8.5 Common Pleading Defects in Superior Court

The following are common pleading problems that may be evident on the face of the indictment or that may become evident during trial. *See also supra* § 8.2F, Common Pleading Defects in District Court. The timing of challenges to these problems is discussed *infra* § 8.5J, Timing of Motions to Challenge Indictment Defects. *See also infra* § 9.4, Challenges to Grand Jury Procedures.

A. Pleading Does Not State Crime within Superior Court's Jurisdiction

If your client is indicted in superior court, make sure that the pleading charges a felony or a misdemeanor that is within the original jurisdiction of the superior court. *See State v. Bell*, 121 N.C. App. 700 (1996) (indictment dismissed because superior court lacked jurisdiction over case; indictment charged misdemeanor and failed to allege facts that would have elevated offense to felony); *see also State v. Wagner*, 356 N.C. 599 (2002) ("felony" possession of drug paraphernalia does not exist, and trial court never had jurisdiction over offense). In addition to subject matter jurisdiction, check for territorial jurisdiction. North Carolina courts have jurisdiction over a crime only if at least one of the essential acts of the crime took place in North Carolina. *See infra* § 10.2, Territorial Jurisdiction.

B. Pleading Does Not State Any Crime

An indictment or information must state a violation of the current criminal code or a current common law crime. When an indictment alleges a violation of a rescinded or superseded law, or where it does not allege proscribed behavior, the pleading is defective and a motion to dismiss must be granted.

In the following cases, convictions have been vacated because the indictment failed to allege a crime.

State v. McGaha, 306 N.C. 699 (1982) (indictment alleging first-degree rape on theory that victim was under 12 years old was invalid where victim was 12 years, 8 months at time of offense)

State v. Hanson, 57 N.C. App. 595 (1982) (court of appeals finds, sua sponte, that indictment alleging attempt to provide controlled substance to inmate was fatally defective as statute does not proscribe such behavior; conviction vacated)

State v. Wallace, 49 N.C. App. 475 (1980) (citation alleged that "named defendant did unlawfully and willfully operate a (motor) vehicle on a (street or highway) . . . [b]y hunting deer with dogs in violation of Senate Bill #391 which prohibits same"; no crime stated, and trial court properly dismissed on motion made at trial)

State v. Holmon, 36 N.C. App. 569 (1978) (indictment alleged common-law kidnapping, which had been superseded by statutory kidnapping; conviction vacated for failure of indictment to state a crime)

C. Pleading Does Not State Required Elements of Crime

Generally. Except for those crimes where a short-form indictment is statutorily permitted, an indictment must allege every essential element of a crime. *See* G.S. 15A-924(a)(5); *State v. Westbrooks*, 345 N.C. 43 (1996); *State v. Hare*, 243 N.C. 262 (1955) (indictment that fails to allege every element of crime strips superior court of jurisdiction over case). This requirement serves two purposes: first, it ensures that the grand jury considered and found probable cause to believe that the defendant committed every element of the charged offense; second, it puts the defendant on notice of the offense and potential punishment.

Pleading defects often arise in cases involving controlled substances under G.S. 90-95(a); in those cases, the pleading must allege, among other things, the identity of the controlled substance and, in sale and delivery cases, the identity of the buyer or recipient. *See e.g.*, *State v. LePage*, 204 N.C. App. 37 (2010) (indictment identifying controlled substance as "benzodiazepines, which is included in Schedule IV of the North Carolina Controlled Substances Act" was fatally defective; benzodiazepines are not listed in Schedule IV); *State v. Turshizi*, 175 N.C. App. 783 (2006) (indictment fatally flawed where it did not include the full name of controlled substance; substance listed as "methylenedioxymethamphetamine" but did not include "3,4" as listed in statute); Smith, *Criminal Indictment*, at 43–48.

Illustrative cases. In the following cases, our appellate courts vacated convictions where the indictment failed to contain an essential element of the crime.

State v. Schalow ("Schalow I"), 251 N.C. App. 334 (2016) (short-form indictment for attempted first-degree murder that failed to allege malice was insufficient to charge attempted murder, though it sufficiently charged attempted voluntary manslaughter)

State v. Galloway, 226 N.C. App. 100 (2013) (trial court erred by instructing jury on offense of discharging a firearm into a vehicle that is in operation under G.S. 14-34.1(b) where indictment failed to allege vehicle was in operation)

State v. Justice, 219 N.C. App. 642 (2012) (indictment charging defendant with larceny from a merchant by removal of anti-theft device fatally defective where term "merchandise" in charging language was too general to identify the property allegedly taken; court also notes that indictment alleges only an attempted rather than completed larceny by stating the defendant "did remove a component of an anti-theft or inventory control device . . . in an effort to steal merchandise")

State v. Barnett, 223 N.C. App. 65 (2012) (indictment charging failing to notify sheriff's office of change of address by a registered sex offender under G.S. 14-208.9 was defective where it failed to allege that defendant was a person required to register)

State v. Harris, 219 N.C. App. 590 (2012) (sex offender unlawfully on premises indictment stated that defendant "did unlawfully, willfully, and feloniously on the premises of Winget Park Elementary School, located at . . . Charlotte North Carolina. A place intended primarily for the use, care, or supervision of minors and defendant is a registered sex offender"; court found grammatical errors did not render indictment insufficient and "willfully" alleged requisite "knowing" conduct; indictment defective, however, because it did not allege a conviction of a required, specific offense with the term "registered sex offender"); *accord State v. Herman*, 221 N.C. App. 204 (2012)

State v. Burge, 212 N.C. App. 220 (2011) (warrant charging defendant with a violation of G.S. 67-4.2, failure to confine a dangerous dog, could not support a conviction for a violation of G.S. 67-4.3, attack by a dangerous dog; though the warrant cited G.S. 67-4.2, it would have supported a conviction under G.S. 67-4.3 had it included the element of medical treatment cost, but it failed to do so)

State v. Brunson, 51 N.C. App. 413 (1981) (motion to dismiss at close of evidence for failure to allege required element of financial transaction card fraud; conviction vacated, although State could refile charge)

State v. Epps, 95 N.C. App. 173 (1989) (conviction for conspiracy to traffic in cocaine vacated for failure to allege amount of cocaine, an essential element of crime)

State v. Coppedge, 244 N.C. 590 (1956) (indictment for refusing to pay child support invalid where indictment left out term "willfully," and willful refusal to support was element of crime)

Where the indictment alleges an element of the crime but the State's proof does not conform to the allegation, fatal variance may result. *See infra* § 8.5I, Variance Between Pleading and Proof.

D. Failure to Identify Defendant

Every indictment must correctly name the defendant or contain a description of the defendant sufficient to identify him or her. *See* G.S. 15A-924(a)(1); *State v. Simpson*, 302 N.C. 613 (1981) (name of defendant, or sufficient description if his or her name is unknown, must be alleged in body of indictment); *State v. Powell*, 10 N.C. App. 443 (1971) (warrant fatally defective that gave defendant's last name as Smith when it actually was Powell). Misspelling of the defendant's name, or use of a nickname, does not necessarily invalidate an indictment. *See State v. Higgs*, 270 N.C. 111 (1967) (per curiam) (indictment valid where "Burford Murril Higgs" was spelled "Beauford Merrill Higgs"; court found that names were enough alike to come within doctrine of *idem sonans*, which means sounding the same); *State v. Spooner*, 28 N.C. App. 203 (1975) ("Mike" instead of "Michael" Spooner adequate). An incorrect allegation of the defendant's birthday or race is mere surplusage that does not invalidate an otherwise sufficient indictment. *State v. Stroud*, 259 N.C. App. 411 (2018).

A pleading may identify the defendant by an alias if it is done in good faith. *See State v. Young*, 54 N.C. App. 366 (1981) (nickname alleged was sufficiently similar to actual name; also, defendant waived objection to misnomer by failing to object before entering plea and going to trial), *aff'd*, 305 N.C. 391 (1982); *see also State v. Sisk*, 123 N.C. App. 361 (1996) (no error where defendant's name misstated in one part of indictment but correctly stated in another part), *aff'd in part*, 345 N.C. 749 (1997); *State v. Johnson*, 77 N.C. App. 583 (1985) (no error when defendant's name omitted from body of indictment but included in caption referenced in body of indictment).

E. Lack of Identification, or Misidentification, of Victim

An indictment or information must correctly name the victim against whom the defendant allegedly committed the crime. The omission of the victim's name, or incorrect identification of the victim, is fatal. If the State's proof of the identity of the victim varies from the allegation in the pleading, the variance constitutes grounds to dismiss the charge. A misspelling or incorrect order in the victim's name, if it does not mislead the defendant as to the identity of the victim, will not provide grounds for dismissal.

For a discussion of these principles and applicable cases, see *supra* "Misidentification of victim" in § 8.2F, Common Pleading Defects in District Court.

F. Two Crimes in One Count (Duplicity)

Each count in an indictment may charge only one offense. Where a count charges more than one offense, the defendant may require the State to elect which offense it will pursue at trial; a count may be dismissed if the State fails to make a choice. *See* G.S. 15A-924(b); *see also supra* "Duplicity" in § 8.2F, Common Pleading Defects in District Court.

G. Disjunctive Pleadings

Where a single statute creates more than one offense set forth in the disjunctive, or where a statute states alternative ways of committing an offense, questions may arise regarding both pleadings and jury instructions.

Single statute creates one offense. If a single statute states alternative means of committing an offense, an indictment should link the alternatives conjunctively by the word "and." *See State v. Swaney*, 277 N.C. 602 (1971) (indictment for robbery with a dangerous weapon properly charged "endangered *and* threatened"; State could prove at trial that defendant either endangered or threatened victim), *overruled on other grounds, State v. Hurst*, 320 N.C. 589 (1987); *State v. Armstead*, 149 N.C. App. 652 (2002) (indictment properly charged that defendant did "obtain *and* attempt to obtain" property by false pretense; State was not required to prove defendant actually obtained the property in addition to attempting to do so); *see also State v. Pigott*, 331 N.C. 199 (1992) (kidnapping indictment proper that listed two different purposes for kidnapping as conjunctive alternatives). The rationale for conjunctive wording is that a disjunctive allegation may "leave it uncertain what is relied on as the accusation" against the defendant. *Swaney*, 277 N.C. at 612. However, use of the disjunctive does not render an indictment defective if the indictment charges only one offense and the allegations represent alternative means of committing that offense. *See State v. Creason*, 313 N.C. 122 (1985) (where defendant is charged with the single offense of possession of LSD with intent to sell or deliver, State must prove only the intent to transfer to another, regardless of the method used).

The State is not bound to prove all the alternatives it alleges, even though the indictment alleges them in the conjunctive. *See State v. Birdsong*, 325 N.C. 418 (1989) (where indictment sets forth conjunctively two means by which crime charged may have been committed, no fatal variance between indictment and proof when State offers evidence supporting only one of the means charged).

Also, although the indictment alleges the alternatives in the conjunctive, the court may instruct the jury of the alleged alternatives in the disjunctive. The reason given by the courts is that the jury does not need to be unanimous on the method of committing a single crime. *See, e.g., State v. Garnett*, 209 N.C. App. 537 (2011) (not error for trial court to instruct jury that State must prove defendant maintained a dwelling house for "keeping *or* selling marijuana" where indictment charged defendant with maintaining a dwelling house for "keeping *and* selling a controlled substance"); *State v. Petty*, 132 N.C. App. 453 (1999) (in first-degree sex offense case, disjunctive instructions on whether sex act was cunnilingus or penetration not error because offense could be committed in either of two ways).

Reversal on appeal may still be required, however, if the judge instructs the jury on alternative ways of committing the offense, there is insufficient evidence to support one of those theories, and the record does not indicate on which theory the jury relied. *See, e.g., State v. Pakulski*, 319 N.C. 562 (1987) (error to instruct jury on felony murder based

on felonious breaking or entering and armed robbery where breaking was without a deadly weapon, so that felony would not be a predicate to a felony murder charge; new trial ordered because uncertain whether jury relied on improper theory to support murder verdict); *State v. Moore*, 315 N.C. 738 (1986) (insufficient evidence to support one of three purposes submitted to jury in support of first-degree kidnapping). In *State v. Malachi*, 371 N.C. 719 (2018), the court clarified that a jury instruction on a theory unsupported by the evidence was not per se reversible error; rather, the defendant must demonstrate prejudice resulting from the erroneous instruction.

If the State alleges only one of the alternative ways of committing an offense, the State may be bound by the theory it has alleged and precluded from obtaining a conviction based on alternative theories. *See, e.g., State v. Yarborough***,** 198 N.C. App. 22 (2009) (while State is not required to allege the felony that was the purpose of a kidnapping, if it does so, the State must prove the particular felony or fatal variance may result); *see also infra* § 8.5I, Variance Between Pleading and Proof (discussing variance issues).

For further discussion of these issues, see Jeff Welty, *Pleading in the Conjunctive*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Feb. 5, 2013); Shea Denning, *What Happens When the Jury Is Instructed on the Wrong Theory?*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Dec. 12, 2018) (discussing *Malachi* decision).

Single statute creates more than one crime. If a single statute creates more than one crime—that is, the statute creates separate offenses for which a defendant could be separately punished—only one of those crimes should be charged in each count. *See State v. Thompson*, 257 N.C. 452, 456 (1962) (stating that pleading "should contain a separate count, complete within itself, as to each criminal offense" but holding that defendant waived right to attack warrant by proceeding to trial without moving to quash); *State v. Albarty*, 238 N.C. 130 (1953) (jury verdict, which was based on misdemeanor pleading charging that defendant sold, bartered, or caused to be sold a lottery ticket, was invalid; each act of selling, bartering, or causing to be sold was separate offense, and verdict was not sufficiently definite to identify crime of which defendant was convicted). Older cases indicate that if the State alleges more than one offense (conjunctively or disjunctively) in a single count, the count is defective and subject to dismissal. However, under G.S. 15A-924(e), the defendant's remedy appears to be a motion to require the State to elect one of the offenses. *See supra* § 8.5F, Two Crimes in One Count (Duplicity).

If the court gives disjunctive jury instructions and the alternatives are separate offenses, not alternative ways of committing a single offense, the instructions violate the defendant's state constitutional right to a unanimous verdict. *See, e.g., State v. Lyons*, 330 N.C. 298 (1991) (disjunctive instructions are fatally ambiguous if the alternatives constitute separate offenses for which the defendant could be separately punished; instruction that permitted jury to find that defendant assaulted Douglas Jones and/or Preston Jones violated jury unanimity requirement); *State v. Diaz*, 317 N.C. 545 (1986) (jury instructions that charged that defendant "knowingly possessed or transported" marijuana invalid because each act of possessing and transporting constituted separate crime for which defendant could be separately punished).

Which is it? Where a statute contains disjunctive clauses, it is not always easy to discern whether the legislature intended to make each disjunctive alternative a separate offense, or intended for the disjunctive clauses to create alternative means of committing one offense. The N.C. Supreme Court has stated that where the disjunctive alternatives go to the "gravamen" of the offense then separate offenses were intended, and otherwise not. *See State v. Creason*, 313 N.C. 122 (1985) (possession with intent to sell or deliver creates one offense with separate means of committing it; possession with intent to transfer is gravamen of offense); *State v. Hartness*, 326 N.C. 561 (1990) (indecent liberties with child by touching child or compelling child to touch defendant creates alternative means of committing same offense; gravamen of offense is taking indecent liberties); *see also Schad v. Arizona*, 501 U.S. 624 (1991) (due process requires jury unanimity regarding specific crime; court does not decide extent to which states may define acts as alternative means of committing single crime).

This rule can be hard to apply. In situations where the law is unclear, be careful what you ask for. An objection to a pleading on the ground that it is disjunctive may result in the State re-indicting the defendant separately for each alternative and punishing the defendant separately for each.

For more cases on this issue, see Robert L. Farb, *The "Or" Issue in Criminal Pleadings, Jury Instructions, and Verdicts; Unanimity in Jury Verdict* (UNC School of Government, Feb. 2010).

H. One Crime in Multiple Counts (Multiplicity)

The Double Jeopardy Clause of the Fifth Amendment regulates multiple punishments for the same offense in the same proceeding. (Double Jeopardy imposes stricter requirements on prosecution of the same offense in successive proceedings. *See infra* § 8.6A, Double Jeopardy.) The State may indict and try a defendant for crimes that are the "same" for Double Jeopardy purposes, but the defendant may only be punished for one of the offenses unless the legislature has made it clear that it intended for there to be multiple punishments. *See Missouri v. Hunter*, 459 U.S. 359 (1983); *State v. Gardner*, 315 N.C. 444 (1986). For example, if two counts of an indictment separately charge your client with larceny and robbery of the same property, the State may proceed to trial on both charges. However, if the defendant is convicted of both, judgment on one of the two must be arrested to avoid multiple punishment. *See State v. Jaynes*, 342 N.C. 249 (1995) (where defendant was separately indicted for and convicted of robbery and larceny of vehicle from same victim in same taking, larceny was lesser included offense of robbery and judgment for larceny had to be arrested).

Even if offenses are not considered the "same" for double jeopardy purposes, multiple punishments may still be barred in light of legislative intent. *See State v. Ezell*, 159 N.C. App. 103 (2003) (legislature did not intend to allow multiple punishments for assault inflicting serious bodily injury and assault with deadly weapon with intent to kill inflicting serious injury in connection with same conduct); *see also State v. Davis*, 364 N.C. 297 (2010) (applying *Ezell*'s analysis to hold that defendant could not be sentenced

for second-degree murder and felony death by vehicle; similarly, defendant could not be sentenced for assault with deadly weapon inflicting serious injury and felony serious injury by vehicle). In both *Ezell* and *Davis*, the court relied on the General Assembly's inclusion in the statute that it applied "unless the conduct is covered under some other provision of law providing greater punishment." In light of this language, the court concluded that the General Assembly did not intend to impose multiple punishments.

I. Variance Between Pleading and Proof

General rule. A defendant may be convicted only of the offense alleged in the indictment. *See State v. Faircloth*, 297 N.C. 100 (1979); *State v. Cooper*, 275 N.C. 283 (1969); *State v. Jackson*, 218 N.C. 373 (1940). Not only must the *proof* conform to the indictment, the *instructions* to the jury must also be tailored to the offense alleged in the pleadings. It has been held to be plain error to instruct the jury on an offense not charged in the indictment. *See, e.g.*, *State v. Williams*, 318 N.C. 624 (1986) (where indictment alleged forcible rape and state's proof was of statutory rape because victim was under twelve years old, indictment would not support conviction); *State v. Rahaman*, 202 N.C. App. 36 (2010) (proper to arrest judgment where jury was instructed on the crime of felony possession of a stolen motor vehicle, but defendant was never indicted on that crime; however, retrial of that charge not barred because dismissal was not based on insufficient evidence and therefore did not amount to acquittal); *State v. Langley*, 173 N.C. App. 194 (2005) (finding fatal variance in possession of firearm by felon case where State alleged in indictment that defendant possessed handgun but evidence at trial showed defendant possessed sawed-off shotgun; "handgun" was a material and essential element of offense); *cf. State v. Rogers*, 227 N.C. App. 617 (2013) (error, but not plain error where first-degree burglary indictment alleged that defendant entered dwelling with intent to commit larceny, but trial court instructed jury it could find defendant guilty if at the time of the breaking and entering he intended to commit robbery with a dangerous weapon; defendant was not prejudiced because instruction benefited defendant by requiring State to prove an additional element).

If the indictment alleges a particular theory of a crime, the State is bound to prove that theory. *See, e.g.*, *State v. Clark*, 208 N.C. App. 388 (2010) (in felonious breaking and entering a motor vehicle, where State alleged the intent to commit a specific felony, the State must prove that allegation); *State v. Loudner*, 77 N.C. App. 453 (1985) (State need not allege particular sex act in indictment for sex offense, but when it does it is bound by those allegations). An exception to this rule exists where the allegations in the pleading are considered "surplusage" or not essential to the crime. *See State v. Pickens*, 346 N.C. 628 (1997) (allegation in indictment for firing into occupied dwelling that shooting was done with shotgun was surplusage; no error where State proved that weapon used was handgun); *State v. Westbrooks*, 345 N.C. 43 (1996) (allegations in indictment for murder that defendant was actor in concert was surplusage; State free to prove that defendant was accessory before fact); *State v. Lark*, 198 N.C. App. 82 (2009) (language in indictment identifying a particular sex act to support felonious child abuse charge was surplusage; trial court instructed jury on the theory alleged in the indictment and on second theory supported by the proof). If you are not sure whether factually specific allegations in an

indictment are binding, or will be considered mere surplusage, ask for a bill of particulars. Bills of particular are binding on the State. *See* G.S. 15A-925(e).

Motion to dismiss. A challenge to a variance between pleading and proof should be raised by a motion to dismiss for insufficient evidence *and* for fatal variance at the close of the State's evidence and at the close of all of the evidence. *See State v. Bell*, 270 N.C. 25 (1967) (variance properly raised by motion for nonsuit); *State v. Pulliam*, 78 N.C. App. 129 (1985) (variance properly raised by motion to dismiss for insufficient evidence). Recent cases have required that defendants specifically assert fatal variance to preserve the issue for appeal. *State v. Mason*, 222 N.C. App. 223 (2012) (by failing to assert fatal variance as a basis for his motion to dismiss, defendant did not preserve the argument for appellate review); *accord Hester*, 224 N.C. App. 353 (2012). Until recently, counsel was advised to use the following "magic words" to ensure preservation.

> "Your Honor, the defense moves to dismiss each charge on the ground that the evidence is insufficient as a matter of law on every element of each charge to support submission of the charge to the jury and that submission to the jury would therefore violate the Fourteenth Amendment of the U.S. Constitution and article I, § 19 of the N.C. Constitution.
>
> Further, the defense moves to dismiss each charge on the ground that, as to each charge, there is a variance between the crime alleged in the indictment and any crime for which the State's evidence may have been sufficient to warrant submission to the jury and that submission to the jury would therefore violate the Fifth, Sixth, and Fourteenth Amendments of the U.S. Constitution and article I, § 19 of the N.C. Constitution.
>
> [Lay out specific insufficiency arguments and specific variance arguments, if any.]
>
> [If you made specific insufficiency or variance arguments, then repeat motion to dismiss: "Therefore, Your Honor, the defense moves to dismiss each charge on the ground that . . . .]"

The language was drafted in response to a line of cases finding that where the defendant argues the insufficiency of evidence as to one element of the offense in a motion to dismiss at the close of the State's evidence and not another, the appellate court will only review the sufficiency of the challenged element, and claims of insufficiency as to any other elements will be waived. *See, e.g., State v. Walker*, 252 N.C. App. 409 (2017). In *State v. Golder*, 374 N.C. 238 (2020), the N.C. Supreme Court overruled this line of cases and held that a properly timed motion to dismiss preserves all sufficiency issues. Thus, the language suggested for sufficiency motions above is no longer necessary to preserve review of sufficiency issues. However, in cases involving more than one offense, defense counsel should continue to make a motion to dismiss as to all offenses (at least until the

scope of *Golder* is clear). Further, *Golder* did not specifically address variance motions, and defenders should continue to rely on the suggested language above regarding motions to dismiss for fatal variance in order to preserve that issue for appellate review. For more information on these principles, see Phil Dixon, *Preserving Motions to Dismiss for Insufficient Evidence*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Apr. 21, 2020).

Reindictment following dismissal for variance. When charges are dismissed because of variance between the pleading and proof, the defendant is acquitted of the charged offense. The State has failed to offer sufficient evidence to support the charged offense and suffers a nonsuit. Generally, the State is free to reindict on the theory that was proven at trial but not charged. *See State v. Wall*, 96 N.C. App. 45 (1989); *State v. Loudner*, 77 N.C. App. 453 (1985); *State v. Ingram*, 20 N.C. App. 464 (1974).

Reindictment may be barred in some instances, however. *See supra* § 8.2E, Timing and Effect of Motions to Dismiss in District Court (discussing effect of dismissal on subsequent charges) and *infra* § 8.6, Limits on Successive Prosecution.

Cases finding fatal variance. In the following cases, the granting of a motion to dismiss at the end of the evidence was upheld on the grounds of variance between the pleading and proof.

State v. Christopher, 307 N.C. 645 (1983) (fatal variance where defendant prepared alibi defense based on indictment alleging offense occurred on a specific date, but State offered evidence showing crime might have occurred over a three-month period)

State v. Faircloth, 297 N.C. 100 (1979) (indictment charged kidnapping to facilitate flight following commission of felony of rape, while proof was that victim was kidnapped to facilitate commission of felony of rape)

State v. Best, 292 N.C. 294 (1977) (doctor who prescribed drugs wrongly charged with sale or delivery of drugs)

State v. Bell, 270 N.C. 25 (1967) (indictment charged robbery of Jean Rogers while evidence showed robbery of Susan Rogers)

State v. Hill, 247 N.C. App. 342 (2016) (indictment charged larceny from Tutti Frutti, LLC, but proof showed property belonged to the son of the owner and no evidence indicated that the store had lawful possession or custody of the property)

State v. Sergakis, 223 N.C. App. 510 (2012) (trial court committed plain error by instructing jury it could find defendant guilty of conspiracy if defendant conspired to commit felony breaking and entering or felony larceny where indictment alleged only a conspiracy to commit felony breaking or entering); *see also State v. Pringle*, 204 N.C. App. 562, 566–67 (2010) ("where an indictment charging a defendant with conspiracy names specific individuals with whom the defendant is alleged to have conspired and the evidence at trial shows the defendant may have conspired with persons other than those

named in the indictment, it is error for the trial court to instruct the jury that it may find the defendant guilty of conspiracy based upon an agreement with persons not named in the indictment"; no error in this case where indictment alleged that defendant conspired to commit robbery with a dangerous weapon with "Jimon Dollard and another unidentified male," evidence at trial did not vary from allegation in indictment, and trial court instructed jury that it could find defendant guilty if the jury found the defendant conspired with "at least one other person," which court found was in accord with material allegations in indictment and evidence at trial)

State v. Khouri, 214 N.C. App. 389 (2011) (fatal variance existed where indictment stated sexual offense occurred sometime between March 30, 2000 and December 31, 2000, but testimony showed the offense occurred in spring 2001)

State v. Langley, 173 N.C. App. 194 (2005) (finding fatal variance in possession of firearm by felon case where State alleged in indictment that defendant possessed handgun but evidence at trial showed defendant possessed sawed-off shotgun; "handgun" was a material and essential element of offense)

State v. Skinner, 162 N.C. App. 434 (2004) (fatal variance existed between the indictment and the evidence at trial where indictment alleged defendant assaulted victim with his hands, a deadly weapon; and evidence at trial indicated that the deadly weapon used was a hammer or pipe)

State v. Custis, 162 N.C. App. 715 (2004) (fatal variance existed between dates alleged in sex offense and indecent liberties indictment and evidence introduced at trial; the indictment alleged that the defendant committed the offenses on or about June 15, 2001; at trial there was no evidence of sexual acts or indecent liberties occurring on or about that date; evidence at trial suggested sexual encounters over a period of years some time before the date listed in the indictment; and defendant relied on the date alleged in the indictment to prepare alibi defense for the weekend of June 15)

State v. Bruce, 90 N.C. App. 547 (1988) (different sex act with child than that alleged in indictment)

State v. McClain, 86 N.C. App. 219 (1987) (indictment alleged kidnapping to facilitate rape and terrorize victim; court instructed jury it could convict if defendant kidnapped to inflict serious injury)

State v. Washington, 54 N.C. App. 683 (1981) (indictment charged prison escape under G.S. 148-45(b) while evidence showed failure to return from work release program in violation of G.S. 148-45(g)(1))

State v. Trollinger, 11 N.C. App. 400 (1971) (defendant charged with armed robbery but evidence was that he obtained items from trash can)

Cases where fatal variance not shown. In the following cases, convictions were upheld.

State v. Thompson, 359 N.C. 77 (2004) (no fatal variance where indictment for armed robbery designated a property owner different from the property owner shown at trial; gravamen of offense is endangering or threatening human life by firearms or other dangerous weapons in perpetration of robbery)

State v. Pickens, 346 N.C. 628 (1997) (no fatal variance where indictment alleged firing into occupied dwelling with shotgun and evidence showed firing into occupied dwelling with handgun; "gist of offense" was firing into dwelling with firearm)

State v. Westbrooks, 345 N.C. 43 (1996) (no fatal variance where indictment alleged defendant acted in concert with another to commit murder, and proof showed that defendant was accessory before fact to murder; theory of murder was "surplusage," and State was not bound by it)

State v. McNair, 253 N.C. App. 178 (2017) (no fatal variance where indictment named specific tools in prosecution for possession of burglary tools; essential element of offense is possession of housebreaking tools and specific tools named in indictment were surplusage)

State v. Bacon, 254 N.C. App. 463 (2017) (where the indictment alleged all of the stolen property belonged to the home owner and the proof showed some of the items belonged to the owner's daughter and the daughter's friend, a variance existed but did not require dismissal; allegations of property not belonging to the owner treated as surplusage)

State v. Jefferies, 243 N.C. App. 455 (2015) (no fatal variance where indictment alleged setting fire to the victim's bed, jewelry, and clothing but proof showed only burning of the bed; jewelry and clothing allegations were surplusage; no material variance between allegation of "bed" in indictment and jury instruction of "bedding")

State v. Seelig, 226 N.C. App. 147 (2013) (no fatal variance between indictment alleging that defendant obtained value from victim and evidence showed that he obtained value from victim's husband; indictment for obtaining property by false pretenses need not allege ownership of the thing of value obtained; thus allegation was surplusage)

State v. Mason, 222 N.C. App. 223 (2012) (no fatal variance where name of victim was "You Xing Lin" in indictment but Lin You Xing testified at trial; court finds defendant not surprised or disadvantaged by different order of name)

State v. Roman, 203 N.C. App. 730 (2010) (no fatal variance where warrant alleged defendant assaulted officer while he was discharging official duty of arresting defendant for communicating threats, and testimony at trial showed assault occurred when officer arrested defendant for being intoxicated and disruptive in public; reason for arrest was immaterial)

State v. Johnson, 202 N.C. App. 765 (2010) (no fatal variance where indictment alleged "Detective Dunabro" as purchaser of cocaine and evidence at trial identified purchaser as "Agent Amy Gaulden," where they were the same person; she was commonly known by both her maiden and married name)

State v. Williams, 201 N.C. App. 161 (2009) (even if there was variance between the allegation concerning the method of strangulation and the evidence at trial, variance was immaterial; method of strangulation alleged in indictment was surplusage)

Other cases. For additional cases addressing fatal variance, see Smith, *Criminal Indictment*.

J. Timing of Motions to Challenge Indictment Defects

There are two somewhat inconsistent rules governing the timing of challenges to indictments. G.S. 15A-952 states that challenges to indictments must be made before arraignment or they are waived. On the other hand, if the defect in the indictment is jurisdictional, then the error is not waivable and may be raised at any time, even post-conviction. *See State v. Wallace*, 351 N.C. 481, 503 (2000) ("where an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time"); G.S. 15A-952(d) (motion concerning jurisdiction of court or failure of pleading to charge offense may be made at any time).

It is not always easy to determine whether a defect in a pleading is jurisdictional. The first three subsections of this § 8.5, Common Pleading Defects in Superior Court—covering failure to allege a crime within the jurisdiction of the superior court, failure to allege a crime at all, and failure to set forth all essential elements of the crime—describe jurisdictional errors. *See Wallace*, 351 N.C at 503–04 (allegation that indictment failed to include all elements of crime was jurisdictional in nature). Failing to identify the victim, or misidentifying the victim, likely is also fatal. However, if a mistake concerning the identity of the victim appears technical, and did not mislead the defendant, the error may be waivable.

Misnomers regarding the defendant's name usually must be objected to before entry of plea. *See State v. Young*, 54 N.C. App. 366 (1981), *aff'd*, 305 N.C. 391 (1982). Other errors, such as an incorrect date or place, that do not change the nature of the offense charged, are not jurisdictional defects. *See, e.g., State v. Price*, 310 N.C. 596 (1984) (permissible to amend indictment to change date of offense from date victim died to date victim was shot). Duplicity and multiplicity in the pleadings are not jurisdictional defects (although jury instructions that are disjunctive may sometimes invalidate a conviction for lack of a unanimous jury verdict, and multiple punishments for overlapping offenses may be barred).

If you are dealing with an indictment that contains a jurisdictional defect, it may be advantageous to wait until during trial (after jeopardy has attached, that is, when the jury

is empaneled and sworn) or even after conviction to object to the indictment. There are several potential advantages to such a strategy. First, in certain situations, going to trial may create a double jeopardy bar to a successor prosecution. Second, if there is a mistake in the indictment and the State's proof does not conform to the allegations in the indictment, you may have a good variance claim at the end of trial. Third, if you try the case without raising any objection and the defendant is acquitted, the State is likely barred from retrying the defendant. *See Ball v. United States*, 163 U.S. 662 (1896) (acquittal upon indictment that defendant did not object to as insufficient barred second indictment for same offense).

Sometimes the remedy for a faulty indictment is not dismissal. If the indictment states the essential elements of a crime (for instance, indecent liberties with a child), but fails to allege sufficient details to prepare a defense, you should request a bill of particulars (this may be requested as alternative relief in a motion to dismiss). *See* G.S. 15A-925. If the pleading is duplicitous you should request that the State elect an offense prior to trial. If the State declines to elect, you then have grounds for dismissal. *See* G.S. 15A-924(b). The cure for pleadings where the "same" offense is charged twice or the General Assembly did not intend to impose multiple punishments (multiplicity) is to move to arrest judgment on one offense after conviction.

G.S. 15A-924(f) also provides that the defendant may move to strike allegations that are inflammatory or prejudicial surplusage.