



# Out of the Shadows

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## *THE NEED TO CHARGE ASSAULT IN THE PRESENCE OF A MINOR*

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In North Carolina, “assault in the presence of a minor” is a chargeable offense with stringent sentencing provisions. According to the General Statutes of North Carolina section 14-33(d):

Any person who, in the course of an assault, assault and battery, or affray, inflicts serious injury upon another person, or uses a deadly weapon, in violation of subdivision (c)(1) of this section, on a person with whom the person has a personal relationship, and in the presence of a minor, is guilty of a Class A1 misdemeanor. A person convicted under this subsection, who is sentenced to a community punishment, shall be placed on supervised probation in addition to any other punishment imposed by the court. A person committing a second or subsequent violation of this subsection shall be sentenced to an active punishment of no less than 30 days in addition to any other punishment imposed by the court.

To date, no case law has interpreted its provisions. Prior to the enactment of section 14-33(d) in 2003, assault in the presence of a minor could serve as a non-statutory aggravating factor at sentencing. *See State v. Morgan*, 156 N.C. App. 523 (N.C. Ct. App. 2003) (holding that evidence could serve as proof of both an aggravating sentencing factor and the offense of misdemeanor child abuse, when a six-year-old girl, whose parents were divorced, witnessed her father break a bottle over the head of her mother’s male friend and then use the jagged glass to assault her mother).

The stringent sentencing provisions of the crime, including mandatory active sentences, promote greater safety for the family and accountability for the domestic violence offender for placing the child at risk. However, if children are not recognized or identified in a police report as being present during the assault, or if the charge is routinely dismissed during plea negotiations, then the legal advantages of charging assault in the presence of a minor are wasted. Attention should be paid to whether charging policies, including those at the Magistrate’s Office, encourage recognition of the harm caused to children witnessing domestic violence.

Not all would agree. Nationally, there is active debate regarding the appropriateness of criminalizing child endangerment related crimes. *See, e.g., Sarah Abramowicz, Rethinking Parental Incarceration*, 82 U. Colo. L. Rev. 793 (2011). However, there is little debate that witnessing violence is harmful to children. In addition to the risks of being intentionally assaulted or caught in the middle, exposure to violence and its aftermath may have serious negative impacts on the psychological, developmental and physical well-being of children, infants, and even fetuses. *E.g., Kathryn M. Yount et al., Impacts of Domestic Violence on Child Growth and Nutrition*, 72 Soc. Sci. & Med. 1534 (2011); Alytia A. Levendosky et al., *The Effects of Domestic Violence on the Stability of Attachment from Infancy to Preschool*, 40(3) J. Clinical Child & Adol. Psychol. 398 (2011).

Few states actually provide for a separate crime for assault in the presence of a minor, although many more have sentencing enhancements for such conduct. *E.g., Del. Code Ann. 11 § 1102 (a)(4)* (Delaware’s child endangerment crime specifically includes violent crimes by a defendant who knows that a minor family member has witnessed the crime “either by sight or sound”); Utah Code Ann. § 76-5-109.1 (Utah’s “domestic violence in the presence of a child” provides that the crime is “separate and distinct from” the charge of domestic violence, and that the crime may be separately charged for each child present). The sentencing enhancements are often broadly interpreted to include a broad range of exposure. For example, in *State v. Burgett*, the Arizona Court of Appeals upheld application of the aggravating factor “domestic violence in the presence of a child” when the children were in another room during the aggravated assault by the children’s mother against their father. 226 Ariz. 85 (Ariz. Ct. App. 2010) (interpreting Ariz. Rev. Stat. § 13-701(D)(18)). The Court...

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recognized as sufficient “presence” that the children saw her leave the room they were in with a box cutter, then heard their father screaming and soon after saw him run bleeding past them. *Id.* at 91.

Like Utah, in North Carolina, the crime of assault in the presence of a minor may be charged in addition to the domestic violence assault. There would be no resulting double jeopardy violation, nor is one a lesser included charge of the other as section 14-33(d) addresses the harm to the child, while section 14-33(c)(1) addresses the harm to the person assaulted. The statute defines minor as “any person under the age of 18 years who is residing with or is under the care and supervision of, and who has a personal relationship with, the person assaulted or the person committing the assault.” N.C. Gen. Stat. § 14-33(d)(3). The “personal relationship” is one defined under section 50B-1(b), which defines domestic violence relationships for the purpose of a variety of criminal and civil statutes.

A more complex interpretation is required for defining “in the presence of a minor.” According to section 14-33(d)(3), “in the presence of” means “that the minor was in a position to have observed the assault.” Is an infant or child who hears the violence from the next room “in a position to have observed” the violent act? Would a deaf or blind child in the room where the violence occurs “observe” the violence? Would a child speaking online to a parent in another city over a webcam who then sees that parent struck by her boyfriend “observe” the violence? The law does not require the child to have visually or aurally observed the assault, or to be within a certain distance of the violence. *Cf.* N.C. Gen. Stat. § 14-190.1(b) (the Class 1 misdemeanor crime “exhibiting harmful performances to minors” more specifically requires that the defendant allow a minor to “view” a live performance that is harmful).

In light of its ambiguity, charging considerations and legal argument for assault in the presence of a minor could focus on the risks of harm to the minor in a particular case. Harm need not be physical risk, as underscored by the elements of North Carolina’s crime of felony child abuse which defines serious physical injury as causing “great pain and suffering,” inclusive of “serious mental injury.” N.C. Gen. Stat. § 14-318.4. As indicated by the social science research, children are at risk of psychological trauma and harm whether they hear or see violence against others, particularly family members upon whom they are dependent.

Moreover, the North Carolina statute does not require the child “to have observed” the assault, but rather to be “in a position to have observed the assault.” Therefore, the child’s mere presence is sufficient, and no proof is required that the child actually saw or heard it. An infant asleep in a nearby bedroom could suffice. This is a lesser burden for prosecutors than charging similar conduct under the crime of misdemeanor child abuse, which provides:

Any parent of a child less than 16 years of age, or any other person providing care to or supervision of such child, who inflicts physical injury, or who allows physical injury to be inflicted, or who creates or allows to be created a substantial risk of physical injury, upon or to such child by other than accidental means is guilty of the Class A1 misdemeanor of child abuse.

N.C. Gen. Stat. § 14-318.2. Although both are categorized as A1 misdemeanors, assault in the presence of a minor assumes a risk of harm to the child through merely being in a position to have observed the assault, while misdemeanor child abuse requires proof of a substantial risk of harm.

While the statute remains untested in the appellate courts, hopefully prosecutors will vigorously and creatively pursue North Carolina’s fairly unique crime holding offenders accountable for exposing infants and children to domestic violence. Not only is it one of the easier domestic violence charges to prove, but it imposes some of the strictest sentencing provisions. More important, however, is that it enables the criminal justice system to better respond to the most vulnerable victims – children – and the need to intervene in the intergenerational cycle of violence.

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