

Lessor Included Offense

Trial Court Committed Plain Error by Not Submitting Assault on a Government Official as Lesser Offense of Assault with Deadly Weapon on Government Official

State v. Clark, ___ N.C. App. ___, 689 S.E.2d 553 (8 December 2009).

The court ruled that the trial court committed plain error by not submitting assault on a government official as a lesser offense of assault with a deadly weapon on a government official. Based on the facts in this case, the jury could have found that the truck used to assault the officer was not a deadly weapon.

Assault Is Not Lesser-Included Offense of Sexual Battery

State v. Corbett, ___ N.C. App. ___, 675 S.E.2d 150 (21 April 2009).

The court ruled that assault is not a lesser-included offense of sexual battery. The crime of assault has elements that are not elements of sexual battery.

(2) Trial Judge Did Not Err in Not Instructing on Assault Inflicting Serious Injury as Lesser Offense of Felony Assault

State v. Liggons, ___ N.C. App. ___, 670 S.E.2d 333 (6 January 2009).

The defendant was convicted of assault with a deadly weapon with intent to kill inflicting serious injury (the victim was driver of a vehicle) and other offenses. The defendant or his accomplice threw a large rock at a moving vehicle, and the rock crashed through the windshield. After the vehicle stopped, they assaulted the passenger and robbed him. The driver suffered a severe skull fracture and underwent surgery to remove pieces of bone and rock lodged in her brain. (2) The court ruled that the trial judge did not err in not instructing on assault inflicting serious injury as a lesser offense of the felony assault of the driver. The rock, considering its size and the manner of its use, was a deadly weapon as a matter of law. Thus an instruction on an offense without the deadly weapon element was not required.

(3) Trial Judge Did Not Err in Not Instructing on Lesser Included Trafficking Offenses Based on Lesser Amounts of Marijuana

State v. Robledo, ___ N.C. App. ___, 668 S.E.2d 91 (4 November 2008).

The defendant was convicted of (i) trafficking in 50 pounds or more but less than 2,000 pounds of marijuana, and (ii) conspiracy to traffic by possessing 50 pounds or more but less than 2,000 pounds of marijuana. Officers intercepted a box (ox A) at a UPS store that contained 43.8 pounds. They repackaged it and waited for someone to pick it up. The defendant arrived at the store in a Pontiac Grand Am to pick up another box (box B). Box B was not addressed to the defendant, but he had an authorization note from his niece to receive the box. About a half hour later, the defendant returned to the store in the same vehicle with an alleged co-conspirator (not his niece). The coconspirator entered the store and requested box A, produced an authorization note from the defendant's niece, and with the defendant's and a store employee's assistance loaded box A into the Pontiac. Officers stopped the Pontiac as it left the store. Box B as well as box A were in the Pontiac. Box B contained 44.1 pounds of marijuana, for a total of 87.9 pounds of marijuana in both boxes. Both boxes had identical packaging inside containing Styrofoam for padding and laundry detergent to prevent detection of the marijuana. The defendant told an officer that he and his niece had previously lived at the same residence and she had received many packages from UPS. He also acknowledged he knew that he would be collecting two boxes that day. Changing the amounts during the interview, he stated that he was expecting to be paid \$50, \$100, or \$200 just for delivering the boxes. (3) The court ruled that the trial judge did not err in not instructing on lesser included trafficking offenses based on lesser amounts of marijuana. The court noted that the defendant did not present conflicting evidence to suggest that the defendant possessed only one of the two boxes of marijuana to require a lesser-included offense instruction based on an amount less than 50 pounds.

(2) Trial Judge Did Not Err in Not Submitting Attempted Misdemeanor Breaking or Entering as Lesser Offense of Attempted First-Degree Burglary

State v. Martin, ___ N.C. App. ___, 665 S.E.2d 471 (5 August 2008).

The defendant was convicted of attempted first-degree burglary that was committed on March 29, 2007. A person taking a bath in a house heard a loud noise, looked out the bathroom window, and saw the defendant walk around the corner of her house. She then heard scratching at her bedroom window. She pulled back the window shade and saw the defendant on the other side of the window, pulling on the window and a cord attached to the window. The defendant had put his fingers around the window screen and had pushed the window off its track. The defendant then left the area. (2) The court ruled that the trial judge did not err in not submitting attempted misdemeanor breaking or entering as a lesser offense of attempted first degree burglary. The court stated that there was no evidence presented at trial to suggest that the defendant's intent was anything other than to commit a felony within the home. There was no evidence to support the defendant's appellate argument that the defendant could have been attempting to look at the person while she was bathing.

Trial Judge Did Not Err in Not Submitting Second-Degree Murder as Lesser Offense of First-Degree Felony Murder When Evidence of Armed Robbery Was Not in Conflict—Ruling of Court of Appeals Is Reversed

State v. Gwynn, 362 N.C. 334, 661 S.E.2d 706 (12 June 2008), reversing, 182 N.C. App. 343 (6 March 2007).

The court ruled that the trial judge did not err in not submitting second-degree murder as a lesser offense of first-degree felony (armed robbery) murder when evidence of the armed robbery was not in conflict. The robbery involved the defendant as a buyer of marijuana from the murder victim. The victim gave the defendant limited and temporary access to the marijuana by tossing it in the backseat of a vehicle, where the defendant was seated, shortly before entering the vehicle himself. The victim did so only because he was expecting payment from the defendant. The victim in no way granted the defendant permission to depart with the property. The defendant's shooting of the victim and then departing with the marijuana constituted armed robbery, and the evidence of that offense was not in conflict.

**No Error in Calculating Prior Record Level For Murder and Attempted Murder
Convictions to Assign Points to Both Prior Felony Drug Conviction and To Prior
Conviction of Possession of Firearm by Felon, in Which Felony Drug Conviction Was
Element of Possession of Firearm by Felon**

State v. Goodwin, ___ N.C. App. ___, 661 S.E.2d 46 (20 May 2008).

The court ruled that there was no error in calculating the defendant's prior record level for second-degree murder and attempted first-degree murder convictions to assign points to both a prior felony drug conviction and to a prior conviction of possession of firearm by felon, in which the felony drug conviction was an element of possession of firearm by felon. The court reasoned, distinguishing *State v. Gentry*, 135 N.C. App. 107 (1999), that possession of firearm by felon is a separate substantive offense from the defendant's prior felony drug conviction on which his status as a felon was based.

**Although Trial Judge in Felonious Assault Trial Correctly Submitted Issue Whether 2x4
Board Was Deadly Weapon, Trial Judge Erred in Not Submitting Lesser Offense of
Assault Inflicting Serious Injury**

State v. Tillery, 186 N.C. App. 447, 651 S.E.2d 291 (16 October 2007).

The defendant was convicted of assault with a deadly weapon inflicting serious injury. The court ruled, relying on *State v. Lowe*, 150 N.C. App. 682 (2002), and *State v. Palmer*, 293 N.C. 633 (1977), that although the trial judge correctly submitted the issue to the jury whether a 2x4 board was a deadly weapon, the trial judge erred in not submitting the lesser offense of assault inflicting serious injury. The 2x4 board used in this case was not a deadly weapon as a matter of law.

Sexual Battery Is Not Lesser-Included Offense of Second-Degree Rape Under G.S. 14-

27.3(a)(2) (Vaginal Intercourse With Mentally Helpless, Mentally Incapacitated, or Physically Helpless)

State v. Pettis, ___ N.C. App. ___, 651 S.E.2d 231 (18 September 2007).

The court ruled that sexual battery is not a lesser-included offense of second-degree rape under G.S. 14-27.3(a)(2) (vaginal intercourse with mentally helpless, mentally incapacitated, or physically helpless). Sexual battery has a purpose element (battery committed for purpose of sexual arousal, sexual gratification, or sexual abuse) that is not an element of second-degree rape under G.S. 14-27.3(a)(2).

Constitutional Law -- Double Jeopardy -- First-Degree Murder by Acting in Concert -- Solicitation to Commit Murder -- Conspiracy to Commit Murder -- Not a Lesser Included Offense

State v. Kemmerlin, 356 N.C. 446 (2002).

The trial court did not err in a first-degree capital murder case by failing to vacate the convictions of solicitation to commit murder and conspiracy to commit murder even though defendant asserts that both convictions merge with the conviction for first-degree murder by acting in concert and that punishment for both crimes allegedly violates double jeopardy, because: (1) the crime of solicitation requires counseling, enticing, or inducing another to commit a crime whereas this element is not required for acting in concert; (2) acting in concert requires actual or constructive presence at the crime which is not an element present in the definition of solicitation; (3) regarding defendant's contention that her conspiracy conviction also merged based on her allegation that her presence at the scene of the murder was incidental and unnecessary, defendant was not only present at the scene of the murder but she also let the co-participant into her home knowing he was going to kill her husband and she also brought her husband into the room where he would be killed; (4) conspiracy is a separate offense from the substantive offense and therefore does not merge into the substantive offense; and (5) the requirement of an agreement which is an element of conspiracy is not a necessary element for murder by acting in concert.

Assault--deadly weapon inflicting serious injury--failure to instruct on lesser- included offenses

State v. McKoy, 174 NCA 105 (2005)

The trial court erred by failing to instruct the jury on the lesser-included offenses of assault with a deadly weapon and assault inflicting serious injury for the charge of assault with a deadly weapon inflicting serious injury, because: (1) the jurors were not instructed that defendant's hands were deadly weapons per se, but rather they were asked to determine whether defendant's hands became deadly weapons as used in the alleged assault; (2) there was no way to ascertain what verdict the jury might have reached had it been given an alternative which did not include the use of a deadly weapon; and (3) assault with a deadly weapon does not require the victim to suffer serious injury, and the victim in the instant case did not seek medical treatment nor does the record contain any evidence of pain, blood loss, or time lost from work as a result of the injuries.

Assault--with a deadly weapon inflicting serious injury--refusal to charge on lesser offense--evidence of deadly weapon

State v. Caudle, 172 NCA 261 (2005)

There was no plain error in the trial court's refusal to instruct on the lesser included offense of assault inflicting serious injury in a prosecution for assault with a deadly weapon inflicting serious injury.

Indecent liberties - Indecent liberties does not merge with and is not a lesser included offense of first degree sexual offense.

State v. Brewer, 171 NC App 686 (2005)

Kidnapping--second-degree--failure to instruct on false imprisonment as lesser-included offense

State v. Petro, 167 NCA 749 (2005)

The trial court did not err by denying defendant's request to instruct the jury on the charge of false imprisonment as a lesser-included offense of second-degree kidnapping, because: (1) defendant's theory of the case is that a letter written by the victim accurately portrayed the events of 20 August 2001 and negates a purpose to terrorize the victim at any point during that time; (2) defendant's theory, if believed, eliminates not only the purpose element required for second-degree kidnapping, but also the unlawful restraint element of both second-degree kidnapping and false imprisonment; and (3) the jury would therefore have to find defendant guilty of second-degree kidnapping if the victim's testimony was believed or not guilty of any offense if the victim's letter was believed.

Robbery--armed--failure to instruct on lesser-included offense of common law robbery—invited error

State v. Walker, 167 NCA 110 (2004)

The trial court did not commit plain error by failing to instruct the jury on the charge of common law robbery as a lesser-included offense of armed robbery, because: (1) a defendant may not decline an opportunity for instructions on a lesser-included offense and then claim on appeal that failure to instruct on the lesser-included offense was error; and (2) in the instant case two of the defendants foreclosed appeal of this issue when neither of their attorneys objected to the trial court's instructions nor requested additional instructions even after the trial court specifically stated it would not instruct on any lesser-included offense for robbery with a dangerous weapon, and a third defendant waived his right to appeal this issue since he did not object during the jury charge conference and did not cite error or plain error as to this issue.

Burglary and Unlawful Breaking or Entering—breaking in to sleep—instructions on lesser included offenses

State v. Friend, 164 NCA 430 (2004)

Evidence in a felonious breaking and entering prosecution that defendant had admitted breaking into a house to sleep but not to commit a larceny or another felony should have resulted in an instruction on the lesser included offense of misdemeanor breaking and entering. However, defendant was not entitled to an instruction on misdemeanor larceny because any larceny that occurred pursuant to a breaking and entering is a felony regardless of the value of what was stolen.

Possession of Stolen Property—instruction on lesser included offense—no conflicting evidence

State v. Friend, 164 NCA 430 (2004)

Defendant was not entitled to an instruction on the lesser included offense of misdemeanor possession of stolen goods where there was no conflicting evidence. Defendant's assertion that the jury accepted a portion of the State's case and rejected other parts of it was not sufficient.

Rape—first-degree--assault on a female as lesser offense —instruction denied--short form indictment not applicable

State v. Hedgepeth, 165 NCA 321 (2004)

The trial court correctly denied an instruction on assault on a female to a first-degree rape defendant indicted under N.C.G.S. § 14-27.2. Where the indictment specifically alleges all of the elements of first-degree rape under N.C.G.S. § 14-27.2(a)(2)(a) & (b) and does not contain the specific averments or allegations of N.C.G.S. § 15-144.1 (the short form indictment, which can include assault on a female as a lesser offense), the court has jurisdiction only to issue instructions on first-degree rape and any lesser included offenses that meet the definitional test. Assault on a female does not meet that test because it contains elements not present in the greater offense of rape.

Prisons and Prisoners—malicious conduct by prisoner—no instruction on lesser offense

State v. Smith, 163 NCA 771 (2004)

The trial court did not err in a trial for malicious conduct by a prisoner by not instructing the jury on the alleged lesser included offense of assault on a government official. The State presented evidence as to each essential element of malicious conduct by a prisoner and defendant did not negate the State's evidence. N.C.G.S. § 14-258.4(a).

Homicide--second-degree murder--failure to instruct on lesser-included charge of involuntary manslaughter

State v. Reynolds, 160 NCA 579 (2003)

The trial court erred in a second-degree murder case by failing to instruct the jury on involuntary manslaughter and the case is remanded for a new trial, because: (1) where the circumstances as described by defendant suggest that the victim was unintentionally killed with a deadly weapon during a physical struggle with defendant, the trial court should charge the jury on the offense of involuntary manslaughter; and (2) defendant in this case testified that he attempted to knock a loaded and cocked gun from the victim's hand, providing evidence from which a jury could find culpable negligence.

Robbery--armed--motion to dismiss--sufficiency of evidence--lesser-included offense of common law robbery

State v. Gaither, 161 NCA 96 (2003)

The trial court did not err by denying defendant's motion to dismiss the charge of armed robbery, or in the alternative, refusing to instruct the jury on the lesser-included offense of common law robbery, because: (1) there was an unlawful

taking of shirts from store premises, defendant showed the security officers that he possessed a gun, and the security officers testified that they believed defendant might use the gun; (2) while defendant's use of intimidation occurred after the taking of property, defendant's effort to avoid apprehension by store and mall security officers is an action continuous with the taking and therefore constitutes a part of the robbery attempt; (3) the fact that only one witness to the incident actually observed the gun in defendant's possession goes to the weight of the evidence; and (4) there was no evidence presented to support an instruction on the lesser-included offense of common law robbery. See Farb p13.

Homicide - second-degree murder - failure to submit lesser-included offense of involuntary manslaughter

State v. Mccollum, 157 N.C. App. 408 (2003)

The trial court did not commit plain error in a first-degree murder case by failing to submit the lesser-included offense of involuntary manslaughter ex mero motu, because: (1) the failure to instruct did not have a probable impact on the jury's finding that defendant was guilty of second-degree murder; and (2) any error is harmless in light of the jury's rejection of voluntary manslaughter and conviction of defendant for second-degree murder since a finding of malice precludes a finding of either voluntary manslaughter or involuntary manslaughter.

Criminal Law—indictment for completed offense—conviction for attempt

State v. Sines, 158 NCA 70 (2003)

An indictment for a completed statutory sexual offense will support a conviction for the lesser crime of attempted statutory sexual offense.

Homicide - instruction on second-degree murder denied - possibility that jury might not believe all of the State's evidence

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

A first-degree murder defendant was not entitled to an instruction on second-degree murder upon the argument that the jury had to pick and choose between pieces of evidence in order to convict of second-degree murder. A defendant is not entitled to an instruction on a lesser-included offense merely because the jury could possibly believe some of the State's evidence but not all of it.

Burglary and Unlawful Breaking or Entering--misdemeanor breaking or entering--first-degree trespass

State v. Williams, 150 NCA 497 (2002)

The trial court erred by sentencing a defendant for both first-degree trespass and misdemeanor breaking or entering, and defendant's conviction for first-degree trespass must be vacated and his conviction for resisting a public officer that was consolidated with his conviction for first-degree trespass must be remanded for resentencing, because: (1) first-degree trespass is a lesser included offense of misdemeanor breaking or entering; and (2) whether defendant's conviction of resisting a public officer warrants the sentence imposed in connection with the two consolidated crimes is a matter for the trial court to reconsider.

Assault--deadly weapon with intent to kill inflicting serious injury--failure to instruct on lesser included offense of misdemeanor assault inflicting serious injury

State v. Lowe, 150 NCA 682 (2002)

The trial court committed plain error by failing to instruct on misdemeanor assault inflicting serious injury under N.C.G.S. § 14-33(c) as a lesser-included offense of assault with a deadly weapon with intent to kill inflicting serious injury, because: (1) there is sufficient evidence from which the jury could find that fists and a commode lid were not used as deadly weapons but did inflict serious injury; and (2) even though the State argues that the jury would have found defendant guilty of felonious assault inflicting serious bodily injury under N.C.G.S. § 14-32.4, felonious assault inflicting serious bodily injury is not a lesser-included offense of

assault with a deadly weapon with intent to kill inflicting serious injury.

Drugs--trafficking by possession of cocaine--instruction on lesser included offense of trafficking by possession of less than twenty-eight grams of cocaine

State v. Reid, 151 NCA 420 (2002)

The trial court did not err in a trafficking by possession of cocaine case by denying defendant's request to instruct the jury on the lesser included offense of trafficking by possession of less than twenty-eight grams of cocaine even though defendant contends the cocaine was not fully dry when weighed after its submersion in the toilet, because it is well-established that the total quantity of the mixture containing cocaine is the relevant weight to be used in determining a violation of N.C.G.S. § 90-95(h)(3) rather than the actual weight of the cocaine portion of the mixture.

Crime Against Nature § 4 (NCI4th) - indecent liberties with child - assault on female not lesser offense

State v. Love, 127 N.C. App. 437 (1997)

Assault on a female is not a lesser included offense of taking indecent liberties with a child because assault on a female contains elements not present in the offense of taking indecent liberties; therefore, the trial court did not err by refusing to instruct on assault on a female as a lesser included offense in a prosecution for taking indecent liberties with a child.

Homicide § 73 (NCI4th) solicitation to commit murder lesser included offense of accessory before the fact

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

Solicitation to commit murder is a lesser included offense of murder as an accessory before the fact because solicitation to commit murder contains no element that is not also present in the offense of being an accessory before the fact to murder.

Homicide 21 (NCI4th) - attempted murder - recognized - lesser-included offense of murder

State v. Collins, 334 N.C. 54, 431 S.E.2d 188 (1993)

Homicide 566 (NCI4th) - murder - instruction on voluntary manslaughter as lesser included offense - imperfect self defense - denied

State v. Ligon, 332 N.C. 224, 420 S.E.2d 136 (1992)

The trial court did not err in a murder prosecution by not instructing the jury on the lesser included offense of voluntary manslaughter based on imperfect self defense where, even assuming defendant's version of the evidence is accurate, there was absolutely no evidence that defendant believed it necessary to kill the victim in order to save himself from death or great bodily harm and, even if he had such a belief, it certainly would not have been reasonable, given that the victim's car was speeding away when the shots were fired.

Homicide 562 (NCI4th) - murder - instruction on voluntary manslaughter as lesser included offense - provocation - denied

State v. Ligon, 332 N.C. 224, 420 S.E.2d 136 (1992)

The trial court did not err in a murder prosecution by not instructing the jury on the lesser included offense of voluntary manslaughter based on provocation where, assuming defendant's version of the evidence was accurate, there was absolutely no evidence that defendant shot the victim in the heat of passion upon adequate provocation. While defendant may have been "provoked" that the victim

stole his cocaine, that is hardly what the law regards as adequate provocation.