liberties--motion to dismiss--sufficiency of evidence—fatal variance from indictment

State v. Custis, 162 NCA 715 (2004)

The trial court erred by denying defendant’s motion to dismiss the charges of two counts of firstdegree sexual offense and two counts of indecent liberties with a child, because: (1) the State failed to present evidence that the charged offenses occurred on or about 15 June 2001 as alleged in the indictment; (2) defendant relied on the language in the indictment to build his alibi defense for the 15 June 2001 weekend; and (3) all of the evidence presented at trial went to sexual encounters over a period of years ending some time prior to the date listed in the indictment, and such a dramatic variance between the indictment date and the evidence adduced at trial prejudiced defendant by denying him the opportunity to present an adequate defense.

Indictment and Information--obtaining property by false pretense--amendment to date of offense

State v. May, 159 NCA 159 (2003)

The trial court did not commit plain error in an obtaining property by false pretense case by permitting the State to amend the date of offense on the indictment to accurately reflect the date of the offense rather than the date of arrest, because: (1) the date was not an essential element of the crime; and (2) the change in the date on the indictment did not affect defendant’s planned defense.

Indictment and Information--motion to amend--date of charged offense

State v. Simpson, 159 NCA 435 (2003)

The trial court did not err in an obtaining property by false pretenses case by granting the State's motion to amend the indictment to change the date of the charged offense, because: (1) the change did not substantially alter the charge; and (2) time was not of the essence. N.C.G.S. § 15A-923(e). *State v. Simpson* 357 NC 652 (2003) Aff. Ct Appeals 159 NCA 435

Drugs--conspiracy to traffic in cocaine by possession--failure of indictment to include weight of cocaine

State v. Outlaw, 159 NCA 423 (2003)

Defendant was improperly convicted for conspiracy to traffic in cocaine by possession because the indictment failed to include the weight of the cocaine possessed, and that fact was an essential element of the offense charged.

Sexual Offenses--first-degree sexual offense--indictment--confused with statutory sexual offense

State v. Miller, 159 NCA 608 (2003)

Indictments for first-degree sexual offense were fatally defective because they confused first-degree sexual offense with statutory sexual offense. The indictments alleged a combination of the elements of the two offenses without alleging each element of either offense, and they erroneously cite a different statute than the one under which defendant was tried, convicted, and sentenced. The "short-form" language of N.C.G.S. § 15-144.2(b) was not sufficient to cure the defects under these narrow circumstances. N.C.G.S. § 14-27.7A; N.C.G.S. § 14-27.4(a)(1).

Indictment and Information—name of one victim deleted—no error

State v. Ingram, 160 NCA 224 (2003)

The trial court did not err by allowing the State to delete the name of one of the victims in an armed robbery indictment. The alteration did not change the nature of the offense, prejudice defendant's theory of defense, or change the State's burden of proof.

Evidence - citation - not admissible

State v. Jones, 157 N.C. App. 472 (2003)

The admission of a citation charging defendant with resisting an officer and displaying a fictitious registration plate was prejudicial error. While a citation is not an indictment, there is no distinction between the potential for prejudice from the language of this citation and that found in indictments and other pleadings that may not be read to the jury by statute. The error was prejudicial because the case consisted almost entirely of witness testimony and turned on which account the jury believed. N.C.G.S. § 15A-1221(b).

Indictment and Information—motion to suppress before indictment—no jurisdiction

State v. Wolfe, 158 NCA 539 (2003)

The denial of a motion to suppress was void where the motion was filed and heard before defendant was indicted or waived indictment. Both the State Constitution and the Criminal Procedure Act require an indictment or waiver for a superior court to have jurisdiction in a criminal case. The fact that defendant filed the motion and participated in the suppression hearing did not give the court jurisdiction.

Drugs–felonious possession of marijuana–indictment–“felonious” not mentioned

State v. Blakney, 156 NCA 671 (2003)

An indictment did not support a guilty plea to felonious possession of marijuana where it did not contain the word “felonious” and did not refer by number to N.C.G.S. § 90-95(d)(4), which provides for felonious possession. Although the wording of the indictment might lead to the statute, the words by themselves do not provide specific notice of the statute.

Indictment and Information - discharging firearm into occupied property - sufficiency of description

State v. Cockerham, 155 N.C. App. 729 (2003)

An indictment charging defendant with a violation of N.C.G.S. § 14-34.1 for discharging a firearm into occupied property "known as apartment D-1" was not fatally defective because an apartment is an enclosure for purposes of N.C.G.S. § 14-34.1 and the description provided sufficient precision to clearly apprise defendant of the elements of the accusation against him.

Assault; Indictment and Information–multiple count indictment–necessary element---no incorporation by reference

State v. Moses, 154 NCA 332 (2002)

A motion to arrest judgment on a conviction for assault with a deadly weapon inflicting serious injury was allowed where the applicable count of the indictment, Count III, did not mention the bottle which was the weapon and did not incorporate by reference the mention of the bottle in Count II, which charged armed robbery. However, the indictment sufficiently alleged assault inflicting serious injury, the jury was instructed on this offense, and the case was remanded

for entry of judgment on that offense. Failed to name the deadly weapon.

Indictment and Information—amendment of indictment—elevation of offense to felony

State v. Moses, 154 NCA 332 (2002)

A conviction for felonious operation of a motor vehicle to elude arrest was remanded because the indictment had been amended to add one of two necessary aggravating factors. N.C.G.S. § 15A-923(e) has been interpreted to mean that an indictment may not be amended to substantially alter the charge set forth in the indictment; a change which results in a misdemeanor being elevated to a felony substantially alters the original charge. The case was remanded for entry of judgment on the misdemeanor. Error to allow the admendment.

Indictment and Information—fatal variance—identity of person to whom drugs sold

State v. Smith, 155 NCA 500 (2002)

There was a fatal variance between an indictment for sale of a controlled substance and the evidence where the indictment alleged the sale of marijuana to Berger; the evidence indicated that Berger's companion, Chadwell, went into the building to buy the marijuana; and there was no testimony that defendant knew that Chadwell was acting on Berger's behalf. An indictment for the sale of a controlled substance must accurately name the person to whom defendant sold; however, the State is at liberty to obtain another bill of indictment.

Indictment and Information—variance with evidence—date of sexual abuse of child

State v. McGriff, 151 NCA 631 (2002)

There was not a fatal variance between the indictments and the evidence in a prosecution for statutory rape and indecent liberties where defendant took issue

with the dates, but courts are lenient in child abuse cases where there are differences between the dates alleged in the indictment and those proven at trial if they do not prejudice a defendant's opportunity to present an adequate defense. This defendant offered no alibi defense; in fact, defendant offered no evidence at all.

Indictment and Information--amendment--dates of sexual offenses

State v. McGriff, 151 NCA 631 (2002)

The trial court did not err during a trial for statutory rape and indecent liberties by allowing the State to amend the indictment to conform to the evidence of dates. Changing the dates in the indictment to expand the time frame did not substantially alter the charge set forth in the indictment.

Larceny--fatal variance in indictment--property of evicted tenant stolen--no possessory interest in landlord

State v. Craycraft, 152 NCA 211 (2002)

The trial court erred by not dismissing a felony larceny charge for a fatal variance between the indictment and the evidence where the indictment alleged that defendant had taken items belonging to the landlord of a mobile home from which defendant's father had been evicted, but the evidence was that the items belonged to defendant's father. No civil ejection documents were introduced into evidence and the landlord did not have any special possessory interest in the items, although he was maintaining them for his former tenant.

Indictment and Information--first-degree arson--error to find first-degree when elements of second-degree charged

State v. Scott, 150 NCA 442 (2002)

The trial court erred by entering judgment against defendant for first-degree arson and on remand the trial court is instructed to enter judgment against defendant for second-degree arson and to sentence defendant accordingly, because: (1) the indictment was not sufficient to put defendant on notice that he may be tried for first-degree arson and did not allow defendant to prepare accordingly; (2) although the indictment charged defendant with violating N.C.G.S. § 14-58 by burning the dwelling house inhabited by the two victims, the indictment did not allege that the house was in fact occupied at the time of the burning; and (3) the trial court lacks subject matter jurisdiction to try or enter judgment on an offense based on an indictment that only charges a lesser-included offense.

Burglary and Unlawful Breaking or Entering--first-degree--variance between indictment and instructions--no effect on felony murder convictions--harmless error

State v. Scott, 150 NCA 442 (2002)

Any error by the trial court's instruction on first-degree burglary allowing defendant to be convicted if the evidence proved he intended to commit murder or rape when he broke into the victims' home when the indictment alleged only the intent to commit murder was harmless because (1) the trial court properly arrested judgment on the first-degree burglary conviction since burglary was the underlying felony for two convictions of defendant for felony murder, and (2) any variance between the burglary indictment and the trial court's instructions had no effect on defendant's felony murder convictions since the State was not required to secure a separate indictment for the underlying felony in a felony murder prosecution, and the short-form indictment was sufficient to charge felony murder. ***See Farb P. 11***

Kidnapping - bases of charge - "and" or "or"

State v. Gainey, 355 N.C. 73 (2002)

There was no plain error in a first-degree kidnapping prosecution where the indictment alleged failure to release in a safe place "and" serious injury while the court's instructions joined the phrases with "or." There is no evidence that the jury

erroneously considered the charge and, in reality, only one of the two bases was necessary for the State to convict defendant of first-degree kidnapping.

Indictment and Information--amendment--attempting to obtain a controlled substance by forgery--name of controlled substance

State v. Brady, 147 NCA 755 (2001)

The trial court did not err in an attempting to obtain a controlled substance by forgery case by allowing an amendment to change the name of the controlled substance from “Zanax” to “Percocet” in the indictment, because: (1) an inadvertent variance neither misleads nor surprises the defendant as to the nature of the charges; and (2) the name of the controlled substance was not necessary to charge defendant with a crime under N.C.G.S. § 90-108(a)(10) since the charge remained the same whether the controlled substance was a Schedule II or a Schedule IV drug.

Indictment and Information--habitual felon--conviction dates changed--not a substantial change

State v. Hargett, 148 NCA 688 (2002)

The amendment of conviction dates in an habitual felon indictment did not constitute a substantial change in the indictment.

Larceny--indictment--identity of corporate victim--insufficient

State v. Norman, 149 NCA 588 (2002)

A larceny indictment which alleged that property was taken from “Quail Run Homes Ross Dotson, Agent ” was fatally defective because it lacked any indication of the legal ownership status of the victim.

Indictment and Information--amendment--victim's name--typographical errors

State v. McNair, 146 NCA 674 (2001)

The trial court did not err in a robbery with a dangerous weapon, second-degree kidnapping, and first-degree kidnapping case by allowing the State to amend the name of the victim in two of seven indictments from Donald Dale Cook to Ronald Dale Cook to comport with the evidence present at the trial on the ground that they were typographical errors, because: (1) the correct name of the victim appears twice on the indictment for robbery with a dangerous weapon; (2) the variance was inadvertent, and defendant was neither misled nor surprised as to the nature of the charges; and (3) the amendment did not substantially alter the charge in the original indictment.

Indictment and Information--amendment--obtaining property by false pretenses--non-essential variance

State v. Parker, 146 NCA 715 (2001)

The trial court did not err by convicting defendant for two counts of obtaining property by false pretenses even though the State amended the indictment to change the items listed that defendant represented as his own from two cameras and photography equipment to a Magnavox VCR, because: (1) the amendment was not a substantial alteration of the charge since the description of the item or items which defendant falsely represented as his own is irrelevant to proving all essential elements of the charge; and (2) the proof required to convict defendant under the amended indictment was the same as that required by the original indictment.

Sexual Offenses--date of offense--variance between indictment and evidence--prejudicial

State v. Stewart, 353 N.C. 516 (2001)

The trial court erred in a prosecution for a first-degree sexual offense against a juvenile under the age of thirteen by not granting defendant's motion to dismiss where the indictment listed only the month of July 1991 as the time of the assaults, defendant presented evidence of his whereabouts for each day of that month, the prosecutor introduced evidence concerning sexual encounters between the victim and defendant over a two- and one-half-year period, and the prosecutor presented no evidence of a specific act occurring during July of 1991. Generally, the time listed in the indictment is not an essential element of the crime charged, but here the dramatic variance between the date set forth in the indictment and the evidence presented by the State prejudiced defendant by depriving him of an opportunity to adequately present his defense.

Indictment and Information--variance--victim's name

State v. Bowen, 139 N.C. App. 18 (2000)

The trial court did not err by allowing the State to change the indictment in case 98 CRS 4124 to read "SB" instead of "SR" for the victim's name, based on the evidence revealing that SB was adopted by her grandparents after the indictment had been issued against defendant, because: (1) the indictment and the proof were not at variance, tending to show that defendant sexually abused SB while she was still SR; and (2) the amendment to the indictment was permissible since it did not substantially alter the charge in the original indictment.

Indictment and Information--defective warrant--amended--fatal error not cured

State v. Madry, 140 N.C. App. 600 (2000)

A fatally defective warrant charging a misdemeanor was not cured by an amendment in district court. Instead of issuing an amendment, the State should have filed a statement of charges.

Sexual Offenses--first-degree--force element missing in original indictment--amendment not substantial alternation

State v. Haywood, 144 N.C. App. 223 (2001)

The trial court properly concluded the indictment charging defendant with first-degree sexual offense under N.C.G.S. § 15-144.2(a) should not have been dismissed even though it omitted the element of force, because the State's amendment of the indictment to include the addition of the term "by force" did not substantially alter the charge against defendant when the terms "feloniously" and "against the victim's will" were already included in the indictment.

Indictment and Information - short-form indictments - constitutionality

State v. Wallace, 351 N.C. 481 (2000)

The trial court did not err in concluding the short-form indictments used to charge defendant with nine counts of first-degree murder, eight counts of first-degree rape, and two counts of first-degree sexual offense do not violate defendant's right to due process under the Fifth and Fourteenth Amendments and his right to notice and trial by jury under the Sixth Amendment because: (1) indictments based on N.C.G.S. § 15-144, § 15-144.1, or § 15-144.2 are in compliance with both the North Carolina and United States Constitutions; (2) the United States Supreme Court has not applied the due process clause of the Fourteenth Amendment in a manner which requires that a state indictment for a state offense must contain each element and fact which might increase the maximum punishment for the crime charged; and (3) the United States Supreme Court has specifically declined to apply the Fifth Amendment requirement of indictment by grand jury to the states via the Fourteenth Amendment.

Indictment and Information - Short-form indictments - constitutionality

State v. Lawrence, 352 N.C. 1 (2000)

Although the short-form indictment used to charge defendant with first-degree murder did not allege elements differentiating the degrees of murder and did not charge the aggravating circumstances that would increase the maximum penalty

from life imprisonment to the death penalty, the trial court did not err in concluding the indictment did not violate defendant's right to due process under the Fifth and Fourteenth Amendments.

Homicide - Short-form indictments - constitutionality

State v. Braxton, 352 N.C. 158 (2000)

Although the short-form indictment used to charge defendant with first-degree murder did not allege the elements of premeditation, deliberation, and specific intent to kill, the trial court did not err in concluding the indictment was constitutional.

Indictment and Information - Address - correction - unnecessary to set out offense - no misleading of charge by substitution

State v. Grady, 136 N.C. App. 394 (2000)

The trial court did not err by allowing the State's pre-evidentiary motion to amend a count of the indictment charging keeping and maintaining a dwelling for the use of a controlled substance to the correct address of 929 Dollard Town Road, instead of 919 Dollard Town Road, because: (1) specific designation of the address of the dwellings at issue was unnecessary to set out the offense of maintaining a dwelling under N.C.G.S. § 90-108(a) (7); (2) the amendment did not substantially alter the charge set forth in the indictment; and (3) defendant could not have been misled or surprised as to the nature of the charges against him by this substitution.

Kidnapping--indictment and instruction--use of conjunctive and disjunctive

State v. Lancaster, 137 N.C. App. 37 (2000)

The trial court did not err in its instructions on kidnapping where the indictment charged defendant with kidnapping by confining, restraining, and removing, and the instruction allowed a conviction upon a showing of either confining, restraining, or removing. There was substantial evidence to support any of the three methods set out in the indictment and an indictment alleging all three theories is sufficient and puts defendant on notice that the State intends to show that defendant committed kidnapping in any one of the three theories.

Indictment, Information, and Criminal Proceedings 29 (NCI4th) - rape - allegations as to dates not specific - not grounds for dismissal

State v. Mckinney, 110 N.C. App. 365 (1993) 430 S.E.2d 300

Indictment, Information, and Criminal Proceedings 52 (NCI4th) - first-degree rape and indecent liberties - time of offense - variance between indictment and evidence - not fatal

State v. Mckinney, 110 N.C. App. 365 (1993) 430 S.E.2d 300

Indictment, Information, and Criminal Pleadings 9 (NCI4th) - caption listing one offense – body describing another - sufficiency of indictment to charge offense in body

State v. Allen, 112 N.C. App. 419 (1993) 435 S.E.2d 802

The warrant and true bill of indictment properly charged defendant with the offense of assault with a deadly weapon upon a law enforcement officer, even if the caption on the true bill of indictment referred to the wrong statute, since the body of the indictment described a violation of the correct statute; the caption is not part of an indictment and can neither enlarge nor diminish the offense charged in the body; and an indictment is sufficient if it appraises defendant of the charge against him with enough certainty for him to prepare his defense and to be protected from subsequent prosecution for the same offense, which the indictment did in this case.

Indictment, Information, and Criminal Pleadings 38 (NCI4th) - impaired driving - amendment to allege public vehicular area

State v. Snyder, 118 N.C. App. 540 (1995)

The trial court erred by permitting the State to amend an indictment for driving while impaired which alleged that defendant drove on a "street or highway" to allege that defendant drove on a "highway or public vehicular area" because the amendment altered an essential element of the offense and thus substantially altered the charge against defendant.

Indictment, Information, and Criminal Pleadings 40 (NCI4th) - embezzlement - amendment of indictment - change of owner from individual to corporation

State v. Hughes, 118 N.C. App. 573 (1995)

Where the indictments alleged that defendant embezzled gasoline "belonging to Mike Frost, President of Petroleum World, Incorporated, a North Carolina corporation," the trial court erred by permitting the State to amend the indictments at the close of its evidence by deleting "Mike Frost, President" from each of the indictments and thus to change ownership from an individual to a corporation, since this was a substantial alteration of the indictment prohibited by N.C.G.S. 15A-923(e).

Weapons and Firearms 11 (NCI4th) possession of firearm by felon sufficiency of indictment

State v. Bishop, 119 N.C. App. 695 (1995) ___ S.E.2d ___

An indictment charging defendant with possession of a firearm by a felon did not need to allege possession away from defendant's home or business, since situs is an exception to the offense, not an essential element; nor did the indictment need

to allege that a Florida felony of which defendant was convicted was "substantially similar" to a particular North Carolina crime, since the indictment gave sufficient notice to defendant of the offense charged. N.C.G.S. 14-415.1.

Indictment, Information, and Criminal Pleadings 53 (NCI4th) alleged variance between indictment and proof no error

State v. Frazier, 121 N.C. App. 1 (1995) ___ S.E.2d ___

In a prosecution of defendant for taking indecent liberties with a minor and rape, there was no merit to defendant's contention that there was a fatal variance between the indictments and the evidence presented at trial, since specificity regarding dates diminishes in child abuse cases, the indictments alleged that defendant's sexual misconduct occurred "on or about" certain dates, and the State took adequate measures to put defendant on notice that the dates alleged should not be relied upon for any degree of certainty.

Indictment, Information, and Criminal Pleadings § 36 (NCI4th) driving while impaired "street or highway" amendment to "public vehicular area"

State v. Snyder, 343 N.C. 61 (1996) 468 S.E.2d 221

The trial court did not err in a prosecution for driving while impaired and being an habitual felon by granting the State's motion to amend the DWI indictment that defendant operated a motor vehicle on "a street or highway" to read "on a highway or public vehicular area" where defendant was stopped in a parking lot. This change was merely a refinement in the description of the type of situs on which defendant was driving while impaired rather than a change in an essential element of the offense.

Indictment, Information, and Criminal Pleadings § 55 (NCI4th) minor difference between indictment and evidence no fatal variance

State v. Weaver, 123 N.C. App. 276 (1996) 473 S.E.2d 362

There was no fatal variance between the indictment and proof where defendant was charged with attempted larceny of a car from "Finch-Wood-Chevrolet-Geo, Inc.," and the evidence showed that Finch-Wood Chevrolet had custody of the car, but the evidence did not show that Finch-Wood was incorporated or that Finch-Wood Chevrolet was also known as Finch-Wood Chevrolet-Geo, since defendant did not demonstrate or argue that any prejudice resulted from the minor difference between the indictment and the evidence at trial.

**Indictment, Information, and Criminal Pleadings § 19 (NCI4th); Homicide § 138 (NCI4th)
indictment for murder acting in concert theory conviction as accessory indictment
sufficient**

State v. Westbrooks, 345 N.C. 43 (1996) 478 S.E.2d 483

An indictment for acting in concert to commit murder supported a verdict of first-degree murder on an accessory-before-the-fact theory. An indictment must allege all of the essential elements of the crime sought to be charged but allegations beyond the essential elements are irrelevant and may be treated as surplusage. Moreover, the purposes of an indictment include giving notice of the charge against defendants so that they may prepare their defense and be in a position to plead double jeopardy

**Indictment, Information, and Criminal Pleadings § 36 (NCI4th) - amendment - not
prejudicial – not substantial - habitual felon - defendant's age - no error**

State v. Hicks, 125 N.C. App. 158 (1997)

The trial court did not err in allowing the State to amend its habitual felon indictment to correctly specify that one of the defendant's felonies was committed prior to his eighteenth birthday. It is permissible to amend an indictment so long as the amendment does not substantially alter the charge set forth in the indictment. N.C.G.S. § 15A-923

Indictment, Information, and Criminal Proceedings § 50 (NCI4th) - discharging a "shotgun, a firearm" into house - evidence that weapon a handgun - no fatal variance

State v. Pickens, 346 N.C. 628 (1997)

There was not a fatal variance between the indictment and the evidence where the indictment charged that defendant "did discharge a shotgun, a firearm," into a dwelling house while it was actually occupied and the evidence at trial established that the fatal shot came from a handgun. The essential element of discharging a firearm was alleged; the averment to the shotgun was not necessary, making it mere surplusage.

Indictment, Information, and Criminal Pleadings § 43 (NCI4th) - bill of particulars denied - no error

State v. Jacobs, 128 N.C. App. 559 (1998)

The trial court did not abuse its discretion in the prosecution of a scoutmaster for sexual offenses by denying defendant's motion for a bill of particulars. Defendant committed sexual offenses at various times over a period of years, the State provided as much specific information as to the time of the various incidents as was available, there is no contention that the State's proof at trial was more specific as to dates than the information which had been provided to defendant, and defendant failed to show that his defense was significantly impaired by the lack of information sought in the bill of particulars.

Indictment and Information - variance - child abuse - nature of injury - surplusage

State v. Qualls, 130 N.C. App. 1 (1998)

The trial court did not err by not dismissing a charge of felonious child abuse based on an alleged fatal variance between the indictment and the evidence where the indictment alleged that the victim suffered a subdural hematoma and the evidence tended to show an epidural hematoma. The indictment alleged the

elements of the crime and the reference to a subdural rather than an epidural hematoma was surplusage and properly disregarded.

Indictment and Information - True Bill not checked - no evidence of presentation to court - presumption of validity

State v. Hall, 131 N.C. App. 427 (1998)

Indictments charging defendant with armed robberies were valid where both were signed by the grand jury foreman and clearly indicated the charges against defendant, but neither of the boxes designating "True Bill" or "Not a True Bill" were checked and there was no evidence of the presentation of a true bill to the trial court. An indictment affords the protection guaranteed by the Constitution of North Carolina so long as it charges the criminal offense in a plain, intelligible and explicit manner.

Indictment and Information - conversion - corporate victim - identity not sufficiently alleged

State v. Woody, 132 N.C. App. 788 (1999)

An indictment for conversion by a bailee was fatally defective and could not support either a felony or misdemeanor conviction where the indictment alleged that the property belonged to "P&R Unlimited." While "ltd." or "limited" are proper corporate identifiers, "unlimited" is not a term capable of notifying a criminal defendant either directly or by clear import that the victim is a legal entity capable of holding property. The indictment also fails to name the persons composing a partnership. The exception in *State v. Wooten*, 18 N.C. App. 652, for the shoplifting statute does not apply to this statute.

Indictment and Information - statutory rape - date of offenses - bill of particulars denied

State v. Jarrell, 133 N.C. App. 264 (1999)

The trial court did not err in a prosecution for taking indecent liberties and statutory rape by denying defendant's motion for a bill of particulars as to the dates of the offenses where the indictments alleged that the rapes were "on or about December, 1995," "on or about January 1996," and "on or between February 1 and 14, 1996." The indictments listed the month and year that each offense was alleged to have occurred and sufficiently complied with N.C.G.S. § 15A-924 (a)(4) by charging that the offense occurred during a designated period of time.

Indictment and Information - date of offense - correction

State v. Campbell, 133 N.C. App. 531 (1999)

The trial court did not err in a prosecution for a first-degree burglary and first-degree statutory rape by granting the prosecution's motion to correct the date of the offenses. Time is not an essential element of these crimes, defendant was obviously aware that the date on the indictment was incorrect, defendant was neither misled nor surprised as to the nature of the charges, and there was no evidence of an alibi or any other defense wherein time would be material.