

**2008**  
**CUMULATIVE  
SUPPLEMENT TO  
NORTH CAROLINA  
CRIMES**  
**A GUIDEBOOK ON THE ELEMENTS OF CRIME**  
JESSICA SMITH



UNC  
SCHOOL OF GOVERNMENT

The School of Government at the University of North Carolina at Chapel Hill works to improve the lives of North Carolinians by engaging in practical scholarship that helps public officials and citizens understand and improve state and local government. Established in 1931 as the Institute of Government, the School provides educational, advisory, and research services for state and local governments. The School of Government is also home to a nationally ranked graduate program in public administration and specialized centers focused on information technology, environmental finance, and civic education for youth.

As the largest university-based local government training, advisory, and research organization in the United States, the School of Government offers up to 200 courses, seminars, and specialized conferences for more than 12,000 public officials each year. In addition, faculty members annually publish approximately fifty books, book chapters, bulletins, and other reference works related to state and local government. Each day that the General Assembly is in session, the School produces the *Daily Bulletin*, which reports on the day's activities for members of the legislature and others who need to follow the course of legislation.

The Master of Public Administration Program is a full-time, two-year program that serves up to sixty students annually. It consistently ranks among the best public administration graduate programs in the country, particularly in city management. With courses ranging from public policy analysis to ethics and management, the program educates leaders for local, state, and federal governments and nonprofit organizations.

Operating support for the School of Government's programs and activities comes from many sources, including state appropriations, local government membership dues, private contributions, publication sales, course fees, and service contracts. Visit [www.sog.unc.edu](http://www.sog.unc.edu) or call 919.966.5381 for more information on the School's courses, publications, programs, and services.

Michael R. Smith, DEAN

Thomas H. Thornburg, SENIOR ASSOCIATE DEAN

Frayda S. Bluestein, ASSOCIATE DEAN FOR PROGRAMS

Todd A. Nicolet, ASSOCIATE DEAN FOR INFORMATION TECHNOLOGY

Ann Cary Simpson, ASSOCIATE DEAN FOR DEVELOPMENT AND COMMUNICATIONS

Bradley G. Volk, ASSOCIATE DEAN FOR ADMINISTRATION

#### FACULTY

Gregory S. Allison	Alyson A. Grine	Janet Mason	Jessica Smith
David N. Ammons	Milton S. Heath Jr.	Laurie L. Mesibov	Karl W. Smith
Ann M. Anderson	Norma Houston (on leave)	Christopher B. McLaughlin	Carl W. Stenberg III
A. Fleming Bell, II	Cheryl Daniels Howell	Kara A. Millonzi	John B. Stephens
Maureen M. Berner	Jeffrey A. Hughes	Jill D. Moore	Charles A. Szypszak
Mark F. Botts	Joseph E. Hunt	Jonathan Q. Morgan	Shannon H. Tufts
Joan G. Brannon	Willow S. Jacobson	Ricardo S. Morse	Vaughn Upshaw
Michael Crowell	Robert P. Joyce	C. Tyler Mulligan	A. John Vogt
Shea Riggsbee Denning	Kenneth L. Joyner	David W. Owens	Aimee N. Wall
James C. Drennan	Diane M. Juffras	William C. Rivenbark	Jeffrey B. Welty
Richard D. Ducker	David M. Lawrence	Dale J. Roenigk	Richard B. Whisnant
Robert L. Farb	Dona G. Lewandowski	John Rubin	Gordon P. Whitaker
Joseph S. Ferrell	James M. Markham	John L. Saxon	Eileen R. Youens

© 2009

School of Government

The University of North Carolina at Chapel Hill

Use of this publication for commercial purposes or without acknowledgment of its source is prohibited. Reproducing, distributing, or otherwise making available to a non-purchaser the entire publication, or a substantial portion of it, without express permission, is prohibited.

Printed in the United States of America

ISBN 978-1-56011-599-1

∞ This publication is printed on permanent, acid-free paper in compliance with the North Carolina General Statutes.

♻️ Printed on recycled paper

# TABLE OF CONTENTS

## **Introduction / ix**

- Chapter 1 **States of Mind / 1**  
Negligently (page 4) / 1
- Chapter 3 **Participants in Crime / 3**  
Principals—Acting in Concert (page 21) / 3  
Aiding and Abetting (page 22) / 3
- Chapter 4 **Punishment under Structured Sentencing / 5**  
Felonies (page 30) / 5  
Misdemeanors (page 37) / 5
- Chapter 5 **General Crimes / 7**  
Attempt (page 49) / 7  
Solicitation of Another to Commit a Felony (page 51) / 8  
Conspiracy (page 52) / 8  
Committing a Misdemeanor Because of Prejudice (page 60) / 8
- Chapter 6 **Homicide / 9**  
First-Degree Murder (page 65) / 9  
Second-Degree Murder (page 70) / 10  
Voluntary Manslaughter (page 72) / 10  
Involuntary Manslaughter (page 74) / 10  
Death by Vehicle Offenses (page 76) / 11  
    I. Felony Death by Vehicle (page 77) / 11  
    III. Repeat Felony Death by Vehicle (page 78) / 11
- Chapter 7 **Assaults / 13**  
Simple Assault (page 83) / 13  
Assault Inflicting Serious Injury (page 86) / 13  
Assault Inflicting Physical Injury by Strangulation (page 88) / 14  
Assault with a Deadly Weapon (page 88) / 14  
Assault with a Deadly Weapon with Intent to Kill (page 91) / 15  
Discharging a Barreled Weapon or Firearm into  
    Occupied Property (page 95) / 15  
Discharging a Barreled Weapon or Firearm into an Occupied Dwelling  
    or Occupied Conveyance in Operation (page 96) / 16  
Discharging a Barreled Weapon or Firearm into Occupied  
    Property Causing Serious Bodily Injury (page 97) / 16  
Assault on a Female (page 98) / 16  
Simple Assault on a Handicapped Person (page 101) / 17  
Aggravated Assault on a Handicapped Person (page 102) / 17  
Assault on a Governmental Officer or Employee (page 102) / 17  
Assault with a Firearm or Other Deadly Weapon on a Governmental Officer  
    or Employee or Company or Campus Police Officer (page 105) / 17  
Ethnic Intimidation (page 119) / 18
- Chapter 8 **Threats, Harassment, Stalking, and Violation of  
Domestic Violence Protective Orders / 19**  
Communicating Threats (page 129) / 19  
Stalking (page 136) / 19  
    I. Misdemeanor Stalking / 20  
    II. Habitual Stalking / 22  
    III. Stalking When a Court Order is in Place / 22  
Violation of a Domestic Violence Protective Order (page 138) / 23

Chapter 9	<b>Abuse and Neglect / 25</b>
	Child Abuse (Misdemeanor) (page 143) / 25
	Child Abuse—Inflicting Serious Physical Injury (Felony) (page 145) / 25
	Child Abuse—Inflicting Serious Bodily Injury or Mental or Emotional Injury (Felony) (page 146) / 27
	Child Abuse—Willful Act or Omission Showing Reckless Disregard and Causing Serious Bodily Injury (Felony) (New Crime) / 27
	Child Abuse—Willful Act or Omission Showing Reckless Disregard and Causing Serious Physical Injury (Felony) (New Crime) / 27
	Child Abuse—Prostitution (Felony) (page 147) / 28
	Child Abuse—Sexual Act (Felony) (page 148) / 28
	Contributing to a Juvenile’s Being Delinquent, Undisciplined, Abused, or Neglected (page 148) / 29
	Patient Abuse and Neglect (page 150) / 29
Chapter 10	<b>Sexual Assaults / 31</b>
	First-Degree Forcible Rape (page 157) / 31
	Second-Degree Forcible Rape (page 162) / 32
	First-Degree Statutory Rape (page 164) / 32
	Statutory Rape by an Adult (New Crime) / 32
	Statutory Rape of a Person Who Is 13, 14, or 15 Years Old (page 165) / 34
	I. Statutory Rape of a Person Who Is 13, 14, or 15 Years Old by a Defendant Who Is at Least Six Years Older Than the Victim (page 165) / 34
	First-Degree Forcible Sexual Offense (page 167) / 34
	Second-Degree Forcible Sexual Offense (page 170) / 35
	First-Degree Statutory Sexual Offense (page 171) / 35
	Statutory Sexual Offense by an Adult (New Crime) / 35
	Sexual Activity by a Substitute Parent (page 174) / 37
	Sexual Activity by a Custodian (page 176) / 37
	Sexual Activity with a Student (page 177) / 37
	Indecent Liberties with a Child (page 180) / 37
	Sexual Battery (page 187) / 38
	Solicitation of a Child by Computer to Commit an Unlawful Sex Act (page 188) / 38
	Sex Offender Crimes (Revised Title) (page 189) / 39
	I. Failure to Register, etc., as a Sex Offender (page 198) / 45
	III. Knowingly Residing Near a School or Child Care Center (page 201) / 46
	VI. Failing to Enroll in a Satellite-Based Monitoring Program (page 203) / 46
	VII. Tampering with a Satellite-Based Monitoring Device (page 203) / 46
	VIII. Accessing a Social Networking Site (New Crime) / 47
	IX. Being Present at Location Used by Minors (New Crime) / 48
Chapter 11	<b>Crime against Nature, Incest, Indecent Exposure, and Related Offenses / 49</b>
	Crime against Nature (page 207) / 49
	Incest Offenses (page 209) / 49
	I. Incest (page 209) / 49
	II. Incest with a Person Who Is under 13 (page 210) / 50
	III. Incest with a Person Who Is 13, 14, or 15 Years Old by a Defendant Who Is at Least Six Years Older Than the Victim (page 211) / 50

	IV. Incest with a Person Who Is 13, 14, or 15 Years Old by a Defendant Who Is More Than Four but Less Than Six Years Older Than the Victim (page 211) / 50
	Indecent Exposure (page 213) / 50
	II. Indecent Exposure (Felony) (page 215) / 50
	Peeping (page 216) / 50
Chapter 12	<b>Kidnapping and Related Offenses / 51</b>
	First-Degree Kidnapping (page 225) / 51
	Second-Degree Kidnapping (page 231) / 53
	Felonious Restraint (page 232) / 53
	Abduction of Children (page 233) / 53
	Human Trafficking, Involuntary Servitude, and Sexual Servitude (page 234) / 54
	III. Sexual Servitude (page 236) / 54
Chapter 13	<b>Larceny, Possession of Stolen Goods, Embezzlement, and Related Offenses / 55</b>
	Misdemeanor Larceny (page 241) / 55
	Felonious Larceny (page 246) / 55
	Possession of Stolen Goods—Misdemeanor (page 251) / 56
	Possession or Receiving of Goods Represented as Stolen (New Crime) / 56
	Receiving Stolen Goods—Misdemeanor (page 254) / 57
	Receiving Stolen Goods—Felony (page 256) / 58
	Larceny from a Merchant (New Crime) / 58
	Organized Retail Theft (New Crime) / 58
	I. Conspiracy to Commit Retail Theft (New Crime) / 59
	II. Receiving or Possessing Retail Theft Property (New Crime) / 59
	Financial Transaction Card Theft (page 263) / 60
	I. Taking or Withholding a Card (page 263) / 60
	Embezzlement (page 269) / 60
	Embezzlement by Public Officers and Trustees (page 273) / 60
	Motor Vehicle Chop Shops (New Crime) / 60
Chapter 14	<b>Robbery, Extortion, and Blackmail / 61</b>
	Common Law Robbery (page 281) / 61
	Armed Robbery (page 283) / 61
Chapter 15	<b>Burglary, Breaking or Entering, and Related Offenses / 63</b>
	First-Degree Burglary (page 293) / 63
Chapter 16	<b>Fraud, Forgery, False Pretenses, and Related Offenses / 65</b>
	Obtaining Property by False Pretenses (page 320) / 65
	Residential Mortgage Fraud (New Crime) / 65
	Food Stamp Fraud (page 353) / 66
	Fraudulently Obtaining Telephone Records (New Crime) / 67
	False Statement to Procure Insurance Benefits (page 357) / 67
Chapter 17	<b>Arson and Burning Offenses / 69</b>
	First-Degree Arson (page 371) / 69
Chapter 18	<b>Trespass, Property Damage, and Littering / 71</b>
	Injury to Real Property (page 395) / 71
	Littering (page 401) / 71

Chapter 19	<b>Disorderly Conduct, Riot, and Gang-Related Offenses (New Title)</b> / 73
	Disorderly Conduct (page 410) / 73
	IV. Disorderly Conduct by Disrupting Students (page 414) / 73
	Gang-Related Crimes (New Crime) / 73
	I. Street Gang Activity (New Crime) / 73
	II. Organizer of Street Gang Activity (New Crime) / 75
	III. Soliciting Participation in Street Gang Activity (New Crime) / 76
	IV. Soliciting Minor's Participation in Street Gang Activity (New Crime) / 77
	V. Threat to Deter Gang Withdrawal (New Crime) / 77
	VI. Threats after Gang Withdrawal (New Crime) / 78
	VII. Discharging a Firearm in Connection with a Pattern of Street Gang Activity (New Crime) / 78
Chapter 20	<b>Bombing, Terrorism, and Related Offenses</b> / 81
	Making a False Bomb Report (page 438) / 81
	I. Making a False Bomb Report as to a Public Building (page 438) / 81
	II. Making a False Bomb Report as to a Nonpublic Building or a Vehicle, Aircraft, Vessel, or Boat (page 439) / 81
	Making a False Report Concerning Mass Violence on Educational Property (New Crime) / 81
Chapter 21	<b>Perjury, Bribery, and Other Crimes Against the Administration of Justice</b> / 83
	Common Law Obstruction of Justice (page 451) / 83
	Intimidating Witnesses (page 452) / 83
	Perjury (page 455) / 84
	Resisting, Delaying, or Obstructing an Officer (page 460) / 84
	False Report to Law Enforcement Agencies or Officers (page 462) / 85
	Interfering with an Emergency Communication (page 463) / 85
Chapter 22	<b>Weapons Offenses</b> / 87
	Possession of a Firearm by a Felon (page 473) / 87
	Carrying a Concealed Weapon (page 477) / 88
	I. Carrying a Concealed Pistol or Gun (page 478) / 88
	Possession of Weapons on School Grounds (page 483) / 88
	I. Possession of Firearms (page 485) / 88
Chapter 23	<b>Prostitution, Loitering for Prostitution, and Related Offenses</b> / 89
	Promoting Prostitution of a Minor (page 499) / 89
	I. Facilitating a Minor's Prostitution (page 500) / 89
	II. Protecting a Minor's Prostitution (page 501) / 89
	Participating in the Prostitution of a Minor (page 502) / 90
	I. Soliciting a Minor for Prostitution (page 502) / 90
	II. Paying a Minor to Participate in Prostitution (page 503) / 90
	III. Paying a Minor for Prostitution under a Prior Agreement (page 504) / 90
Chapter 24	<b>Obscenity and Related Offenses</b> / 91
	Disseminating Obscenity (page 507) / 91
	Using a Minor to Assist in an Obscenity Offense (page 512) / 91
	Displaying Material Harmful to Minors (page 514) / 91
	First-Degree Sexual Exploitation of a Minor (page 519) / 92
	I. Facilitating Production (page 520) / 92

	II. Permitting Sexual Activity for Production (page 520) / 92
	III. Transporting Minor for Production (page 521) / 92
	IV. Producing Material Commercially (page 521) / 92
	Second-Degree Sexual Exploitation of a Minor (page 522) / 93
	I. Producing Material Noncommercially (page 522) / 93
	II. Circulating Material (page 523) / 93
	Third-Degree Sexual Exploitation of a Minor (page 523) / 93
Chapter 25	<b>Gambling, Bingo, and Raffles / 95</b>
	Gambling (page 536) / 95
	Promoting, Operating, or Conducting a Server-Based Electronic Game Promotion (New Crime) / 95
	Possession of Server-Based Electronic Game Terminal (New Crime) / 96
Chapter 27	<b>Drug Offenses / 99</b>
	Sale or Delivery of a Controlled Substance (page 561) / 99
	Manufacture of a Controlled Substance (page 578) / 99
	Possession of a Controlled Substance (page 579) / 99
	Possession of a Controlled Substance on Premises of a Prison or Local Confinement Facility (page 584) / 101
	Possession of a Controlled Substance with Intent to Manufacture, Sell, or Deliver (page 585) / 101
	Manufacture, Sale, Delivery, or Possession of a Controlled Substance with Intent to Manufacture, Sell, or Deliver at or Near a School, Child Care Center, or Public Park (Revised Title) (page 596) / 101
	Trafficking (page 597) / 102
	I. Trafficking in Marijuana (page 600) / 102
	V. Trafficking in Amphetamine (page 606) / 103
	VI. Trafficking in Methamphetamine (page 606) / 103
	Maintaining a Store, Dwelling, Vehicle, Boat, or Other Place for Use, Storage, or Sale of Controlled Substances (page 614) / 103
	Inhaling Toxic Fumes (page 621) / 105
	Possession of a Toxic Substance (page 622) / 105
	Sale, etc., of a Toxic Substance (page 623) / 105
	Manufacture, etc., of an Alcohol Vaporizing Device (New Crime) / 105
Chapter 28	<b>Motor Vehicle Offenses / 107</b>
	Driving While License Revoked or Disqualified (page 627) / 107
	I. Driving While License Revoked (page 629) / 107
	Impaired Driving and Related Offenses (page 634) / 107
	I. Impaired Driving (page 634) / 107
	V. Habitual Impaired Driving (page 643) / 108
	VI. Driving by a Person under 21 Years of Age after Consuming Alcohol or Drugs (page 644) / 108
	Serious Injury by a Vehicle (page 646) / 109
	I. Felony Serious Injury by a Vehicle (page 647) / 109
	Reckless Driving (page 649) / 109
	II. Reckless Driving: Endangering Persons or Property (page 651) / 109
	Hit and Run and Related Offenses (page 655) / 109
	I. Hit and Run: Driver's Failure to Stop or Remain at the Scene with a Vehicle When Personal Injury or Death Occurs (page 655) / 109
	II. Hit and Run: Driver's Failure to Give Information or Assistance When Injury or Death Occurs (page 658) / 109

III. Hit and Run: Driver's Failure to Stop or Give Information When Injury or Death is Not Apparent or Only Property Damage Occurs (page 659) / 110	
School Bus Offenses (page 666) / 110	
III. Felony Passing or Failure to Stop for a School Bus (page 668) / 110	
IV. Use of a Cell Phone When Driving a School Bus (New Crime) / 110	
Failure to Stop, Move Over, or Slow Down for an Emergency Vehicle (page 668) / 111	
III. Failure to Move Over or Slow Down for a Stopped Emergency or Public Service Vehicle (page 671) / 111	



# INTRODUCTION

This book supplements *North Carolina Crimes: A Guidebook on the Elements of Crime* (UNC School of Government, 6th ed. 2007). It includes cases decided and legislation enacted through December 31, 2008. Chapter and page numbers used throughout this supplement refer to chapters and pages in the main edition.



# CHAPTER 1

## STATES OF MIND

(PAGE 3)

### NEGLIGENTLY (PAGE 4)

A juvenile's failure to render aid to a victim who became sick after ingesting a drug provided by the juvenile constituted culpable negligence sufficient to support a finding of delinquency for involuntary manslaughter (\_\_\_ N.C. App. \_\_\_, 657 S.E.2d 894). In that case, after the victim became ill, the juvenile sent his father away, falsely stating that everything was fine; the juvenile did not act when the victim asked to go to the hospital or when the victim began foaming at the mouth; although another person called 911, the juvenile lied to the 911 operator, saying that everything was fine, and he failed to give his address to the operator; although the juvenile approached a neighbor for help, he told the neighbor not to call the police for fear of getting into trouble; when the paramedics arrived, the juvenile lied, saying that he did not know whether the victim had taken drugs.



# CHAPTER 3

## PARTICIPANTS IN CRIME

(PAGE 17)

### PRINCIPALS—ACTING IN CONCERT (PAGE 21)

#### Notes (page 21)

**Element (1) (page 21).** A defendant who participated in two crimes with an accomplice, remained in a truck during a third crime (a store robbery) and then drove away with the accomplice was constructively present during the store robbery (182 N.C. App. 365).

**Element (2) (page 21).** A homicide conviction on the theory of acting in concert was proper where the defendant and another person shared a common purpose of forcibly confronting the victim with a weapon (180 N.C. App. 527). For other cases in which the evidence was sufficient to establish a common purpose, see 187 N.C. App. 131 (the defendant, a county jail shift supervisor, shared a common purpose with another during a beating of a prisoner); 181 N.C. App. 209 (common purpose to commit larceny); 182 N.C. App. 88 (armed robbery); 183 N.C. App. 514 (armed robbery).

**Extent of criminal liability (page 22).** 172 N.C. App. 649, discussed in this note in the main edition, held that sexual assault was not a natural and probable consequence of a robbery of a business. Distinguishing that case, a recent decision held that a rape by an accomplice in the course of a residential robbery was a natural and probable consequence of the intended robbery; the defendant twice raped the victim, in the presence of the accomplice, in order to induce her boyfriend to turn over cash and drugs and he then told her to wash up in a bathroom, where she was subsequently raped by the accomplice (\_\_\_ N.C. App. \_\_\_, 661 S.E.2d 304).

### AIDING AND ABETTING (PAGE 22)

#### Notes (page 23)

**Generally (page 23).** For a case in which the defendant's money laundering activity constituted sufficient evidence to support a conviction of aiding and abetting obtaining property by false pretenses, see 186 N.C. App. 364.

**Element (2) (page 23).** To be convicted of this offense, the defendant must know that the other person was committing a crime (\_\_\_ N.C. App. \_\_\_, 656 S.E.2d 638). In a trial for aiding and abetting statutory rape, the trial court erred by denying the defendant's request for an instruction that the defendant had to

**2008 Cumulative Supplement to North Carolina Crimes**

know the victims' age; although statutory rape is a strict liability crime, aiding and abetting statutory rape is not (\_\_\_ N.C. App. \_\_\_, 656 S.E.2d 638).

**Charging issues (page 24).** The trial judge could instruct the jury on aiding and abetting even though the indictment alleged acting in concert (186 N.C. App. 364).

# CHAPTER 4

## PUNISHMENT UNDER STRUCTURED SENTENCING

(PAGE 27)

### FELONIES (PAGE 30)

#### Special Provisions (page 36)

**Firearm enhancement (page 36).** Effective December 1, 2008, for offenses committed on or after that date, 2008 legislation (S.L. 2008-214) amended the firearm enhancement in G.S. 15A-1340.16A to make it apply to deadly weapons as well as firearms.

### MISDEMEANORS (PAGE 37)

#### Special Provisions (page 40)

**Enhancement for criminal gang activity (new note).** G.S. 14-50.22, enacted in 2008 (S.L. 2008-214) and effective December 1, 2008, for all offenses committed on or after that date, provides that a person age 15 or older who is convicted of a misdemeanor committed for the benefit of, at the direction of, or in association with any criminal street gang is guilty of an offense that is one class higher than the offense committed. A Class A1 misdemeanor is enhanced to a Class I felony. New G.S. 14-50.29 provides for a conditional discharge for first offenders under the age of 18 sentenced under the criminal street gang enhancement. For a definition of the term "criminal street gang," see the note on Element (1) under "Street Gang Activity" in Chapter 19 in this supplement.





# CHAPTER 5

## GENERAL CRIMES

(PAGE 47)

### ATTEMPT (PAGE 49)

#### Notes (page 50)

**Element (1) (page 50).** For a case in which the evidence was sufficient to establish intent to commit robbery, see 184 N.C. App. 156. The evidence was sufficient to establish that the defendant intended to engage in vaginal intercourse with the victim when the defendant repeatedly asked the victim to have intercourse with him, told her that he wanted to be “inside [her]” and be “[her] first,” and performed other sexual acts on her (184 N.C. App. 553). The evidence was sufficient to establish an intent to commit rape when the defendant, whose pants were unzipped, straddled the victim and tried to pull up her shirt (187 N.C. App. 174).

**Element (2) (page 50).** For an attempted robbery case in which there was sufficient evidence of an overt act, see 184 N.C. App. 156. The evidence of an overt act was sufficient in an attempted first-degree sexual offense case when there was no violence but the evidence showed that the defendant removed his pants, walked into the room where the child victim was seated, stood in front of her, and asked her to put his penis in her mouth (182 N.C. App. 406).

**Attempted assault (new note).** Attempted assault is not a crime; because an assault includes an overt act or attempt, or the unequivocal appearance of an attempt, an attempted assault would be an attempt to attempt (181 N.C. App. 302).

**Impossibility (page 50).** The evidence established an attempt to commit indecent liberties when the defendant had the specific intent to take indecent liberties with a child he believed to be 12 years old but in fact was a law enforcement officer (\_\_\_ N.C. App. \_\_\_, 657 S.E.2d 51). The evidence was sufficient to establish attempted solicitation of a child by computer to commit an unlawful sexual act when the person solicited was an undercover officer (G.S. 14-202.3 was later amended, making it possible to commit the substantive crime if the defendant solicited someone whom the defendant believed to be a child under 16) (\_\_\_ N.C. App. \_\_\_, 657 S.E.2d 51).

**SOLICITATION OF ANOTHER TO  
COMMIT A FELONY (PAGE 51)****Notes (page 51)**

**Element (1) (page 51).** The evidence was insufficient to establish solicitation to commit murder when it showed only that the defendant had a “plan” to have the victim killed, an agreement with the killer about when he should arrive at the scene to kill the victim, and twice stated that she wanted the victim “gone”; the evidence did not show that the defendant counseled, enticed, or induced the killer to murder the victim (\_\_\_ N.C. App. \_\_\_, 656 S.E.2d 688).

**CONSPIRACY (PAGE 52)****Notes (page 53)**

**Element (1) (page 53).** Other cases in which there was sufficient evidence of an agreement include \_\_\_ N.C. App. \_\_\_, 656 S.E.2d 688 (conspiracy to commit murder), 181 N.C. App. 196 (conspiracy to commit first-degree murder), 185 N.C. App. 376 (conspiracy to traffic in cocaine by possession), and \_\_\_ N.C. App. \_\_\_, 668 S.E.2d 91 (conspiracy to traffic in marijuana by possession).

For a case in which the evidence was insufficient to establish an agreement to traffic in cocaine by transportation, see 182 N.C. App. 268 (the defendant was stopped while driving a vehicle with one passenger, cocaine was found in the trunk of the vehicle, both men were nervous, and the vehicle had an odor of air freshener; there was no evidence of conversation between the driver and the passenger, unusual movements or actions, large amounts of cash, possession of weapons, or anything else suggesting an agreement).

**COMMITTING A MISDEMEANOR BECAUSE  
OF PREJUDICE (PAGE 60)**

**Punishment (page 60).** Effective December 1, 2008, and applying to offenses committed on or after that date, 2008 legislation (S.L. 2008-197) amended G.S. 14-3(c) to increase the punishment for a Class A1 or Class 1 misdemeanor offense committed because of the victim’s race, color, religion, nationality, or country of origin from a Class I to a Class H felony.

# CHAPTER 6

## HOMICIDE

(PAGE 63)

### FIRST-DEGREE MURDER (PAGE 65)

**Statute (page 65).** In 2007 the General Assembly amended the murder statute, G.S. 14-17, to provide that a defendant convicted of first-degree murder who was under age 18 at the time of the murder may not be sentenced to death (S.L. 2007-81). Such a defendant will be sentenced to life imprisonment without parole (S.L. 2007-81). This change became effective June 14, 2007.

**Notes (page 66)**

**Element (3)(a)(ii) (page 67).** For cases in which there was sufficient evidence of a specific intent to kill, see 174 N.C. App. 745 (in order to avoid paying child support, the defendant abandoned an infant in 30-degree weather and in a remote, dilapidated shed where she would not likely be found) and \_\_\_ N.C. App. \_\_\_, 653 S.E.2d 174 (the defendant had a history of beating the victim, hit the victim without provocation on the day of the killing, told others to tell him good-bye, and told the victim to say his prayers; the cause of death was strangulation and blunt trauma; and the defendant attempted to conceal the body and evidence).

For cases in which the evidence sufficiently established premeditation and deliberation, see 168 N.C. App. 614 (the defendant attacked an unsuspecting victim and made statements indicating that he intended to kill the victim); 171 N.C. App. 504 (the wounds inflicted by the defendant were brutal, the blows were multiple, the victim had harassed the defendant, and the defendant left the scene of the crime); and \_\_\_ N.C. App. \_\_\_, 660 S.E. 2d 123 (there was sufficient time for the defendant to contemplate his actions, the defendant threatened the victim, the victim did not provoke the defendant, the victim was shot in the back, and the defendant did not surrender after the shooting).

**Element (3)(c) (page 68).** For another case supporting the statement that the crime of discharging a weapon into occupied property can support a felony murder charge, see \_\_\_ N.C. App. \_\_\_, 659 S.E.2d. 73 (rejecting the defendant's argument that the merger doctrine required a different result).

For a fuller discussion of the continuous transaction doctrine and the merger rule, see Robert L. Farb, *North Carolina Capital Case Law Handbook*, pp. 17–18 and 149–52 (UNC School of Government, 2d ed. 2004) [hereinafter *Capital Handbook*].

For an additional case supporting the statement in the last paragraph of this note that for felony-murder to apply, the defendant, co-conspirators, aiders or others acting in concert with the defendant must have committed the homicide, see 185 N.C. App. 318.

**Proximate cause (page 69).** The defendant's failure to aid the victim after providing her with a drug that made her ill and in failing to act appropriately after undertaking to provide aid was the proximate cause of the victim's death (\_\_\_ N.C. App. \_\_\_, 657 S.E.2d. 894).

**Lesser-included offenses (page 70).** For a more detailed discussion of the lesser-included offenses of first-degree murder, see *Capital Handbook* at pp. 139–43.

## SECOND-DEGREE MURDER (PAGE 70)

### Notes (page 71)

**Element (3) (page 71).** There was sufficient evidence of malice when the defendant drove knowing that his license had been revoked, took the vehicle without permission, and fled from the police (187 N.C. App. 174).

## VOLUNTARY MANSLAUGHTER (PAGE 72)

### Notes (page 72)

**Attempted voluntary manslaughter (page 73).** The following should be added at the end of the second paragraph of this note: Jury verdicts of guilty for assault with a deadly weapon inflicting serious injury and attempted voluntary manslaughter concerning the same victim are mutually exclusive when the jury rejected a felonious assault charge involving an intent to kill (174 N.C. App. 755).

**Multiple convictions (new note).** Attempted voluntary manslaughter is a lesser-included offense of a felonious assault offense that includes an element of intent to kill, and the defendant may not be convicted of both (174 N.C. App. 755).

## INVOLUNTARY MANSLAUGHTER (PAGE 74)

### Notes (page 74)

**Element (3)(b) (page 75).** For an additional case upholding a conviction based on a mishap with a firearm, see 181 N.C. App. 579.

**DEATH BY VEHICLE OFFENSES (PAGE 76)**

**Statute (page 76).** Effective August 30, 2007, the General Assembly amended G.S. 20-141.4(a6), as discussed below under “III. Repeat Felony Death by Vehicle” (S.L. 2007-493, sec. 15). To save space, the revised statute is not reproduced here.

**I. Felony Death by Vehicle (page 77)****Notes (page 77)**

**License revocation (new note).** Conviction of any offense under G.S. 20-141.4 results in a license revocation [G.S. 20-17(a)(9); S.L. 2007-493, sec. 2].

**III. Repeat Felony Death by Vehicle (page 78)**

Legislation enacted in 2007 amended G.S. 14-141.4(a6) as follows: (1) adding the requirement that pleading and proof of previous convictions must be in accordance with G.S. 15A-928, and (2) deleting the clause stating that the basis of a previous conviction under G.S. 14-17 or G.S. 14-18 is determined from the face of the indictment.



# CHAPTER 7

## ASSAULTS

(PAGE 81)

### SIMPLE ASSAULT (PAGE 83)

**Notes (page 84)**

**Forms of assault (page 84).** Delete the last sentence of the second paragraph of this note.

**Attempted assault (new note).** Attempted assault is not a crime; because an assault includes an overt act or attempt, or the unequivocal appearance of an attempt, an attempted assault would be an attempt to attempt (181 N.C. App. 302).

### ASSAULT INFLICTING SERIOUS INJURY (PAGE 86)

**Notes (page 86)**

**Element (2) (page 86).** Add the following at the end of the first paragraph: However, if reasonable minds could differ as to whether the injury was serious, it is error for the trial court to give such a peremptory instruction (183 N.C. App. 514) (error to give peremptory instruction as to gunshot wound to a leg).

Add the following to the end of the second paragraph of this note: There was sufficient evidence of serious injury when (1) a bullet went completely through the victim's leg and the victim was unable to drive to the hospital, was treated at the hospital, and suffered pain for two or three weeks (183 N.C. App. 514); (2) although the victim drove himself to the hospital and was not admitted after being shot in the knee, he received treatment, took prescribed pain medication for two weeks, had a limp for one to two weeks, and his injury took one month to heal (\_\_\_ N.C. App. \_\_\_ 664 S.E.2d 368); and (3) the victim experienced traumatic head injuries, extreme facial bruising and swelling, bleeding from her ear and nose, an eye that was swollen shut for over one month, damage to the inside of her ear and mouth, and a loss of consciousness (\_\_\_ N.C. App. \_\_\_, 667 S.E.2d 295).

## ASSAULT INFLICTING PHYSICAL INJURY BY STRANGULATION (PAGE 88)

### Notes (page 88)

**Element (2) (page 88).** Evidence of cuts and bruises on the victim's neck constituted physical injury (\_\_\_ N.C. App. \_\_\_, 654 S.E.2d 760).

**Element (3) (page 88).** The North Carolina Criminal Pattern Jury Instructions define "strangulation" as "a form of asphyxia characterized by closure of the blood vessels and/or air passages of the neck as a result of external pressure on the neck brought about by hanging, ligature, or the manual assertion of pressure" (N.C.P.I.—Crim. 208.61, n.1).

"[W]rapping one's hands around another's throat and applying pressure until the person loses consciousness" constitutes strangulation (\_\_\_ N.C. App. \_\_\_, 654 S.E.2d 760). The evidence was sufficient when it showed that the defendant grabbed the victim by the throat causing her to have difficulty breathing; the State is not required to prove that the victim had a complete inability to breathe (183 N.C. App. 36).

**Lesser-included offenses (new note).** Assault on a female is not a lesser-included offense of assault inflicting physical injury by strangulation (\_\_\_ N.C. App. \_\_\_, 653 S.E.2d 552).

## ASSAULT WITH A DEADLY WEAPON (PAGE 88)

### Notes (page 89)

**Element (2) (page 89).** The following should be added at the end of the first paragraph: The trial court did not err when it instructed the jury that a knife is a deadly weapon, where the evidence showed that the victim suffered life threatening injuries but the knife was not introduced or described in detail at trial (186 N.C. App. 182). When there is a factual issue concerning whether or not a weapon is a deadly weapon, the judge errs by failing to instruct on a lesser-included nondeadly weapon assault offense (186 N.C. App. 447).

The following should be added to the third paragraph of this note: Distinguishing 361 N.C. 207 (holding that hands and feet are not deadly weapons for purposes of robbery with a dangerous weapon), the Court of Appeals twice has held that hands and feet can be deadly weapons for purposes of assault (\_\_\_ N.C. App. \_\_\_, 657 S.E.2d 701; \_\_\_ N.C. App. \_\_\_, 667 S.E.2d 295). The evidence was sufficient to establish that the defendant's hands and feet were deadly weapons when the defendant was 65 pounds heavier than the victim and the victim had a shoe print on her back, handprint bruises on her arms, thighs, and buttocks and handprints on her neck consistent with a choke hold that could have been responsible for swelling in her mouth, tongue, and throat (\_\_\_ N.C. App. \_\_\_, 657 S.E.2d 701). The evidence was sufficient to establish that the defendant's hands were deadly weapons when the defendant was 13 years younger, 7 inches taller, and 40 pounds heavier than the victim; the defendant struck repeated blows to the victim's head and face, causing traumatic head injuries, extreme facial bruising and swelling, bleeding from the ear and nose, an eye that was swollen shut for over one month, damage to the inside of the ear and mouth, and a loss of consciousness (\_\_\_ N.C. App. \_\_\_, 667 S.E.2d 295).



A defendant's use of his hands in conjunction with water constituted a deadly weapon (186 N.C. App. 57). In that case, the defendant pushed the victim into a river, held his head underwater, and pushed the victim back underwater after the victim managed to get a breath. The court emphasized that because the defendant did not use his hands alone, the State was not required to present evidence as to the size or condition of the victim and the defendant.

The following should be added at the end of this note: There was sufficient evidence of assault with a firearm when the defendant reached for, but did not succeed in touching, a weapon that was inches from his hand (181 N.C. App. 302).

## ASSAULT WITH A DEADLY WEAPON WITH INTENT TO KILL (PAGE 91)

### Notes (page 91)

**Element (3) (page 91).** Even though the defense offered unrebutted expert testimony that the defendant could not form an intent to kill due to mental disorders and an excessive dose of medication, there was sufficient evidence as to that element given the number of stab wounds the defendant inflicted on the victims and the manner in which the stabbings took place (the defendant stabbed one victim 22 times, knocked her to the ground, got on top of her, and continued stabbing her, and he stabbed another victim five times, inflicting serious injuries) as well as the defendant's statement that he attacked one of the victims (183 N.C. App. 93).

**Multiple charges and punishments (page 91).** A defendant may be convicted and sentenced for both attempted first-degree murder and assault with a deadly weapon with intent to kill when those crimes rise out of the same event (\_\_\_ N.C. App. \_\_\_, 663 S.E.2d 340).

## DISCHARGING A BARRELED WEAPON OR FIREARM INTO OCCUPIED PROPERTY (PAGE 95)

### Notes (page 95)

**Element (1) (page 95).** The State is not required to prove that the defendant intentionally discharged the firearm at a victim or at the occupied property; this crime is a general intent crime and the intent element applies to the discharging of the firearm, not the eventual destination of the bullet (\_\_\_ N.C. App. \_\_\_, 664 S.E.2d 380).

**Element (2) (page 95).** Striking an exterior wall of an apartment building is a shooting "into" an apartment (\_\_\_ N.C. App. \_\_\_, 664 S.E.2d 380).

**Element (3) (page 95).** For another case in which there was sufficient evidence that the defendant had reasonable grounds to believe that a building was occupied, see 361 N.C. 646.

**Multiple convictions and punishments (page 96).** For an additional case supporting the statement in the note that each separate shot supports a separate conviction, see \_\_\_ N.C. App. \_\_\_, 656 S.E.2d 704).

**Related Offenses  
Not in This Chapter (page 96)**

“Discharging a Firearm in Connection with a Pattern of Street Gang Activity”  
(Chapter 19 in this supplement)

**DISCHARGING A BARRELED WEAPON OR FIREARM  
INTO AN OCCUPIED DWELLING OR OCCUPIED  
CONVEYANCE IN OPERATION (PAGE 96)**

**Related Offenses  
Not in This Chapter (page 97)**

“Discharging a Firearm in Connection with a Pattern of Street Gang Activity”  
(Chapter 19 in this supplement)

**DISCHARGING A BARRELED WEAPON OR  
FIREARM INTO OCCUPIED PROPERTY CAUSING  
SERIOUS BODILY INJURY (PAGE 97)**

**Elements (page 97)**

The second element of this offense should read:

- (2) the violation results in serious bodily injury.

**Related Offenses  
Not in This Chapter (page 97)**

“Discharging a Firearm in Connection with a Pattern of Street Gang Activity”  
(Chapter 19 in this supplement)

**ASSAULT ON A FEMALE (PAGE 98)**

**Notes (page 98)**

**Element (3) (new note).** The age requirement for this offense pertains only to the defendant; there is no age requirement for the victim (184 N.C. App. 553).

## SIMPLE ASSAULT ON A HANDICAPPED PERSON (PAGE 101)

### Related Offenses Not in This Chapter (page 101)

Injuring or killing law enforcement agency animal or assistance animal (G.S. 14-163.1)

## AGGRAVATED ASSAULT ON A HANDICAPPED PERSON (PAGE 102)

### Related Offenses Not in This Chapter (page 102)

This section should state:

See the offenses listed under “Simple Assault on a Handicapped Person.”

## ASSAULT ON A GOVERNMENTAL OFFICER OR EMPLOYEE (PAGE 102)

### Notes (page 103)

**Charging both assault on a governmental officer or employee and resisting arrest (page 104).** For an additional case supporting the statement in this note that convictions for both offenses are proper when based on different conduct, see 186 N.C. App. 382.

## ASSAULT WITH A FIREARM OR OTHER DEADLY WEAPON ON A GOVERNMENTAL OFFICER OR EMPLOYEE OR COMPANY OR CAMPUS POLICE OFFICER (PAGE 105)

### Notes (page 105)

**Element (1) (page 105).** The following should be added to this note: An assault with a firearm was accomplished when the defendant reached for, but did not succeed in touching, a weapon that was inches from his hand (181 N.C. App. 302).

**Element (2) (page 107).** When there is a factual issue as to whether a deadly weapon was used, a trial court must submit to the jury the lesser-included offense of assault on a governmental officer or employee (186 N.C. App. 57).

**ETHNIC INTIMIDATION (PAGE 119)****Related Offenses  
Not in This Chapter (page 121)**

Prohibited Secret Societies and Activities (G.S. Ch. 14, Art. 4A)

# CHAPTER 8

## THREATS, HARASSMENT, STALKING, AND VIOLATION OF DOMESTIC VIOLENCE PROTECTIVE ORDERS

(PAGE 127)

### COMMUNICATING THREATS (PAGE 129)

**Related Offenses  
Not in This Chapter (page 130)**

Prohibited Secret Societies and Activities (G.S. Ch. 14, Art. 4A)

### STALKING (PAGE 136)

Effective December 1, 2008, for offenses occurring on or after that date, 2008 legislation (S.L. 2008-167) repealed G.S. 14-277.3, the stalking statute discussed in the main volume, and enacted a new stalking statute, G.S. 14-277.3A. The following text should replace the text on pages 136–38 of the main volume. The old statute criminalized misdemeanor stalking, habitual stalking, and stalking when a court order is in place. These variations of the crime were discussed in the note on “Punishment” on page 137 in the main volume. To provide additional detail, these variations are listed as separate crimes in this supplement.

**Statute § 14-277.3A. Stalking.**

(a) Legislative Intent.—The General Assembly finds that stalking is a serious problem in this State and nationwide. Stalking involves severe intrusions on the victim’s personal privacy and autonomy. It is a crime that causes a long-lasting impact on the victim’s quality of life and creates risks to the security and safety of the victim and others, even in the absence of express threats of physical harm. Stalking conduct often becomes increasingly violent over time.

The General Assembly recognizes the dangerous nature of stalking as well as the strong connections between stalking and domestic violence and between stalking and sexual assault. Therefore, the General Assembly enacts this law to encourage effective intervention by the criminal justice system before stalking escalates into behavior that has serious or lethal consequences. The General Assembly intends to enact a stalking statute that permits the criminal justice system to hold stalkers accountable for a wide range of acts, communications, and conduct. The General Assembly recognizes that stalking includes, but is not limited to, a pattern of following, observing, or monitoring

the victim, or committing violent or intimidating acts against the victim, regardless of the means.

(b) Definitions.—The following definitions apply in this section:

- (1) Course of conduct.—Two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, is in the presence of, or follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.
- (2) Harasses or harassment.—Knowing conduct, including written or printed communication or transmission, telephone, cellular, or other wireless telephonic communication, facsimile transmission, pager messages or transmissions, answering machine or voice mail messages or transmissions, and electronic mail messages or other computerized or electronic transmissions directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose.
- (3) Reasonable person.—A reasonable person in the victim's circumstances.
- (4) Substantial emotional distress.—Significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling.

(c) Offense.—A defendant is guilty of stalking if the defendant willfully on more than one occasion harasses another person without legal purpose or willfully engages in a course of conduct directed at a specific person without legal purpose and the defendant knows or should know that the harassment or the course of conduct would cause a reasonable person to do any of the following:

- (1) Fear for the person's safety or the safety of the person's immediate family or close personal associates.
- (2) Suffer substantial emotional distress by placing that person in fear of death, bodily injury, or continued harassment.

(d) Classification.—A violation of this section is a Class A1 misdemeanor. A defendant convicted of a Class A1 misdemeanor under this section, who is sentenced to a community punishment, shall be placed on supervised probation in addition to any other punishment imposed by the court. A defendant who commits the offense of stalking after having been previously convicted of a stalking offense is guilty of a Class F felony. A defendant who commits the offense of stalking when there is a court order in effect prohibiting the conduct described under this section by the defendant against the victim is guilty of a Class H felony.

(e) Jurisdiction.—Pursuant to G.S. 15A-134, if any part of the offense occurred within North Carolina, including the defendant's course of conduct or the effect on the victim, then the defendant may be prosecuted in this State.

## I. Misdemeanor Stalking

**Statute** See G.S. 14-277.3(c) and (d), reproduced above.

**Elements** A person guilty of this offense

- (1) willfully
- (2) without legal purpose
- (3) (a) harasses another person on more than one occasion *or*  
(b) engages in a course of conduct directed at a specific person
- (4) when the person knows or should know that the harassment or course of conduct would cause
- (5) a reasonable person to
  - (b) fear for
    - (ii) the person's safety,
    - (iii) the safety of the person's immediate family, *or*
    - (iv) the safety of the person's close personal associates *or*

- (c) suffer substantial emotional distress by placing that person in fear of
  - (ii) death,
  - (iii) bodily injury, or
  - (iv) continued harassment.

**Punishment** Class A1 misdemeanor [G.S. 14-277.3A(d)]. A defendant who is sentenced to a community punishment, must be placed on supervised probation in addition to any other punishment imposed by the court. [G.S. 14-277.3A(d)].

**Notes** **Element (1).** See “Willfully” in Chapter 1, “States of Mind.”

**Element (3)(a).** G.S. 14-277.3A(b)(2) defines the terms “harasses” and “harassment” as knowing conduct directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose. The conduct can occur through written or printed communication or transmission; telephone, cellular, or other wireless telephonic communication; facsimile transmission; pager messages or transmissions; answering machine or voice mail messages or transmissions; and electronic mail messages or other computerized or electronic transmissions [G.S. 14-277.3A(b)(2)].

**Element (3)(b).** G.S. 14-277.3A(b)(1) defines the term “course of conduct” as two or more acts, including, but not limited to, those where the stalker (directly, indirectly, or through third parties) in any way is in the presence of, or follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person’s property.

**Element (5).** The term “reasonable person” refers to a reasonable person in the victim’s circumstances [G.S. 14-277.3A(b)(3)].

**Element (5)(b).** “Substantial emotional distress” means significant mental suffering or distress that may or may not require medical or other professional treatment or counseling [G.S. 14-277.3A(b)(4)].

**Sufficiency of evidence to support stalking conviction.** The following cases were decided under a prior version of the stalking statute. There was sufficient evidence of stalking when the defendant assaulted the victim when they were both students at medical school and the defendant was told not to contact the victim; the defendant later traveled to the victim’s home on three occasions and hid in the woods and watched her home; and the victim saw the defendant at the local public library and reported the incident to the sheriff’s department and expressed concern about her safety (173 N.C. App. 162). There was sufficient evidence of stalking when during an altercation with the victim, the defendant told her she would “be sorry” and the next day told her she would live to regret her conduct; knowing his presence was not welcome, the defendant drove up and down an isolated road leading to the victim’s house and told her neighbors that he had better not catch them coming from or going to her house; the defendant violated a restraining order by appearing near the victim’s workplace; the defendant told an officer he was engaged in psychological warfare against the victim; and the defendant told a third party he intended to engage in violence (157 N.C. App. 638). There was sufficient evidence of felony stalking when there was a court order requiring the defendant not to contact the victim; during a nine-month period he followed her a short distance on his bicycle about fifty times; and one night he approached her with a knife, causing her to fear for her life (168 N.C. App. 525).

**Constitutionality.** A prior version of the stalking statute was upheld in the face of a challenge that it was unconstitutionally vague (169 N.C. App. 331).

**Jurisdiction.** If any part of the offense occurred within North Carolina, including the defendant's course of conduct or the effect on the victim, then the defendant may be prosecuted in North Carolina [G.S. 14-277.3A(e)].

**Related Offenses  
Not in This Chapter**

See the offenses listed in Chapter 18, "Trespass, Property Damage, and Littering."

## II. Habitual Stalking

**Statute** See G.S. 14-277.3(c) and (d), reproduced above.

**Elements** A person guilty of this offense

- (1) willfully
- (2) without legal purpose
- (3) (a) harasses another person on more than one occasion *or*  
(b) engages in a course of conduct directed at a specific person
- (4) when the person knows or should know that the harassment or course of conduct would cause
- (5) a reasonable person to
  - (a) fear for
    - (i) the person's safety,
    - (ii) the safety of the person's immediate family, *or*
    - (iii) the safety of the person's close personal associates *or*
  - (b) suffer substantial emotional distress by placing that person in fear of
    - (i) death,
    - (ii) bodily injury, *or*
    - (iii) continued harassment, *and*
- (6) the person previously has been convicted of a stalking offense.

**Punishment** Class F felony [G.S. 14-277.3A(d)]

**Notes** **Generally.** This offense is the same as "I. Misdemeanor Stalking," above, except that for this offense Element (6) requires that the defendant have a prior stalking offense. Thus the notes to "I. Misdemeanor Stalking" apply here as well.

**Related Offenses  
Not in This Chapter**

See the offenses listed in Chapter 18, "Trespass, Property Damage, and Littering."

## III. Stalking When a Court Order is in Place

**Statute** See G.S. 14-277.3(c) and (d), reproduced above.

**Elements** A person guilty of this offense

- (1) willfully
- (2) without legal purpose
- (3) (a) harasses another person on more than one occasion *or*  
(b) engages in a course of conduct directed at a specific person
- (4) when the person knows or should know that the harassment or course of conduct would cause



- (5) a reasonable person to
  - (a) fear for
    - (i) the person's safety,
    - (ii) the safety of the person's immediate family, *or*
    - (iii) the safety of the person's close personal associates *or*
  - (b) suffer substantial emotional distress by placing that person in fear of
    - (i) death,
    - (ii) bodily injury, *or*
    - (iii) continued harassment
- (6) when there is a court order in effect prohibiting the defendant from engaging in this conduct.

**Punishment** Class H felony [G.S. 14-277.3A(d)]

**Notes** **Generally.** This offense is the same as "I. Misdemeanor Stalking," above, except that for this offense Element (6) requires that a court order be in place prohibiting the conduct. Thus the notes to "I. Misdemeanor Stalking" apply here as well.

**Element (7).** G.S. 14-277.3A(d) specifies that there be a "court order in effect prohibiting the conduct described under this section by the defendant against the victim."

**Related Offenses  
Not in This Chapter**

See the offenses listed in Chapter 18, "Trespass, Property Damage, and Littering."

## VIOLATION OF A DOMESTIC VIOLENCE PROTECTIVE ORDER (PAGE 138)

**Statute (page 138).** Effective December 1, 2008, and applying to offenses committed on or after that date, 2008 legislation (S.L. 2008-93) amended subsection (f) of G.S. 50B-4.1 to read:

(f) Unless covered under some other provision of law providing greater punishment, any person who knowingly violates a valid protective order as provided in subsection (a) of this section, after having been previously convicted of two offenses under this Chapter, shall be guilty of a Class H felony.

Effective December 1, 2007, G.S. 50B-4.1 was amended (S.L. 2007-190) by adding new subsection (g) as follows:

(g) Unless covered under some other provision of law providing greater punishment, any person who, while in possession of a deadly weapon on or about his or her person or within close proximity to his or her person, knowingly violates a valid protective order as provided in subsection (a) of this section by failing to stay away from a place, or a person, as so directed under the terms of the order, shall be guilty of a Class H felony.

**Punishment (page 139).** The note in the main text states that legislation enacted in 2001 added new subsection G.S. 50B-4.1(f) increasing the punishment for a violation of the statute to a Class H felony if the person previously has been convicted of three offenses under Chapter 50B of the General Statutes. As a result of 2008

legislation, discussed and reproduced above, that subsection now requires only two prior offenses under Chapter 50B. Pursuant to new subsection (g), reproduced above, any person who, while in possession of a deadly weapon, knowingly violates a valid protective order by failing to stay away from a place or a person as directed under the terms of the order is guilty of a Class H felony. The additional facts must be pleaded and proved beyond a reasonable doubt at trial.

This note discusses the fact that a person who commits a felony knowing that the behavior is prohibited by a valid domestic violence protective order is guilty of an offense one class higher than the felony committed. A temporary restraining order granted in a Chapter 50 civil action (divorce from bed and board) is issued pursuant to Chapter 50B and thus qualifies as a protective order for purposes of the enhanced punishment (185 N.C. App. 597, *review allowed*, 361 N.C. 697).

# CHAPTER 9

## ABUSE AND NEGLECT

(PAGE 141)

### CHILD ABUSE (MISDEMEANOR) (PAGE 143)

**Punishment** (page 143). Effective December 1, 2008, for offenses committed on or after that date, 2008 legislation (S.L. 2008-191) increased the punishment for this offense from a Class1 misdemeanor to a Class A1 misdemeanor.

### CHILD ABUSE—INFLECTING SERIOUS PHYSICAL INJURY (FELONY) (PAGE 145)

**Statute** (page 145). Effective December 1, 2008, and applying to offenses committed on or after that date, 2008 legislation (S.L. 2008-191) amended G.S. 14-318.4. The new statute is set forth below.

(a) A parent or any other person providing care to or supervision of a child less than 16 years of age who intentionally inflicts any serious physical injury upon or to the child or who intentionally commits an assault upon the child which results in any serious physical injury to the child is guilty of a Class E felony, except as otherwise provided in subsection (a3) of this section.

(a1) Any parent of a child less than 16 years of age, or any other person providing care to or supervision of the child, who commits, permits, or encourages any act of prostitution with or by the child is guilty of child abuse and shall be punished as a Class E felon.

(a2) Any parent or legal guardian of a child less than 16 years of age who commits or allows the commission of any sexual act upon the child is guilty of a Class E felony.

(a3) A parent or any other person providing care to or supervision of a child less than 16 years of age who intentionally inflicts any serious bodily injury to the child or who intentionally commits an assault upon the child which results in any serious bodily injury to the child, or which results in permanent or protracted loss or impairment of any mental or emotional function of the child, is guilty of a Class C felony.

(a4) A parent or any other person providing care to or supervision of a child less than 16 years of age whose willful act or grossly negligent omission in the care of the child shows a reckless disregard for human life is guilty of a Class E felony if the act or omission results in serious bodily injury to the child.

(a5) A parent or any other person providing care to or supervision of a child less than 16 years of age whose willful act or grossly negligent omission in the care of the child shows a reckless disregard for human life is guilty of a Class H felony if the act or omission results in serious physical injury to the child.

(b) The felony of child abuse is an offense additional to other civil and criminal provisions and is not intended to repeal or preclude any other sanctions or remedies.

(c) Abandonment of an infant less than seven days of age pursuant to G.S. 14-322.3 may be treated as a mitigating factor in sentencing for a conviction under this section involving that infant.

(d) The following definitions apply in this section:

- (1) Serious bodily injury.—Bodily injury that creates a substantial risk of death or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization.
- (2) Serious physical injury.—Physical injury that causes great pain and suffering. The term includes serious mental injury.

#### Notes (page 145)

**Elements (2)(a) and (2)(b) (page 145).** An additional case supporting the statement in this note that the State must prove only that the defendant intentionally inflicted injury that was serious and need not prove that the defendant intended to inflict serious injury is 184 N.C. App. 351. Culpable or criminal negligence can satisfy the intent element of this crime (\_\_\_ N.C. App. \_\_\_, 663 S.E.2d 453).

The evidence was sufficient to show that the defendant acted intentionally when he beat the victim with a belt for 40 to 100 minutes; the victim bled, was short of breath due to asthma, and vomited; the victim's arms were covered in bruises, his legs were swollen, and his buttocks were black and blue; the victim was hospitalized after the incident and was in pain for two weeks; and a medical expert testified that the victim's injuries were moderately to seriously severe, could have resulted in complications, and were nonaccidental. (184 N.C. App. 351).

**Element (3) (page 145).** Delete the first paragraph of this note and the first sentence of the second paragraph and replace it with the following text: Effective December 1, 2008, for offenses committed on or after that date, the statute defines "serious physical injury" as physical injury that causes great pain and suffering and specifies that it includes serious mental injury (S.L. 2008-191).

The evidence established serious physical injury when the defendant beat the victim with a belt for 40 to 100 minutes; the victim bled, was short of breath due to asthma, and vomited; the victim's arms were covered in bruises, his legs were swollen, and his buttocks were black and blue; the victim was hospitalized after the incident and was in pain for two weeks; and a medical expert testified that the victim's injuries were moderately to seriously severe and could have resulted in complications (184 N.C. App. 351).

#### Related Offenses Not in This Chapter (page 146)

"Assault Inflicting Serious Injury" (Chapter 7)

## CHILD ABUSE—INFLICTING SERIOUS BODILY INJURY OR MENTAL OR EMOTIONAL INJURY (FELONY) (PAGE 146)

### Notes (page 146)

**Element (3)(a) (page 146).** As a result of 2008 legislation (S.L. 2008-191), the citation for the definition of “serious bodily injury” should be to G.S. 14-318.4d)(1).

## CHILD ABUSE—WILLFUL ACT OR OMISSION SHOWING RECKLESS DISREGARD AND CAUSING SERIOUS BODILY INJURY (FELONY) (NEW CRIME)

Effective December 1, 2008, for offenses committed on or after that date, 2008 legislation (S.L. 2008-191) created this new offense.

**Statute** See subsection (a4) of G.S. 14-318.4, reproduced above in this supplement.

**Elements** A person guilty of this offense

- (1) (a) is a parent of a child less than 16 years of age *or*
- (b) is a person providing care or supervision to a child less than 16 years of age *and*
- (2) whose
  - (a) willful act *or*
  - (b) grossly negligent omission in the care of a child
- (3) shows a reckless disregard for human life *and*
- (4) results in serious bodily injury to a child.

**Punishment** Class E felony

**Notes** **Element (4).** For the definition of “serious bodily injury,” see the note to Element (3)(a) under “Child Abuse Inflicting Serious Bodily Injury or Mental or Emotional Injury (Felony).”

### Related Offenses Not in This Chapter

See the offenses listed under “Child Abuse (Misdemeanor)”  
“Assault Inflicting Serious Bodily Injury” (Chapter 7)

## CHILD ABUSE—WILLFUL ACT OR OMISSION SHOWING RECKLESS DISREGARD AND CAUSING SERIOUS PHYSICAL INJURY (FELONY) (NEW CRIME)

Effective December 1, 2008, for offenses committed on or after that date, 2008 legislation (S.L. 2008-191) created this new offense.

**Statute** See subsection (a5) of G.S. 14-318.4, reproduced above in this supplement.

**2008 Cumulative Supplement to North Carolina Crimes**

- Elements** A person guilty of this offense
- (1) (a) is a parent of a child less than 16 years of age *or*
    - (b) is a person providing care or supervision to a child less than 16 years of age *and*
  - (2) whose
    - (a) willful act *or*
    - (b) grossly negligent omission in the care of a child
  - (3) shows a reckless disregard for human life *and*
  - (4) results in serious physical injury to a child.

**Punishment** Class H felony

**Notes** **Generally.** This offense is the same as “Child Abuse—Willful Act or Omission Showing Reckless Disregard and Causing Serious Bodily Injury (Felony),” above, except for the nature of the injury sustained. For that offense the injury must be serious bodily injury. For this one it must be serious physical injury.

**Element (4).** For the definition of “serious physical injury,” see the note on Element (3) under “Child Abuse Inflicting Serious Physical Injury (Felony),” above, in this supplement.

**Related Offenses  
Not in This Chapter**

See the offenses listed under “Child Abuse (Misdemeanor)”  
“Assault Inflicting Serious Injury” (Chapter 7)

### **CHILD ABUSE—PROSTITUTION (FELONY) (PAGE 147)**

**Notes (page 147)**

**Sex offender registration required (new note).** As a result of 2008 legislation (S.L. 2008-220), this offense now is defined as a “sexually violent offense” requiring registration as a sex offender [G.S. 14-208.6(5)].

### **CHILD ABUSE—SEXUAL ACT (FELONY) (PAGE 148)**

**Notes (page 148)**

**Sex offender registration required (new note).** As a result of 2008 legislation (S.L. 2008-220), this offense now is defined as a “sexually violent offense” requiring registration as a sex offender [G.S. 14-208.6(5)].

**CONTRIBUTING TO A JUVENILE'S BEING  
DELINQUENT, UNDISCIPLINED, ABUSED,  
OR NEGLECTED (PAGE 148)****Related Offenses  
Not in This Chapter (page 150)**

Selling alcohol to underage person [G.S. 18B-302(a)]  
Giving alcohol to underage person [G.S. 18B-302(a1)]

**PATIENT ABUSE AND NEGLECT (PAGE 150)**

**Punishment (page 150).** Effective December 1, 2007, the General Assembly amended G.S. 14-32.2(b) to increase, from a Class A1 misdemeanor to a Class H felony, the punishment for this offense when Elements (1) through (4) and (5)(d) exist (S.L. 2007-188).





# CHAPTER 10

## SEXUAL ASSAULTS

(PAGE 155)

### FIRST-DEGREE FORCIBLE RAPE (PAGE 157)

#### Notes (page 158)

**Element (1) (page 158).** The victim's testimony that the defendant "had sex" with her, along with other evidence, was sufficient to establish penetration (183 N.C. App. 369).

**Element (3) (page 158).** Constructive force could be inferred from the parent-child relationship between the defendant and the victim (184 N.C. App. 553).

**Element (5)(a) (page 159).** The evidence is sufficient if it establishes that the defendant used or displayed the weapon (or what reasonably appeared to be a dangerous or deadly weapon) in the course of a continuous transaction that included the penetration (\_\_\_ N.C. App. \_\_\_, 663 S.E.2d 898).

A defendant's hands are not dangerous or deadly weapons for purposes of first-degree rape or first-degree sexual offense; an "external" weapon must be used (\_\_\_ N.C. App. \_\_\_, 654 S.E.2d 711).

The evidence was sufficient to establish that the defendant displayed an article which the victim reasonably believed to be a dangerous or deadly weapon; the victim testified that the defendant grabbed her, told her he would kill her, and reached into his pocket to get something; although the victim did not see the object, she testified that it was shiny and silver and that she thought it was a knife (\_\_\_ N.C. App. \_\_\_, 663 S.E.2d 898).

When the State alleges that use or display of a dangerous or deadly weapon elevates a rape or sexual offense to first-degree and the jury is not instructed on the theory of acting in concert or aiding and abetting, the evidence must support a finding that the defendant personally used or displayed the weapon (\_\_\_ N.C. App. \_\_\_, 653 S.E.2d 560).

**Attempt (page 160).** For a case in which the evidence was not sufficiently conflicting on penetration as to require an instruction on attempted rape, see 187 N.C. App. 140.

**Lesser-included offenses (page 160).** Sexual battery is not a lesser-included offense of first-degree or second-degree rape (\_\_\_ N.C. App. \_\_\_, 654 S.E.2d 28; 186 N.C. App. 116).

**Multiple prosecutions (page 161).** A defendant may not be convicted for both forcible rape and statutory rape based on the same act; the same rule applies to sexual offenses (185 N.C. App. 423).

**Punishment for separate acts (page 161).** The defendant was properly convicted of two counts of rape when he penetrated the victim on a couch, withdrew, and penetrated her again on the floor (\_\_\_ N.C. App. \_\_\_, 661 S.E.2d 304).

**Sex offender registration required (new note).** This offense is a sexually violent offense triggering registration requirements under the sex offender registration statutes [G.S. 14-208.6(5)].

## SECOND-DEGREE FORCIBLE RAPE (PAGE 162)

### Notes (page 163)

**Element (3)(b) (page 163).** A victim is not mentally incapacitated when the victim himself or herself is responsible for the mental incapacitation (for example by ingesting alcohol); however, such a victim might be physically helpless (\_\_\_ N.C. App. \_\_\_, 664 S.E.2d 339).

There was sufficient evidence that the victim was physically helpless when she was 83 years old, suffered from severe arthritis, walked with the assistance of a walker, needed assistance with everyday household chores, and could only go down steps or do daily errands with assistance (\_\_\_ N.C. App. \_\_\_, 666 S.E.2d 809).

**Sex offender registration required (new note).** This offense is a sexually violent offense triggering registration requirements under the sex offender registration statutes [G.S. 14-208.6(5)].

## FIRST-DEGREE STATUTORY RAPE (PAGE 164)

### Notes (page 164)

**Multiple prosecutions (page 165).** This offense is a lesser-included offense of "Statutory Rape by an Adult," discussed immediately below [G.S. 14-27.2A(e)].

**Sex offender registration required (new note).** This offense is a sexually violent offense triggering registration requirements under the sex offender registration statutes [G.S. 14-208.6(5)].

## STATUTORY RAPE BY AN ADULT (NEW CRIME)

Legislation enacted in 2008 (S.L. 2008-117) and effective for offenses committed on or after December 1, 2008, created this new offense.

### Statute § 14-27.2A. Rape of a child; adult offender.

(a) A person is guilty of rape of a child if the person is at least 18 years of age and engages in vaginal intercourse with a victim who is a child under the age of 13 years.

(b) A person convicted of violating this section is guilty of a Class B1 felony and shall be sentenced pursuant to Article 81B of Chapter 15A of the General Statutes, except that in no case shall the person receive an active punishment of less than 300 months, and except as provided in subsection (c) of this section. Following the termination of active punishment, the person shall be enrolled in satellite-based monitoring for life pursuant to Part 5 of Article 27A of Chapter 14 of the General Statutes.

(c) Notwithstanding the provisions of Article 81B of Chapter 15A of the General Statutes, the court may sentence the defendant to active punishment for a term of months greater than that authorized pursuant to G.S. 15A-1340.17, up to and including life imprisonment without parole, if the court finds that the nature of the offense and the harm inflicted are of such brutality, duration, severity, degree, or scope beyond that normally committed in such crimes, or considered in basic aggravation of these crimes, so as to require a sentence to active punishment in excess of that authorized pursuant to G.S. 15A-1340.17. If the court sentences the defendant pursuant to this subsection, it shall make findings of fact supporting its decision, to include matters it considered as egregious aggravation. Egregious aggravation can include further consideration of existing aggravating factors where the conduct of the defendant falls outside the heartland of cases even the aggravating factors were designed to cover. Egregious aggravation may also be considered based on the extraordinarily young age of the victim, or the depraved torture or mutilation of the victim, or extraordinary physical pain inflicted on the victim.

(d) Upon conviction, a person convicted under this section has no rights to custody of or rights of inheritance from any child born as a result of the commission of the rape, nor shall the person have any rights related to the child under Chapter 48 or Subchapter 1 of Chapter 7B of the General Statutes.

(e) The offense under G.S. 14-27.2(a)(1) is a lesser included offense of the offense in this section.

- Elements** A person guilty of this offense
- (1) has vaginal intercourse
  - (2) with a child under the age of 13 years *and*
  - (3) the defendant is at least 18 years old.

**Punishment** Class B1 felony, except that the offense is subject to a mandatory minimum of at least 300 months of active time [G.S. 14-27.2A(b)]. New G.S. 14-27.2A(c) provides that a defendant may be sentenced to an active term above that normally provided for a Class B1 felony if the judge finds egregious aggravation. However, this procedure appears to run afoul of the United States Supreme Court decision in *Blakely v. Washington* (542 U.S. 296) (holding that any factor, other than a prior conviction, that increases punishment beyond the prescribed statutory maximum must be submitted to the jury and proved beyond a reasonable doubt).

**Notes** **Generally.** This offense is the same as “Statutory Sexual Offense by an Adult,” below in this supplement, except for the sexual conduct involved. For statutory sexual offense by an adult, a sexual act other than vaginal intercourse is required. For this offense, vaginal intercourse is required.

**Element (1).** See the note on Element (1) under “First-Degree Forcible Rape” in the main volume.

**Element (2).** See the note on Element (2) under “First-Degree Statutory Rape” in the main volume.

**Element (3).** See the note on Element (4) under “First-Degree Statutory Rape” in the main volume.

**Sex offender registration required.** The 2008 legislation (S.L. 2008-117) that created this crime also provides that it is a sexually violent offense requiring registration as a sex offender [G.S. 14-208.6(5)].

**Lifetime satellite-based monitoring required.** Following the termination of active punishment, a person convicted of this offense must submit to satellite-based monitoring for life under the sex offender monitoring statutes [G.S. 14-27.2A(b)].

**Convicted defendant has no rights of custody or inheritance.** A person convicted of this crime loses all custody and inheritance rights from any child born as a result of the commission of the rape and has no rights under the adoption or abuse, neglect, and dependency statutes [G.S. 14-27.2A(d)].

**Lesser-included offenses.** First-degree statutory rape is a lesser-included offense of this crime [G.S. 14-27.2A(e)].

## STATUTORY RAPE OF A PERSON WHO IS 13, 14, OR 15 YEARS OLD (PAGE 165)

### I. Statutory Rape of a Person Who Is 13, 14, or 15 Years Old by a Defendant Who Is at Least Six Years Older Than the Victim (page 165)

#### Notes (page 166)

**Element (3) (page 166).** The last sentence of this note cites a case holding that there was sufficient evidence that the defendant was more than six years older than the victim when the victim testified that the defendant was her biological father and it was biologically impossible for the defendant to be less than six years older than the victim and to be her father. Another case supporting that statement is \_\_\_ N.C. App. \_\_\_, 656 S.E.2d 663.

**Sex offender registration required (new note).** This offense is a sexually violent offense triggering registration requirements under the sex offender registration statutes [G.S. 14-208.6(5)].

## FIRST-DEGREE FORCIBLE SEXUAL OFFENSE (PAGE 167)

#### Notes (page 168)

**Attempt (page 169).** For a case in which the evidence on penetration was not conflicting and did not require an instruction on attempted anal intercourse, see \_\_\_ N.C. App. \_\_\_, 653 S.E.2d 560.

**Punishment for separate acts (page 169).** This note includes a “but see” cite to 132 N.C. App. 453 as a case holding that when both cunnilingus and inserting an object into a minor’s genital area occurred during a single transaction, only one conviction was allowed. The North Carolina Court of Appeals has since noted that the cited case dealt with the separate issue of unanimity of the jury verdict (186 N.C. App. 308 at n.5). That case also stated in dictum that a defendant may be punished for separate and distinct sexual acts that occurred in a single transaction [186 N.C. App. 308 at n.7 (stating that even if the defendant had preserved his challenge to convictions for both cunnilingus and fellatio that occurred in the same transaction, it would fail)]. That dictum in turn cited a recent indecent liberties case, which held that the defendant’s action of engaging in three distinct sexual acts on the victim in one transaction—fondling her breasts, performing oral sex on her, and having sexual intercourse with her—supported

three separate indecent liberties convictions [182 N.C. App. 698, 643 S.E.2d 34 (distinguishing 178 N.C. App. 337 by stating that in that case the defendant's actions all involved the same sexual contact—touching—whereas this case involved three distinct sexual acts)].

**Sex offender registration required (new note).** This offense is a sexually violent offense triggering registration requirements under the sex offender registration statutes [G.S. 14-208.6(5)].

## SECOND-DEGREE FORCIBLE SEXUAL OFFENSE (PAGE 170)

### Notes (page 170)

**Sex offender registration required (new note).** This offense is a sexually violent offense triggering registration requirements under the sex offender registration statutes [G.S. 14-208.6(5)].

## FIRST-DEGREE STATUTORY SEXUAL OFFENSE (PAGE 171)

### Notes (page 172)

**Multiple prosecutions (page 172).** This offense is a lesser-included offense of "Statutory Sexual Offense by an Adult," discussed immediately below [G.S. 14-27.4(d)].

**Sex offender registration required (new note).** This offense is a sexually violent offense triggering registration requirements under the sex offender registration statutes [G.S. 14-208.6(5)].

## STATUTORY SEXUAL OFFENSE BY AN ADULT (NEW CRIME)

Legislation enacted in 2008 (S.L. 2008-117) and effective for offenses committed on or after December 1, 2008, created this new offense.

### Statute § 14-27.4A. Sexual offense with a child; adult offender.

(a) A person is guilty of sexual offense with a child if the person is at least 18 years of age and engages in a sexual act with a victim who is a child under the age of 13 years.

(b) A person convicted of violating this section is guilty of a Class B1 felony and shall be sentenced pursuant to Article 81B of Chapter 15A of the General Statutes, except that in no case shall the person receive an active punishment of less than 300 months, and except as provided in subsection (c) of this section. Following the termination of active punishment, the person shall be enrolled in satellite-based monitoring for life pursuant to Part 5 of Article 27A of Chapter 14 of the General Statutes.

(c) Notwithstanding the provisions of Article 81B of Chapter 15A of the General Statutes, the court may sentence the defendant to active punishment for a term of months greater than that authorized pursuant to G.S. 15A-1340.17, up to and including life imprisonment without parole, if the court finds that the nature of the offense and the harm inflicted are of such brutality, duration, severity, degree, or scope beyond that normally committed in such crimes, or considered in basic aggravation of these crimes, so as to require a sentence to active punishment in excess of that authorized pursuant to G.S. 15A-1340.17. If the court sentences the defendant pursuant to this subsection, it shall make findings of fact supporting its decision, to include matters it considered as egregious aggravation. Egregious aggravation can include further consideration of existing aggravating factors where the conduct of the defendant falls outside the heartland of cases even the aggravating factors were designed to cover. Egregious aggravation may also be considered based on the extraordinarily young age of the victim, or the depraved torture or mutilation of the victim, or extraordinary physical pain inflicted on the victim.

(d) The offense under G.S. 14-27.4(a)(1) is a lesser included offense of the offense in this section.

- Elements** A person guilty of this offense
- (1) engages in a sexual act other than vaginal intercourse
  - (2) with a child under the age of 13 years *and*
  - (3) the defendant is at least 18 years old.

**Punishment** Class B1 felony, except that the offense is subject to a mandatory minimum of 300 months of active time [G.S. 14-27.4A(b)]. New G.S. 14-27.4A(c) provides that a defendant may be sentenced to an active term above that normally provided for a Class B1 felony if the judge finds egregious aggravation. However, this procedure appears to run afoul of the United States Supreme Court decision in *Blakely v. Washington* (542 U.S. 296) (holding that any factor, other than a prior conviction, that increases punishment beyond the prescribed statutory maximum must be submitted to the jury and proved beyond a reasonable doubt).

**Notes** **Generally.** This offense is the same as “Statutory Rape by an Adult,” above in this supplement, except for the sexual conduct involved. For statutory rape by an adult, vaginal intercourse is required. For this offense, a sexual act other than vaginal intercourse is required.

**Element (1).** See the note on Element (1) under “First-Degree Forcible Sexual Offense” in the main volume.

**Element (2).** See the note on Element (2) under “First-Degree Statutory Rape” in the main volume.

**Element (3).** See the note on Element (4) under “First-Degree Statutory Rape” in the main volume.

**Sex offender registration required.** The 2008 legislation (S.L. 2008-117) that created this crime also provides that it is a sexually violent offense requiring registration as a sex offender [G.S. 14-208.6(5)].

**Lifetime satellite-based monitoring required.** Following the termination of active punishment, a person convicted of this offense must submit to satellite-based monitoring for life under the sex offender monitoring statutes [G.S. 14-27.4A(b)].

**Lesser-included offenses.** First-degree statutory sex offense is a lesser-included offense of this crime [G.S. 14-27.4A(d)].

## SEXUAL ACTIVITY BY A SUBSTITUTE PARENT (PAGE 174)

### Notes (page 175)

**Sex offender registration required (new note).** This offense is a sexually violent offense triggering registration requirements under the sex offender registration statutes [G.S. 14-208.6(5)].

## SEXUAL ACTIVITY BY A CUSTODIAN (PAGE 176)

### Notes (page 176)

**Element (1) (page 176).** A mental health clinician employed by an independent contractor who provided services to prisoners in a local jail was an agent of the sheriff and as such could be convicted of this crime; an agent “is one who acts for or in place of another by authority from him” (362 N.C. 162).

**Sex offender registration required (new note).** This offense is a sexually violent offense triggering registration requirements under the sex offender registration statutes [G.S. 14-208.6(5)].

## SEXUAL ACTIVITY WITH A STUDENT (PAGE 177)

G.S. 14-208.6(5) includes G.S. 27.7 within the definition of sexually violent offenses that trigger registration requirements under the sex offender registration statutes. However, it has been suggested that when the General Assembly enacted the G.S. 27.7(b) offenses, it may not have intended for them to trigger registration requirements. For more information, see John Rubin, *Determining the Defendant’s Registration, Satellite Monitoring, and Other Obligations under the Sex Offender Laws*, at p.7 n. \* (Nov. 2008) available online at [www.sog.unc.edu/programs/crimlaw/Sex%20Offender%20Handout.pdf](http://www.sog.unc.edu/programs/crimlaw/Sex%20Offender%20Handout.pdf).

## INDECENT LIBERTIES WITH A CHILD (PAGE 180)

### Notes (page 180)

**General discussion of Elements (2)(a) and (2)(b) (page 180).** The defendant’s act of masturbating while lying in a bed with the victim and watching a pornographic movie constituted an indecent liberty even though the defendant did not touch the victim (182 N.C. App. 316). The defendant’s act of undressing a child and exposing his penis to her was sufficient to support a conviction (\_\_\_ N.C. App. \_\_\_, 660 S.E.2d 82, *temporary stay allowed*, \_\_\_ N.C. \_\_\_, 663 S.E.2d 858).

The defendant’s act of “french kissing” the victim constituted a lewd or lascivious act (182 N.C. App. 316).

There was insufficient evidence to support an indecent liberties conviction when the victim, who testified to many acts performed by the defendant, provided no testimony in support of this charge; the only evidence supporting the charge was a doctor's testimony that the victim "described that [the defendant] wanted her to perform fellatio, or put his penis in her mouth, but that she didn't want to do that"; the doctor's testimony raised only a suspicion or conjecture (184 N.C. App. 553).

**Element (2)(a)(i) (page 181).** For another case in which there was sufficient evidence that the defendant assaulted the victim for the purpose of sexual desire, see 185 N.C. App. 423.

**Multiple prosecutions (page 182).** The defendant's acts of engaging in three distinct sexual acts on the victim in one transaction—fondling her breasts, performing oral sex on her, and having sexual intercourse with her—supported three separate indecent liberties convictions (182 N.C. App. 698). The court distinguished 178 N.C. App. 337, discussed in the text, on grounds that there the defendant's actions all involved the same sexual contact—touching—whereas the case before it involved three distinct sexual acts (182 N.C. App. 698).

**Sex offender registration required (new note).** This offense is a sexually violent offense triggering registration requirements under the sex offender registration statutes [G.S. 14-208.6(5)].

## SEXUAL BATTERY (PAGE 187)

### Notes (page 188)

**Element (2) (page 188).** Sexual contact does not require penetration (\_\_\_ N.C. App. \_\_\_, 658 S.E.2d 529).

**Element (3)(a) (page 188).** Constructive force was present sufficient to sustain a conviction when the defendant, a massage therapist, engaged in sexual contact with a client; an "implicit threat" was delivered through the defendant's abuse of his position of trust and relative authority as a professional massage therapist (\_\_\_ N.C. App. \_\_\_, 658 S.E.2d 529).

**Relationship to rape (new note).** Sexual battery is not a lesser-included offense of second-degree rape (186 N.C. App. 116).

**Sex offender registration required (new note).** This offense is a sexually violent offense triggering registration requirements under the sex offender registration statutes [G.S. 14-208.6(5)].

## SOLICITATION OF A CHILD BY COMPUTER TO COMMIT AN UNLAWFUL SEX ACT (PAGE 188)

**Statute (page 188).** Effective December 1, 2008, for offenses occurring on or after that date, 2008 legislation (S.L. 2008-218) amended subsection (c) of the statute. The new provision states:



- (c) Punishment.—A violation of this section is punishable as follows:
- (1) A violation is a Class H felony except as provided by subdivision (2) of this subsection.
  - (2) If either the defendant, or any other person for whom the defendant was arranging the meeting in violation of this section, actually appears at the meeting location, then the violation is a Class G felony.

**Punishment (page 189).** Class H felony [G.S. 14-202.3(c)(1)]. If either the defendant or any other person for whom the defendant was arranging the meeting actually appears at the meeting location, then the violation is a Class G felony [G.S. 14-202.3(c)(2)]. If the prosecution pursues the new Class G felony version of this offense, the additional fact—that the defendant or someone for whom the defendant was arranging the meeting actually appeared at the meeting location—must be alleged in the indictment and proved beyond a reasonable doubt to a jury.

**Notes (page 189)**

**Sex offender registration required (new note).** This offense is a sexually violent offense triggering registration requirements under the sex offender registration statutes [G.S. 14-208.6(5)].

## SEX OFFENDER CRIMES (REVISED TITLE) (PAGE 189)

**Statute (page 189).** Legislation enacted in 2007 and 2008 amended a number of the provisions related to the registration offenses and enacted several new provisions (S.L. 2007-213; S.L. 2008-117; S.L. 2008-220). These amendments are discussed in detail in Chapter 7, “Criminal Law and Procedure,” in *North Carolina Legislation 2007* (UNC School of Government, 2007), available online at [www.sog.unc.edu/pubs/nclegis/nclegis2007/index.html](http://www.sog.unc.edu/pubs/nclegis/nclegis2007/index.html), and in Chapter 6, “Criminal Law and Procedure,” in *North Carolina Legislation 2008* (UNC School of Government, 2008), available online at [www.sog.unc.edu/pubs/nclegis/nclegis2008/index.html](http://www.sog.unc.edu/pubs/nclegis/nclegis2008/index.html). This supplement discusses the significant changes affecting the elements of the sex offender crimes.

Two pieces of 2008 legislation amended G.S. 14-208.6 (S.L. 2007-117 and 2008-220). The revised statute is reproduced below.

**§ 14-208.6. Definitions.**

The following definitions apply in this Article:

- (1a) “Aggravated offense” means any criminal offense that includes either of the following: (i) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim of any age through the use of force or the threat of serious violence; or (ii) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim who is less than 12 years old.
- (1b) “County registry” means the information compiled by the sheriff of a county in compliance with this Article.
- (1c) “Division” means the Division of Criminal Information of the Department of Justice.
- (1d) “Electronic mail” means the transmission of information or communication by the use of the Internet, a computer, a facsimile machine, a pager, a cellular telephone, a video recorder, or other electronic means sent to a person identified by a unique address or address number and received by that person.
- (1e) “Employed” includes employment that is full-time or part-time for a period of time exceeding 14 days or for an aggregate period of time exceeding 30 days

- during any calendar year, whether financially compensated, volunteered, or for the purpose of government or educational benefit.
- (1f) "Entity" means a business or organization that provides Internet service, electronic communications service, remote computing service, online service, electronic mail service, or electronic instant message or chat services whether the business or organization is within or outside the State.
- (1g) "Instant Message" means a form of real-time text communication between two or more people. The communication is conveyed via computers connected over a network such as the Internet.
- (1h) "Institution of higher education" means any postsecondary public or private educational institution, including any trade or professional institution, college, or university.
- (1i) "Internet" means the global information system that is logically linked together by a globally unique address space based on the Internet Protocol or its subsequent extensions; that is able to support communications using the Transmission Control Protocol/Internet Protocol suite, its subsequent extensions, or other Internet Protocol compatible protocols; and that provides, uses, or makes accessible, either publicly or privately, high-level services layered on the communications and related infrastructure described in this subdivision.
- (1j) "Mental abnormality" means a congenital or acquired condition of a person that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of others.
- (1k) "Nonresident student" means a person who is not a resident of North Carolina but who is enrolled in any type of school in the State on a part-time or full-time basis.
- (1l) "Nonresident worker" means a person who is not a resident of North Carolina but who has employment or carries on a vocation in the State, on a part-time or full-time basis, with or without compensation or government or educational benefit, for more than 14 days, or for an aggregate period exceeding 30 days in a calendar year.
- (1m) "Offense against a minor" means any of the following offenses if the offense is committed against a minor, and the person committing the offense is not the minor's parent: G.S. 14-39 (kidnapping), G.S. 14-41 (abduction of children), and G.S. 14-43.3 (felonious restraint). The term also includes the following if the person convicted of the following is not the minor's parent: a solicitation or conspiracy to commit any of these offenses; aiding and abetting any of these offenses.
- (1n) "Online identifier" means electronic mail address, instant message screen name, user ID, chat or other Internet communication name, but it does not mean social security number, date of birth, or pin number.
- (2) "Penal institution" means:
- a. A detention facility operated under the jurisdiction of the Division of Prisons of the Department of Correction;
  - b. A detention facility operated under the jurisdiction of another state or the federal government; or
  - c. A detention facility operated by a local government in this State or another state.
- (2a) "Personality disorder" means an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has an onset in adolescence or early adulthood, is stable over time, and leads to distress or impairment.
- (2b) "Recidivist" means a person who has a prior conviction for an offense that is described in G.S. 14-208.6(4).
- (3) "Release" means discharged or paroled.
- (4) "Reportable conviction" means:
- a. A final conviction for an offense against a minor, a sexually violent offense, or an attempt to commit any of those offenses unless the conviction is for aiding and abetting. A final conviction for aiding and abetting is a reportable conviction only if the court sentencing the individual finds that the

- registration of that individual under this Article furthers the purposes of this Article as stated in G.S. 14-208.5.
- b. A final conviction in another state of an offense, which if committed in this State, is substantially similar to an offense against a minor or a sexually violent offense as defined by this section, or a final conviction in another state of an offense that requires registration under the sex offender registration statutes of that state.
  - c. A final conviction in a federal jurisdiction (including a court martial) of an offense, which is substantially similar to an offense against a minor or a sexually violent offense as defined by this section.
  - d. A final conviction for a violation of G.S. 14-202(d), (e), (f), (g), or (h), or a second or subsequent conviction for a violation of G.S. 14-202(a), (a1), or (c), only if the court sentencing the individual issues an order pursuant to G.S. 14-202(l) requiring the individual to register.
- (5) "Sexually violent offense" means a violation of G.S. 14-27.2 (first degree rape), G.S. 14-27A (rape of a child; adult offender), G.S. 14-27.3 (second degree rape), G.S. 14-27.4 (first degree sexual offense), G.S. 14-27.4A (sex offense with a child; adult offender), G.S. 14-27.5 (second degree sexual offense), G.S. 14-27.5A (sexual battery), G.S. 14-27.6 (attempted rape or sexual offense), G.S. 14-27.7 (intercourse and sexual offense with certain victims), G.S. 14-27.7A(a) (statutory rape or sexual offense of person who is 13-, 14-, or 15-years-old where the defendant is at least six years older), G.S. 14-43.13 (subjecting or maintaining a person for sexual servitude), G.S. 14-178 (incest between near relatives), G.S. 14-190.6 (employing or permitting minor to assist in offenses against public morality and decency), G.S. 14-190.9(a1)(felonious indecent exposure), G.S. 14-190.16 (first degree sexual exploitation of a minor), G.S. 14-190.17 (second degree sexual exploitation of a minor), G.S. 14-190.17A (third degree sexual exploitation of a minor), G.S. 14-190.18 (promoting prostitution of a minor), G.S. 14-190.19 (participating in the prostitution of a minor), G.S. 14-202.1 (taking indecent liberties with children), or G.S. 14-202.3 (Solicitation of child by computer to commit an unlawful sex act), G.S. 14-318.4(a1) (parent or caretaker commit or permit act of prostitution with or by a juvenile), or G.S. 14-318.4(a2) (commission or allowing of sexual act upon a juvenile by parent or guardian). The term also includes the following: a solicitation or conspiracy to commit any of these offenses; aiding and abetting any of these offenses.
  - (6) "Sexually violent predator" means a person who has been convicted of a sexually violent offense and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in sexually violent offenses directed at strangers or at a person with whom a relationship has been established or promoted for the primary purpose of victimization.
  - (7) "Sheriff" means the sheriff of a county in this State.
  - (8) "Statewide registry" means the central registry compiled by the Division in accordance with G.S. 14-208.14.
  - (9) "Student" means a person who is enrolled on a full-time or part-time basis, in any postsecondary public or private educational institution, including any trade or professional institution, or other institution of higher education."

2008 legislation (S.L. 2008-117) amended G.S. 14-208.6A to lengthen the registration period from ten years to thirty years, with the ability of registrants to petition the superior court for a shortening of the registration period after ten years.

2008 legislation (S.L. 2008-117) amended G.S. 14-208.7(a) to (1) shorten the period in which a person must initially register from ten days to three business days and (2) make conforming changes reflecting the new thirty-year registration period. Separate 2008 legislation amended G.S. 14-208.7(b) to require reporting of any online identifier that a person required to register uses or intends to use.

2007 legislation (S.L. 2007-213) amended G.S. 14-208.9(a) to require that when a registrant moves to another county, he or she must report to the sheriff of the new county. 2008 legislation (S.L. 2008-117) amended G.S. 14-208.9 to shorten the reporting period for change of address, academic status, or educational employment status and a move to another state from ten days to three business days. Other 2008 legislation (S.L. 2008-220) amended G.S. 14-208.9 by adding the following new subsection:

- (e) If a person required to register changes an online identifier, or obtains a new online identifier, then the person shall, within 10 days, report in person to the sheriff of the county with whom the person registered to provide the new or changed online identifier information to the sheriff. The sheriff shall immediately forward this information to the Division.

2008 legislation (S.L. 2008-117) amended G.S. 14-208.9A to shorten the period for submitting periodic verifications from ten days to three business days. That legislation also changed the time period for appearing before the sheriff when requested to do so for the taking of a photograph from 72 hours to three business days. Other 2008 legislation (S.L. 2008-220) amended G.S. 14-208.9A(a)(3) to now read as follows:

- (3) The verification form shall be signed by the person and shall indicate the following:
  - a. Whether the person still resides at the address last reported to the sheriff. If the person has a different address, then the person shall indicate that fact and the new address.
  - b. Whether the person still uses or intends to use any online identifiers last reported to the sheriff. If the person has any new or different online identifiers, then the person shall provide those online identifiers to the sheriff.

2008 legislation (S.L. 2008-220) amended G.S. 14-208.11(a), adding new subsection (10) as follows:

- (10) Fails to inform the registering sheriff of any new or changes to existing online identifiers that the person uses or intends to use.

2008 legislation (S.L. 2008-220) enacted new G.S. 14-208.15A (Release of online identifiers to entity; fee). To save space, the new provision is not reproduced here.

2007 legislation (S.L. 2007-213) amended G.S. 14-208.16(d)(3). The revised subsection now reads:

- (3) Resides with an immediate family member who established residence in accordance with this subsection. For purposes of this subsection, "immediate family member" means a child or sibling who is 18 years of age or older, or a parent, grandparent, legal guardian, or spouse of the registrant.

2008 legislation (S.L. 2008-117) enacted a new statute as follows:

**§ 14-208.18. Sex offender unlawfully on premises.**

(a) It shall be unlawful for any person required to register under this Article, if the offense requiring registration is described in subsection (b) of this section, to knowingly be at any of the following locations:

- (1) On the premises of any place intended primarily for the use, care, or supervision of minors, including, but not limited to, schools, children's museums, child care centers, nurseries, and playgrounds.
- (2) Within 300 feet of any location intended primarily for the use, care, or supervision of minors when the place is located on premises that are not intended primarily for the use, care, or supervision of minors, including,

but not limited to, places described in subdivision (1) of this subsection that are located in malls, shopping centers, or other property open to the general public.

(3) At any place where minors gather for regularly scheduled educational, recreational, or social programs.

(b) Notwithstanding any provision of this section, a person subject to subsection (a) of this section who is the parent or guardian of a minor may take the minor to any location that can provide emergency medical care treatment if the minor is in need of emergency medical care.

(c) Subsection (a) of this section is applicable only to persons required to register under this Article who have committed any of the following offenses:

- (1) Any offense in Article 7A of this Chapter.
- (2) Any offense where the victim of the offense was under the age of 16 years at the time of the offense.

(d) A person subject to subsection (a) of this section who is a parent or guardian of a student enrolled in a school may be present on school property if all of the following conditions are met:

(1) The parent or guardian is on school property for the purpose for one of the following:

- a. To attend a conference at the school with school personnel to discuss the academic or social progress of the parents' or guardians' child; or
- b. The presence of the parent or guardian has been requested by the principal or his or her designee for any other reason relating to the welfare or transportation of the child.

(2) The parent or guardian complies with all of the following:

- a. Notice: The parent or guardian shall notify the principal of the school of the parents' or guardians' registration under this Article and of his or her presence at the school unless the parent or guardian has permission to be present from the superintendent or the local board of education, or the principal has granted ongoing permission for regular visits of a routine nature. If permission is granted by the superintendent or the local board of education, the superintendent or chairman of the local board of education shall inform the principal of the school where the parents' or guardians' will be present. Notification includes the nature of the parents' or guardians' visit and the hours when the parent or guardian will be present at the school. The parent or guardian is responsible for notifying the principal's office upon arrival and upon departure. Any permission granted under this sub-subdivision shall be in writing.
- b. Supervision: At all times that a parent or guardian is on school property, the parent or guardian shall remain under the direct supervision of school personnel. A parent or guardian shall not be on school property even if the parent or guardian has ongoing permission for regular visits of a routine nature if no school personnel are reasonably available to supervise the parent or guardian on that occasion.

(e) A person subject to subsection (a) of this section who is eligible to vote may be present at a location described in subsection (a) used as a voting place as defined by G.S. 163-165 only for the purposes of voting and shall not be outside the voting enclosure other than for the purpose of entering and exiting the voting place. If the voting place is a school, then the person subject to subsection (a) shall notify the principal of the school that he or she is registered under this Article.

(f) A person subject to subsection (a) of this section who is eligible under G.S. 115C-378 to attend public school may be present on school property if permitted by the local board of education pursuant to G.S. 115C-391(d)(2).

(g) A juvenile subject to subsection (a) of this section may be present at a location described in that subsection if the juvenile is at the location to receive medical treatment or mental health services and remains under the direct supervision of an employee of the treating institution at all times.

(h) A violation of this section is a Class H felony.

2007 and 2008 legislation (S.L. 2007-213; S.L. 2008-117) amended G.S. 14-208.40(a). The revised subsection is set forth below.

(a) The Department of Correction shall establish a sex offender monitoring program that uses a continuous satellite-based monitoring system and shall create guidelines to govern the program. The program shall be designed to monitor three categories of offenders as follows:

- (1) Any offender who is convicted of a reportable conviction as defined by G.S. 14-208.6(4) and who is required to register under Part 3 of Article 27A of Chapter 14 of the General Statutes because the defendant is classified as a sexually violent predator, is a recidivist, or was convicted of an aggravated offense as those terms are defined in G.S. 14-208.6.
- (2) Any offender who satisfies all of the following criteria: (i) is convicted of a reportable conviction as defined by G.S. 14-208.6(4), (ii) is required to register under Part 2 of Article 27A of Chapter 14 of the General Statutes, (iii) has committed an offense involving the physical, mental, or sexual abuse of a minor, and (iv) based on the Department's risk assessment program requires the highest possible level of supervision and monitoring.
- (3) Any offender who is convicted of G.S. 14-27.2A or G.S. 14-27.4A, who shall be enrolled in the satellite-based monitoring program for the offender's natural life upon termination of the offender's active punishment.

2007 legislation (S.L. 2007-213) enacted G.S. 14-208.40A (Determination of satellite-based monitoring requirement by court); G.S. 14-208.40B (Determination of satellite-based monitoring requirement in certain circumstances); and G.S. 14-208.40C (Requirements of enrollment). 2008 legislation (S.L. 2007-117; S.L. 2008-187) amended some of these provisions. To save space the new statutes are not reproduced in this supplement.

2007 legislation (S.L. 2007-213; S.L. 2007-484) amended G.S. 14-208.41. The revised statute is set forth below.

**§ 14-208.41. Enrollment in satellite-based monitoring programs mandatory; length of enrollment.**

(a) Any person described by G.S. 14-208.40(a)(1) shall enroll in a satellite-based monitoring program with the Division of Community Corrections office in the county where the person resides. The person shall remain enrolled in the satellite-based monitoring program for the registration period imposed under G.S. 14-208.23 which is the person's life, unless the requirement to enroll in the satellite-based monitoring program is terminated pursuant to G.S. 14-208.43.

(b) Any person described by G.S. 14-208.40(a)(2) who is ordered by the court pursuant to G.S. 14-208.40A or required by the Department pursuant to G.S. 14-208.40B to enroll in a satellite-based monitoring program shall do so with the Division of Community Corrections office in the county where the person resides. The person shall remain enrolled in the satellite-based monitoring program for the period of time ordered by the court or the period of time specified by the Department.

2007 legislation (S.L. 2007-213; S.L. 2007-484) amended G.S. 14-208.42. The revised provision is set forth below.

**§ 14-208.42. Offenders required to submit to satellite-based monitoring required to cooperate with Department upon completion of sentence.**

Notwithstanding any other provision of law, when an offender is required to enroll in satellite-based monitoring pursuant to G.S. 14-208.40A or G.S. 14-208.40B, upon completion of the offender's sentence and any term of parole, post-release supervision, intermediate punishment, or supervised probation that follows the sentence, the offender shall continue to be enrolled in the satellite-based monitoring program for the period required by G.S. 14-208.40A or G.S. 14-208.40B unless the requirement that the person enroll in a satellite-based monitoring program is terminated pursuant to G.S. 14-208.43.

The Department shall have the authority to have contact with the offender at the offender's residence or to require the offender to appear at a specific location as needed for the purpose of enrollment, to receive monitoring equipment, to have equipment examined or maintained, and for any other purpose necessary to complete the requirements of the satellite-based monitoring program. The offender shall cooperate with the Department and the requirements of the satellite-based monitoring program until the offender's requirement to enroll is terminated and the offender has returned all monitoring equipment to the Department.

2007 legislation (S.L. 2007-213) amended G.S. 14-208.44. The revised provision is set forth below.

**§ 14-208.44. Failure to enroll; tampering with device.**

(a) Any person required to enroll in a satellite-based monitoring program who fails to enroll shall be guilty of a Class F felony.

(b) Any person who intentionally tampers with, removes, vandalizes, or otherwise interferes with the proper functioning of a device issued pursuant to a satellite-based monitoring program to a person duly enrolled in the program shall be guilty of a Class E felony.

(c) Any person required to enroll in a satellite-based monitoring program who fails to provide necessary information to the Department, or fails to cooperate with the Department's guidelines and regulations for the program shall be guilty of a Class 1 misdemeanor.

(d) For purposes of this section, "enroll" shall include appearing, as directed by the Department, to receive the necessary equipment.

**I. Failure to Register, etc., as a Sex Offender (page 198)**

**Elements (page 198)**

Element (3)(b) should read as follows:

(3)(b) fails to notify the sheriff of a change of address *or*

As a result of 2008 legislation (S.L. 2008-220), the following new element should be added to this offense:

(3)(j) fails to inform the registering sheriff of any new or changes to existing online identifiers that the person uses or intended to use.

**Notes (page 198)**

**Element (1) (page 199).** A defendant who resided outside of North Carolina when he committed an offense in North Carolina was a resident required to register when he was released from prison in North Carolina (\_\_\_ N.C. App. \_\_\_, 660 S.E.2d 200).

**Elements (3)(b) and (3)(g).** Legislation enacted in 2007 (S.L. 2007-213, sec. 9A) modified the registration requirements for a change of address in G.S. 14-208.9(a). The statute has required the person to report a change of address to the sheriff of the county where the person was last registered. The amendments add the requirement that when a person moves to another county, he or she also must report in person to the sheriff of the new county and provide written notice of the person's address not later than ten days after the move.

**Element (3)(b) (page 199).** A change of address means a change of a "home address," which is where a person resides and receives mail and other communications; a home address is not the same as a domicile

[\_\_\_ N.C. App. \_\_\_, 666 S.E.2d 657, *temporary stay allowed* \_\_\_ S.E.2d \_\_\_ (N.C. Oct. 6, 2008)]. For a case in which the evidence was insufficient to establish that the defendant changed her address, see \_\_\_ N.C. App. \_\_\_, 666 S.E.2d 657, *temporary stay allowed* \_\_\_ S.E.2d \_\_\_ (N.C. Oct. 6, 2008).

**Element (3)(j) (new note).** “Online identifier” means an electronic mail address, instant message screen name, user ID, chat or other Internet communication name [G.S. 14-208.6(1n)]. It does not include Social Security number, date of birth, or pin number [G.S. 14-208.6(1n)].

**Revocation of post-release supervision no bar to conviction (new note).** Double jeopardy does not bar prosecution of a defendant under G.S. 14-208.11 for failing to notify the sheriff of a change in address when the defendant already has experienced revocation of post-release supervision for the same conduct (362 N.C. 181).

### III. Knowingly Residing Near a School or Child Care Center (page 201)

#### Notes (page 201)

**Changes in ownership after residency is established (page 201).** Due to 2007 legislative changes (S.L. 2007-213, sec. 10), the last sentence of this note should read as follows: Residency is established when a person purchases or leases the residence or lives with a child or sibling 18 or older or with a parent, grandparent, legal guardian, or spouse who has established residence [G.S. 14-208.16(d)].

### VI. Failing to Enroll in a Satellite-Based Monitoring Program (page 203)

#### Related Offenses Not in This Chapter (page 203)

Failing to provide information to or cooperate with the Department [G.S. 14-208.44(c)]

### VII. Tampering with a Satellite-Based Monitoring Device (page 203)

**Elements (page 203).** As a result of 2007 legislative changes (S.L. 2007-213, sec. 6), the second element of this offense should read:

- (2) tampers with, removes, vandalizes, or otherwise interferes with the proper functioning of

#### Related Offenses Not in This Chapter (page 203)

Failing to provide information to or cooperate with the Department [G.S. 14-208.44(c)]



## VIII. Accessing a Social Networking Site (New Crime)

Effective December 1, 2008, and applicable to offenses occurring on or after that date, 2008 legislation (S.L. 2008-218) created this new crime.

### **Statute §14-202.5. Ban use of commercial social networking Web sites by sex offenders.**

(a) **Offense.**—It is unlawful for a sex offender who is registered in accordance with Article 27A of Chapter 14 of the General Statutes to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages on the commercial social networking Web site.

(b) For the purposes of this section, a “commercial social networking Web site” is an Internet Web site that meets all of the following requirements:

- (1) Is operated by a person who derives revenue membership fees, advertising, or other sources related to the operation of the Web site.
- (2) Facilitates the social introduction between two or more persons for the purposes of friendship, meeting other persons, or information exchanges.
- (3) Allows users to create Web pages or personal profiles that contain information such as the name or nickname of the user, photographs placed on the personal Web page by the user, other personal information about the user, and links to other personal Web pages on the commercial social networking Web site of friends or associates of the user that may be accessed by other users or visitors to the Web site.
- (4) Provides users or visitors to the commercial social networking Web site mechanisms to communicate with other users, such as a message board, chat room, electronic mail, or instant messenger.

(c) A commercial social networking Web site does not include an Internet Web site that either:

- (1) Provides only one of the following discrete services: photo-sharing, electronic mail, instant messenger, or chat room or message board platform; or
- (2) Has as its primary purpose the facilitation of commercial transactions involving goods or services between its members or visitors.

(d) **Jurisdiction.**—The offense is committed in the State for purposes of determining jurisdiction, if the transmission that constitutes the offense either originates in the State or is received in the State.

(e) **Punishment.**—A violation of this section is a Class I felony.

**Elements** A person guilty of this offense

- (1) is a sex offender who is required to register *and*
- (2) accesses
- (3) a commercial social networking Web site
- (4) knowing that the site permits minors to become members or to create or maintain personal Web pages on the site.

**Punishment** Class I felony [G.S. 14-202.5(e)]

**Notes** **Element (1).** See the note entitled “Generally” under “I. Failure to Register, etc., as a Sex Offender” in the main volume for a discussion of persons required to register under the sex offender registration laws.

**Element (3).** The term “commercial social networking Web site” is defined in G.S. 14-202.5(b). Exclusions are contained in G.S. 14-202.5(c).

**Jurisdiction.** The offense occurs in North Carolina if the transmission at issue either originates or is received in North Carolina [G.S. 14-202.5(d)].

**Civil liability for commercial social networking site.** G.S. 14-202.5A provides that a commercial social networking site may be civilly liable for damages for failing to make reasonable efforts to prevent a registered sex offender from accessing its site. This provision is effective May 1, 2009, and applies to acts occurring on or after that date (S.L. 2008-218, sec. 11).

**Related Offenses  
Not in This Section** None

### IX. Being Present at Location Used by Minors (New Crime)

Effective December 1, 2008, and applying to offenses committed on or after that date, 2008 legislation (S.L. 2008-117) created the following new offense.

**Statute** See G.S. 14-208.18, reproduced above.

**Elements** A person guilty of this offense

- (1) is required to register as a sex offender
- (2) because of a conviction for
  - (a) any rape or sexual offense or sexual battery *or*
  - (b) any offense in which the victim was less than 16 years old *and*
- (3) knowingly
- (4) is present
  - (a) on the premises of any place intended primarily for the use, care, or supervision of minors, including schools, children's museums, child care centers, nurseries, and playgrounds;
  - (b) within 300 feet of any location intended primarily for the use, care, or supervision of minors when the place is located on premises that are not intended primarily for the use, care, or supervision of minors, including malls, shopping centers, or other property open to the general public; *or*
  - (c) at any place where minors gather for regularly scheduled educational, recreational, or social programs.

**Punishment** Class H felony

**Notes** **Element (1).** See this note under "I. Failure to Register, etc., as a Sex Offender," in the main volume.

**Element (2).** The statute refers to the covered offenses "described in subsection (b)." However, no such offenses are described in that subsection. This appears to be a drafting error, with the covered offenses in subsection (c) and defined to include any offense in G.S. Chapter 14, Article 7A, and any offense where the victim was less than 16 years old at the time of the offense.

**Element (3).** See "Knowingly" in Chapter 1 "States of Mind."

**Element (4).** The statute provides that the defendant may not "be" at the specified locations.

**Exceptions.** The statute contains explicit exceptions for when a person is present at a specified location related to medical treatment, voting, or school [G.S. 14-208.18(b), (d)-(g)].

**Related Offenses  
Not in This Chapter** None

# CHAPTER 11

## CRIME AGAINST NATURE, INCEST, INDECENT EXPOSURE, AND RELATED OFFENSES

(PAGE 205)

### CRIME AGAINST NATURE (PAGE 207)

#### Notes (page 207)

**Constitutionality (page 207).** Application of the crime against nature statute to a minor's consensual sexual activity with another minor does not violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution (361 N.C. 287).

**Age and consent (page 208).** The offense of crime against nature applies to consensual acts between minors, regardless of the age difference between the minors (361 N.C. 287).

### INCEST OFFENSES (PAGE 209)

#### I. Incest (page 209)

#### Notes (page 209)

**Element (2)(b) (page 210).** The evidence was sufficient to establish paternity when the victim testified that the defendant was her biological father and identified him in open court; the victim's birth certificate, clearly identifying defendant as the victim's father, was admitted into evidence; and the defendant testified that he sought to be a "cool dad" to the victim (\_\_\_ N.C. App. \_\_\_, 656 S.E.2d 662).

**Sex offender registration required (new note).** This offense is a sexually violent offense triggering registration requirements under the sex offender registration statutes [G.S. 14-208.6(5)].

## 2008 Cumulative Supplement to North Carolina Crimes

### II. Incest with a Person Who Is under 13 (page 210)

#### Notes (page 210)

**Sex offender registration required (new note).** This offense is a sexually violent offense triggering registration requirements under the sex offender registration statutes [G.S. 14-208.6(5)].

### III. Incest with a Person Who Is 13, 14, or 15 Years Old by a Defendant Who Is at Least Six Years Older Than the Victim (page 211)

#### Notes (page 211)

**Sex offender registration required (new note).** This offense is a sexually violent offense triggering registration requirements under the sex offender registration statutes [G.S. 14-208.6(5)].

### IV. Incest with a Person Who Is 13, 14, or 15 Years Old by a Defendant Who Is More Than Four but Less Than Six Years Older Than the Victim (page 211)

#### Notes (page 211)

**Sex offender registration required (new note).** This offense is a sexually violent offense triggering registration requirements under the sex offender registration statutes [G.S. 14-208.6(5)].

## INDECENT EXPOSURE (PAGE 213)

### II. Indecent Exposure (Felony) (page 215)

#### Notes (page 216)

**Sex offender registration required (new note).** This offense is a sexually violent offense triggering registration requirements under the sex offender registration statutes [G.S. 14-208.6(5)].

## PEEPING (PAGE 216)

In certain circumstances, peeping can trigger registration requirements under the sex offender registration statutes [G.S. 14-208.6(4)d].

# CHAPTER 12

## KIDNAPPING AND RELATED OFFENSES

(PAGE 223)

### FIRST-DEGREE KIDNAPPING (PAGE 225)

#### Notes (page 226)

**Element (1) (page 226).** The following should be added to the second paragraph of this note: There was sufficient evidence of confinement when the victim testified that although she asked the defendant to leave her apartment, he continued to stand by the door with his back to the only exit, and the defendant admitted that he closed and locked the apartment door while the victim was inside (183 N.C. App. 576).

The following text should be added to the third paragraph of this note: There was sufficient evidence of restraint when the defendant pinned the victim on a bed by pushing his knee into her chest and grabbed her hair to prevent her from escaping (183 N.C. App. 36).

For another case explaining the difference between confinement and restraint, see 186 N.C. App. 576.

The evidence was sufficient to establish that the defendant restrained and confined three young children when he and an accomplice entered the residence with a shotgun and isolated the children and two others in a bedroom away from the children's mother and her boyfriend; the defendant and his accomplice terrorized the mother and boyfriend, forced a woman in the room with the children to remove her clothes and refused to allow her to leave to use the bathroom, and directed racial slurs at the one other person in the room with the children (\_\_\_ N.C. App. \_\_\_, 661 S.E.2d 304).

**Element (3) (page 226).** When the victim is a child under 16 years old, the State is not required to prove that the defendant knew the victim's age; the State need only prove that the person was under 16 years old (\_\_\_ N.C. App. \_\_\_, 656 S.E.2d 638).

**Elements (4)(d) and (e) (page 227).** For cases in which the evidence was insufficient to establish that the confinement, restraint, or removal was to facilitate a felony, see 186 N.C. App. 576 (crime allegedly facilitated was completed when the kidnapping occurred) and 183 N.C. App. 576 (same).

**Element (4)(g) (page 228).** For a case in which the evidence was sufficient to show an intent to terrorize, see \_\_\_ N.C. App. \_\_\_, 664 S.E.2d 654.

**Element (5)(a) (page 228).** The victims were not released when (1) the defendants departed from the premises, leaving the victims bound [(183 N.C. App. 160); \_\_\_ N.C. App. \_\_\_, 658 S.E.2d 300 (same but the victims also were blindfolded and without access to a telephone)]; (2) the defendant fled but continued to be

constructively present because neither the victims nor law enforcement officers were certain about whether he had actually relinquished the victims and vacated the premises (181 N.C. App. 655); (3) the defendant left the child victims in an upstairs room where they had been confined while the defendant forced their mothers downstairs and the defendant did not engage in affirmative action to release the children (181 N.C. App. 655); and (4) the defendant handed the victim off to an accomplice from whom the victim later escaped (181 N.C. App. 655).

When the State proceeds on an acting in concert theory and an accomplice, acting alone, releases the victim in a safe place, this does not mean that the defendant released the victim in a safe place [State v. Smith, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Dec. 2, 2008)].

**Element (5)(b) (page 228).** The trial court did not err in instructing the jury that serious injury is injury that causes great pain and suffering or mental injury where the mental injury extends for some appreciable time beyond the crime; the court was not required to instruct that serious mental injury also must be beyond that normally experienced by victims of the type of crime charged (\_\_\_ N.C. App. \_\_\_, 653 S.E.2d 249).

**Multiple punishment (page 229).** A defendant could be convicted of kidnapping, burglary, and armed robbery when the restraint inherent in the burglary and armed robbery was separate from that involved in the kidnapping; as to two of the victims, the robbery was complete when the restraint occurred (181 N.C. App. 655). Because the defendants bound the victims, the restraint involved with the kidnapping was separate from and not inherent in the armed robbery [183 N.C. App. 160; \_\_\_ N.C. App. \_\_\_, 658 S.E.2d 300 (defendants bound and blindfolded the victims and forced them to lie on the floor)]. The defendant's restraint and removal of the victim was more than mere technical asportation inherent in an armed robbery (183 N.C. App. 514). The defendant's act of restraint and removal in preventing the victim's escape from her residence, when the armed robbery had not yet begun, was sufficient evidence to support a kidnapping conviction (361 N.C. 670). The defendant's restraint of the victim went beyond that inherent in attempted second-degree rape when after that crime was completed, he pulled the victim away from a couch and dragged her to the kitchen and toward a door (\_\_\_ N.C. App. \_\_\_, 653 S.E.2d 249). By pinning the victim on the bed, grabbing her hair, and preventing her from leaving the motel room, the defendant engaged in restraint separate and apart from the crime of assault by strangulation (183 N.C. App. 36).

The defendant's kidnapping conviction was vacated because any confinement and restraint was inherent in the defendant's assault on the victim and any removal was inherent in the armed robbery of the victim (181 N.C. App. 295). Making restaurant patrons lie on the floor at gunpoint while the restaurant was robbed did not constitute confinement, restraint, or removal beyond that required for the robbery (\_\_\_ N.C. App. \_\_\_, 664 S.E.2d 375, *stay allowed*, \_\_\_ N.C. \_\_\_, 665 S.E.2d 461). When the evidence showed only that the defendant raped the victim in a guest bedroom, there was no evidence of confinement, restraint, or removal other than that inherent to the rape offense (\_\_\_ N.C. App. \_\_\_, 662 S.E.2d 559).

When the evidence showed that the defendant confined the victim, the court was not required to consider whether the restraint involved with the kidnapping was inherent in another charged felony (183 N.C. App. 576).

A defendant may not be convicted of rape for a sexual assault that serves as the basis for elevating kidnapping to first-degree (\_\_\_ N.C. App. \_\_\_, 659 S.E.2d 22). If the jury finds the defendant guilty of first-degree kidnapping for failure to release the victim in a safe place or for having committed a sexual assault on the victim but does not specify which theory it relied on to find the defendant

guilty, the defendant may not be convicted of both first-degree kidnapping and the sexual assault (\_\_\_ N.C. App. \_\_\_, 659 S.E.2d 22).

**Sex offender registration required (new note).** If the victim is a minor and the person committing the offense is not the minor's parent, this offense is classified as an offense against a minor, triggering registration requirements under the sex offender registration statutes [G.S. 14-208.6(1m)].

## SECOND-DEGREE KIDNAPPING (PAGE 231)

### Notes (page 231)

**Sex offender registration required (new note).** If the victim is a minor and the person committing the offense is not the minor's parent, this offense is classified as an offense against a minor, triggering registration requirements under the sex offender registration statutes [G.S. 14-208.6(1m)].

## FELONIOUS RESTRAINT (PAGE 232)

### Notes (page 232)

**Sex offender registration required (new note).** If the victim is a minor and the person committing the offense is not the minor's parent, this offense is classified as an offense against a minor, triggering registration requirements under the sex offender registration statutes [G.S. 14-208.6(1m)].

## ABDUCTION OF CHILDREN (PAGE 233)

### Notes (page 233)

**Sex offender registration required (new note).** If the victim is a minor and the person committing the offense is not the minor's parent, this offense is classified as an offense against a minor, triggering registration requirements under the sex offender registration statutes [G.S. 14-208.6(1m)].

**HUMAN TRAFFICKING, INVOLUNTARY SERVITUDE,  
AND SEXUAL SERVITUDE (PAGE 234)****III. Sexual Servitude (page 236)****Notes (page 227)**

**Sex offender registration required (new note).** This offense is a sexually violent offense triggering registration requirements under the sex offender registration statutes [G.S. 14-208.6(5)].



# CHAPTER 13

## LARCENY, POSSESSION OF STOLEN GOODS, EMBEZZLEMENT, AND RELATED OFFENSES

(PAGE 239)

### MISDEMEANOR LARCENY (PAGE 241)

#### Notes (page 242)

**Element (1) (page 242).** The following text should be added at the end of the first paragraph of this note: Effective December 1, 2008, and applying to offenses committed on or after that date, 2008 legislation (S.L. 2008-128) enacted G.S. 14-83A (subsequently recodified as G.S. 14-83.1), providing that personal property that has been affixed to real property may be the subject of a larceny.

**Element (4) (page 243).** An intent to permanently deprive the possessor could be inferred when the defendant took the victim's vehicle in North Carolina and abandoned it in Virginia; this act placed the vehicle beyond the defendant's power to return it and showed indifference to whether the victim ever recovered the vehicle (\_\_\_ N.C. App. \_\_\_, 667 S.E.2d 295).

**Multiple offenses (page 243).** Two separate acts of larceny occurred supporting two convictions when the defendant stole a shotgun from a truck and then entered and stole another vehicle; the defendant's different purposes for taking the shotgun and vehicle suggested that each taking was motivated by a unique criminal impulse or intent (180 N.C. App. 664).

#### Related Offenses Not in This Chapter (page 246)

Motion picture piracy (G.S. 14-440.1)

### FELONIOUS LARCENY (PAGE 246)

#### Notes (page 247)

**Element (6)(b) (page 247).** A larceny was from the person when the defendant stole cash from an employee who was replenishing an automatic teller machine; the money was in a grocery cart by the employee's side (186 N.C. App. 259).

## POSSESSION OF STOLEN GOODS— MISDEMEANOR (PAGE 251)

### Notes (page 251)

**Element (1) (page 251).** The evidence established that the defendant possessed stolen tools found in a truck he was driving when the defendant had unrestricted access to the truck, gave permission for the tools to be placed in the truck, saw the tools placed in the truck, was given the tools by the passenger of the truck, and did not refuse the property (\_\_\_ N.C. App. \_\_\_, 657 S.E.2d 419).

**Element (2) (page 252).** Knowledge or reasonable grounds to believe that property was stolen can be inferred when a defendant-seller is willing to sell property at a fraction of its cost or when a defendant-buyer buys property at a fraction of its cost (\_\_\_ N.C. App. \_\_\_, 666 S.E.2d 845). For a case in which the evidence raised only a suspicion or conjecture that the defendant knew or should have known that the goods were stolen, and thus was insufficient on this element, see \_\_\_ N.C. App. \_\_\_, 666 S.E.2d 212.

For a case holding that the evidence was sufficient to establish the defendant's knowledge that goods were stolen but insufficient to establish that the defendant knew that a gun was stolen, see 176 N.C. App. 642. For another case in which the evidence was insufficient on the issue of whether the defendant knew that a gun was stolen, see 182 N.C. App. 277. The evidence was sufficient to establish that the defendant knew that tools had been stolen when (1) the tools were visible in the bed of a pickup being driven by the defendant, both the tools and the truck were reported stolen hours before the defendant was stopped in the truck, and the defendant fled after being pulled over (187 N.C. App. 235); and (2) although the defendant testified that he only suspected that the tools were stolen, he also stated that he did not trust the person who gave him the tools and was not surprised that the tools were stolen (\_\_\_ N.C. App. \_\_\_, 657 S.E.2d 419).

**Element (3) (page 252).** A dishonest purpose was established when the defendant helped the thief carry the items from the scene of the crime and later was found in possession of some of those items (\_\_\_, N.C. App. \_\_\_, 666 S.E.2d 845).

## POSSESSION OR RECEIVING OF GOODS REPRESENTED AS STOLEN (NEW CRIME)

2007 legislation (S.L. 2007-373) amended G.S. 14-71 to create this new crime, set forth in G.S. 14-71(b), below. 2008 legislation [S.L. 2008-187, sec. 43(a)] amended G.S. 14-71(b) to extend its application to goods represented as stolen by one authorized to act on behalf of a law enforcement agency.

### Statute **§ 14-71. Receiving stolen goods; receiving or possessing goods represented as stolen.**

(a) If any person shall receive any chattel, property, money, valuable security or other thing whatsoever, the stealing or taking whereof amounts to larceny or a felony, either at common law or by virtue of any statute made or hereafter to be made, such person knowing or having reasonable grounds to believe the same to have been feloniously stolen or taken, he shall be guilty of a Class H felony, and may be indicted and convicted, whether the felon stealing and taking such chattels, property, money, valuable

security or other thing, shall or shall not have been previously convicted, or shall or shall not be amenable to justice; and any such receiver may be dealt with, indicted, tried and punished in any county in which he shall have, or shall have had, any such property in his possession or in any county in which the thief may be tried, in the same manner as such receiver may be dealt with, indicted, tried and punished in the county where he actually received such chattel, money, security, or other thing; and such receiver shall be punished as one convicted of larceny.

(b) If a person knowingly receives or possesses property in the custody of a law enforcement agency that was explicitly represented to the person by an agent of the law enforcement agency or a person authorized to act on behalf of a law enforcement agency as stolen, the person is guilty of a Class H felony and may be indicted, tried, and punished in any county in which the person received or possessed the property.

- Elements** A person guilty of this offense:
- (1) knowingly
  - (2) possesses or receives
  - (3) property
  - (4) in the custody of a law enforcement agency
  - (5) that was explicitly represented to the person to be stolen
  - (6) (a) by an agent of the law enforcement agency or  
(b) by a person authorized to act on behalf of a law enforcement agency.

**Punishment** Class H felony

**Notes** **Element (1).** See “Knowingly” in Chapter 1 “States of Mind.”

**Element (2).** See the note to Element (1) under “Possession of Stolen Goods—Misdemeanor.”

**Related Offenses**  
**Not in This Chapter** See the offenses listed under “Possession of Stolen Goods—Misdemeanor.”

## RECEIVING STOLEN GOODS— MISDEMEANOR (PAGE 254)

**Statute** (page 254). The statute has been revised by 2007 and 2008 legislation [S.L. 2007-373; S.L. 2008-187, sec. 34(a)]. The new statute is reproduced under “Possession or Receiving of Goods Represented As Stolen,” above, in this supplement.

**Notes** (page 255)

**Attempt (page 255).** Delete this note.

## RECEIVING STOLEN GOODS—FELONY (PAGE 256)

**Statute (page 256).** The statute has been revised by 2007 and 2008 legislation [S.L. 2007-373; S.L. 2008-187, sec. 34(a)]. The new statute is reproduced under “Possession or Receiving of Goods Represented As Stolen,” above, in this supplement.

**Notes (page 256)**

**Attempt (page 256).** Delete this note.

## LARCENY FROM A MERCHANT (NEW CRIME)

Effective December 1, 2007, the General Assembly enacted G.S. 14-72.11, creating a new Class H felony of larceny from a merchant (S.L. 2007-373). That statute was amended in 2008 [S.L. 2008-187, sec. 34(b)]. To save space, the statute is not reproduced here. The elements of the new crime are listed below.

A person guilty of this offense

- (1) commits a larceny
- (2) against a merchant *and*
  - (a) takes property valued at more than \$200.00 using a specified exit door;
  - (b) removes, destroys, or deactivates a component of an anti-shoplifting or inventory control device to prevent the activation of any such device;
  - (c) affixes a product code created to fraudulently obtain goods or merchandise at less than actual sale price; *or*
  - (d) the property is infant formula valued at more than \$100.00.

The new provision does not define the term “merchant.” The exit door referenced in Element (2)(a) is defined as an “exit door erected and maintained to comply with the requirements of 29 C.F.R. § 1910.36 and 29 C.F.R. § 1910.37, upon which door has been placed a notice, sign, or poster providing information about the felony offense and punishment provided under this subsection” (G.S. 14-72.11). The term “infant formula” is defined by a cross-reference to 21 U.S.C. § 321(z) (G.S. 14-72.11).

## ORGANIZED RETAIL THEFT (NEW CRIME)

Legislation enacted in 2007 added new G.S. 14-86.6, creating two new crimes of organized retail theft (S.L. 2007-373). 2008 legislation amended the statute [S.L. 2008-187, sec. 34(c)]. To save space, the statute is not reproduced here. The original provision became effective December 1, 2007, and applies to offenses committed on or after that date. The new offenses are outlined below.

## I. Conspiracy to Commit Retail Theft (New Crime)

- Elements** A person guilty of this offense
- (1) conspires with another person
  - (2) to commit theft
  - (3) of retail property
  - (4) with a value of more than \$1,500 aggregated over a ninety-day period
  - (5) from retail establishments
  - (6) with the intent to sell the property for gain *and*
  - (7) takes or causes the property to be placed in the control of a retail property fence or other person
  - (8) in exchange for consideration.

**Punishment** Class H felony [G.S. 14-86.6(a)]

**Notes** **Element (1).** See “Conspiracy” in Chapter 5, “General Crimes,” of the main volume.

**Elements (2) and (3).** “Theft” is defined as follows: “[t]o take possession of, carry away, transfer, or cause to be carried away the retail property of another with the intent to steal the retail property” [G.S. 14-86.5(3)]. “Retail property” is defined as “any new article, product, commodity, item, or component intended to be sold in retail commerce” [G.S. 14-86.5(1)].

**Element (4).** The value of an item is defined as the “retail value of an item as advertised by the affected retail establishment, to include all applicable taxes” [G.S. 14-86.5(4)].

**Element (7).** A “retail property fence” is a person or business that buys retail property knowing or believing that retail property is stolen [G.S. 14-86.5(2)].

**Forfeiture.** Any interest a person has acquired or maintained in violation of the provision is subject to forfeiture under G.S. 18B-504 [G.S. 14-86.6(b)].

**Related Offenses  
Not in This Chapter** None

## II. Receiving or Possessing Retail Theft Property (New Crime)

- Elements** A person guilty of this offense
- (1) receives or possesses
  - (2) retail property
  - (3) that has been taken or stolen in connection with a conspiracy to commit retail theft
  - (4) knowing or having reasonable grounds to believe that the property is stolen.

**Punishment** Class H felony [G.S. 14-86.6(a)]

**Notes** **Generally.** The notes on “I. Conspiracy to Commit Retail Theft” apply here as well.

**Related Offenses  
Not in This Chapter** None

**FINANCIAL TRANSACTION CARD THEFT (PAGE 263)****I. Taking or Withholding a Card (page 263)****Notes (page 264)**

**Element (1) (page 264).** The evidence was sufficient when it showed that the defendant obtained cards without consent but not that the defendant stole the cards (182 N.C. App. 683).

**EMBEZZLEMENT (PAGE 269)****Notes (page 270)**

**Element (1) (new note).** When a defendant receives money under an agency relationship and does not transmit it to the party to whom it is due, this is circumstantial evidence of the requisite criminal intent (\_\_\_ N.C. App. \_\_\_, 657 S.E.2d 400).

**Element (4) (page 270).** There was sufficient evidence of a fiduciary relationship when the defendant entered into a contract with vendors under which he promised to collect receipts on their behalf and remit the money less a commission, with an accounting, on the 15th of each month, thus showing that the vendors owned the money at the time it came into the defendant's hands; the contracts referred to the defendant as "service agent" and the Operating Agreement incorporated into the contracts referred to the defendant as a "nonexclusive [marketing] agent." (\_\_\_ N.C. App. \_\_\_, 657 S.E.2d 400).

**EMBEZZLEMENT BY PUBLIC OFFICERS AND TRUSTEES (PAGE 273)****Notes (page 274)**

**Lesser-included offenses (new note).** Violations of G.S. 159-8(a) and G.S. 159-181(a) are not lesser-included offenses of this crime (184 N.C. App. 149).

**MOTOR VEHICLE CHOP SHOPS (NEW CRIME)**

In 2007 the General Assembly enacted G.S. 14-72.7 creating new Class H felonies that apply to, among other things, receiving, possessing, and distributing stolen or altered motor vehicles and motor vehicle parts (S.L. 2007-178). To save space, the statute is not reproduced here. The new law became effective December 1, 2007, and applies to offenses committed on or after that date.

# CHAPTER 14

## ROBBERY, EXTORTION, AND BLACKMAIL

(PAGE 279)

### COMMON LAW ROBBERY (PAGE 281)

#### Notes (page 281)

**Element (1) (page 281).** A taking occurred when the defendant approached the victim as she was unlocking her car, pressed a handgun into her stomach, grabbed her purse from the passenger seat, and then threw the purse back on the seat when the victim said it contained very little money (182 N.C. App. 102).

**Element (3).** The State need not prove both violence and intimidation; either is sufficient (186 N.C. App. 259).

The snatching of a necklace worn around a person's neck involved sufficient actual force to constitute robbery; the necklace was fastened around the victim's neck and broke as the defendant ripped it off (186 N.C. App. 437).

When a battery did not induce the victim to part with the property, no common law robbery occurred (186 N.C. App. 259).

### ARMED ROBBERY (PAGE 283)

#### Notes (page 283)

**Element (3) (page 283).** For a case in which a motor vehicle was found to be a dangerous weapon, see 182 N.C. App. 88.

**Timing of elements (page 285).** A continuous transaction supporting the conviction occurred when (1) the defendant took a store item but did not brandish a weapon until confronted by a store employee (180 N.C. App. 680); and (2) the defendant and an accomplice took store merchandise without paying for it and were pursued by a store employee into the parking lot, where the defendant shoved the employee to the ground and the accomplice attempted to run over her with a vehicle (182 N.C. App. 88).

**Lesser-included offenses (page 285).** For another case supporting the statement in this note that assault with a deadly weapon is a lesser-included offense of armed robbery, see 361 N.C. 207.

**Charging issues (page 285).** An indictment charging this offense must name the weapon and allege either that the weapon used was a dangerous one or facts that demonstrate its dangerous nature (\_\_\_ N.C. App. \_\_\_, 656 S.E.2d 709).

**“Presumption” of the use of a dangerous weapon and instructing on the lesser-included offense of common law robbery (page 286).** The defendant’s testimony that he did not possess a dangerous weapon did not require dismissal of the armed robbery charge; the victim’s testimony that she believed that the defendant had a gun created a mandatory presumption that a dangerous weapon was used; the defendant’s testimony required that the mandatory presumption disappear and be replaced by a permissive inference; the permissive inference was enough to survive a motion to dismiss (\_\_\_ N.C. App. \_\_\_, 656 S.E.2d 709).



# CHAPTER 15

## BURGLARY, BREAKING OR ENTERING, AND RELATED OFFENSES

(PAGE 291)

### FIRST-DEGREE BURGLARY (PAGE 293)

#### Notes (page 294)

**Element (1) (page 294).** A constructive breaking and entering occurred when the defendant grabbed the victim and pulled him out of his house (187 N.C. App. 162).

**Element (3) (page 294).** The following should be added at the end of the first full paragraph on page 295: A constructive breaking occurred when the victim was forced into a motel room at gunpoint while being physically assaulted (\_\_\_ N.C. App. \_\_\_, 657 S.E. 2d 733). A constructive breaking and entering occurred when, after the victim came to his door, the defendant grabbed the victim and pulled him out of his house (187 N.C. App. 162).

The following should be added at the end of this note: Although the public had access to the building in question, the public did not have access to the private office entered into by the defendant and thus there was no consent to enter this location (\_\_\_ N.C. App. \_\_\_, 664 S.E.2d 414). Even if the defendant had implied consent to enter a private office in a public building, such consent was void ab initio when he entered the office with the intent to steal (\_\_\_ N.C. App. \_\_\_, 664 S.E.2d 414; see also 181 N.C. App. 209).

**Element (7) (page 296).** For a case in which the court of appeals took judicial notice of the time of sunset and of the end of civil twilight, see 186 N.C. App. 576.

**Element (8) (page 298).** Although the indictment need not allege the specific felony or larceny intended, if it does, then the State must prove that the defendant intended to commit that specific crime (187 N.C. App. 162). The evidence was sufficient to establish an intent to commit felonious assault as alleged in the indictment even though it also supported an intent to commit the unalleged crime of murder (186 N.C. App. 576). The evidence was sufficient to show an intent to commit an armed robbery when the defendants, armed with two guns, entered the residence knowing that the residents soon would arrive; the defendants were not surprised by the arrival of the first family member and immediately bound and blindfolded him; and as each family member arrived home, the defendants overcame them (\_\_\_ N.C. App. \_\_\_, 658 S.E.2d 300). The evidence was insufficient to show an intent to commit armed robbery inside of a home when the defendant pulled the victim outside of the house, thus showing an intent to commit the crime outside of the home (187 N.C. App. 162).



# CHAPTER 16

## FRAUD, FORGERY, FALSE PRETENSES, AND RELATED OFFENSES

(PAGE 313)

### OBTAINING PROPERTY BY FALSE PRETENSES (PAGE 320)

#### Notes (page 321)

**Element (1) (page 321).** The note states that the representation need not be oral or written and may be communicated by action. A false representation was communicated by action when a defendant used a credit card belonging to another person to obtain merchandise from a store; the false representation was that the defendant was authorized to use the card (181 N.C. App. 209).

An additional case supporting the statement that presentation of a worthless check constitutes a false statement is 182 N.C. App. 71.

**Actual loss and absence of compensation not required (page 322).** An additional case indicating that an actual pecuniary loss by the victim is not necessary for conviction is 182 N.C. App. 71.

### RESIDENTIAL MORTGAGE FRAUD (NEW CRIME)

Effective December 1, 2007, the General Assembly enacted the Residential Mortgage Fraud Act, as described below (S.L. 2007-163). To save space, the act, which encompasses G.S. 14-118.10 through 14-118.17, is not reproduced here.

- Elements** A person guilty of this offense
- (1) with intent to defraud *and*
  - (2) for financial gain
  - (3) (a) (i) knowingly makes or attempts to make any material misstatement, misrepresentation, or omission
  - (ii) within the mortgage lending process
  - (iii) with the intent that any person or entity involved in the mortgage lending process relies on it; *or*
  - (b) (i) knowingly uses or facilitates or attempts to use or facilitate the use of any misstatement, misrepresentation, or omission

- (ii) within the mortgage lending process
- (iii) with the intent that any other person or entity involved in the mortgage lending process relies on it; or
- (c) (i) receives or attempts to receive proceeds or funds
- (ii) in connection with a residential mortgage closing
- (iii) that the person knew, or should have known, resulted from the conduct described in (3)(a) or (3)(b).

**Punishment** A violation involving a single mortgage loan is a Class H felony [G.S. 14-118.15(a)]. A violation involving a pattern of residential mortgage fraud is a Class E felony [G.S. 14-118.15(b)]. A pattern of residential mortgage fraud is one that involves five or more mortgage loans that have the same or similar intents, results, accomplices, victims, or methods of commission or are otherwise interrelated [G.S. 14-118.11(a)(3)]. If the Class E version of this crime is charged, the relevant facts regarding a pattern of residential mortgage fraud must be pleaded and proved to the jury. The statute provides for forfeiture and for restitution (G.S. 14-118.16).

**Notes** **Element (1).** The State need not show that any person or entity was harmed financially or that any person or entity relied on the misstatement, misrepresentation, or omission [G.S. 14-118.12(b)].

**Element (3) generally.** G.S. 14-118.11 defines the relevant terms.

**Element (3)(b)(i).** Unlike Element (3)(a)(i), for this element the misstatement, misrepresentation, or omission apparently need not be material.

**Conspiracy or solicitation.** Conspiracy or solicitation to do one of the prohibited acts is punished the same as the completed crime [G.S. 14-118.12(a)(4)]. See "Conspiracy" and "Solicitation of Another to Commit a Felony" in Chapter 5, "General Crimes," of the main volume.

**Venue.** G.S. 14-118.13 provides for venue for criminal proceedings pursuant to the Residential Mortgage Fraud Act.

**Authority to investigate and prosecute.** G.S. 14-118.14 provides that on its own investigation or on referral by the Office of the Commissioner of Banks, the North Carolina Real Estate Commission, the Attorney General, the North Carolina Appraisal Board, or other parties, a district attorney may institute criminal proceedings for a violation.

**Liability for reporting suspected mortgage fraud.** G.S. 14-118.17 provides that in the absence of fraud, bad faith, or malice, a person is not subject to civil liability for filing reports or furnishing other information to a regulatory or law enforcement agency regarding suspected residential mortgage fraud.

**Related Offenses**  
**Not in This Chapter** None

## FOOD STAMP FRAUD (PAGE 353)

Legislation enacted in 2007 (S.L. 2007-97) amended the statutes dealing with food stamp fraud (G.S. 108A-53 and G.S. 108A-53.1) to replace the phrase "food stamps or authorization cards" with "electronic food and nutrition benefits."

**FRAUDULENTLY OBTAINING TELEPHONE RECORDS (NEW CRIME)**

Effective December 1, 2007, the General Assembly enacted the Telephone Records Privacy Protection Act, codified at G.S. 14-113.30 through 14-113.33 (S.L. 2007-374). That act creates new Class H felony offenses pertaining to fraudulently obtaining telephone records and selling fraudulently obtained records. To save space, the statutes are not reproduced here.

**FALSE STATEMENT TO PROCURE INSURANCE BENEFITS (PAGE 357)**

**Related Offenses  
Not in This Chapter (page 359)**

Motor vehicle insurance rate fraud (G.S. 58-2-164)

# CHAPTER 17

## ARSON AND BURNING OFFENSES

(PAGE 369)

### FIRST-DEGREE ARSON (PAGE 371)

**Related Offenses  
Not in This Chapter (page 373)**

The second-to-last offense listed should read:  
Injuring houses, churches, uninhabited houses, outhouses by means other than burning and injuring fences, walls, and other enclosures by burning or otherwise (G.S. 14-144)



# CHAPTER 18

## TRESPASS, PROPERTY DAMAGE, AND LITTERING

(PAGE 387)

### INJURY TO REAL PROPERTY (PAGE 395)

#### Related Offenses Not in This Chapter (page 396)

The sixth offense listed should read:

Injuring houses, churches, uninhabited houses, outhouses by means other than burning and injuring fences, walls, and other enclosures by burning or otherwise (G.S. 14-144)

### LITTERING (PAGE 401)

#### Elements (page 403)

As a result of a court decision (\_\_\_ N.C. App. \_\_\_, 659 S.E.2d 34), element (4) should be revised as follows and a new element (5) should be added to this crime:

- (4) on property not owned by the person, *and*
- (5) the litter was not placed into a litter receptacle so that it would be prevented from being carried away or deposited by the elements on any part of the public or private property or waters.

#### Notes (page 404)

**Element (5) (new note).** A private dumpster is a litter receptacle (\_\_\_ N.C. App. \_\_\_, 659 S.E.2d 34).

**Exceptions (page 404).** The North Carolina Court of Appeals has held that the provision in G.S. 14-399(a)(2)—the litter was not placed into a litter receptacle—is not an exception but rather is an element of the crime that must be proved by the State (\_\_\_ N.C. App. \_\_\_, 659 S.E.2d 34). That decision did not address whether the provision in G.S. 14-399(a)(1)—disposal on property designated by the state or a political subdivision for the disposal of garbage and refuge by a person authorized to use the property for this purpose—is an exception or an element of the offense.





# CHAPTER 19

## DISORDERLY CONDUCT, RIOT, AND GANG-RELATED OFFENSES (NEW TITLE)

(PAGE 409)

### DISORDERLY CONDUCT (PAGE 410)

#### IV. Disorderly Conduct by Disrupting Students (page 414)

##### Notes (page 414)

**Element (2) (page 414).** The evidence was insufficient to support a juvenile adjudication of delinquency for this offense when the juvenile and a friend were walking in the hall when they should have been in class; when they were asked to stop, they grinned, giggled, and ran down the hall; the juvenile was stopped by a school resource officer after a brief chase; and a few students and teachers looked out into the hall while the officer was escorting the juvenile to the school office (\_\_\_ N.C. App. \_\_\_, 660 S.E.2d 653).

### GANG-RELATED CRIMES (NEW CRIME)

2008 legislation (S.L. 2008-214) created a number of new gang-related offenses, set forth below.

#### I. Street Gang Activity (New Crime)

##### Statute § 14-50.16. Pattern of criminal street gang activity.

(a) It is unlawful for any person employed by or associated with a criminal street gang to do either of the following:

- (1) To conduct or participate in a pattern of criminal street gang activity.
- (2) To acquire or maintain any interest in or control of any real or personal property through a pattern of criminal street gang activity.

A violation of this section is a Class H felony, except that a person who violates subdivision (a)(1) of this section, and is an organizer, supervisor, or acts in any other position of management with regard to the criminal street gang, shall be guilty of a Class F felony.

(b) As used in this Article, 'criminal street gang' or 'street gang' means any ongoing organization, association, or group of three or more persons, whether formal or informal, that:

- (1) Has as one of its primary activities the commission of one or more felony offenses, or delinquent acts that would be felonies if committed by an adult;
- (2) Has three or more members individually or collectively engaged in, or who have engaged in, criminal street gang activity; and
- (3) May have a common name, common identifying sign or symbol.

(c) As used in this Article, 'criminal street gang activity' means to commit, to attempt to commit, or to solicit, coerce, or intimidate another person to commit an act or acts, with the specific intent that such act or acts were intended or committed for the purpose, or in furtherance, of the person's involvement in a criminal street gang or street gang. An act or acts are included if accompanied by the necessary mens rea or criminal intent and would be chargeable by indictment under the following laws of this State:

- (1) Any offense under Article 5 of Chapter 90 of the General Statutes (Controlled Substances Act).
- (2) Any offense under Chapter 14 of the General Statutes except Articles 9, 22A, 40, 46, 47, 59 thereof; and further excepting G.S. 14-78.1, 14-82, 14-86, 14-145, 14-179, 14-183, 14-184, 14-186, 14-190.9, 14-195, 14-197, 14-201, 14-247, 14-248, 14-313 thereof.

(d) As used in this Article, 'pattern of criminal street gang activity' means engaging in, and having a conviction for, at least two prior incidents of criminal street gang activity, that have the same or similar purposes, results, accomplices, victims, or methods of commission or otherwise are interrelated by common characteristics and are not isolated and unrelated incidents, provided that at least one of these offenses occurred after December 1, 2008, and the last of the offenses occurred within three years, excluding any periods of imprisonment, of prior criminal street gang activity. Any offenses committed by a defendant prior to indictment for an offense based upon a pattern of street gang activity shall not be used as the basis for any subsequent indictments for offenses involving a pattern of street gang activity.

**Elements** A person guilty of this offense

- (1) is employed by or associated with a criminal street gang *and*
- (2) (a) conducts or participates in a pattern of criminal street gang activity *or*  
(b) acquires or maintains any interest in or control of any real or personal property through a pattern of criminal street gang activity.

**Punishment** Class H felony. G.S. 14-50.29 provides for a conditional discharge for first offenders under the age of 18.

**Notes** **Element (1).** The terms "criminal street gang" and "street gang" mean any ongoing organization, association, or group of three or more persons, formal or informal, that (1) has as one of its primary activities the commission of one or more felony offenses or delinquent acts that would be felonies if committed by an adult; (2) has three or more members individually or collectively engaged in, or who have engaged in, criminal street gang activity; and (3) may have a common name, common identifying sign, or symbol [G.S. 14-50.16(b)]. The term "criminal street gang activity" is defined in the next note.

**Element (2).** "Criminal street gang activity" means to commit, to attempt to commit, or to solicit, coerce, or intimidate another person to commit an act or acts, with the specific intent that such act or acts were intended or committed for the purpose, or in furtherance, of the person's involvement in a criminal street gang or street gang. An act or acts are included if they are accompanied by the necessary mens rea or criminal intent and would be chargeable by indictment

under Article 5 of G.S. Chapter 90 or an offense under G.S. Chapter 14, with certain exceptions [G.S. 14-50.16(c)]. The Chapter 14 exceptions include offenses in Article 9 (Hazing); Article 22A (Trespassing upon “Posted” Property to Hunt, Fish, Trap, or Remove Pine Needles/Straw); Article 40 (Protection of the Family); Article 46 (Regulation of Landlord and Tenant); Article 47 (Cruelty to Animals); Article 59 (Public Intoxication); G.S. 14-82 (Taking horses, mules or dogs for temporary purposes); G.S. 14-145 (Unlawful posting of advertisements); G.S. 14-183 (Bigamy); G.S. 14-184 (Fornication and adultery); G.S. 14-186 (Opposite sexes occupying same bedroom at hotel for immoral purposes; falsely registering as husband and wife); G.S. 14-190.9 (Indecent exposure); G.S. 14-197 (Using profane or indecent language on public highways; counties exempt); G.S. 14-247 (Private use of publicly owned vehicle); G.S. 14-248 (Obtaining repairs and supplies for private vehicle at expense of State); and G.S. 14-313 (Youth access to tobacco products). The statute also excepts G.S. 14-78.1, G.S. 14-86, G.S. 14-179, G.S. 14-195, and G.S. 14-201, but these are repealed statutes.

The term “pattern of criminal street gang activity” means engaging in, and having a conviction for, at least two prior incidents of criminal street gang activity that have the same or similar purposes, results, accomplices, victims, or methods of commission or otherwise are interrelated by common characteristics and are not isolated and unrelated incidents, provided that at least one of these offenses occurred after December 1, 2008, and the last of the offenses occurred within three years, excluding any periods of imprisonment, of prior criminal street gang activity [G.S. 14-50.16(d)]. Any offenses committed by a defendant prior to indictment for an offense based upon a pattern of street gang activity shall not be used as the basis for any subsequent indictments for offenses involving a pattern of street gang activity [G.S. 14-50.16(d)].

**Juveniles.** G.S. 14-50.28 provides that this crime does not apply to a juvenile under the age of 16.

**Multiple offenses.** G.S. 14-50.21 provides that all of the gang-related offenses covered in this section are separate offenses.

**Seizure and forfeiture of property.** G.S. 15-50.23 provides for seizure and forfeiture of property used or intended for use in, derived from, or realized through criminal street gang activity or a pattern of criminal street gang activity.

**Real property declared a public nuisance.** G.S. 14-50.24 provides that real property erected, established, maintained, owned, leased, or used by any criminal street gang to conduct criminal street gang activity shall constitute a public nuisance and may be abated as provided in the General Statutes.

**Related Offenses  
Not in This Chapter** None

## II. Organizer of Street Gang Activity (New Crime)

**Statute** See G.S. 14-50.16, reproduced above under “I. Street Gang Activity.”

**Elements** A person guilty of this offense

- (1) is employed by or associated with a criminal street gang *and*
- (2) is an organizer, supervisor, or acts in any other position of management with regard to the criminal street gang *and*
- (3) (a) conducts or participates in a pattern of criminal street gang activity *or*

- (b) acquires or maintains any interest in or control of any real or personal property through a pattern of criminal street gang activity.

**Punishment** Class F felony

**Notes** **Elements (1) and (2).** For the definition of “criminal street gang” and “street gang,” see the note on Element (1) under “I. Street Gang Activity,” above, in this supplement.

**Element (3).** For the definition of “criminal street gang activity” and “pattern of criminal street gang activity” see the note on Element (2) under “I. Street Gang Activity,” above, in this supplement.

**Juveniles.** See this note under “I. Street Gang Activity.”

**Multiple offenses.** See this note under “I. Street Gang Activity.”

**Seizure and forfeiture of property.** See this note under “I. Street Gang Activity.”

**Real property declared a public nuisance.** See this note under “I. Street Gang Activity.”

**Related Offenses  
Not in This Chapter** None

### III. Soliciting Participation in Street Gang Activity (New Crime)

**Statute** § 14-50.17. **Soliciting; encouraging participation.**

(a) It is unlawful for any person to cause, encourage, solicit, or coerce a person 16 years of age or older to participate in criminal street gang activity.

(b) A violation of this section is a Class H felony.

**Elements** A person guilty of this offense

- (1) causes, encourages, solicits, or coerces
- (2) a person 16 years of age or older
- (3) to participate in criminal street gang activity.

**Punishment** Class H felony. G.S. 14-50.29 provides for a conditional discharge for first offenders under the age of 18.

**Notes** **Element (3).** For the definition of “criminal street gang,” see the note on Element (1) under “I. Street Gang Activity,” above, in this supplement.

**Juveniles.** See this note under “I. Street Gang Activity.”

**Multiple offenses.** See this note under “I. Street Gang Activity.”

**Seizure and forfeiture of property.** See this note under “I. Street Gang Activity.”

**Real property declared a public nuisance.** See this note under “I. Street Gang Activity.”

**Related Offenses  
Not in This Chapter** “Solicitation of Another to Commit a Felony” (Chapter 5)

**IV. Soliciting Minor's Participation in Street Gang Activity (New Crime)****Statute § 14-50.18. Soliciting; encouraging participation; minor.**

- (a) It is unlawful for any person to cause, encourage, solicit, or coerce a person under 16 years of age to participate in criminal street gang activity.
- (b) A violation of this section is a Class F felony.
- (c) Nothing in this section shall preclude a person who commits a violation of this section from criminal culpability for the underlying offense committed by the minor under any other provision of law.

- Elements** A person guilty of this offense
- (1) causes, encourages, solicits, or coerces
  - (2) a person under 16 years of age
  - (3) to participate in criminal street gang activity.

**Punishment** Class F felony

**Notes** **Element (3).** For the definition of "criminal street gang," see the note on Element (1) under "I. Street Gang Activity," above, in this supplement.

**Juveniles.** See this note under "I. Street Gang Activity."

**Multiple offenses.** See this note under "I. Street Gang Activity."

**Seizure and forfeiture of property.** See this note under "I. Street Gang Activity."

**Real property declared a public nuisance.** See this note under "I. Street Gang Activity."

**Related Offenses  
Not in This Chapter**

"Solicitation of Another to Commit a Felony" (Chapter 5)

"Contributing to a Juvenile's Being Delinquent, Undisciplined, Abused or Neglected" (Chapter 9)

**V. Threat to Deter Gang Withdrawal (New Crime)****Statute § 14-50.19. Threats to deter from gang withdrawal.**

- (a) It is unlawful for any person to communicate a threat of injury to a person, or to damage the property of another, with the intent to deter a person from assisting another to withdraw from membership in a criminal street gang.
- (b) A violation of this section is a Class H felony.

- Elements** A person guilty of this offense
- (1) communicates
  - (2) a threat
  - (3) of injury to a person or to damage the property of another
  - (4) with the intent to deter a person from assisting another to withdraw from membership in a criminal street gang.

**Punishment** Class H felony. G.S. 14-50.29 provides for a conditional discharge for first offenders under the age of 18.

**Notes** **Element (3).** For the definition of "criminal street gang," see the note on Element (1) under "I. Street Gang Activity," above, in this supplement.

**Juveniles.** See this note under "I. Street Gang Activity."

**Multiple offenses.** See this note under "I. Street Gang Activity."

**Seizure and forfeiture of property.** See this note under "I. Street Gang Activity."

**Real property declared a public nuisance.** See this note under "I. Street Gang Activity."

**Related Offenses  
Not in This Chapter**

See various offenses in Chapter 8, "Threats, Harassment, Stalking, and Violation of Domestic Protective Orders."

**VI. Threats after Gang Withdrawal (New Crime)**

**Statute § 14-50.20. Threats of punishment or retaliation.**

(a) It is unlawful for any person to communicate a threat of injury to a person, or to damage the property of another, as punishment or retaliation against a person for having withdrawn from a criminal street gang.

(b) A violation of this section is a Class H felony.

**Elements** A person guilty of this offense

- (1) communicates
- (2) a threat of injury to a person or to damage the property of another
- (3) as punishment or retaliation against a person for having withdrawn from a criminal street gang.

**Punishment** **Class H felony.** G.S. 14-50.29 provides for a conditional discharge for first offenders under the age of eighteen.

**Notes** **Element (3).** For the definition of "criminal street gang" see the note on Element (1) under "I. Street Gang Activity," above in this supplement.

**Juveniles.** See this note under "I. Street Gang Activity."

**Multiple offenses.** See this note under "I. Street Gang Activity."

**Seizure and forfeiture of property.** See this note under "I. Street Gang Activity."

**Real property declared a public nuisance.** See this note under "I. Street Gang Activity."

**Related Offenses  
Not in This Chapter**

See various offenses in Chapter 8, "Threats, Harassment, Stalking, and Violation of Domestic Protective Orders."

**VII. Discharging a Firearm in Connection with a Pattern of Street Gang Activity (New Crime)**

**Statute § 14-34.9. Discharging a firearm from within an enclosure.**

Unless covered under some other provision of law providing greater punishment, any person who willfully or wantonly discharges or attempts to discharge a firearm, as a part of a pattern of criminal street gang activity, from within any building, structure, motor vehicle, or other conveyance, erection, or enclosure toward a person or persons not within that enclosure shall be punished as a Class E felon.

- Elements** A person guilty of this offense
- (1) willfully or wantonly
  - (2) discharges or attempts to discharge
  - (3) a firearm
  - (4) from within any building, structure, motor vehicle, or other conveyance, erection, or enclosure
  - (5) toward a person or persons not within that enclosure *and*
  - (6) as a part of a pattern of criminal street gang activity.

**Punishment** Class E felony

**Notes** **Element (6).** The statute does not define “pattern of criminal street gang activity.” For a definition of that term as used in a related statute, see the note on Element (2) under “I. Street Gang Activity,” above, in this supplement.

**Related Offenses  
Not in This Chapter**

“Discharging a Barreled Weapon or Firearm into Occupied Property”  
(Chapter 7)

“Discharging a Barreled Weapon or Firearm into an Occupied Dwelling or Conveyance in Operation” (Chapter 7)

“Discharging a Barreled Weapon or Firearm into Occupied Property Causing Serious Bodily Injury” (Chapter 7)

Various offenses in Chapter 22, “Weapons Offenses”





# CHAPTER 20

## **BOMBING, TERRORISM, AND RELATED OFFENSES**

(PAGE 433)

### **MAKING A FALSE BOMB REPORT (PAGE 438)**

#### **I. Making a False Bomb Report as to a Public Building (page 438)**

##### **Notes (page 439)**

**Relationship between the two versions of this offense (new note).** A student who typed a message “Bomb at Lunch” on a school calculator while at school could have been charged under either G.S. 14-69.1(a) or (c); although the defendant could have been charged with making a false report about a bomb in a public building under G.S. 14-69.1(c), the conviction under G.S. 14-69.1(a) was proper because the school was a building covered by G.S. 14-69.1(a) (186 N.C. App. 108).

**Element (4) (page 439).** “Public building” is defined in G.S. 14-69.1(c).

#### **II. Making a False Bomb Report as to a Nonpublic Building or a Vehicle, Aircraft, Vessel, or Boat (page 439)**

##### **Notes (page 440)**

**Relationship between the two versions of this offense (new note).** See this note under “I. Making a False Bomb Report as to a Public Building,” above, in this supplement.

### **MAKING A FALSE REPORT CONCERNING MASS VIOLENCE ON EDUCATIONAL PROPERTY (NEW CRIME)**

Effective December 1, 2007, the General Assembly made it a felony to make a false report concerning mass violence on educational property, as described below (S.L. 2007-196). To save space, the statute (G.S. 14-277.5) is not reproduced here.

**2008 Cumulative Supplement to North Carolina Crimes**

- Elements** A person guilty of this offense
- (1) makes a report
  - (2) to any person or groups of persons
  - (3) that an act of mass violence
  - (4) is going to occur
  - (5) on educational property or at a school-sponsored activity
  - (6) knowing or having reason to know that the report is false.

**Punishment** Class H felony [G.S. 14-277.5(b)]. The court may order restitution, including costs and consequential damages resulting from the disruption of the normal activity that would have otherwise occurred on the premises but for the false report [G.S. 14-277.5(c)].

**Notes** **Element (1).** The report may be made by any means of communication [G.S. 14-277.5(b)].

**Element (3).** The term “mass violence” is defined in G.S. 14-277.5(a).

**Element (5).** The school-sponsored activity may be a curricular or extracurricular activity [G.S. 14-277.5(b)]. The terms “educational property” and “school” are defined in G.S. 14-269.2 [G.S. 14-277.5(a)(1) and (3)].

**Related Offenses**  
**Not in This Chapter** None

# CHAPTER 21

## PERJURY, BRIBERY, AND OTHER CRIMES AGAINST THE ADMINISTRATION OF JUSTICE

(PAGE 449)

### COMMON LAW OBSTRUCTION OF JUSTICE (PAGE 451)

**Related Offenses  
Not in This Chapter (page 452)**

Giving false information required in a report of a reportable accident [(G.S. 20-279.31(b)(1))]

Unauthorized practice of law (G.S. 84-4)

### INTIMIDATING WITNESSES (PAGE 452)

**Notes (page 453)**

**Element (1) (page 453).** The words “menace” and “coerce” are synonymous with the word “threat” (186 N.C. App. 233). The defendant left a voice mail message for the victim calling her a “stinking nasty bitch” and stating that “you’ve got me under a \$5,000 bond. As soon as I make it, I’m going to give you a God damn taste of your own fucking medicine.” The message, combined with evidence of the volatile and violent relationship between the two, was sufficient evidence to support one count of intimidating a witness (183 N.C. App. 36). However, the victim’s testimony that the defendant told her “at least ten” times not to testify was not sufficient to show that the defendant threatened her at any other time, and thus all of the other counts should have been dismissed (183 N.C. App. 36). For a case in which there was insufficient evidence of alleged “menaces and coercive statements” as alleged in the indictment, see 186 N.C. App. 233.

## PERJURY (PAGE 455)

### Notes (page 455)

**Element (1) (page 455).** For a case in which there was sufficient evidence of this element, even though the defendant claimed that he did not intentionally misstate the facts regarding his ownership interest in real estate on an affidavit of indigency, see 361 N.C. 662.

**False statement on an affidavit of indigency (new note).** See 361 N.C. 662 for a case in which a perjury conviction was upheld based on a false statement in an affidavit of indigency. Note that G.S. 7A-456 also criminalizes making a false statement on an affidavit of indigency. For a case in which the evidence was insufficient to sustain a conviction under that statute, see 361 N.C. 662.

### Related Offenses Not in This Chapter (page 455)

Giving false information required in a report of a reportable accident [G.S. 20-279.31(b)(1)]

## RESISTING, DELAYING, OR OBSTRUCTING AN OFFICER (PAGE 460)

### Elements (page 460)

Element (1) should read:

- (1) willfully and unlawfully

### Notes (page 460)

**Element (1) (page 460).** A defendant does not act unlawfully if there is a justification or excuse for the defendant's action or the action is legally permissible. For example, a defendant could not be convicted of this crime when he fled from officers who stopped him without reasonable suspicion; since the encounter between the defendant and the officer was entirely consensual, the defendant had a right to disregard the police (\_\_\_ N.C. App. \_\_\_, 663 S.E.2d 866). By contrast, a conviction was upheld when the defendant fled during a lawful investigatory stop after an officer had ordered him to stop (\_\_\_ N.C. App. \_\_\_, 668 S.E.2d 622).

**Element (4) (page 461).** Although this offense covers resisting an arrest, it also includes any resistance, delay, or obstruction of an officer in the discharge of his or her duties (186 N.C. App. 382).

**Relationship with assault on a governmental officer or employee (page 461).** There was no double jeopardy bar to trying the defendant in superior court for resisting, delaying, or obstructing an officer following her appeal from a district court trial in which she was convicted of that crime and acquitted of assault on a governmental officer; although both offenses were based on the same incident, different evidence supported the two charges (186 N.C. App. 382).

**Related Offenses  
Not in This Chapter (page 462)**

Injuring or killing a law enforcement agency or assistance animal (G.S. 14-163.1)

**FALSE REPORT TO LAW ENFORCEMENT  
AGENCIES OR OFFICERS (PAGE 462)**

**Notes (page 462)**

**Element (5) (page 463).** It is not enough that the false report had the effect of interfering with the operation of a law enforcement officer; for a defendant to be convicted of this offense, the State must show that he or she committed the act with one of the statutory purposes in mind (\_\_\_ N.C. App. \_\_\_, 660 S.E.2d 197).

**Related Offenses  
Not in This Chapter (page 463)**

Misuse of 911 system (G.S. 14-111.4)

**INTERFERING WITH AN EMERGENCY  
COMMUNICATION (PAGE 463)**

**Related Offenses  
Not in This Chapter (page 463)**

Misuse of 911 system (G.S. 14-111.4)



# CHAPTER 22

## WEAPONS OFFENSES

(PAGE 471)

### POSSESSION OF A FIREARM BY A FELON (PAGE 473)

#### Notes (page 474)

**Element (1) (page 474).** The trial court did not err, on the facts of this case, by declining to accept the defendant's stipulation as to the prior felony and by allowing the State to introduce evidence of that crime (\_\_\_ N.C. App. \_\_\_, 664 S.E.2d 432).

**Element (2) (page 474).** There was sufficient evidence to establish possession when, on a cool day, a warm, dry, chrome-plated handgun was found in wet grass six inches from the defendant's hand after he was tackled by officers and the defendant was reaching for the gun (181 N.C. App. 302). The evidence was sufficient to establish that the defendant had constructive possession of a weapon found in the cargo area of a vehicle when the defendant was the owner and driver of the vehicle, the defendant had exclusive control of the vehicle, the cargo area contained other objects owned by the defendant, the defendant said that everything in the cargo area belonged to him, and the weapon was found wrapped in a man's jacket (\_\_\_ N.C. App. \_\_\_, 666 S.E.2d 191).

**Multiple convictions (new note).** A defendant may be convicted and sentenced only once for simultaneous possession of more than one firearm (\_\_\_ N.C. App. \_\_\_, 663 S.E.2d 340).

**Constitutionality (page 475).** The North Carolina Court of Appeals has upheld the 2004 version of the statute in the face of challenges that it was not rationally related to a legitimate state interest, was a prohibited bill of attainder, and violated the Ex Post Facto Clause, due process, equal protection, and the Second Amendment (185 N.C. App. 610). The statute does not violate the Double Jeopardy Clause (\_\_\_ N.C. App. \_\_\_, 656 S.E.2d 322); 185 N.C. App. 227).

**Crime is a substantive offense (new note).** G.S. 14-415.1 creates a substantive offense and is not merely a recidivist statute (\_\_\_ N.C. App. \_\_\_, 656 S.E.2d 322).



**CARRYING A CONCEALED WEAPON (PAGE 477)****I. Carrying a Concealed Pistol or Gun (page 478)****Notes (page 479)**

**Element (3) (page 479).** In order to satisfy this element, the weapon must be within the reach and control of the person charged (\_\_\_ N.C. App. \_\_\_, 662 S.E.2d 564). There was insufficient evidence of this element when the gun was found in a backpack in a van driven by the defendant but no evidence was presented regarding the backpack's location in the van or its proximity to the defendant (\_\_\_ N.C. App. \_\_\_, 662 S.E.2d 564).

**POSSESSION OF WEAPONS ON SCHOOL GROUNDS (PAGE 483)**

**Statute (page 483).** In 2007 the General Assembly amended subsection (g) of G.S. 14-269.2, pertaining to exceptions to the weapons ban (S.L. 2007-427 and S.L. 2007-511). The exception in subsection (g)(2) now pertains to firefighters, emergency service personnel, and North Carolina Forest Service personnel and any private police employed by a school (under the previous version, an "educational institution") when acting in the discharge of their official duties. Additionally, 2007 legislation (S.L. 2007-427 and S.L. 2007-511) added exceptions for an individual registered under G.S. Chapter 74C as (1) an armed armored car service guard or an armed courier service guard when acting in the discharge of the guard's duties and with the permission of the college or university, and (2) an armed security guard while on the premises of a hospital or health care facility located on educational property when acting in the discharge of the guard's duties with the permission of the college or university [G.S. 14-269.2(g) (5) and (6)].

**I. Possession of Firearms (page 485)****Notes (page 485)**

**Exemptions (page 485).** See the discussion immediately above regarding the 2007 legislative changes.

# CHAPTER 23

## PROSTITUTION, LOITERING FOR PROSTITUTION, AND RELATED OFFENSES

(PAGE 493)

### PROMOTING PROSTITUTION OF A MINOR (PAGE 499)

**Statute (page 499).** Effective December 1, 2008, and applying to offenses committed on or after that date, 2008 legislation (S.L. 2008-218) amended subsection (5) of G.S. 14-190.13 to add the following activity to the definition of “sexual activity”:

- g. The lascivious exhibition of the genitals or pubic area of any person.

Effective December 1, 2008, and applying to offenses committed on or after that date, 2008 legislation (S.L. 2008-117) amended subsection (c) of G.S. 14-190.18 to increase the punishment for this offense from a Class D felony to a Class C felony.

#### I. Facilitating a Minor’s Prostitution (page 500)

**Punishment (page 500).** Class C felony

**Notes (page 500)**

**Broad definition of “prostitution” (page 500).** As noted immediately above, the statutory definition of sexual activity now includes the lascivious exhibition of the genitals or pubic area of any person.

**Sex offender registration required (new note).** This offense is a sexually violent offense triggering registration requirements under the sex offender registration statutes [G.S. 14-208.6(5)].

#### II. Protecting a Minor’s Prostitution (page 501)

**Punishment (page 502).** Class C felony

**Notes (page 502)**

**Sex offender registration required (new note).** This offense is a sexually violent offense triggering registration requirements under the sex offender registration statutes [G.S. 14-208.6(5)].

**PARTICIPATING IN THE PROSTITUTION  
OF A MINOR (PAGE 502)****I. Soliciting a Minor for Prostitution (page 502)****Notes (page 502)**

**Sex offender registration required (new note).** This offense is a sexually violent offense triggering registration requirements under the sex offender registration statutes [G.S. 14-208.6(5)].

**II. Paying a Minor to Participate in Prostitution (page 503)****Notes (page 503)**

**Sex offender registration required (new note).** This offense is a sexually violent offense triggering registration requirements under the sex offender registration statutes [G.S. 14-208.6(5)].

**III. Paying a Minor for Prostitution under a Prior Agreement (page 504)****Notes (page 504)**

**Sex offender registration required (new note).** This offense is a sexually violent offense triggering registration requirements under the sex offender registration statutes [G.S. 14-208.6(5)].

# CHAPTER 24

## OBSCENITY AND RELATED OFFENSES

(PAGE 505)

### DISSEMINATING OBSCENITY (PAGE 507)

**Notes** (page 508)

**Element (3) (page 508).** A witness's testimony about material alleged to be obscene was sufficient to sustain a conviction under G.S. 14-190.1 without introduction of the exact material (184 N.C. App. 553).

### USING A MINOR TO ASSIST IN AN OBSCENITY OFFENSE (PAGE 512)

**Notes** (page 513)

**Sex offender registration required (new note).** This offense is a sexually violent offense triggering registration requirements under the sex offender registration statutes [G.S. 14-208.6(5)].

### DISPLAYING MATERIAL HARMFUL TO MINORS (PAGE 514)

**Statute** (page 514). Effective December 1, 2008, and applying to offenses committed on or after that date, 2008 legislation (S.L. 2008-218) amended subsection (5) of G.S. 14-190.13 to add the following activity to the definition of "sexual activity":

- g. The lascivious exhibition of the genitals or pubic area of any person.

**Notes** (page 516)

**Element (3) (page 516).** As noted immediately above, the statutory definition of sexual activity now includes the lascivious exhibition of the genitals or pubic area of any person.

## FIRST-DEGREE SEXUAL EXPLOITATION OF A MINOR (PAGE 519)

**Statute** (page 519). Effective December 1, 2008, and applying to offenses committed on or after that date, 2008 legislation (S.L. 2008-218; S.L. 2008-117) amended G.S. 14-190.16(d) to increase the punishment for this offense from a Class D felony to a Class C felony.

### I. Facilitating Production (page 520)

**Punishment** (page 520). Class C Felony [G.S. 14-190.16(d)]

**Notes** (page 520)

**Sex offender registration required (new note).** This offense is a sexually violent offense triggering registration requirements under the sex offender registration statutes [G.S. 14-208.6(5)].

### II. Permitting Sexual Activity for Production (page 520)

**Punishment** (page 520). Class C Felony [G.S. 14-190.16(d)]

**Notes** (page 521)

**Sex offender registration required (new note).** This offense is a sexually violent offense triggering registration requirements under the sex offender registration statutes [G.S. 14-208.6(5)].

### III. Transporting Minor for Production (page 521)

**Punishment** (page 521). Class C Felony [G.S. 14-190.16(d)]

**Notes** (page 521)

**Sex offender registration required (new note).** This offense is a sexually violent offense triggering registration requirements under the sex offender registration statutes [G.S. 14-208.6(5)].

### IV. Producing Material Commercially (page 521)

**Punishment** (page 521). Class C Felony [G.S. 14-190.16(d)]

**Notes** (page 521)

**Sex offender registration required (new note).** This offense is a sexually violent offense triggering registration requirements under the sex offender registration statutes [G.S. 14-208.6(5)].

## SECOND-DEGREE SEXUAL EXPLOITATION OF A MINOR (PAGE 522)

**Statute (page 522).** Effective December 1, 2008, and applying to offenses committed on or after that date, 2008 legislation (S.L. 2008-218; S.L. 2008-117) amended G.S. 14-190.17(d) to increase the punishment for this offense from a Class F felony to a Class E felony.

### I. Producing Material Noncommercially (page 522)

**Punishment (page 522).** Class E Felony [G.S. 14-190.17(d)]

**Notes (page 522)**

**Sex offender registration required (new note).** This offense is a sexually violent offense triggering registration requirements under the sex offender registration statutes [G.S. 14-208.6(5)].

### II. Circulating Material (page 523)

**Punishment (page 523).** Class E Felony [G.S. 14-190.17(d)]

**Notes (page 523)**

**Sex offender registration required (new note).** This offense is a sexually violent offense triggering registration requirements under the sex offender registration statutes [G.S. 14-208.6(5)].

**Multiple convictions and punishments (new note).** A defendant may be convicted of second-degree sexual exploitation of a minor based on receipt of images of minors and of third-degree sexual exploitation of a minor based on possession of those same images [State v. Anderson, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Dec. 16, 2008)].

## THIRD-DEGREE SEXUAL EXPLOITATION OF A MINOR (PAGE 523)

**Statute (page 523).** Effective December 1, 2008, and applying to offenses committed on or after that date, 2008 legislation (S.L. 2008-218; S.L. 2008-117) amended G.S. 14-190.17A(d) to increase the punishment for this offense from a Class I felony to a Class H felony.

**Punishment (page 523).** Class H Felony [G.S. 14-190.17(d)]

**Notes (page 524)**

**Element (1) (new note).** Although cases have stated that there is no requirement of knowing possession (\_\_\_ N.C. App. \_\_\_, 661 S.E.2d 899; 186 N.C. App. 587), they also have stated that a defendant is in possession of child pornography when he or she has the power and intent to control the disposition of the

images (\_\_\_ N.C. App. \_\_\_, 661 S.E.2d 899). This element is satisfied when the State establishes that the computer belongs to the defendant and that the images had been opened and saved on that computer (\_\_\_ N.C. App. \_\_\_, 661 S.E.2d 899). The evidence sufficiently established that the defendant owned the computer when it was found at the defendant's place of business and was registered to the defendant and a receipt signed by the defendant, a payment receipt bearing his name and address, and two of his deposit slips were found in and around the desk where the computer was located (\_\_\_ N.C. App. \_\_\_, 661 S.E.2d 899). For another case in which there was sufficient evidence that the defendant was in possession of computer images in violation of the statute, see 186 N.C. App. 587.

**Element (3) (new note).** The statute provides that the defendant must have knowledge of the material's character or content. Sufficient evidence was presented as to this element when the defendant conceded that the computer contained images of a minor engaging in sexual activity, a SBI agent testified that he found twelve saved files with names indicating that they contained child pornography (e.g., "Child Porn, Very Illegal"), a computer forensic analysis revealed that the pornography was stored on the hard drive, and the jury reviewed the files to determine whether their names reflected their content (\_\_\_ N.C. App. \_\_\_, 661 S.E.2d 899).

**Stipulation as to content (new note).** A defendant's offer to stipulate that the material contains images of child pornography does not bar the State from presenting evidence as to the content of the material (\_\_\_ N.C. App. \_\_\_, 661 S.E.2d 899).

**Sex offender registration required (new note).** This offense is a sexually violent offense triggering registration requirements under the sex offender registration statutes [G.S. 14-208.6(5)].

**Multiple convictions and punishments (page 524).** A defendant may be convicted of second-degree sexual exploitation of a minor based on receipt of images of minors and of third-degree sexual exploitation of a minor based on possession of those same images [State v. Anderson, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Dec. 16, 2008)].

# CHAPTER 25

## GAMBLING, BINGO, AND RAFFLES

(PAGE 529)

### GAMBLING (PAGE 536)

#### Notes (page 536)

**Element (2) (page 536).** Poker is a game of chance, not a game of skill (183 N.C. App. 92).

### PROMOTING, OPERATING, OR CONDUCTING A SERVER-BASED ELECTRONIC GAME PROMOTION (NEW CRIME)

Effective December 1, 2008, and applying to offenses committed on or after that date, 2008 legislation (S.L. 2008-122) created this new offense.

#### Statute § 14-306.3. Certain game promotions unlawful.

(a) It is unlawful to promote, operate, or conduct a server-based electronic game promotion.

(b) It is unlawful for any person to possess any game terminal with a display that simulates a game ordinarily played on a slot machine regulated under G.S. 14-306 or a video gaming machine regulated under G.S. 14-306.1A for the purpose of promoting, operating, or conducting a server-based electronic game promotion.

(c) As used in this section, “server-based electronic game promotion” means a system that meets all of the following criteria:

- (1) A database contains a pool of entries with each entry associated with a prize value.
- (2) Participants purchase, or otherwise obtain by any means, a prepaid card.
- (3) With each prepaid card purchased or obtained, the participant also obtains one or more entries.
- (4) Entries may be revealed in any of the following ways:
  - a. At a point-of-sale terminal at the time of purchase or later.
  - b. At a game terminal with a display that simulates a game ordinarily played on a slot machine regulated under G.S. 14-306 or a video gaming machine regulated under G.S. 14-306.1A.

(d) Upon conviction or plea of guilty, all of the following held by the person shall be automatically revoked:

- (1) A permit issued under Chapter 18B of the General Statutes.
- (2) A contract to sell tickets or shares under Article 5 of Chapter 18C of the General Statutes.



(e) Nothing in this section shall apply to the form of Class III gaming legally conducted on Indian lands which are held in trust by the United States government for and on behalf of federally recognized Indian tribes if conducted in accordance with an approved Class III Tribal-State Gaming Compact applicable to that tribe as provided in G.S. 147-12(14) and G.S. 71A-8.

**Elements** A person guilty of this offense  
 (1) promotes, operates, or conducts  
 (2) a server-based electronic game promotion.

**Punishment** Class 1 misdemeanor for a first offense, Class H felony for a second offense, and Class G felony for a third or subsequent offense [G.S. 14-309(a)]

**Notes** **Element (2).** The term “server-based game promotion” is defined in G.S. 14-306.3(c), reproduced above.

**Revocations.** G.S. 14-306.3(d) provides for automatic revocation of any alcoholic beverage and control permit under G.S. Chapter 18B and any contract to sell lottery tickets under Article 5 of G.S. Chapter 18C.

**Exemption for gaming on Indian lands.** G.S. 14-306.3(e) exempts certain gaming on Indian lands.

**Seizure of illegal gaming items.** The seizure provision of G.S. 14-298 applies to this offense. For more detail, see this note under “Advertising Lotteries” in the main volume.

**Related Offenses**  
**Not in This Chapter** See the offenses listed under “Advertising Lotteries” in the main volume.

## POSSESSION OF SERVER-BASED ELECTRONIC GAME TERMINAL (NEW CRIME)

Effective December 1, 2008, and applying to offenses committed on or after that date, 2008 legislation (S.L. 2008-122) created this new offense.

**Statute** See G.S. 14-306.3(b), reproduced above under “Promoting, Operating, or Conducting Server-Based Electronic Game Promotion.”

**Elements** A person guilty of this offense  
 (1) possesses  
 (2) any game terminal with a display that simulates a game ordinarily played on a slot machine regulated under G.S. 14-306 or a video gaming machine regulated under G.S. 14-306.1A  
 (3) for the purpose of promoting, operating, or conducting a server-based electronic game promotion.

**Punishment** Class 1 misdemeanor for a first offense, Class H felony for a second offense, and Class G felony for a third or subsequent offense or when the person possesses five or more machines [G.S. 14-309(a), (c)]

**Notes** **Element (3).** The term “server-based game promotion” is defined in G.S. 14-306.3(c), reproduced above under “Promoting, Operating, or Conducting Server-Based Electronic Game Promotion.”

**Revocations.** See this note under “Promoting, Operating, or Conducting Server-Based Electronic Game Promotion.”

**Exemption for gaming on Indian lands.** See this note under “Promoting, Operating, or Conducting Server-Based Electronic Game Promotion.”

**Seizure of illegal gaming items.** See this note under “Promoting, Operating, or Conducting Server-Based Electronic Game Promotion.”

**Related Offenses  
Not in This Chapter**

See the offenses listed under “Advertising Lotteries” in the main volume.



# CHAPTER 27

## DRUG OFFENSES

(PAGE 559)

### SALE OR DELIVERY OF A CONTROLLED SUBSTANCE (PAGE 561)

**Notes** (page 575)

**Multiple convictions (page 577).** This note states that a defendant may not be separately convicted of both the sale and delivery of a controlled substance arising from a single transaction. Another case supporting this point is 182 N.C. App. 676.

### MANUFACTURE OF A CONTROLLED SUBSTANCE (PAGE 578)

**Notes** (page 578)

**Element (2) (page 578).** There was sufficient evidence of manufacturing by repackaging when the defendant was seen bagging marijuana and a plastic bag containing marijuana found in his pants pocket was similar to plastic bags found in the apartment (186 N.C. App. 277).

### POSSESSION OF A CONTROLLED SUBSTANCE (PAGE 579)

**Notes** (page 580)

**Element (2) (page 580).** The following are additional cases in which there was sufficient evidence of constructive possession:

- Controlled substances were found on the ground along a path that the defendant used to flee from officers (\_\_\_ N.C. App. \_\_\_, 663 S.E.2d 866).
- Although the defendant did not have exclusive possession over the vehicle in which the cocaine was found, other incriminating circumstances existed, including: the defendant obtained the cocaine from a third party, the cocaine was found in the defendant's jacket

under the seat where the defendant was sitting, and the defendant presented the cocaine to an informant (\_\_\_ N.C. App. \_\_\_, 661 S.E.2d 272).

- There was sufficient evidence of possession as to both the driver and the passenger of a vehicle in which drugs were found; the State also established constructive possession of controlled substances recovered in a room over which the defendant did not have exclusive control (185 N.C. App. 376).
- The defendant had constructive possession of methamphetamine and precursor chemicals found in a shed owned by someone other than the defendant; the owner found the defendant alone in the shed with the door locked from the inside and after the defendant left the shed, investigators found a jar of unknown liquid on a heater that was warm to the touch and a letter addressed to the defendant containing confidential tax information (185 N.C. App. 190).
- Sufficient evidence showed constructive possession in a trafficking by possession case in which the defendant had nonexclusive possession of the home where the drugs were found (183 N.C. App. 652).
- Items were found in a house occupied by the defendant and another man and used by a third person a couple of nights a week (176 N.C. App. 642).

The following is an additional case in which there was insufficient evidence of constructive possession:

- The police entered a home and found the defendant sitting on a bed and another person sitting on a chair in the same room; the police also found a plastic bag of crack cocaine behind a door about three feet from the bed and a rock of crack cocaine among the folds of the bedding; the defendant's birth certificate and driver's license were on a television stand in the room; there was no evidence that the defendant acted nervously or made any motion to hide anything or that he owned any of the items found near the drugs; the presence of the defendant's documents in the room was insufficient to establish that the defendant resided on the premises; although cocaine was found on the bed, the bed was messy and the cocaine was not in plain view (\_\_\_ N.C. App. \_\_\_, 661 S.E.2d 770, *temporary stay allowed*, \_\_\_ N.C. \_\_\_, 665 S.E.2d 87).

**Multiple punishment (page 583).** In order for the State to obtain multiple convictions for possession of a controlled substance, the State must show distinct acts of possession separated in time and space (\_\_\_ N.C. App. \_\_\_, 655 S.E.2d 464). The defendant could be convicted of only one offense where, on the same day, law enforcement officers found marijuana in the defendant's automobile and in his shoe, there was no evidence that the defendant possessed the marijuana for two distinct purposes, and the possession was simultaneous (\_\_\_ N.C. App. \_\_\_, 655 S.E.2d 464).

A defendant may be convicted of felony possession of marijuana (based on drug quantity) and possession with intent to manufacture, sell, or deliver, based on the same contraband (\_\_\_ N.C. App. \_\_\_, 664 S.E.2d 601).

## POSSESSION OF A CONTROLLED SUBSTANCE ON PREMISES OF A PRISON OR LOCAL CONFINEMENT FACILITY (PAGE 584)

### Notes (page 584)

**Element (4) (page 584).** The State is not required to show that the defendant was in a secured area accessible only to officers and their detainees (\_\_\_ N.C. App. \_\_\_, 655 S.E.2d 464).

**Multiple offenses (new note).** A defendant may not be convicted of possession of a controlled substance and this offense, based on the same incident (\_\_\_ N.C. App. \_\_\_, 655 S.E.2d 464).

## POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO MANUFACTURE, SELL, OR DELIVER (PAGE 585)

### Notes (page 585)

**Element (4) (page 585).** The evidence was insufficient to show an intent to sell or deliver when it revealed that the juvenile was found with a single rock of crack cocaine wrapped in cellophane and \$271 in cash (184 N.C. App. 579).

**Multiple convictions (page 586).** A defendant may be convicted of possession with intent to manufacture, sell, or deliver and trafficking by possession, based on the same cocaine (\_\_\_ N.C. App. \_\_\_, 661 S.E.2d 272). A defendant may be convicted of felony possession of marijuana (based on drug quantity) and possession with intent to manufacture, sell, or deliver, based on the same marijuana (\_\_\_ N.C. App. \_\_\_, 664 S.E.2d 601).

## MANUFACTURE, SALE, DELIVERY, OR POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO MANUFACTURE, SELL, OR DELIVER AT OR NEAR A SCHOOL, CHILD CARE CENTER, OR PUBLIC PARK (REVISED TITLE) (PAGE 596)

Legislation enacted in 2007 and effective December 1, 2007, increased the “safe zone” around schools, child care centers and parks from 300 to 1,000 feet (S.L. 2007-375). Additionally, while the offense had applied to a “playground in a public park,” the amended version applies to “a public park” and the detailed statutory definition for “playground” has been deleted. Thus the note to Element (5)(c) should be deleted and elements for this offense should now read as follows:

A person guilty of this offense

- (1) is 21 years old or older *and*
- (2) knowingly

- (3) (a) manufactures *or*
- (b) sells *or*
- (c) delivers *or*
- (d) possesses with intent to sell or deliver or manufacture
- (4) a controlled substance
- (5) on property used for or within 1,000 feet of the boundary of real property used for
  - (a) an elementary or secondary school *or*
  - (b) a child care center *or*
  - (c) a public park.

## TRAFFICKING (PAGE 597)

### I. Trafficking in Marijuana (page 600)

**Punishment (page 600).** The following should be added at the end of the first paragraph: However, G.S. 90-95(h) does not require consecutive sentences for offenses disposed of in the same hearing (\_\_\_ N.C. App. \_\_\_, 666 S.E.2d 872).

#### Notes (page 600)

**Element (1) (page 600).** The offense of trafficking by possession includes an element of knowing possession (\_\_\_ N.C. App. \_\_\_, 668 S.E.2d 91; \_\_\_ N.C. App. \_\_\_, 661 S.E.2d 272). Knowledge may be inferred by incriminating circumstances (\_\_\_ N.C. App. \_\_\_, 668 S.E.2d 91). There was sufficient evidence of the defendant's knowing possession of the controlled substances when boxes containing the drugs were controlled by the defendant (the defendant signed for and collected a package from a delivery service company containing 44.1 pounds of marijuana; about thirty minutes later he helped load a second package containing 43.8 pounds of marijuana into the back seat of a car that he was driving) and other incriminating circumstances existed (the defendant expected to earn \$50 to \$200 for picking up the package for his niece, he once lived with his niece and knew that she frequently received packages, and the delivery address on the box did not exist) (\_\_\_ N.C. App. \_\_\_, 668 S.E.2d 91).

**Element (2) (page 601).** For additional cases in which there was sufficient evidence of transportation, see 182 N.C. App. 762 (rejecting the defendant's argument that there was no evidence showing that he personally transported the marijuana when someone else drove the car, which the defendant did not own; the defendant supplied the marijuana that was in the car and did not contest the fact that he had possession of the marijuana at the time) and \_\_\_ N.C. App. \_\_\_, 661 S.E.2d 272 (there was sufficient evidence of transportation where a witness testified that he and the defendant drove to the location where the drug transaction was to occur, with the cocaine in the vehicle). For a case in which there was insufficient evidence of transportation, see \_\_\_ N.C. App. \_\_\_, 660 S.E.2d 151 (recognizing that the State may prove this element by demonstrating that a defendant acted in concert with another person to move the controlled substances from one place to another but holding that theory could not apply in this case because there was no evidence that the defendant was actually or constructively present when the drugs were transported).

**Element (5) (page 601).** The State established an adequate foundation that a scale used to weigh the marijuana was properly functioning when evidence showed that ordinary scales, common procedures, and reasonable steps to ensure accuracy were used (184 N.C. App. 130).

Once the State introduces evidence as to the weight of the marijuana, the defendant must make an affirmative showing that the weight improperly included excludable material, such as mature stalks [see the note on Element (3) in the main volume]; if the defendant makes this showing, the issue of weight then becomes a factual question for the jury (184 N.C. App. 130).

**Multiple convictions and punishments (page 601).** A defendant may be convicted of possession with intent to manufacture, sell, or deliver and trafficking by possession, based on the same cocaine (\_\_\_ N.C. App. \_\_\_, 661 S.E.2d 272).

#### V. Trafficking in Amphetamine (page 606)

Relying on the language in G.S. 90-95(h)(3b) (the subsection on trafficking in methamphetamine and in amphetamine) and distinguishing that subsection from those prohibiting trafficking in other substances, the court of appeals recently held that the total weight of a liquid mixture containing a detectable but undetermined amount of methamphetamine cannot be used to establish the quantity required to convict a defendant of trafficking in methamphetamine, when there was no evidence that the amount of methamphetamine was twenty-eight grams or more [State v. Conway, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Dec. 2, 2008)]. Presumably this holding would apply to trafficking in amphetamine as well.

#### VI. Trafficking in Methamphetamine (page 606)

Relying on the language in G.S. 90-95(h)(3b) (the subsection on trafficking in methamphetamine and in amphetamine) and distinguishing that subsection from those prohibiting trafficking in other substances, the court of appeals recently held that the total weight of a liquid mixture containing a detectable but undetermined amount of methamphetamine cannot be used to establish the quantity required to convict a defendant of trafficking in methamphetamine, when there was no evidence that the amount of methamphetamine was twenty-eight grams or more [(State v. Conway, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Dec. 2, 2008)].

### MAINTAINING A STORE, DWELLING, VEHICLE, BOAT, OR OTHER PLACE FOR USE, STORAGE, OR SALE OF CONTROLLED SUBSTANCES (PAGE 614)

#### Notes (page 614)

**Element (2) (page 614).** In order to determine whether a person keeps or maintains a place the following factors may be considered, none of which are dispositive: ownership and occupancy of the property, repairs to the property, and payment of utilities, repairs, or rent (\_\_\_ N.C. App. \_\_\_, 664 S.E.2d 601;



184 N.C. App. 706). Additionally, the term “keeping” suggests possession that occurs over a period of time (184 N.C. App. 706).

The State presented substantial evidence to show that the defendant kept and maintained a dwelling when the defendant resided there with his fiancée and children, watched the children while his fiancée worked, contributed money toward household expenses, consistently described the residence as his home, and allowed two children he had with another woman to spend weekends at the residence (\_\_\_ N.C. App. \_\_\_, 656 S.E.2d 287). Although occupancy is not enough to establish that a defendant maintained the property, residence is sufficient (\_\_\_ N.C. App. \_\_\_, 664 S.E.2d 601).

For a case in which the evidence showed only that the defendant occupied the property from time to time and did not establish that he kept or maintained the residence, see 184 N.C. App. 706. In that case, the evidence showed that the defendant was the sole occupant of the residence when the search was conducted, three photographs found in a bedroom showed the defendant in various places in the house, and the defendant’s identification and other papers were found there but none listed the residence as his home address; the State presented no evidence showing that the defendant owned the property or took any other responsibility for it, and, in fact, a utility bill was found in the name of the defendant’s brother. In another case, the evidence was insufficient to establish that the defendant maintained a hotel room that he used with his wife; although the defendant occupied the room one night and was present during the search, there was no evidence that he paid for the room or was a registered guest; it would be speculation to say that the defendant, as opposed to his wife, maintained the room (\_\_\_ N.C. App. \_\_\_, 653 S.E.2d 187).

**Element (4) (page 615).** The determination of whether a place is used for keeping or selling controlled substances depends on the totality of the circumstances; relevant factors include the amount of controlled substances and cash present, whether the defendant admitting selling controlled substances, and the presence of drug paraphernalia or multiple cellular telephones or pagers (\_\_\_ N.C. App. \_\_\_, 654 S.E.2d 814; \_\_\_ N.C. App. \_\_\_, 661 S.E.2d 272).

There was insufficient evidence that the defendant maintained a place for keeping or selling cocaine when officers recovered 6.5 grams of cocaine from a boot inside the defendant’s closet; although the defendant was implicated in a sale of cocaine from a vehicle, no evidence indicated that the cocaine from the vehicle came from the bedroom; the defendant admitted being a habitual cocaine user and that he had purchased the cocaine found in his bedroom the previous week; the defendant asserted the cocaine in the boot was for personal use and denied any intent or plans to sell it; and the State presented no evidence to the contrary (\_\_\_ N.C. App. \_\_\_, 661 S.E.2d 272). The evidence was insufficient to establish that the defendant used a residence to unlawfully keep cocaine when it showed only that he was in possession of 2.1 grams of cocaine at the time of his arrest but did not show that he used his home as a place to keep cocaine over a duration of time; the evidence also was insufficient to establish that the house was being used to sell cocaine when it showed only that he was in possession of 2.1 grams of cocaine along with \$345 in cash (\_\_\_ N.C. App. \_\_\_, 654 S.E.2d 814). There was sufficient evidence that the defendant kept or maintained a dwelling for the purpose of keeping and selling cocaine when the defendant testified that his neighborhood had “a high crime rate of drugs” and the evidence showed that two drug transactions occurred at the residence (\_\_\_ N.C. App. \_\_\_, 656 S.E.2d 287).

**INHALING TOXIC FUMES (PAGE 621)**

Legislation enacted in 2007 and effective December 1, 2007, amended the statute, G.S. 90-113.10, to add ethyl alcohol to the list of covered substances (S.L. 2007-134). Additionally, that legislation modified the statutory exception for use pursuant to the direction of a physician or dentist so that it covers use pursuant to the direction of a "licensed medical provider authorized by law to prescribe the inhalant or chemical substance possessed" (S.L. 2007-134).

**POSSESSION OF A TOXIC SUBSTANCE (PAGE 622)**

Legislation enacted in 2007 and effective December 1, 2007, amended the statute, G.S. 90-113.11, to add ethyl alcohol to the list of covered substances (S.L. 2007-134).

**SALE, ETC., OF A TOXIC SUBSTANCE (PAGE 623)**

Legislation enacted in 2007 and effective December 1, 2007, amended the statute, G.S. 90-113.11, to add ethyl alcohol to the list of covered substances (S.L. 2007-134).

**MANUFACTURE, ETC., OF AN ALCOHOL VAPORIZING DEVICE (NEW CRIME)**

Legislation enacted in 2007 and effective December 1, 2007, enacted G.S. 90-113.10A making it a Class 1 misdemeanor for a person to knowingly manufacture, sell, give, deliver, possess, or use an alcohol vaporizing device [S.L. 2007-134; G.S. 90-113.13 (punishment provision)]. An "alcohol vaporizing device" is "a device, machine, apparatus, or appliance that is designed or marketed for . . . mixing ethyl alcohol with pure or diluted oxygen, or another gas, to produce an alcoholic vapor that an individual can inhale or snort," with specified exceptions (G.S. 90-113.10A). This new offense is not a lesser-included offense of possession of drug paraphernalia (G.S. 90-113.10A).



# CHAPTER 28

## MOTOR VEHICLE OFFENSES

(PAGE 625)

### DRIVING WHILE LICENSE REVOKED OR DISQUALIFIED (PAGE 627)

#### I. Driving While License Revoked (page 629)

##### Notes (page 629)

**Element (4) (page 630).** In a case in which the 2006 amendments to G.S. 20-48 did not apply, adequate proof of notice was made when the State introduced a signed certificate of a Division of Motor Vehicles employee; the certificate stated that the employee deposited notice of the suspension in the mail in a postage-paid envelope addressed to the defendant's address on record with the division (184 N.C. App. 140). The State's evidence that it sent numerous notices to the defendant created a "prima facie presumption of receipt," even though those letters were not sent to the defendant's address shown on Division of Motor Vehicles records; since the defendant presented no evidence, the presumption was not rebutted (\_\_\_ N.C. App. \_\_\_, 656 S.E.2d 322).

### IMPAIRED DRIVING AND RELATED OFFENSES (PAGE 634)

#### I. Impaired Driving (page 634)

**Punishment (page 634).** Legislation enacted in 2007 added new subsection (h1) to G.S. 20-179. Effective December 1, 2007, the new subsection provides that for Level One and Two punishments, a judge may impose, as a probation condition, that the defendant abstain from alcohol consumption for a minimum of 30 days to a maximum of 60 days, as verified by a continuous alcohol monitoring system (S.L. 2007-165).

##### Notes (page 635)

**Element (1) (page 635).** The evidence was sufficient to establish that the defendant was driving the vehicle when there was blood on the driver's side airbag and blood on the defendant but no blood on the passenger side; the

driver's seat was pushed too far back for the only other person involved to drive; and the other person suffered from a fabric burn that was consistent with a passenger-side seatbelt injury (\_\_\_ N.C. App. \_\_\_, 655 S.E.2d 426).

**Element (3) (page 635).** Legislation enacted in 2007 amended the definition of "public vehicular area" in G.S. 20-4.01(32) (S.L. 2007-455). The amendment, which is effective December 1, 2007, pertains to the third category of areas discussed in the note. Thus the second to last sentence of the first paragraph of this note should be deleted and replaced with the following: The third category of included property is a road used by vehicular traffic within or leading to a gated or nongated subdivision or community, whether or not the subdivision or community roads have been offered for dedication to the public [G.S. 20-4.01(32)(c)].

**Pretrial license revocation or license seizure does not bar prosecution (page 637).** For another case holding that a license revocation does not bar an impaired driving prosecution, see \_\_\_ N.C. App. \_\_\_, 666 S.E.2d 199).

**Element (4)(a) (page 636).** The evidence was sufficient when the defendant drank at a party, drove 92 m.p.h. in a 45 m.p.h. zone, ran off the road, and an officer testified that the defendant's eyes were red and glassy and that he had trouble maintaining his balance when walking (\_\_\_N.C. App. \_\_\_, 658 S.E.2d 73).

## V. Habitual Impaired Driving (page 643)

### Notes (page 643)

**Constitutionality (new note).** The habitual impaired driving statute does not violate double jeopardy, even when prior convictions used to support one habitual impaired driving conviction later are used to support a second such conviction (146 N.C. App. 381; 187 N.C. App. 190). *Blakely v. Washington* does not change this holding (181 N.C. App. 557).

## VI. Driving by a Person under 21 Years of Age after Consuming Alcohol or Drugs (page 644)

**Punishment (page 645).** The conflict as to punishment discussed in this note was resolved by 2007 legislation, and it is now clear that the punishment for this offense is as provided in G.S. 20-138.3 (S.L. 2007-493, sec. 20).

### Related Offenses Not in This Chapter (page 646)

Delete the first offense listed and replace it with the following:  
Selling alcohol to underage person [G.S. 18B-302(a)]  
Giving alcohol to underage person [G.S. 18B-302(a1)]  
Purchase, Possession, or Consumption of Alcohol by Underage Person [G.S. 18B-302(b)]

## SERIOUS INJURY BY A VEHICLE (PAGE 646)

### I. Felony Serious Injury by a Vehicle (page 647)

#### Notes (page 647)

**License revocation (page 647).** Delete the text of this note and replace it with the following: Legislation enacted in 2007 amended G.S. 20-19(d) and (e) to require a four-year license revocation upon a conviction of felony serious injury by a vehicle and a permanent revocation upon a conviction of aggravated felony serious injury by a vehicle (S.L. 2007-493).

## RECKLESS DRIVING (PAGE 649)

### II. Reckless Driving: Endangering Persons or Property (page 651)

**Element (6) (page 651).** There was sufficient evidence when the defendant was impaired and drove 92 miles per hour in a 45 mile per hour speed zone (\_\_\_ N.C. App. \_\_\_, 658 S.E.2d 73).

## HIT AND RUN AND RELATED OFFENSES (PAGE 655)

### I. Hit and Run: Driver's Failure to Stop or Remain at the Scene with a Vehicle When Personal Injury or Death Occurs (page 655)

Effective December 1, 2008, and applying to offenses committed on or after that date, 2008 legislation (S.L. 2008-128) amended G.S. 20-166, making several changes. The 2008 legislation amended G.S. 20-166(a) to make this crime apply when serious bodily injury or death occurs (previously it required injury or death) and to elevate punishment to a Class F felony. The statute defines the term "serious bodily injury" by cross-reference to G.S. 14-32.4, set out on page 87 of the main volume. The 2008 legislation also enacted G.S. 20-166(a1), creating a Class H felony hit and run offense that applies when personal injury occurs. The 2008 legislation also replaces the terms "accident or collision" and "accident" with the term "crash."

### II. Hit and Run: Driver's Failure to Give Information or Assistance When Injury or Death Occurs (page 658)

**Elements (page 658).** As a result of 2008 legislative changes (S.L. 2008-128), the term "accident or collision" should be replaced with the term "crash." Additionally, element (4) should now read:

- (4) causing injury, serious bodily injury, or death to any person

**III. Hit and Run: Driver's Failure to Stop or Give Information When Injury or Death is Not Apparent or Only Property Damage Occurs (page 659)**

**Elements (page 659).** As a result of 2008 legislative changes (S.L. 2008-128), the terms "accident" and "accident or collision" should be replaced with the term "crash."

**Notes (page 659)**

**Element(6)(b) (page 660).** In the last sentence of this note, the term "reportable accident" should be replaced with the term "reportable crash."

## SCHOOL BUS OFFENSES (PAGE 666)

**III. Felony Passing or Failure to Stop for a School Bus (page 668)**

Legislation enacted in 2007 (S.L. 2007-382) modified this offense, effective December 1, 2007, to delete the element requiring serious bodily injury. Thus the elements of this offense now are as follows:

- (1) willfully
- (2) violates G.S. 20-217(a) by
  - (a) passing or attempting to pass a stopped school bus or
  - (b) failing to stop or remain stopped for a school bus *and*
- (3) strikes any person.

**IV. Use of a Cell Phone When Driving a School Bus (New Crime)**

Legislation enacted in 2007 (S.L. 2007-261) added new G.S. 20-137.4, making it a crime to use a cell phone while operating a school bus, as described below. The law became effective December 1, 2007. To save space, the statute is not reproduced here.

**Elements** A person guilty of this offense

- (1) operates
- (2) a school bus
- (3) on a public street, highway, or public vehicular area *and*
- (4) uses a mobile telephone
- (5) while the school bus is in motion.

**Punishment** Class 2 misdemeanor, punishable by a fine of not less than \$100 [G.S. 20-137.4(f)]

**Notes** **Element (1).** See the note on Element (1) under "I. Driving While License Revoked" in the main volume.

**Element (2).** The term "school bus" is defined in G.S. 20-4.01(27)(d4) except that it also includes any school activity bus defined in G.S. 20-4.01(27)(d3)

and any vehicle transporting public, private, or parochial school students for compensation [G.S. 20-137.4(a)(4)].

**Element (3).** See the note on Element (3) under “Impaired Driving” in the main volume.

**Element (4).** “Mobile telephone” is defined in G.S. 20-137.3(a)(2). The statute also covers use of “any additional technology associated with a mobile phone” [G.S. 20-137.4(b)].

**Exceptions.** G.S. 20-137.4(d) provides that the offense does not apply to the use of a mobile telephone or additional technology associated with a mobile telephone for the sole purpose of communicating in an emergency situation. “Emergency situation” is defined in G.S. 20-137.4(a)(2).

## **FAILURE TO STOP, MOVE OVER, OR SLOW DOWN FOR AN EMERGENCY VEHICLE (PAGE 668)**

In 2007 the General Assembly amended the portion of G.S. 20-157(f) defining “public service vehicle.” The amendment deletes the requirement that the vehicle has been called to the scene by a motorist or a law enforcement officer (S.L. 2007-360).

### **III. Failure to Move Over or Slow Down for a Stopped Emergency or Public Service Vehicle (page 671)**

#### **Notes (page 672)**

**Element (4)(a) (page 672).** The definition of a “public service vehicle” has been amended, as described above.