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Assaults2

Simple Assault

Statute

**§14-33**. Misdemeanor assaults, batteries, and affrays, simple and aggravated; punishments.

(a) Any person who commits a simple assault or a simple assault and battery or participates in a simple affray is guilty of a Class 2 misdemeanor.

(b) Unless his conduct is covered under some other provision of law providing greater punishment, any person who commits any assault, assault and battery, or affray is guilty of a Class 1 misdemeanor if, in the course of the assault, assault and battery, or affray, he:

(1) through (3) Repealed by Session Laws 1995, c. 507, s. 19.5(b);

(4) through (7) Repealed by Session Laws 1991, c. 525, s. 1;

(8) Repealed by Session Laws 1995, c. 507, s. 19.5(b);

(9) Commits an assault and battery against a sports official when the sports official is discharging or attempting to discharge official duties at a sports event, or immediately after the sports event at which the sports official discharged official duties. A “sports official” is a person at a sports event who enforces the rules of the event, such as an umpire or referee, or a person who supervises the participants, such as a coach. A “sports event” includes any interscholastic or intramural athletic activity in a primary, middle, junior high, or high school, college, or university, any organized athletic activity sponsored by a community, business, or nonprofit organization, any athletic activity that is a professional or semiprofessional event, and any other organized athletic activity in the State.

(c) Unless the conduct is covered under some other provision of law providing greater punishment, any person who commits any assault, assault and battery, or affray is guilty   
of a Class A1 misdemeanor if, in the course of the assault, assault and battery, or affray,   
he or she:

(1) Inflicts serious injury upon another person or uses a deadly weapon;

(2) Assaults a female, he being a male person at least 18 years of age;

(3) Assaults a child under the age of 12 years;

(4) Assaults an officer or employee of the State or any political subdivision of the State, when the officer or employee is discharging or attempting to discharge his official duties;

(5) Repealed by Session Laws 1999-105, s. 1, effective December 1, 1999; or

(6) Assaults a school employee or school volunteer when the employee or volunteer is discharging or attempting to discharge his or her duties as an employee or volunteer, or assaults a school employee or school volunteer as a result of the discharge or attempt to discharge that individual’s duties as a school employee or school volunteer. For purposes of this subdivision, the following definitions shall apply:

a. “Duties” means:

1. All activities on school property;

2. All activities, wherever occurring, during a school authorized event or the accompanying of students to or from that event; and

3. All activities relating to the operation of school transportation.

b. “Employee” or “volunteer” means:

1. An employee of a local board of education; or a charter school authorized under G.S. 115C-238.29D, or a nonpublic school which has filed intent to operate under Part 1 or Part 2 of Article 39 of Chapter 115C of the General Statutes;

2. An independent contractor or an employee of an independent contractor of a local board of education, charter school authorized under G.S. 115C-238.29D, or a nonpublic school which has filed intent to operate under Part 1 or Part 2 of Article 39 of Chapter 115C of the General Statutes, if the independent contractor carries out duties customarily performed by employees of the school; and

3. An adult who volunteers his or her services or presence at any school activity and is under the supervision of an individual listed in sub-sub-subdivision 1. or 2. of this sub-subdivision.

(7) Assaults a public transit operator, including a public employee or a private contractor employed as a public transit operator, when the operator is discharging or attempting to discharge his or her duties.

(8) Assaults a company police officer certified pursuant to the provisions of Chapter 74E of the General Statutes or a campus police officer certified pursuant to the provisions of Chapter 74G, Chapter 17C, or Chapter 116 of the General Statutes in the performance of that person’s duties.

(d) Any person who, in the course of an assault, assault and battery, or affray, inflicts serious injury upon another person, or uses a deadly weapon, in violation of subdivision (c)(1) of this section, on a person with whom the person has a personal relationship, and in the presence of a minor, is guilty of a Class A1 misdemeanor. A person convicted under this subsection, who is sentenced to a community punishment, shall be placed on supervised probation in addition to any other punishment imposed by the court.

A person committing a second or subsequent violation of this subsection shall be sentenced to an active punishment of no less than 30 days in addition to any other punishment imposed by the court.

The following definitions apply to this subsection:

(1) “Personal relationship” is as defined in G.S. 50B‑1(b).

(2) “In the presence of a minor” means that the minor was in a position to have observed the assault.

(3) “Minor” is any person under the age of 18 years who is residing with or is under the care and supervision of, and who has a personal relationship with, the person assaulted or the person committing the assault.

Elements

A person guilty of this offense

1. commits an assault
2. on another.

Punishment

Class 2 misdemeanor. G.S. 14-33(a).

Notes

Generally. Although this offense is commonly known as “assault” it actually includes both assaults and batteries, both of which are discussed below. See the note on Element (1) and the note entitled “Battery,” both below.

Element (1). Assault is not defined by statute; instead, it is defined by common law. State v. Roberts, 270 N.C. 655, 658 (1967); State v. Corbett, 196 N.C. App. 508, 511 (2009). North Carolina recognizes two forms of assault. The first form is an overt act or attempt or the unequivocal appearance of attempt, with force and violence, to immediately physically injure another person, with the show of force or menace of violence being sufficient to put a reasonable person in fear of immediate physical injury. Roberts, 270 N.C. at 658 (insufficient evidence of assault); State v. Spellman, 167 N.C. App. 374, 384 (2004); N.C. Pattern Jury Instructions—Crim. 208.40. To constitute an assault, it is not necessary that the victim be placed in fear; it is enough if the act was sufficient to put a reasonable person in fear of immediate bodily harm. State v. Starr, \_\_\_ N.C. App. \_\_\_, 703 S.E.2d 876 (2011). This definition places emphasis on the intent or state of mind of the accused. Roberts, 270 N.C. at 658; State v. McDaniel, 111 N.C. App. 888, 890 (1993). While intent is an essential element of this form of assault, it may be implied from criminal negligence (also called culpable negligence) if the injury or fear caused is the direct result of intentional acts done under circumstances showing a reckless disregard for the safety of others and a willingness to inflict injury. State v. Jones, 353 N.C. 159, 165 (2000); Spellman, 167 N.C. App. at 384. Committing the offense of impaired driving constitutes criminal negligence as a matter of law. State v. Davis, \_\_\_ N.C. App. \_\_\_, 678 S.E.2d 385, 390 (2009). Criminal negligence has been found in assault cases involving vehicles used as deadly weapons even in the absence of impaired driving. Spellman, 167 N.C. App. 374 (sufficient evidence to support conviction for assault with a deadly weapon inflicting serious injury when evidence showed that the defendant continued to drive a truck while an officer held onto the driver’s side door of the truck and the defendant repeatedly struck the officer while the officer was hanging onto the truck door); State v. Wade, 161 N.C. App. 686 (2003) (sufficient evidence to support conviction for assault with a deadly weapon inflicting serious injury when evidence showed that the defendant drove his vehicle over a double yellow line in an attempt to pass two vehicles as he approached a sharp curve and the defendant had no visibility around the curve). For a more detailed discussion of criminal negligence, see “Criminal Negligence” in Chapter 1 (States of Mind).

The second form of assault recognized in North Carolina is assault by show of violence. This form occurs when (1) the defendant shows an apparent ability to inflict injury (even if there is no actual ability); (2) the act is such that a reasonable person would fear harm from it; and (3) the act causes the victim to do something the victim would not have done or to not do something he or she would have done, such as leaving a place or taking a different route. State v. Roberts, 270 N.C. 655, 658 (1967); State v. Allen, 245 N.C. 185, 189 (1956); State v. McIver, 231 N.C. 313 (1949); State v. McDaniel, 111 N.C. App. 888 (1993). The difference between the two forms of assault is that the first focuses on the intent of the defendant while the second places emphasis on the reasonable apprehension of the victim. Roberts, 270 N.C. at 658; McDaniel, 111 N.C. App. at 890–91.

Battery. A battery is an assault whereby any force, however slight, is applied, directly or indirectly, to another. State v. West, 146 N.C. App. 741, 744 (2001); N.C. Pattern Jury Instructions—Crim. 208.41. For example, a battery occurs when the defendant punches the victim. If the defendant only threatens to punch the victim but does so in a way that would put a reasonable person in fear of immediate physical injury, there would be no battery but there would be an assault.

When a battery is committed, the State is not required to show that the victim was placed in fear. State v. Lassiter, 18 N.C. App. 208, 212 (1973); State v. Thompson, 27 N.C. App. 576, 578 (1975) (citing Lassiter); State v. Hill, 266 N.C. 103 (1965).

As a general rule, the statutes use the terms “assault” and “battery” interchangeably, often using “assault” for acts that involve a striking (such as assault inflicting serious injury). For simplicity, “assault,” as used in this book, includes battery. Note, however, that some crimes require both an assault and a battery as elements, see, for example, “Secret Assault,” below, and that for others only a battery will suffice, see, for example, “Battery on An Unborn Child,” below. When this is the case, special note will be made.

Aiding and abetting by failure to defend. A parent may be convicted of aiding and abetting an assault on his or her child if the parent was present when the child was assaulted and did not take reasonable steps to prevent the assault. See the note on Element (2) to “Aiding and Abetting” in Chapter 3 (Participants in Crimes).

Attempted assault. 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. State v. Barksdale, 181 N.C. App. 302, 308 (2007).

Charging issues. For a discussion of charging issues regarding assault and the related offenses covered in this chapter, see Jessica Smith, The Criminal Indictment: Fatal Defect, Fatal Variance, and Amendment, Admin. of Just. Bulletin 2008/03 (UNC School of Government, July 2008) (online at www.sogpubs.unc.edu/electronicversions/pdfs/aojb0803.pdf). For an additional case on point decided after publication of that bulletin, see In re D.S., 197 N.C. App. 598 (2009) (no fatal variance when a juvenile petition alleged that the juvenile assaulted the victim with his hands and the evidence established that he touched her with an object).

Greater and lesser-included offenses. Simple assault is not a lesser-included offense of attempted second-degree rape, State v. Robinson, 97 N.C. App. 597, 604 (1990), or sexual battery, State v. Corbett, 196 N.C. App. 508, 511 (2009) (assault contains elements that are not in sexual battery).

Multiple convictions and punishments. To find a defendant guilty of two separate assaults on the same victim, there must be a distinct interruption in the original assault followed by a second assault. For example, only one conviction was proper when (1) the evidence was insufficient to show a distinct interruption between two assaults done with a deadly weapon and inflicting serious injury, State v. Brooks, 138 N.C. App. 185, 189–90 (2000); and (2) five shots were fired at the victim in rapid succession with a semiautomatic handgun, State v. Maddox, 159 N.C. App. 127, 131–32 (1993). By comparison, the evidence supported two assault convictions when (1) the defendant drove his vehicle over the victim’s leg and then later reentered his vehicle and drove it toward the victim, placing him in fear of injury, State v. Spellman, 167 N.C. App. 374 (2004); (2) the victim was stabbed multiple times, stopped struggling, and fell to the ground and then was shot twice in the leg by a handgun; each assault was temporally distinct and the wounds were inflicted in different locations on the victim’s body, State v. Littlejohn, 158 N.C. App. 628, 636–37 (2003); and (3) the defendant fired three distinct shots from a pistol at a vehicle, State v. Rambert, 341 N.C. 173, 177 (1995) (“Each shot, fired from a pistol, as opposed to a machine gun or other automatic weapon, required that defendant employ his thought processes each time he fired the weapon. Each act was distinct in time, and each bullet hit the vehicle in a different place.”).

For a discussion of when a defendant may be convicted of attempted murder and an assault based on the same conduct, see the note entitled “Attempted homicide” to “Attempt” in Chapter 5 (General Crimes).

Related Offenses Not in This Chapter

“Simple Affray” (Chapter 19)

“Disorderly Conduct” (Chapter 19)

Hazing of student. G.S. 14-35.

Assaults Inflicting a Particular Type of Injury

Assault Inflicting Serious Injury

Statute

See G.S. 14-33(c)(1), reproduced under “Simple Assault,” above.

Elements

A person guilty of this offense

1. commits an assault
2. on another and
3. inflicts serious injury.

Punishment

Class A1 misdemeanor. G.S. 14-33(c).

Notes

Element (1). See this note to “Simple Assault,” above.

Element (3). The serious injury may be physical or mental. State v. Everhardt, 326 N.C. 777, 781 (1990). Whether an injury is serious is a question of fact. Id. at 781; State v. Ferguson, 261 N.C. 558, 560 (1964). Relevant factors in determining whether an injury is serious include but are not limited to pain and suffering; loss of blood; hospitalization; and time lost from work. State v. Tice, 191 N.C. App. 506, 509 (2008); State v. Morgan, 164 N.C. App. 298, 303 (2004).

The following have been found to be serious injuries:

* gunshot wounds, State v. Shankle, 7 N.C. App. 564 (1970) (to the wrist); State v. Bagley, 183 N.C. App. 514, 526–27 (2007) (bullet wound went through the victim’s leg; the victim was unable to drive to the hospital, was treated there, and suffered pain for two or three weeks); State v. Tice, 191 N.C. App. 506, 510 (2008) (a gunshot wound to the knee; the victim received hospital treatment, took prescribed pain medication for two weeks, had a limp for one to two weeks, and required one month to heal; so holding even though the victim drove himself to the hospital); State v. McLean, \_\_\_ N.C. App. \_\_\_, 712 S.E.2d 271 (2011) (there was sufficient evidence that the victim suffered serious injury when, among other things, the defendant shot the victim with a shotgun, causing injuries to the victim’s calf and causing eighteen to twenty pellets to lodge in his leg, which did not fully work themselves out for six months);
* head injuries, State v. Smith, 5 N.C. App. 635 (1969) (swelling on the skull); State v. Allen, 193 N.C. App. 375 (2008) (traumatic head injuries, extreme facial bruising and swelling, bleeding from the ear and nose, an eye swollen shut for over one month, damage to the inside of the ear and mouth, and a loss of consciousness);
* cuts, punctures, and stab wounds, Morgan, 164 N.C. App. 298 (multiple lacerations to the forearm, small stab wounds to the leg, a deep laceration to the thumb, bruising to the back, and a puncture wound to the right orbital rim, causing a bone fracture, with both eye and thumb wounds requiring treatment by specialists); State v. Walker, \_\_\_ N.C. App. \_\_\_, 694 S.E.2d 484, 495 (2010) (the victim lost “a lot” of blood, was stabbed or cut eight or nine times, and had wounds on his lip, back, and arm; he was removed by stretcher to the emergency room, where he remained for twelve hours, receiving a chest tube to drain blood and stitches; he was put on a ventilator because of a lung puncture; he received pain medication for approximately one week; and at trial had visible scars on his lip, arm, and back);
* a nostril that has caved in and knocked-out teeth, State v. Lane, 1 N.C. App. 539 (1968);
* shards of glass in the arm and shoulder of drive-by shooting victim, coupled with an officer’s observation that the victim was shaken, State v. Alexander, 337 N.C. 182 (1994); and
* a badly bruised shoulder, an inability to move the arm properly for three days, and pain and suffering, State v. Ramseur, 338 N.C. 502 (1994).

Mental injury amounting to serious injury was properly found when a victim was sexually assaulted for several days with devices used to degrade and dehumanize and the victim required hospital admission and treatment for severe depression, suicidal tendencies, anorexia, insomnia, and feelings of hopelessness and helplessness. State v. Everhardt, 326 N.C. 777 (1990).

Proving serious injury requires less evidence than proving serious bodily injury for “Assault Inflicting Serious Bodily Injury,” below. State v. Hannah, 149 N.C. App. 713 (2002); State v. Williams, 150 N.C. App. 497 (2002).

When the evidence is not conflicting and is such that reasonable minds could not differ as to the serious nature of the injuries, the trial court may give the jury a peremptory instruction on the issue. State v. Pettiford, 60 N.C. App. 92, 97–98 (1982) (peremptory proper where bullet was lodged in the victim’s head). However, if reasonable minds could differ as to whether the injury was serious, it is error to give a peremptory instruction. State v. Bagley, 183 N.C. App. 514, 527 (2007) (error to give peremptory instruction as to gunshot wound to a leg).

Charging issues. See this note to “Simple Assault,” above.

Greater and lesser-included offenses. Because all of the elements of simple assault are included in assault inflicting serious injury, simple assault is a lesser-included offense of this crime. State v. Tillery, 186 N.C. App. 447, 449 (2007).

Multiple convictions and punishments. See this note to “Simple Assault,” above.

This statute, like a number of assault statutes, begins with or contains the following language: “Unless the conduct is covered under some other provision of law providing greater punishment.” G.S. 14-33(c). For example, G.S. 14-32.4(b) provides that “Unless the conduct is covered under some other provision of law providing greater punishment, any person who assaults another person and inflicts physical injury by strangulation is guilty of a Class H felony.” A plain reading suggests that this means, in the case of G.S. 14-32.4(b), for example, that the defendant may not be punished for assault by strangulation when the conduct is covered by another crime that carries a more severe punishment. Several cases are consistent with that reading. See State v. Williams, 201 N.C. App. 161 (2009) (even though assault by strangulation (Class H felony) and assault inflicting serious bodily injury (Class F felony) require proof of different elements so as to be distinct crimes for purposes of double jeopardy, the statutory language reflects a legislative intent that a defendant only be sentenced for the higher of the two offenses); State v. Ezell, 159 N.C. App. 103 (2003) (the defendant could not be convicted of assault inflicting serious bodily injury and assault with a deadly weapon inflicting serious injury under G.S. 14-32(b) (Class E felony) when G.S. 14-32.4(a) includes the “unless covered” language); State v. McCoy, 174 N.C. App. 105 (2005) (following Ezell with respect to convictions for (1) assault inflicting serious bodily injury and assault with a deadly weapon inflicting serious injury; and (2) assault with a deadly weapon inflicting serious injury and assault inflicting serious injury under G.S. 14-33(c)(1)). However, other cases create confusion on the issue. See State v. Coria, 131 N.C. App. 449 (1998) (the defendant was properly convicted of assault with a deadly weapon on a law enforcement officer under G.S. 14-34.2 (Class F felony) and assault with a deadly weapon with intent to kill under G.S. 14-32(c) (Class E felony) even though G.S. 14-34.2 contains the statutory “unless covered” language; holding that because each offense had an element not in the other, there was no double jeopardy violation but not mentioning the “unless covered” language); State v. Chambers, 152 N.C. App. 478 (2002) (unpublished) (following Coria and holding that the defendant was properly convicted of assault with a deadly weapon on a law enforcement officer and assault with a deadly weapon with intent to kill inflicting serious injury under G.S. 14-32(a) (Class C felony) even though G.S. 14-34.2 contains the “unless covered” language; concluding that the purpose of G.S. 14-34.2 is to impose greater punishment for knowing assaults on law enforcement officers and the purpose of G.S. 14-32(a) is to protect life and limb). Adding to the complexity is State v. Hines, 166 N.C. App. 202, 208 (2004), in which the defendant was convicted of aggravated assault on a handicapped person under G.S. 14-32.1 (Class F felony) and armed robbery (Class D felony). Citing the “unless covered” language in G.S. 14-32.1, the defendant argued that the trial court erred by sentencing her for the assault and the more serious robbery offense. The court rejected this argument, distinguishing Ezell on grounds that it dealt with two assault convictions. The Hines court concluded that the statutory language barred punishment for aggravated assault on a handicapped person and another assault offense, not armed robbery. It is unclear whether this distinction would hold up if presented to the North Carolina Supreme Court. See State v. Davis, 364 N.C. 297 (2010) (holding, based on identical statutory language, that a defendant may not be convicted of (1) felony death by vehicle under G.S. 20-141.4 (Class E felony) and second-degree murder (Class B2 felony); or (2) felony serious injury by vehicle under G.S. 20-141.4 (Class F felony) and assault with a deadly weapon inflicting serious injury (Class E felony).

Related Offenses Not in This Chapter

“Aggravated Misdemeanor Affray” (Chapter 19)

See disorderly conduct (various offenses) in Chapter 19 (Disorderly Conduct, Riot, and Gang Offenses).

See inciting to riot (various offenses) in Chapter 19 (Disorderly Conduct, Riot, and Gang Offenses).

“Injuring Another with a Nuclear, Biological, or Chemical Weapon of Mass Destruction” (Chapter 20)

“Resisting, Delaying, or Obstructing an Officer” (Chapter 21)

Malicious castration. G.S. 14-28.

Castration or other maiming without malice aforethought. G.S. 14-29.

Malicious maiming. G.S. 14-30.

Malicious throwing of corrosive acid or alkal. G.S. 14-30.1.

Hazing of students. G.S. 14-35.

Assault Inflicting Serious Bodily Injury

Statute

**§14-32.4**. Assault inflicting serious bodily injury; strangulation; penalties.

(a) Unless the conduct is covered under some other provision of law providing greater punishment, any person who assaults another person and inflicts serious bodily injury is guilty of a Class F felony. “Serious bodily injury” is defined as 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.

(b) Unless the conduct is covered under some other provision of law providing greater punishment, any person who assaults another person and inflicts physical injury by strangulation is guilty of a Class H felony.

Elements

A person guilty of this offense

(1) commits an assault

(2) on another and

(3) inflicts serious bodily injury.

Punishment

Class F felony. G.S. 14-32.4(a).

Notes

Element (1). See the note on Element (1) to “Simple Assault,” above.

Element (3). G.S. 14-32.4(a) defines serious bodily injury as “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.” This definition requires proof of a more severe injury than is required for the crime of assault inflicting serious injury, discussed above. State v. Rouse, 198 N.C. App. 378, 382 (2009). There was sufficient evidence of serious bodily injury when:

* the victim had a broken jaw that was wired shut for two months causing him to lose thirty pounds and he incurred $6,000 in dental costs, suffered broken ribs, and twice suffered back spasms requiring trips to the emergency room; the back spasms continued until trial, and a doctor said that the broken jaw would cause “quite a bit” of pain and discomfort, State v. Williams, 150 N.C. App. 497, 503–04 (2002);
* the victim lost a natural tooth; even though a dental implant could address the injury, the damage constituted a serious permanent disfigurement, State v. Downs, 179 N.C. App. 860, 862 (2006);
* a 70-year-old female victim had dried blood on her lips and in her nostrils, abdominal pain, a broken collarbone, cuts in her hand requiring stitches, received morphine immediately and was prescribed additional pain medicine, had to return to the emergency room due to an infection in the sutured hand requiring re-stitching and antibiotics, and was in so much pain that a nurse was unable to use a speculum while gathering a rape kit, Rouse, 198 N.C. App. at 383;
* the victim suffered a cracked pelvic bone, a broken rib, torn ligaments in her back, a deep cut over her left eye, and was unable to have sex for seven months; the eye injury developed an infection that lasted months and was never completely cured and the incident left a scar, State v. Williams, 201 N.C. App. 161, 169–70 (2009); and
* the victim sustained a puncture wound to the back of her scalp and a parietal scalp hematoma and went into premature labor as a result of the attack, id. at 187.

There was insufficient evidence of serious bodily injury when the victim received a vicious beating but there was no substantial risk of death; although the victim was sore five months later, there was no evidence of extreme pain. Id. at 425.

Charging issues. See this note to “Simple Assault,” above.

Greater and lesser-included offenses. Because all of the elements of simple assault are included in assault inflicting serious bodily injury, simple assault is a lesser-included offense of this offense.

Assault inflicting serious bodily injury is not a lesser-included offense of assault with a deadly weapon with intent to kill inflicting serious injury. State v. Hannah, 149 N.C. App. 713, 717 (2002).

Multiple convictions and punishments. See this note to “Simple Assault” and “Assault Inflicting Serious Injury,” both above.

Related Offenses Not in This Chapter

See the offenses listed under “Assault Inflicting Serious Injury,” above.

Assault Inflicting Physical Injury by Strangulation

Statute

See G.S. 14-32.4(b), reproduced under “Assault Inflicting Serious Bodily Injury,” above.

Elements

A person guilty of this offense

(1) commits an assault

(2) on another and

(3) inflicts physical injury

(4) by strangulation.

Punishment

Class H felony. G.S. 14-32.4(b).

Notes

Element (1). See the note on Element (1) to “Simple Assault,” above.

Element (3). The statute does not define the term “physical injury.” Although this term is also used in habitual misdemeanor assault, it is not defined there either. It appears to require something more than mere physical contact. In State v. Little, 188 N.C. App. 152, 157 (2008), the court held that the evidence was sufficient to establish physical injury when the victim testified that she received cuts and bruises on her neck as a result of being strangled. Note that in 2011, the General Assembly amended a different assault statute creating a new crime, “Assault Inflicting Physical Injury on a Law Enforcement Officer, Probation or Parole Officer, or Detention Facility Employee,” discussed below. S.L. 2011-356, sec. 1. For purposes of that new crime, the General Assembly defined the term “physical injury” to include cuts, scrapes, bruises, or other physical injury which does not constitute serious injury. Id.; G.S. 34.7(c).

Element (4). The statute does not define the term “strangulation,” and that term is not used in any other assault offenses. One case held that “wrapping one’s hands around another’s throat and applying pressure until the person loses consciousness” constitutes strangulation. Little, 188 N.C. App. at 157. Other cases have held that the evidence was sufficient when the defendant (1) grabbed the victim by the throat, causing her to have difficulty breathing, State v. Braxton, 183 N.C. App. 36, 42–43 (2007) (the State need not prove that the victim had a complete inability to breathe); and (2) pushed down on the victim’s neck with his foot, and the victim thought he was trying to “chok[e] her out” or render her unconscious and that she was going to die, State v. Williams, 201 N.C. App. 161, 170–71 (2009). 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. Pattern Jury Instructions—Crim. 208.61 n.1.

Charging issues. See this note to “Simple Assault,” above. For an additional case on point decided after publication of the bulletin cited in that note, see State v. Williams, 201 N.C. App. 161 (2009) (even if there was a fatal variance between the indictment, which alleged that the defendant accomplished the strangulation by placing his hands on the victim’s neck, and the evidence at trial, the variance was immaterial because the allegation regarding the method of strangulation was surplusage).

Greater and lesser-included offenses. Because all of the elements of simple assault are included in assault inflicting serious injury by strangulation, simple assault is a lesser-included offense of this offense.

Assault on a female is not a lesser-included offense of assault inflicting physical injury by strangulation. State v. Brunson, 187 N.C. App. 472, 478 (2007).

Multiple convictions and punishments. See this note to “Simple Assault” and “Assault Inflicting Serious Injury,” both above.

Related Offenses Not in this Chapter

None

Deadly Weapon Assaults

Assault with a Deadly Weapon

Statute

See G.S. 14-33(c)(1), reproduced under “Simple Assault,” above.

Elements

A person guilty of this offense

(1) commits an assault

(2) on another

(3) with a deadly weapon.

Punishment

Class A1 misdemeanor. G.S. 14-33(c).

Notes

Element (1). See this note to “Simple Assault,” above.

The State must prove either that the defendant had the actual intent to strike the victim with the deadly weapon or that the defendant acted with culpable negligence from which intent may be implied. State v. Maready, \_\_\_ N.C. App. \_\_\_, 695 S.E.2d 771 (2010). For a discussion of culpable negligence, see “Criminal Negligence” in Chapter 1 (States of Mind).

There was sufficient evidence of assault with a firearm when the defendant reached for but did not touch a weapon that was inches away from his hand. State v. Barksdale, 181 N.C. App. 302, 307 (2007).

Element (3). A “deadly weapon” is any instrument that under the circumstances of its use is likely to cause death or serious bodily injury. State v. Walker, \_\_\_ N.C. App. \_\_\_, 694 S.E.2d 484, 493 (2010); State v. Lane, 1 N.C. App. 539, 541 (1968). Whether a weapon is deadly may depend on its nature and size, how it is used—for example, whether it left cut marks, State v. Randolph, 228 N.C. 228 (1947)—and the strength of the defendant compared to the victim, State v. Shubert, 102 N.C. App. 419 (1991).

Some weapons, such as guns, are deadly by their very nature. State v. Torain, 316 N.C. 111 (1986) (utility knife is a dangerous or deadly weapon). When that is the case, the judge should so instruct the jury. State v. Flaugher, \_\_\_ N.C. App. \_\_\_, 713 S.E.2d 576 (2011) (the trial court did not err by instructing the jury that a pickaxe was a deadly weapon; the pickaxe handle was about three feet long and the pickaxe weighed nine to ten pounds; the defendant swung the pickaxe approximately eight times, causing cuts to the victim’s head that required fifty-three staples and slashed his middle finger, leaving it hanging only by a piece of skin); State v. Graham, 186 N.C. App. 182, 194–95 (2007) (the trial court did not err by instructing the jury that a knife is a deadly weapon). In all other circumstances, the jury decides whether the weapon is deadly. State v. Sinclair, 120 N.C. 603 (1897). When there is a factual issue about whether a weapon is deadly, the trial judge must instruct on a lesser non–deadly weapon assault offense. State v. Clark, \_\_\_ N.C. App. \_\_\_, 689 S.E.2d 553, 557–58 (2009); State v. Tillery, 186 N.C. App. 447, 449–51 (2007); State v. Smith, 186 N.C. App. 57, 65–66 (2007). However, the weapon need not be produced in court to obtain a conviction. State v. Walker, \_\_\_ N.C. App. \_\_\_, 694 S.E.2d 484, 494 (2010); Graham, 186 N.C. App. at 194–95 (the trial court did not err by instructing the jury that a knife is a deadly weapon where the victim suffered life-threatening injuries but the knife was not introduced or described in detail at trial). Examples of deadly weapons include:

* a pistol used to fire a bullet, State v. Benson, 183 N.C. 795 (1922), or to strike, State v. Bell, 87 N.C. App. 626 (1987);
* a knife, Walker, \_\_\_ N.C. App. \_\_\_, 694 S.E.2d at 494 (knife was three inches long and victim sustained significant injuries); State v. Caudle, 172 N.C. App. 261 (2005);
* a belt with a metal buckle, State v. Cauley, 244 N.C. 701 (1956);
* an automobile, State v. Jones, 353 N.C. 159, 165 (2000); State v. Ferguson, 261 N.C. 558, 560 (1964); State v. Batchelor, 167 N.C. App. 797 (2005). But see State v. Clark, \_\_\_ N.C. App. \_\_\_, 689 S.E.2d 553, 559 (2009) (vehicle was not a deadly weapon as a matter of law when there was no evidence that it was moving at a high speed; given the victim’s lack of significant injury and the lack of damage to the other vehicle, a jury could conclude that the vehicle was not aimed directly at the victim and that the impact was more of a glancing contact);
* a firebomb, State v. Avery, 315 N.C. 1 (1985);
* a fire used to burn a house and harm a person inside, State v. Riddick, 315 N.C. 749 (1986);
* a dog, State v. Cook, 164 N.C. App. 139;
* a box cutter, State v. Doisey, 162 N.C. App. 447 (2004);
* a broken wine bottle, State v. Morgan, 156 N.C. App. 523 (2003); and
* a rock, State v. Liggons, 194 N.C. App. 734, 742-43 (2009) (deadly weapon as a matter of law when deliberately thrown through the driver’s side windshield of a vehicle traveling at 55–60 mph).

For assaults, hands and feet may be considered deadly weapons depending on the manner in which they were used and the relative size and condition of the parties involved. State v. Harris, 189 N.C. App. 49, 59 n.1 (2008) (distinguishing State v. Hinton, 361 N.C. 207 (2007) (hands and feet are not deadly weapons for purposes of armed robbery)); State v. Allen, 193 N.C. App. 375, 378 (2008) (same). For example, the evidence was sufficient to establish that hands and/or feet were deadly weapons when:

* the defendant outweighed the victim by 65 pounds; the victim had a shoe print on her back and handprint bruises on her arms, thighs, and buttocks; and handprints consistent with a neck choke hold may have caused swelling in her mouth, tongue, and throat, Harris, 189 N.C. App. at 60;
* the defendant was 13 years younger, 7 inches taller, and 40 pounds heavier than the victim; he repeatedly struck the victim, 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, Allen, 193 N.C. App. at 378–79;
* the defendant was a 40-year-old female, 5 feet 2 inches tall and weighing 125 pounds, and the victim was a 79-year-old male, 6 feet tall and weighing 165 pounds but with a heart condition and polyneuropathy; the defendant and her accomplice outweighed the victim by 72 pounds, State v. Wallace, 197 N.C. App. 339, 345–46 (2009);
* the defendant was a big, stocky man, probably larger than the victim, who was a female and likely a user of crack cocaine, and the victim sustained serious injuries, State v. Williams, \_\_\_ N.C. App. \_\_\_, 689 S.E.2d 412, 422 (2009);
* the defendant used his hands to throw the victim, a small-framed, pregnant woman with a cocaine addiction, onto a concrete floor, cracking her head open, and he put his hands around her neck, id. at 427;
* the defendant, a 39-year-old male weighing 210 pounds, hit the victim, a 60-year-old woman, in the head and stomach; brain hemorrhages and other injuries resulted from the beating, causing the victim to be unable to care for herself, State v. Jacobs, 61 N.C. App. 610 (1983);
* the defendant weighed approximately 175 pounds and the victim weighed approximately 107 pounds; the defendant beat the victim about the head with his fists, breaking her jaw and causing her to require extensive hospitalization, and choked her three separate times, leaving marks around her neck, State v. Grumbles, 104 N.C. App. 766 (1991);
* the defendant hit the victim, causing a cracked cheekbone, broken nose, and broken jaw requiring surgery; the defendant choked the victim, leaving marks on her neck; and the defendant was a 6-foot-2-inch-tall male who weighed 165 pounds while the victim was a female who was approximately five foot three and weighed 99 pounds, State v. Rogers, 153 N.C. App. 203 (2002); and
* the male defendant weighed 230 pounds and the pregnant, female victim weighed 190 pounds; the defendant beat the victim with his hands and feet so severely that she had to be flown to a special hospital for treatment, admitted to intensive care, and placed on a ventilator; and her injuries included fractures of the left orbit and the left maxillary and swelling and contusions about her face, neck, and upper chest, State v. Hunt, 153 N.C. App. 316 (2002).

Although one case reached the same conclusion without analyzing the relative size of the defendant and the victims, State v. Yarrell, 172 N.C. App. 135 (2005), another, decided one month later, struck down a conviction on grounds that the State did not present sufficient evidence as to the defendant’s size or condition compared to that of the victim, State v. Lawson, 173 N.C. App. 270 (2005). In the later case, the court rejected the State’s argument that the jury had an opportunity to observe the defendant and victim at trial, concluding that mere observation at trial was not sufficient evidence. Id. In an even more recent case, the court of appeals found the evidence sufficient to sustain a motion to dismiss when it showed a great disparity in height between the defendant (six feet five inches) and the victim (four feet eleven inches) but no evidence was presented as to their respective weights. State v. Brunson, 180 N.C. App. 188 (2006). A defendant’s act of holding the victim’s head under water constituted use of a deadly weapon; 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. State v. Smith, 186 N.C. App. 57, 6364 (2007).

Charging issues. See this note to “Simple Assault,” above.

Greater and lesser-included offenses. Because all of the elements of simple assault are included in assault with a deadly weapon, it is a lesser-included offense of that offense.

This offense is not a lesser-included offense of discharging a barreled weapon or firearm into occupied property, discussed below, State v. Turner, 330 N.C. 249 (1991), or attempted armed robbery, State v. Rowland, 89 N.C. App. 372, 374–77 (1988). But it is a lesser-included offense of assault with a firearm on a law enforcement officer, probation or parole officer, or detention facility employee, discussed below. State v. Dickens, 162 N.C. App. 632, 638 (2004).

Multiple convictions and punishments. See this note to “Simple Assault” and “Assault Inflicting Serious Injury,” both above.

A defendant may be convicted of assault with a deadly weapon and assault with a firearm or other deadly weapon on a governmental officer or employee or company or campus police officer when the convictions are based on distinct conduct. State v. Spellman, 167 N.C. App. 374, 379–84 (2004) (an assault with a deadly weapon on a law enforcement officer occurred when the defendant ran over the officer’s leg with his vehicle; the assault with a deadly weapon occurred after the defendant re-entered the vehicle and drove it toward the officer, thereby placing him in fear of injury).

Relation to other offenses. This offense is different from assault by pointing a gun because (1) to prove this offense in a case involving a gun, the State need not prove that the defendant pointed the gun at the victim, Dickens, 162 N.C. App. at 636; and (2) this offense may be committed with weapons other than guns.

For assaults with deadly weapons against employees and security officers, see “Assault with a Firearm or Other Deadly Weapon on a Governmental Officer or Employee or Company or Campus Police Officer;” “Assault with a Firearm on a Law Enforcement Officer, Probation or Parole Officer, or Detention Facility Employee;” “Assault on an Executive, Legislative, or Court Officer Using a Deadly Weapon or Inflicting Serious Injury;” “Assault on a Firefighter or Medical Personnel Inflicting Serious Injury or Using a Deadly Weapon Other Than a Firearm;” and “Assault on a Firefighter or Medical Personnel with a Firearm,” all below.

Related Offenses Not in This Chapter

“Armed Robbery” (Chapter 14)

“Aggravated Misdemeanor Affray” (Chapter 19)

“Disorderly Conduct” (Chapter 19)

See riot (various offenses) in Chapter 19 (Disorderly Conduct, Riot, and Gang Offenses).

“Manufacture, Possession, etc. of a Machine Gun, Sawed-Off Shotgun, or Weapon of Mass Destruction” (Chapter 20)

“Possession of a Firearm by a Felon” (Chapter 22)

“Carrying a Concealed Weapon” (Chapter 22)

“Carrying a Gun into an Assembly or Establishment Where Alcoholic Beverages Are Sold and Consumed” (Chapter 22)

See possession of weapons on school grounds (various offenses) in Chapter 22 (Weapons Offenses).

Criminal use of laser device. G.S. 14-34.8.

Transporting dangerous weapon or substance during emergency; possession off premises; exceptions. G.S. 14-288.7.

Use of dangerous weapon by prisoner in assault. G.S. 14-258.2.

Assault with a Deadly Weapon with Intent to Kill

Statute

**§14-32**. Felonious assault with deadly weapon with intent to kill or inflicting serious injury; punishments.

(a) Any person who assaults another person with a deadly weapon with intent to kill and inflicts serious injury shall be punished as a Class C felon.

(b) Any person who assaults another person with a deadly weapon and inflicts serious injury shall be punished as a Class E felon.

(c) Any person who assaults another person with a deadly weapon with intent to kill shall be punished as a Class E felon.

Elements

A person guilty of this offense

(1) commits an assault

(2) on another

(3) with a deadly weapon

(4) with intent to kill.

Punishment

Class E felony. G.S. 14-32(c).

Notes

Element (1). See this note to “Simple Assault,” above.

Element (3). See the note on Element (3) to “Assault with a Deadly Weapon,” above.

Element (4). Intent to kill may be inferred from the circumstances of the assault, including the use of a deadly weapon, the manner in which the assault was carried out, and the degree of injury. State v. Thacker, 281 N.C. 447 (1972); State v. Ferguson, 261 N.C. 558 (1964); State v. Revels, 227 N.C. 34 (1946); State v. Peoples, 141 N.C. App. 115 (2000). For a more detailed discussion of intent to kill, see the note on Element (3)(a)(ii) to “First-Degree Murder” in Chapter 6 (Homicide).

For assault cases in which the evidence was sufficient to show an intent to kill, see State v. Wright, \_\_\_ N.C. App. \_\_\_, 708 S.E.2d 112 (2011) (the trial court did not err by failing to instruct the jury on a lesser-included assault not including an intent to kill when the defendant broke into a trailer in the middle of the night and used an iron pipe to repeatedly beat in the head an unarmed, naked victim who had just woken up); State v. Liggons, 194 N.C. App. 734 (2009) (there was sufficient evidence of an intent to kill when the defendant and his accomplice discussed intentionally forcing drivers off the road in order to rob them and one of the two then deliberately threw a very large rock or concrete chunk through the driver’s side windshield of the victim’s automobile as it was approaching at approximately 55 or 60 mph); State v. Pointer, 181 N.C. App. 93, 96–97 (2007) (even though the defense offered unrebutted expert testimony that the defendant could not form an intent to kill due to mental disorders and excessive medication, there was sufficient evidence of that intent given the number of stab wounds inflicted on the victims and the manner in which the stabbings took place (the defendant stabbed one victim twenty-two 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), State v. Cromartie, 177 N.C. App. 73 (2006), State v. Nicholson, 169 N.C. App. 390 (2005), State v. Duff, 171 N.C. App. 662 (2005), State v. Maddox, 159 N.C. App. 127 (2003), and State v. Scott, 161 N.C. App. 104 (2003).

Charging issues. See this note to “Simple Assault,” above.

Greater and lesser-included offenses. Because all of the elements of (1) simple assault; and (2) assault with a deadly weapon are included in assault with a deadly weapon with intent to kill, both are lesser-included offenses of assault with a deadly weapon with intent to kill.

Assault with a deadly weapon with intent to kill is not a lesser-included offense of attempted first-degree murder. State v. Garris, 191 N.C. App. 276, 285–87 (2008).

Multiple convictions and punishments. See this note to “Simple Assault” and “Assault Inflicting Serious Injury,” both above.

Related Offenses Not in This Chapter

“Aggravated Misdemeanor Affray” (Chapter 19)

See riot (various offenses) in Chapter 19 (Disorderly Conduct, Riot, and Gang Offenses).

See the offenses in Chapter 22 (Weapons Offenses).

Assault with a Deadly Weapon Inflicting Serious Injury

Statute

See G.S. 14-32(b), reproduced under “Assault with a Deadly Weapon with Intent to Kill,” above.

Elements

A person guilty of this offense

(1) commits an assault

(2) on another

(3) with a deadly weapon and

(4) inflicts serious injury.

Punishment

Class E felony. G.S. 14-32(b).

Notes

Element (1). See this note to “Simple Assault,” above.

Element (3). See the note on Element (3) to “Assault with a Deadly Weapon,” above.

Element (4). See the note on Element (4) to “Assault Inflicting Serious Injury,” above.

Charging issues. See this note to “Simple Assault,” above.

Greater and lesser-included offenses. Because all of the elements of (1) simple assault; (2) assault with a deadly weapon; and (3) assault inflicting serious injury are included in assault with a deadly weapon inflicting serious injury, all three of those offenses are lesser-included offenses of this one. State v. Tillery, 186 N.C. App. 447, 449 (2007) (assault inflicting serious injury is a lesser-included offense of assault with a deadly weapon inflicting serious injury).

This offense is not a lesser-included offense of attempted first-degree murder. State v. Rainey, 154 N.C. App. 282 (2002).

Multiple convictions and punishments. See this note to “Simple Assault” and “Assault Inflicting Serious Injury,” above.

A defendant was properly convicted of three counts of this offense when he drove while impaired and crashed his vehicle into the victims’ vehicle, seriously injuring three occupants. State v. Jones, 353 N.C. 159, 165 (2000).

A defendant may be convicted and punished for this offense and felony child abuse based on the same conduct. State v. Carter, 153 N.C. App. 756 (2002).

Related Offenses Not in This Chapter

See the offenses listed under “Assault with a Deadly Weapon with Intent to Kill,” above.

Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury

Statute

See G.S. 14-32(a), reproduced under “Assault with a Deadly Weapon with Intent to Kill,” above.

Elements

A person guilty of this offense

(1) commits an assault

(2) on another

(3) with a deadly weapon and

(4) with intent to kill and

(5) inflicts serious injury.

Punishment

Class C felony. G.S. 14-32(a).

Notes

Element (1). See this note to “Simple Assault,” above.

Element (3). See the note on Element (3) to “Assault with a Deadly Weapon,” above.

Element (4). See this note to “Assault with a Deadly Weapon With Intent to Kill,” above.

Element (5). See the note on Element (3) to “Assault Inflicting Serious Injury,” above.

Charging issues. See this note to “Simple Assault,” above.

Greater and lesser-included offenses. Because all of the elements of (1) simple assault; (2) assault with a deadly weapon; (3) assault with a deadly weapon with intent to kill; and (4) assault inflicting serious injury are included in assault with a deadly weapon with intent to kill inflicting serious injury, all four of those offenses are lesser-included offenses of this one. However, assault inflicting serious bodily injury is not a lesser-included offense. State v. Hannah, 149 N.C. App. 713, 717–19 (2002).

Multiple convictions and punishments. See this note to “Simple Assault,” above.

Because each offense includes an element that is not included in the other, double jeopardy does not bar convicting and sentencing a defendant for assault with a deadly weapon with intent to kill inflicting serious injury and the following offenses, when based on the same conduct:

* attempted first-degree murder, State v. Tirado, 358 N.C. 551, 578–79 (2004); State v. Bethea, 173 N.C. App. 43, 58–59 (2005) (following Tirado);
* secret assault, State v. Woodberry, 126 N.C. App. 78, 80–81 (1997);
* discharging a firearm into occupied property, State v. Allah, 168 N.C. App. 190, 196–97 (2005); and
* first-degree kidnapping, State v. Smith, 160 N.C. App. 107, 119 (2003).

Verdict. The court of appeals has held that if a defendant is charged with assault with a deadly weapon with intent to kill inflicting serious injury and attempted voluntary manslaughter and is convicted of attempted voluntary manslaughter and assault with a deadly weapon inflicting serious injury, the convictions cannot stand; the court reasoned that the jury’s determination that the defendant did not commit assault with a deadly weapon with intent to kill inflicting serious injury excludes the possibility that the defendant committed attempted voluntary manslaughter, which requires an intent to kill. State v. Hames, 170 N.C. App. 312 (2005); State v. Chang Yang, 174 N.C. App. 755, 761–62 (2005) (following Hames). However, a subsequent supreme court case calls those decisions into question. State v. Mumford, 364 N.C. 394 (2010).

Related Offenses Not in This Chapter

See the offenses listed under “Assault with a Deadly Weapon with Intent to Kill,” above.

Assault by Pointing a Gun

Statute

**§14-34**. Assaulting by pointing gun.

If any person shall point any gun or pistol at any person, either in fun or otherwise, whether such gun or pistol be loaded or not loaded, he shall be guilty of a Class A1 misdemeanor.

Elements

A person guilty of this offense

(1) intentionally

(2) points a gun

(3) at another.

Punishment

Class A1 misdemeanor. G.S. 14-34.

Notes

Element (1). Even though the defendant might actually have pointed a gun at someone, the offense has not occurred unless the defendant intended to do so. State v. Kluckhohn, 243 N.C. 306 (1956). If the defendant intends to point the gun at one person and mistakenly points it at someone else, he or she has committed this offense. State v. Thornton, 43 N.C. App. 564 (1979). See “Transferred Intent” in Chapter 1 (States of Mind).

If a person points a gun at another with legal justification, then this offense has not occurred. Lowe v. Dep’t of Motor Vehicles, 244 N.C. 353 (1956); In re J.A., 103 N.C. App. 720 (1991). For example, if a law enforcement officer points a gun at a person in the good faith discharge of the officer’s official duties, then this offense has not been committed. See generally “Public Authority” in Chapter 2 (Bars and Defenses). The absence of legal justification is not an element of the offense; instead, a defendant must raise the issue as a defense. State v. Gullie, 96 N.C. App. 366 (1989). But see State v. Dickens, 162 N.C. App. 632 (2004) (describing the elements of the offense as (1) pointing a gun (2) without justification).

Element (2). The statute provides that this offense occurs regardless of the defendant’s purpose in pointing the gun (“in fun or otherwise”) and regardless of whether the gun was loaded. G.S. 14-34.

The evidence was insufficient to support an adjudication of delinquency based on assault by pointing a gun when the weapon was an airsoft gun from which plastic pellets were fired using a “pump action” mechanism. In re N.T., \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Aug. 2, 2011). The court reasoned that for purposes of this statute, the term “gun” “encompasses devices ordinarily understood to be ‘firearms’ and not other devices that fall outside that category,” such as imitation firearms. Id.

Charging issues. See this note to “Simple Assault,” above.

Greater and lesser included offenses. Assault by pointing a gun is not a lesser-included offense of assault with a firearm on a law enforcement officer, probation or parole officer, or detention facility employee. Dickens, 162 N.C. App. at 638 .

Multiple convictions and punishments. See this note to “Simple Assault” and “Assault Inflicting Serious Injury,” both above.

Relation to other offenses. An assault by pointing a gun also could be an assault with a deadly weapon if the pointing amounts to an assault, such as when the defendant points a gun at someone and threatens to shoot. See the note on Element (1) to “Simple Assault,” above. However, this offense applies even if the pointing does not amount to an assault.

If a person dies as a result of this offense, the assault may constitute criminal negligence supporting a charge of involuntary manslaughter. See “Criminal Negligence” in Chapter 1 (States of Mind) for a detailed discussion of criminal negligence, including when gun mishaps constitute criminal negligence.

Related Offenses Not in This Chapter

See the offenses in Chapter 22 (Weapons Offenses).

Criminal use of laser device. G.S. 14-34.8.

Transporting dangerous weapon or substance during emergency. G.S. 14-288.7.

Discharging Barreled Weapons and Firearms

Discharging a Barreled Weapon or Firearm into Occupied Property

Statute

**§14-34.1**. Discharging certain barreled weapons or a firearm into occupied property.

(a) Any person who willfully or wantonly discharges or attempts to discharge any firearm or barreled weapon capable of discharging shot, bullets, pellets, or other missiles at a muzzle velocity of at least 600 feet per second into any building, structure, vehicle, aircraft, watercraft, or other conveyance, device, equipment, erection, or enclosure while it is occupied is guilty of a Class E felony.

(b) A person who willfully or wantonly discharges a weapon described in subsection (a) of this section into an occupied dwelling or into any occupied vehicle, aircraft, watercraft, or other conveyance that is in operation is guilty of a Class D felony.

(c) If a person violates this section and the violation results in serious bodily injury to any person, the person is guilty of a Class C felony.

Elements

A person guilty of this offense

(1) willfully or wantonly

(2) discharges or attempts to discharge a firearm or a barreled weapon

(3) into property

(4) that is occupied when the weapon is discharged.

Punishment

Class E felony. G.S. 14-34.1(a).

Notes

Generally. Although this crime is covered in the chapter on assaults, it does not require proof of an assault.

Element (1). The State is not required to prove that the defendant intentionally discharged the firearm at a victim or at the occupied property; this is a general intent crime and the intent element applies to the discharging of the firearm, not the eventual destination of the bullet. State v. Canady, 191 N.C. App. 680, 685–86 (2008); State v. McLean, \_\_\_ N.C. App. \_\_\_, 712 S.E.2d 271 (2011) (as a general intent crime, this offense does not require the State to prove any specific intent to shoot into the vehicle; rather, the State need only show that the defendant intentionally fired a weapon under circumstances where he or she had reason to believe the conveyance that ended up being shot was occupied). For a more detailed discussion of the required state of mind, see “Willfully” and “Wantonly,” both in Chapter 1 (States of Mind).

Element (2). A “firearm” is a weapon that propels shot, shell, or bullets by the action of an explosive within it, Black’s Law Dictionary 648 (7th ed. 1999); it includes a handgun, shotgun, or rifle which expels a projectile by action of an explosive. State v. Small, \_\_\_ N.C. App. \_\_\_, 689 S.E.2d 444, 450 (2009). G.S. 14-34.1(a) provides that a “barreled weapon” includes only weapons capable of discharging shot, bullets, pellets, or other missiles at a muzzle velocity of at least 600 feet per second. Thus, any air rifle or air pistol with the required muzzle velocity would be covered. Only a barreled weapon must meet the velocity requirements of G.S. 14-34.1(a); a firearm need not meet these requirements. Small, \_\_\_ N.C. App. at \_\_\_, 689 S.E.2d at 450–51.

Element (3). The statute specifies the property as “any building, structure, vehicle, aircraft, watercraft, or other conveyance, device, equipment, erection, or enclosure.”

A firearm is discharged “into” occupied property even if the firearm is inside the property, provided that the defendant is outside the property. For example, a person who, while standing outside a car, puts a pistol into an open window and fires the pistol into the car has discharged a firearm into property. State v. Mancuso, 321 N.C. 464, 468 (1988); State v. Bray, 321 N.C. 663, 670 (1988) (citing Mancuso).

Striking an exterior wall of an apartment building constitutes shooting “into” an apartment. Canady, 191 N.C. App. at 686–88.

Sufficient evidence supported a conviction when the defendant, while in his apartment, discharged a shotgun and a shotgun round went through the apartment’s common wall and into another occupied apartment. State v. Cockerham, 155 N.C. App. 729 (2003).

Element (4). For other crimes, it has been held that property is “occupied” if someone actually is present there. State v. Tippett, 270 N.C. 588 (1967) (burglary).

A person is guilty of this offense only if he or she knows or has reasonable grounds to believe that the property is occupied. State v. Everette, 361 N.C. 646, 650 (2007); State v. Williams, 284 N.C. 67 (1973); State v. James, 342 N.C. 589, 596 (1996) (following Williams). For cases in which there was sufficient evidence that the defendant had reasonable grounds to believe that property was occupied, see Everette, 361 N.C. at 651 (lights were on in a restaurant located in an area known to be crowded in the early morning hours, the surrounding streets were crowded, and nearby establishments stayed open until the early morning); James, 342 N.C. at 597 (reasonable grounds to believe that cars were occupied when the defendant fired a semiautomatic weapon in a club’s parking lot knowing that parked vehicles were there and that people had left the club and were present in the parking lot).

Attempt. The statute attaches the same punishment to an attempt to commit this offense as to the completed offense. This is an exception to the general rule that an attempt to commit a crime is punished one level below the completed offense. See “Attempt” in Chapter 5 (General Crimes).

Felony murder. This offense can constitute a felony supporting a conviction of first-degree ­murder under the felony murder theory. State v. Wall, 304 N.C. 609, 612–13 (1982); see also the note on Element (3)(c) to “First-Degree Murder” in Chapter 6 (Homicide).

Charging issues. See this note to “Simple Assault,” above.

Multiple convictions and punishments. Each separate shot from a pistol supports a separate conviction. State v. Rambert, 341 N.C. 173, 176–77 (1995) (three distinct shots from a pistol fired into an occupied car supported three convictions and punishments; distinguishing the use of a pistol from a machine gun or other automatic weapon because the firing of a pistol requires the defendant to “employ his thought processes each time he fire[s] the weapon”); State v. Hagans, 188 N.C. App. 799, 805 (2008) (following Rambert).

Even when based on the same conduct, a defendant may be convicted and punished for both discharging a barreled weapon or firearm into occupied property and:

* assault with a deadly weapon, discussed above, State v. Messick, 88 N.C. App. 428, 436–37 (1988);
* assault with a deadly weapon with intent to kill inflicting serious injury, discussed above, State v. Allah, 168 N.C. App. 190, 196–97 (2005); and
* assault with a firearm on a law enforcement officer, probation or parole officer, or detention facility employee, discussed below, State v. Sellers, 155 N.C. App. 51, 59–60 (2002) (the defendant shot into a vehicle occupied by the officer).

Related Offenses Not in This Chapter

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

“Malicious Damage to Occupied Property by Use of an Explosive or Incendiary” (Chapter 20)

“Manufacture, Possession, etc. of a Machine Gun, Sawed-Off Shotgun, or Weapon of Mass Destruction” (Chapter 20)

“Possession of a Firearm by a Felon” (Chapter 22)

Discharging a Barreled Weapon or Firearm into an Occupied Dwelling or   
Occupied Conveyance in Operation

Statute

See G.S. 14-34.1(b), reproduced under “Discharging a Barreled Weapon or Firearm into Occupied Property,” above.

Elements

A person guilty of this offense

(1) willfully or wantonly

(2) discharges a firearm or barreled weapon

(3) (a) into an occupied dwelling or

(b) into an occupied vehicle, aircraft, watercraft, or other conveyance that is in operation.

Punishment

Class D felony. G.S. 14-34.1(b).

Notes

Element (1). See this note to “Discharging a Barreled Weapon or Firearm into Occupied Property,” above.

Element (2). See this note to “Discharging a Barreled Weapon or Firearm into Occupied Property,” above.

Element (3)(a). For the meaning of the term “occupied,” see the note on Element (3) to “Discharging a Barreled Weapon or Firearm into Occupied Property,” above. The statute does not define the term “dwelling.” For an explanation of that term as used in burglary, see the note on Element (4) to “First-Degree Burglary” in Chapter 15 (Burglary, Breaking or Entering, and Related Offenses).

Element (3)(b). For the meaning of the term “occupied,” see the note on Element (3) to “Discharging a Barreled Weapon or Firearm into Occupied Property,” above. The statute does not define the term “in operation.” For an explanation of that term as used in the motor vehicle statutes, see the note on Element (1) to “Driving While License Revoked” in Chapter 28 (Motor Vehicle Offenses).

Charging issues. See this note to “Simple Assault,” above. For an additional case on point decided after publication of the bulletin cited in that note, see State v. Curry, \_\_\_ N.C. App. \_\_\_, 692 S.E.2d 129 (2010) (fact that indictment charging discharging a barreled weapon into an occupied dwelling used the term “residence” instead of the statutory term “dwelling” did not result in a lack of notice as to the relevant charge).

Multiple convictions and punishments. See this note to “Discharging a Barreled Weapon or Firearm into Occupied Property,” above.

Related Offenses Not in This Chapter

See the offenses listed under “Discharging a Barreled Weapon or Firearm into Occupied Property,” above.

Discharging a Barreled Weapon or Firearm into Occupied Property   
Causing Serious Bodily Injury

Statute

See G.S. 14-34.1(c), reproduced under “Discharging a Barreled Weapon or Firearm into Occupied Property,” above.

Elements

A person guilty of this offense

(1) (a) violates G.S. 14-34.1(a) (see “Discharging a Barreled Weapon or Firearm into Occupied Property,” above) or

(b) violates G.S. 14-34.1(b) (see “Discharging a Barreled Weapon or Firearm into an Occupied Dwelling or Occupied Conveyance in Operation,” above) and

(2) causes serious bodily injury.

Punishment

Class C felony. G.S. 14-34.1(c)

Notes

Element (1)(a). See the notes to “Discharging a Barreled Weapon or Firearm into Occupied Property,” above.

Element (1)(b). See the notes to “Discharging a Barreled Weapon or Firearm into an Occupied Dwelling or Occupied Conveyance in Operation,” above.

Element (2). The statute does not define the term “serious bodily injury.” It is likely that a court would use the definition of “serious bodily injury” in G.S. 14-32.4. See “Assault Inflicting Serious Bodily Injury,” above.

Charging issues. See this note to “Simple Assault,” above.

Multiple convictions and punishments. See this note to “Discharging a Barreled Weapon or Firearm into Occupied Property,” above.

Related Offenses Not in This Chapter

See the offenses listed under “Discharging a Barreled Weapon or Firearm into Occupied Property,” above.

Secret Assault

Statute

**§14-31**. Maliciously assaulting in a secret manner.

If any person shall in a secret manner maliciously commit an assault and battery with any deadly weapon upon another by waylaying or otherwise, with intent to kill such other person, notwithstanding the person so assaulted may have been conscious of the presence of his adversary, he shall be punished as a Class E felon.

Elements

A person guilty of this offense

(1) commits an assault and battery

(2) on another

(3) with a deadly weapon

(4) in a secret manner

(5) with intent to kill and

(6) with malice.

Punishment

Class E felony. G.S. 14-31.

Notes

Element (1). The statute specifies that both an assault and a battery must occur. For a discussion of what constitutes a battery, see the note entitled “Battery” to “Simple Assault,” above. For a discussion of what constitutes an assault, see the note on Element (1) to “Simple Assault,” above.

Element (2). The State must prove that the assault and battery was committed against a particular individual. State v. Lyons, 330 N.C. 298 (1991) (jury instruction allowing conviction if the defendant assaulted one, two, or both victims was improper).

Element (3). See the note on Element (3) to “Assault with a Deadly Weapon,” above.

Element (4). An assault is secret if the victim is (1) unaware of the defendant’s presence; or (2) aware of the defendant’s presence but unaware of the defendant’s purpose to commit the assault. State v. Holcombe, \_\_\_ N.C. App. \_\_\_, 691 S.E.2d 740, 744 (2010) (insufficient evidence of this element). Examples of assaults that are secret include:

* a sudden shooting through a window, State v. McLamb, 203 N.C. 442 (1932);
* a sudden attack on the driver from a concealed position in a car’s back seat, State v. Kline, 190 N.C. 177 (1925); and
* a shooting from ambush, State v. Miller, 189 N.C. 695 (1925).

For an example of a case in which the evidence was insufficient to establish a secret assault, see State v. Wright, \_\_\_ N.C. App. \_\_\_, 708 S.E.2d 112 (2011) (in the middle of the night, the victim heard a noise and looked up to see someone standing in the bedroom doorway; the victim jumped on the person and hit him with a chair; the victim was aware of the defendant’s presence and purpose before the assault began; in fact, the victim started defending himself before the defendant’s assault was initiated).

Element (5). See the note on Element (4) to “Assault with a Deadly Weapon with Intent to Kill,” above.

Element (6). For a detailed discussion of the meaning of the term “malice,” see “Maliciously” in Chapter 1 (States of Mind) and the notes on Element (3)(a)(i) to “First-Degree Murder” and on Element (3) to “Second-Degree Murder,” both in Chapter 6 (Homicide).

Charging issues. See this note to “Simple Assault,” above.

Greater and lesser-included offenses. Because all of the elements of simple assault are included in secret assault, simple assault is a lesser-included offense of secret assault.

Multiple convictions and punishments. See this note to “Simple Assault,” above.

Because each offense contains an element that is not in the other, double jeopardy is not violated when a defendant is convicted and punished for this offense and assault with a deadly weapon with intent to kill inflicting serious injury, even when both offenses are based on the same assault. State v. Woodberry, 126 N.C. App. 78, 80–81 (2007).

Related Offenses Not in This Chapter

See the offenses in Chapter 22 (Weapons Offenses).

Use of dangerous weapon by prisoner in assault. G.S. 14-258.2.

Assault on a Female

Statute

See G.S. 14-33(c)(2), reproduced under “Simple Assault,” above.

Elements

A person guilty of this offense

(1) is a male

(2) at least 18 years old and

(3) commits an assault

(4) on a female.

Punishment

Class A1 misdemeanor. G.S. 14-33(c).

Notes

Element (2). The jury may estimate a defendant’s age solely by observing his appearance in court, without relying on any additional evidence of age. State v. Evans, 298 N.C. 263 (1979). Circumstantial evidence may be adequate for a jury’s decision. State v. Barnes, 324 N.C. 539 (1989); State v. Ackerman, 144 N.C. App. 452 (2001).

The age requirement for this offense pertains only to the defendant; there is no age requirement for the victim. State v. Mueller, 184 N.C. App. 553, 570–71 (2007).

Element (3). See the note on Element (1) to “Simple Assault,” above.

Constitutionality. This offense does not violate the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution even though a male defendant is subject to a greater penalty than a female who commits the same act. State v. Gurganus, 39 N.C. App. 395 (1979).

Charging issues. See this note to“Simple Assault,” above.

Greater and lesser-included offenses. Because all of the elements of simple assault are included in this offense, simple assault is a lesser-included offense of assault on a female.

This offense is not a lesser-included offense of (1) first-degree statutory rape, State v. Weaver, 306 N.C. 629 (1982); or (2) attempted second-degree rape, State v. Wortham, 318 N.C. 669 (1987); State v. Herring, 322 N.C. 733 (1988).

Multiple convictions and punishments. See this note to “Simple Assault” and “Assault Inflicting Serious Injury,” both above.

Related Offenses Not in This Chapter

See the offenses in Chapter 10 (Sexual Assaults).

“Aggravated Misdemeanor Affray” (Chapter 19)

Assaults Involving Children

Assault on a Child under 12

Statute

See G.S. 14-33(c)(3), reproduced under “Simple Assault,” above.

Elements

A person guilty of this offense

(1) commits an assault

(2) on a child under the age of 12 years.

Punishment

Class A1 misdemeanor. G.S. 14-33(c).

Notes

Element (1). See the note on Element (1) to “Simple Assault,” above. As a general rule, the person who is in charge of a child (a parent or school teacher, for example) is not criminally liable for inflicting moderate punishment to correct the child. “Moderate punishment” is punishment that does not cause lasting injury. State v. Alford, 68 N.C. 322 (1873). See G.S. 115C-390.3 for the authority of school personnel to use reasonable force. See G.S. 115C-390.4 regarding corporal punishment in schools. See generally “Domestic Authority” in Chapter 2 (Bars and Defenses).

Element (2). If the child actually is under the age of 12, it is immaterial whether the defendant believed that the child was 12 or over. See the note on Element (2) to “First-Degree Statutory Rape” in Chapter 10 (Sexual Assaults).

Charging issues. See this note to “Simple Assault,” above.

Greater and lesser-included offenses. Because all of the elements of simple assault are included in this offense, simple assault is a lesser-included offense of assault on a child.

This offense is not a lesser-included offense of first-degree statutory rape. State v. Weaver, 306 N.C. 629 (1982).

Multiple convictions and punishments. See this note to “Simple Assault” and “Assault Inflicting Serious Injury,” both above.

Relation to other offenses. If the victim is 12 or older but under 16 and the defendant is the child’s parent or guardian, child abuse might be charged. See the various child abuse offenses in Chapter 9 (Abuse and Neglect).

Related Offenses Not in This Chapter

“Indecent Liberties with a Child” (Chapter 10)

“Aggravated Misdemeanor Affray” (Chapter 19)

Assault in the Presence of a Minor

Statute

See G.S. 14-33(d), reproduced under “Simple Assault,” above.

Elements

A person guilty of this offense

(1) in the course of an assault, assault and battery, or affray

(2) (a) inflicts serious injury or

(b) uses a deadly weapon

(3) on a person with whom the defendant has a personal relationship and

(4) in the presence of a minor.

Punishment

Class A1 misdemeanor. G.S. 14-33(d). If convicted and sentenced to a community punishment, the defendant must be placed on supervised probation in addition to any other punishment imposed. Id. Second or subsequent convictions must receive active punishment of no less than thirty days, in addition to any other punishment imposed. Id.

Notes

Element (1). For a discussion of the terms “assault” and “battery,” see the note on Element (1) and the note entitled “Battery” to “Simple Assault,” above. For a discussion of the term “affray,” see “Simple Affray” in Chapter 19 (Disorderly Conduct, Riot, and Gang Offenses).

Element (2)(a). For an explanation of the term “serious injury,” see the note on Element (3) to “Assault Inflicting Serious Injury,” above.

Element (2)(b). For an explanation of the term “deadly weapon,” see the note on Element (3) to “Assault with a Deadly Weapon,” above.

Element (3). The term “personal relationship” means relationships in which the parties:

* are current or former spouses;
* are persons of opposite sex who live or have lived together;
* are related as parents and children (including others acting in loco parentis to a minor child or as grandparents and grandchildren);
* have a child in common;
* are current or former household members; or
* are persons of the opposite sex who are or have been in a dating relationship.

G.S. 14-33(d); G.S. 50B-1(b). A “dating relationship” is one in which the parties are romantically involved over time and on a continuous basis during the course of the relationship. G.S. 50B-1(b). A casual acquaintance or ordinary fraternization between persons in a business or social context is not a dating relationship. Id.

Element (4). “In the presence of a minor” means that the minor was in a position to have observed the assault. G.S. 14-33(d). A “minor” is any person under the age of 18 years who is residing with or is under the care and supervision of, and who has a personal relationship with, the person assaulted or the person committing the assault. Id.

Charging issues. See this note to “Simple Assault,” above.

Greater and lesser-included offenses. Because all of the elements of simple assault are included in this offense, simple assault is a lesser-included offense of assault in the presence of a minor.

Multiple convictions and punishments. See this note to “Simple Assault,” above.

Related Offenses Not in This Chapter

“Violation of Domestic Violence Protective Order” (Chapter 8)

“Aggravated Misdemeanor Affray” (Chapter 19)

“Simple Affray” (Chapter 19)

Battery on an Unborn Child

Statute

**§14-23.1**. Definition.

As used in this Article only, “unborn child” means a member of the species homo sapiens, at any stage of development, who is carried in the womb.

**§14-23.6**. Battery on an unborn child.

(a) A person is guilty of the separate offense of battery on an unborn child if the person commits a battery on a pregnant woman. This offense is a lesser included offense of G.S. 14 23.5.

(b) Penalty. – Any person who commits an offense under this section is guilty of a Class A1 misdemeanor.

**§14-23.7**. Exceptions.

Nothing in this Article shall be construed to permit the prosecution under this Article of any of the following:

(1) Acts which cause the death of an unborn child if those acts were lawful, pursuant to the provisions of G.S. 14 45.1.

(2) Acts which are committed pursuant to usual and customary standards of medical practice during diagnostic testing or therapeutic treatment.

(3) Acts committed by a pregnant woman with respect to her own unborn child, including, but not limited to, acts which result in miscarriage or stillbirth by the woman. The following definitions shall apply in this section:

a. Miscarriage. – The interruption of the normal development of an unborn child, other than by a live birth, and which is not an induced abortion permitted under G.S. 14 45.1, resulting in the complete expulsion or extraction from a pregnant woman of the unborn child.

b. Stillbirth. – The death of an unborn child prior to the complete ­expulsion or extraction from a woman, irrespective of the duration of pregnancy and which is not an induced abortion permitted under G.S. 14 45.1.

**§14-23.8**. Knowledge not required.

Except for an offense under G.S. 14 23.2(a)(1), an offense under this Article does not require proof of either of the following:

(1) The person engaging in the conduct had knowledge or should have had knowledge that the victim of the underlying offense was pregnant.

(2) The defendant intended to cause the death of, or bodily injury to, the unborn child.

Elements

A person guilty of this offense

(1) commits a battery

(2) on a pregnant woman.

Punishment

Class A1 misdemeanor. G.S. 14-23.6(b).

Notes

Generally. This crime was enacted in 2011 and applies to offenses committed on or after December 1, 2011. S.L. 2011-60, sec. 8.

Element (1). This offense only applies to a battery—that is, the actual striking. For a discussion of the difference between an assault and a battery, see the note entitled “Battery” to “Simple Assault,” above.

Element (2). G.S. 14‑23.8 provides that this offense does not require proof that the person engaging in the conduct knew or should have known that the woman was pregnant or that the defendant intended to cause the death of or bodily injury to the unborn child.

Criminal liability of the pregnant woman. The session law enacting this offense provides that it may not be used to impose criminal liability on an expectant mother who is the victim of acts of domestic violence that cause injury or death to her unborn child. S.L. 2011-60, sec. 4. The term “domestic violence” is defined by cross-reference to G.S. Chapter 50B. Id. See also the note entitled “Exceptions,” immediately below.

Exceptions. The following acts are excluded from coverage by this offense:

* causing the death of an unborn child if the acts were lawful pursuant to G.S. 14‑45.1 (when abortion is not unlawful);
* acts committed pursuant to usual and customary standards of medical practice during diagnostic testing or therapeutic treatment; or
* acts committed by a pregnant woman with respect to her own unborn child, including, but not limited to, acts which result in miscarriage or stillbirth by the woman.

G.S. 14‑23.7. “Miscarriage” means the “interruption of the normal development of an unborn child, other than by a live birth, and which is not an induced abortion permitted under G.S. 14‑45.1, resulting in the complete expulsion or extraction from a pregnant woman of the unborn child.” G.S. 14-23.7. “Stillbirth” means the “death of an unborn child prior to the complete expulsion or extraction from a woman, irrespective of the duration of pregnancy and which is not an induced abortion permitted under G.S. 14‑45.1.” Id.

Greater and lesser-included offenses. This offense is a lesser-included offense of “Assault Inflicting Serious Bodily Injury on an Unborn Child,” below. G.S. 14-23.6(a).

Multiple convictions and punishments. G.S. 14‑23.6(a) states that battery on an unborn child is a “separate offense.” This indicates a legislative intent that a defendant may be convicted of this offense and any other offense (such as a felonious assault on the woman) when based on the same conduct. This reading is confirmed by the session law, which states: “A prosecution for or conviction under this act is not a bar to conviction of or punishment for any other crime committed by the defendant as part of the same conduct.” S.L. 2011-60, sec. 7.

Related Offenses Not in This Chapter

“Murder of an Unborn Child” (Chapter 6)

“Voluntary Manslaughter of an Unborn Child” (Chapter 6)

“Involuntary Manslaughter of an Unborn Child” (Chapter 6)

“Sale or Delivery of a Controlled Substance to a Pregnant Female” (Chapter 27)

Using drugs or instruments to destroy unborn child. G.S. 14-44.

Using drugs or instruments to produce miscarriage or injure pregnant woman. G.S. 14-45.

Concealing birth of a child. G.S. 14-46.

Assault Inflicting Serious Bodily Injury on an Unborn Child

Statute

See G.S. 14-23.1, reproduced under “Battery on an Unborn Child,” above.

**§14-23.5**. Assault inflicting serious bodily injury on an unborn child; penalty.

(a) A person is guilty of the separate offense of assault inflicting serious bodily injury on an unborn child if the person commits a battery on the mother of the unborn child and the child is subsequently born alive and suffered serious bodily harm as a result of the battery.

(b) For purposes of this section, “serious bodily harm” is defined as 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, or causes the birth of the unborn child prior to 37-weeks gestation, if the child weighs 2,500 grams or less at the time of birth.

(c) Penalty. – Any person who commits an offense under this section shall be guilty of a Class F felony.

See G.S. 14-23.7 and 14-23.8, reproduced under “Battery on an Unborn Child,” above.

Elements

A person guilty of this offense

(1) commits a battery

(2) on the mother of an unborn child and

(3) the child is subsequently born alive and

(4) suffered serious bodily harm as a result of the battery.

Punishment

Class F felony. G.S. 14-23.5(c).

Notes

Generally. This crime was enacted in 2011 and applies to offenses committed on or after December 1, 2011. S.L. 2011-60, sec. 8.

Element (1). See the note on Element (1) to “Battery on an Unborn Child,” above.

Element (2). The term “unborn child” means “a member of the species homo sapiens, at any stage of development, who is carried in the womb.” G.S. 14‑23.1.

Element (3). The statute does not define the term “born alive.” In the context of homicide law nationally, the term has come to mean that the fetus is “fully brought forth” and “established an ‘independent circulation.’ ” 2 W. LaFave & A. Scott Jr., Substantive Criminal Law 419–20 (2d ed. 2003).

Element (4). The term “serious bodily harm” means “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, or causes the birth of the unborn child prior to 37-weeks gestation, if the child weighs 2,500 grams or less at the time of birth.” G.S. 14-23.5(b).

G.S. 14‑23.8 provides that this offense does not require proof that the person engaging in the conduct knew or should have known that the woman was pregnant or that the defendant intended to cause the death of or bodily injury to the unborn child.

Criminal liability of the pregnant woman. See this note to “Battery on an Unborn Child,” above.

Exceptions. See this note to “Battery on an Unborn Child,” above.

Multiple convictions and punishments. G.S. 14‑23.5(a) states that assault inflicting serious bodily injury on an unborn child is a “separate offense.” This indicates a legislative intent that a defendant may be convicted of this offense and any other offense (such as a felonious assault on the woman) when based on the same conduct. This reading is confirmed by the session law, which states: “A prosecution for or conviction under this act is not a bar to conviction of or punishment for any other crime committed by the defendant as part of the same conduct.” S.L. 2011-60, sec. 7.

Related Offenses Not in This Chapter

See the offenses listed under “Battery on an Unborn Child,” above.

Assaults on Handicapped Persons

Simple Assault on a Handicapped Person

Statute

§14-32.1. Assaults on handicapped persons; punishments.

(a) For purposes of this section, a “handicapped person” is a person who has:

(1) A physical or mental disability, such as decreased use of arms or legs, blindness, deafness, mental retardation or mental illness; or

(2) Infirmity which would substantially impair that person’s ability to defend himself.

(b) through (d) Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 767, s. 31.

(e) Unless his conduct is covered under some other provision of law providing greater punishment, any person who commits any aggravated assault or assault and battery on a handicapped person is guilty of a Class F felony. A person commits an aggravated assault or assault and battery upon a handicapped person if, in the course of the assault or assault and battery, that person:

(1) Uses a deadly weapon or other means of force likely to inflict serious injury or serious damage to a handicapped person; or

(2) Inflicts serious injury or serious damage to a handicapped person; or

(3) Intends to kill a handicapped person.

(f) Any person who commits a simple assault or battery upon a handicapped person is guilty of a Class A1 misdemeanor.

Elements

A person guilty of this offense

(1) commits an assault or battery

(2) on a handicapped person

(3) knowing or having reason to know that the person is handicapped.

Punishment

Class A1 misdemeanor. G.S. 14-32.1(f).

Notes

Element (1). See the note on Element (1) and the note entitled “Battery” to “Simple Assault,” both above.

Element (2). A “handicapped person” is someone who has a physical or mental disability (such as decreased use of arms or legs, blindness, deafness, mental retardation, or mental illness) or an infirmity that substantially impairs that person’s ability to defend himself or herself. G.S. 14-32.1(a).

Sufficient evidence of the victim’s handicap was presented when the victim testified that she would not be able to hear someone come up behind her unless the person was making “a lot of noise” and that being out on the street where the incident occurred reduced her ability to hear. State v. Hines, 166 N.C. App. 202 (2004).

Element (3). The State must prove that the defendant knew or had reasonable grounds to know that the victim was handicapped. State v. Singletary, 163 N.C. App. 449 (2004); N.C. Pattern Jury Instructions—Crim. 208.40A. For a case holding that the evidence was sufficient to allow a reasonable juror to find that the defendant knew or should have known of the victim’s handicap, see Singletary, 163 N.C. App. 449.

Charging issues. See this note to “Simple Assault,” above.

Greater and lesser-included offenses. Because all of the elements of simple assault are included in this offense, simple assault is a lesser-included offense.

Multiple convictions and punishments. See this note to “Simple Assault,” above.

Related Offenses Not in This Chapter

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

Aggravated Assault on a Handicapped Person

Statute

See G.S. 14-32.1(e), reproduced under “Simple Assault on a Handicapped Person,” above.

Elements

A person guilty of this offense

(1) commits an assault or battery

(2) on a handicapped person

(3) knowing or having reason to know that the person is handicapped and

(4) (a) uses a deadly weapon or other means of force likely to cause serious injury or serious damage to a handicapped person,

(b) inflicts serious injury on a handicapped person, or

(c) intends to kill a handicapped person.

Punishment

Class F felony. G.S. 14-32.1(e).

Notes

Generally. This offense is the same as “Simple Assault on a Handicapped Person,” above, except that this offense requires proof of the additional Element (4). Thus, the notes on Elements (1) through (3) to “Simple Assault on a Handicapped Person” apply here as well.

Element (4)(a). For an explanation of the term “deadly weapon,” see the note on Element (3) to “Assault with a Deadly Weapon,” above. For an explanation of the term “serious injury,” see the note on Element (3) to “Assault Inflicting Serious Injury,” above.

Element (4)(b). See the note on Element (3) to “Assault Inflicting Serious Injury,” above.

Element (4)(c). See the note on Element (4) to “Assault with a Deadly Weapon with Intent to Kill,” above.

Charging issues. See this note to “Simple Assault,” above.

Greater and lesser-included offenses. Because all of the elements of (1) simple assault; and (2) simple assault on a handicapped person are included in this offense, both are lesser-included offenses of this crime.

Multiple convictions and punishment. See this note to “Simple Assault” and “Assault Inflicting Serious Injury,” both above.

Related Offenses Not in This Chapter

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

Assaults on Government Officers, Employees, and Similar Persons

Assault on a Governmental Officer or Employee

Statute

See G.S. 14-33(c)(4), reproduced under “Simple Assault,” above.

Elements

A person guilty of this offense

(1) commits an assault

(2) on an officer or employee of the state or any political subdivision of the state

(3) who is discharging or attempting to discharge his or her official duties.

Punishment

Class A1 misdemeanor. G.S. 14-33(c).

Notes

Element (1). See the note on Element (1) to “Simple Assault,” above.

Element (2). This statute protects law enforcement officers and other government officers and employees.

It seems that the defendant must know or have reasonable grounds to know that the person he or she assaults is a state officer or employee. In interpreting a similarly written statute concerning assault on law enforcement officers, the North Carolina Supreme Court ruled that the State must prove that the defendant knew that the person he or she assaulted was a law enforcement officer. State v. Avery, 315 N.C. 1 (1985); see also N.C. Pattern Jury Instructions—Crim. 208.82 (requiring that the defendant knew or had reasonable grounds to believe the person was an officer).

It is not clear whether company police and campus police are covered by this offense. However, in 2005, the General Assembly enacted legislation covering assault on these individuals. See “Assault on a Company or Campus Police Officer,” below.

When off-duty members of a city police force were assaulted while working as security guards for a restaurant, charges of assault on a law enforcement officer under former G.S. 14-33(b)(4) (now repealed) were proper. State v. Lightner, 108 N.C. App. 349 (1992) (the officers were working in police uniform and were carrying sidearms, the officers’ employment with the restaurant was arranged through the city police department, the officers were required to follow police department rules and guidelines, and the officers were attempting to place the defendant under arrest—an official duty of office while working for the city—when they were assaulted); see also State v. Gaines, 332 N.C. 461 (1992). In similar circumstances, there also might be a violation of this statute, which covers assaults on law enforcement officers.

Element (3). The statute specifies that the assault may occur either while an officer or employee is discharging a duty of his or her office or while he or she is attempting to discharge such a duty. For example, an assault that occurs while an officer is executing or attempting to execute a search warrant would be covered. It is not clear that the defendant must know that the officer or employee is discharging, or attempting to discharge, a duty of his or her office.

Assaults committed because of a duty previously discharged by the officer or employee are not covered. For example, assaulting a police officer in the grocery store because of an arrest made a week ago would not be covered.

The duty being discharged must be a lawful duty. If, for example, the officer or employee was making an illegal arrest, then this element would not be satisfied. See the note on Element (2) to “Resisting, Delaying, or Obstructing an Officer” in Chapter 21 (Perjury, Bribery, Obstruction, Resisting, and Related Crimes).

Charging issues. See this note to “Simple Assault,” above. For additional cases on point decided after publication of the bulletin cited in that note, see State v. Noel, \_\_\_ N.C. App. \_\_\_, 690 S.E.2d 10 (2010) (an indictment charging assault on a governmental officer under G.S. 14-33(c)(4) need not allege the specific duty the officer was performing; if it does, it is surplusage); State v. Roman, \_\_\_ N.C. App. \_\_\_, 692 S.E.2d 431 (2010) (there was no fatal variance between a warrant charging assault on a governmental officer under G.S. 14-33(c)(4) and the evidence at trial; the warrant charged that the assault occurred while the officer was discharging the duty of arresting the defendant for communicating threats, but at trial the officer testified that the assault occurred when he was arresting the defendant for being intoxicated and disruptive in public; the pivotal element was whether the assault occurred while the officer was discharging his duties; what crime the arrest was for is immaterial).

Greater and lesser-included offenses. Because all of the elements of simple assault are included in this offense, simple assault is a lesser-included offense of this crime.

Multiple convictions and punishments. See this note to “Simple Assault” and “Assault Inflicting Serious Injury,” both above.

Even though assault on a governmental officer or employee and resist, delay, and obstruct an officer each contain elements not in the other and therefore are not the “same” for purposes of double jeopardy, the North Carolina courts have held that double jeopardy prohibits a defendant from being convicted and punished for both offenses when based on the same conduct. State v. Summrell, 282 N.C. 157, 173 (1972); State v. Hardy, 298 N.C. 191, 197–98 (1979) (citing Summrell); State v. Raynor, 33 N.C. App. 698, 701 (1977). The cases also hold that a defendant may be convicted of both of these crimes when different conduct supports each conviction, even if all of the conduct occurred during the same incident. State v. Newman, 186 N.C. App. 382, 386–89 (2007) (no double jeopardy violation when different conduct supported each charge). These cases are not in accord with the great majority of double jeopardy decisions. See, e.g., State v. Martin, 47 N.C. App. 223, 231 (1980) (“If . . . a single act constitutes an offense against two statutes and each statute requires proof of an additional fact which the other does not, the offenses are not the same in law and a defendant may be convicted and punished for both.”); State v. Martin, 195 N.C. App. 43, 54–55 (2009) (“ ‘[D]ouble jeopardy is not violated merely because the same evidence is relevant to show both crimes.’ ” (quoting State v. Cumber, 32 N.C. App. 329, 337 (1977)); see also “Double Jeopardy” in Chapter 2 (Bars and Defenses) and the notes entitled “Multiple convictions and punishments,” throughout this book.

Related Offenses Not in This Chapter

“Threat to Kill or Inflict Serious Injury on Executive, Legislative, or Court Officers” (Chapter 8)

“Aggravated Misdemeanor Affray” (Chapter 19)

“Resisting, Delaying, or Obstructing an Officer” (Chapter 21)

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

Use of dangerous weapon by prisoner in assault. G.S. 14-258.2.

Assault on a Company or Campus Police Officer

Statute

See G.S. 14-33(c)(8), reproduced under “Simple Assault,” above.

Elements

A person guilty of this offense

(1) commits an assault

(2) on a certified company police officer or a certified campus police officer

(3) who is performing his or her duties.

Punishment

Class A1 misdemeanor. G.S. 14-33(c).

Notes

Element (1). See the note on Element (1) to “Simple Assault,” above.

Element (2). The company police officer must have been certified pursuant to G.S. Chapter 74E. The campus police officer must have been certified pursuant to G.S. Chapter 74G, Chapter 17C, or Chapter 116.

Charging issues. See this note to “Simple Assault,” above.

Greater and lesser-included offenses. Because all of the elements of simple assault are included in this crime, simple assault is a lesser-included offense.

Multiple convictions and punishments. See this note to “Simple Assault” and “Assault Inflicting Serious Injury,” both above.

Relation to other offenses. To the extent that the campus police officer is employed by a unit of state or local government, such as an officer employed by a state university, this offense overlaps with assault on a governmental officer or employee.

Related Offenses Not in This Chapter

None

Assault with a Firearm or Other Deadly Weapon on a Governmental Officer or Employee or Company or Campus Police Officer

Statute

§14-34.2. Assault with a firearm or other deadly weapon upon governmental officers or   
employees, company police officers, or campus police officers.

Unless a person’s conduct is covered under some other provision of law providing greater punishment, any person who commits an assault with a firearm or any other deadly weapon upon an officer or employee of the State or of any political subdivision of the State, a company police officer certified pursuant to the provisions of Chapter 74E of the General Statutes, or a campus police officer certified pursuant to the provisions of Chapter 74G, Chapter 17C, or Chapter 116 of the General Statutes, in the performance of his duties shall be guilty of a Class F felony.

Elements

A person guilty of this offense

(1) commits an assault

(2) with

(a) a firearm or

(b) any other deadly weapon

(3) (a) on an officer or employee of the state or any political subdivision of the state,

(b) a certified company police officer, or

(c) a certified campus police officer

(4) who is performing a duty of his or her office.

Punishment

Class F felony. G.S. 14-34.2.

Notes

Element (1). See the note on Element (1) to “Simple Assault,” above. An assault with a firearm or other deadly weapon upon governmental officers or employees, company police officers, or campus police officers occurred when the defendant reached for but did not touch a weapon that was inches away from his hand. State v. Barksdale, 181 N.C. App. 302, 307 (2007) (concluding that the defendant’s conduct constituted an unequivocal appearance of an attempt to harm the officers with the gun).

Element (2)(a). See the note on Element (2) to “Discharging a Barreled Weapon or Firearm into Occupied Property,” above.

Element (2)(b). For a definition of “deadly weapon,” see the note on Element (3) to “Assault with a Deadly Weapon,” above.

Element (3). See the note on Element (2) to “Assault on a Governmental Officer or Employee,” above.

Company and campus police officers are explicitly covered by this offense, while their inclusion as possible victims of assault on a governmental officer or employee is not always clear.

In interpreting a previous version of this G.S. 14-34.2, the courts ruled that the defendant must know that the victim is one of the designated kinds of officers or employees. State v. Avery, 315 N.C. 1 (1985); State v. Mayberry, 38 N.C. App. 509 (1978). This statute is likely to be interpreted similarly.

For a case holding that there was substantial evidence to show that the defendant knew or had reason to know the officers were law enforcement officers and, therefore, government officials, see State v. Batchelor, 167 N.C. App. 797 (2005).

Element (4). This offense is committed only if the officer or employee assaulted is engaged in a lawful duty. However, to be covered by this statute, the duty performed need not be a duty required by law; it need only be a duty permitted by law. For example, a law enforcement officer investigating a minor traffic accident that the officer has no statutory duty to investigate still is discharging a duty of his or her office. State v. Adams, 88 N.C. App. 139 (1987).

When the victim is a law enforcement officer, the duty need not be making an arrest; the officer could be patrolling, checking licenses, or engaged in any other official task. See the note on Element (4) to “Resisting, Delaying, or Obstructing an Officer” in Chapter 21 (Perjury, Bribery, Obstruction, Resisting, and Related Crimes). When an officer fired his pistol at the defendant in attempting to make an arrest, the officer was performing a duty of his office for purposes of this statute, and it was a violation of this statute for the defendant to return fire with a firearm. State v. Irick, 291 N.C. 480 (1977). However, if an officer uses excessive force in making an arrest, the person the officer is attempting to arrest can use reasonable force in self-defense. State v. Mensch, 34 N.C. App. 572 (1977).

Charging issues. See this note to “Simple Assault,” above.

Greater and lesser-included offenses. Because all of the elements of (1) simple assault; (2) assault with a deadly weapon; (3) assault on a governmental officer or employee; and (4) assault on a company or campus police officer are included in this offense, all four of those offenses are lesser-included offenses of this crime.

Multiple convictions and punishments. See this note to “Simple Assault” and “Assault Inflicting Serious Injury,” both above.

Relation to other offenses. Previous versions of this statute made it a crime to commit these kinds of assaults against firefighters, emergency medical services personnel, ambulance attendants, and paramedics, among others. To the extent that such officials are public employees, company police, or campus police, assaults on them will come under this statute. They also may be covered under “Assaults on Firefighters and Emergency or Medical Personnel,” below.

Related Offenses Not in This Chapter

See the offenses listed under “Assault on a Governmental Officer or Employee,” above.

See the offenses in Chapter 22 (Weapons Offenses).

Interference with firefighters. G.S. 58-82-1.

Assault with a Firearm on a Law Enforcement Officer, Probation or   
Parole Officer, or Detention Facility Employee

Statute

**§14-34.5**. Assault with a firearm on a law enforcement, probation, or parole officer or on a person employed at a State or local detention facility.

(a) Any person who commits an assault with a firearm upon a law enforcement officer, probation officer, or parole officer while the officer is in the performance of his or her duties is guilty of a Class E felony.

(b) Anyone who commits an assault with a firearm upon a person who is employed at a detention facility operated under the jurisdiction of the State or a local government while the employee is in the performance of the employee’s duties is guilty of a Class E felony.

Elements

A person guilty of this offense

(1) commits an assault

(2) with a firearm

(3) on a

(a) law enforcement officer,

(b) probation officer,

(c) parole officer, or

(d) state or local government detention facility employee

(4) who is performing his or her duties.

Punishment

Class E felony. G.S. 14-34.5.

Notes

Element (1). See the note on Element (1) to “Simple Assault,” above.

Element (4). See the note on Element (2) to “Discharging a Barreled Weapon or Firearm into Occupied Property,” above.

The State does not need to prove that the defendant pointed a firearm at the covered officer or employee. Rather, it need only prove that the defendant put on a show of force or violence sufficient to put an officer of reasonable firmness in fear of immediate physical injury, State v. Dickens, 162 N.C. App. 632 (2004); State v. Childers, 154 N.C. App. 375 (2002), such as where the defendant slammed a gun down on a counter and then waved it around as he interacted with officers, Childers, 154 N.C. App. 375.

Element (3). To be guilty of this offense, the defendant must have known or had reasonable grounds to know that the victim was a law enforcement officer. Dickens, 162 N.C. App. 632. For a case in which the evidence was sufficient to show that the defendant knew or had ­reasonable grounds to know that the victim was a law enforcement officer, see Dickens, 162 N.C. App. 632.

Element (3)(a). Although G.S. 14-34.5 does not define “law enforcement officer,” another statute and certain court decisions suggest that company police officers are covered by the term under some circumstances. “Company police officers” is a statutory term that includes most campus police officers at public and private colleges and universities, railroad police officers, and any other privately employed law enforcement officer. G.S. 74E-6(b). G.S. 74E-6(c) authorizes company police officers to make arrests and to charge infractions on specified types of property, so they appear to fit the definition of “law enforcement officer” in G.S. 14-288.1(5), which includes any “person authorized under the laws of North Carolina to make arrests and . . . acting within his territorial jurisdiction.” Also, the North Carolina Court of Appeals has characterized company police officers as “public, although limited police officer[s]” in contrasting them with private detectives. N.C. Ass’n of Licensed Detectives v. Morgan, 17 N.C. App. 701 (1973). They probably would be considered law enforcement officers when enforcing state law but not when acting solely to protect private interests of their employers. Tate v. S. Ry. Co., 205 N.C. 51 (1933). They would be considered law enforcement officers when they both enforce state law and protect their employer’s private interests at the same time. See the note on Element (2) to “Assault on a Governmental Officer or Employee,” above.

Element (4). See the note on Element (4) to “Assault with a Firearm or Other Deadly Weapon on a Governmental Officer or Employee or Company or Campus Police Officer,” above.

Charging issues. See this note to “Simple Assault,” above.

Greater and lesser-included offenses. Because all of the elements of (1) simple assault; and (2) assault with a deadly weapon are included in this offense, both offenses are lesser-included offenses of this one. Dickens, 162 N.C. App. at 638.

Multiple convictions and punishments. See this note to “Simple Assault,” above.

Even if based on the same conduct, a defendant may be convicted and punished for assault with a firearm on a law enforcement officer, probation or parole officer, or detention facility employee and (1) attempted first-degree murder, State v. Haynesworth, 146 N.C. App. 523, 531 (2001); and (2) discharging a barreled weapon or firearm into occupied property. State v. Sellers, 155 N.C. App. 51 (2002).

Related Offenses Not in This Chapter

See the offenses listed under “Assault on a Governmental Officer or Employee,” above.

Assault Inflicting Physical Injury on a Law Enforcement Officer, Probation or   
Parole Officer, or Detention Facility Employee

Statute

**§14-34.7**. Assault inflicting serious injury on a law enforcement, probation, or parole officer or on a person employed at a State or local detention facility.

(a) Unless covered under some other provision of law providing greater punishment, a person is guilty of a Class F felony if the person assaults a law enforcement officer, probation officer, or parole officer while the officer is discharging or attempting to discharge his or her official duties and inflicts serious bodily injury on the officer.

(b) Anyone who assaults a person who is employed at a detention facility operated under the jurisdiction of the State or a local government while the employee is in the performance of the employee’s duties and inflicts serious bodily injury on the employee is guilty of a Class F felony, unless the person’s conduct is covered under some other provision of law providing greater punishment.

(c) Unless covered under some other provision of law providing greater punishment, a person is guilty of a Class I felony if the person does either of the following:

(1) Assaults a law enforcement officer, probation officer, or parole officer while the officer is discharging or attempting to discharge his or her official duties and inflicts physical injury on the officer.

(2) Assaults a person who is employed at a detention facility operated under the jurisdiction of the State or a local government while the employee is in the performance of the employee’s duties and inflicts physical injury on the employee.

For the purposes of this subsection, “physical injury” includes cuts, scrapes, bruises, or other physical injury which does not constitute serious injury.

Elements

A person guilty of this offense

(1) commits an assault

(2) on a

(a) law enforcement officer,

(b) probation officer,

(c) parole officer, or

(d) state or local government detention facility employee

(3) who is discharging or attempting to discharge his or her official duties and

(4) inflicts physical injury on the officer or employee.

Punishment

Class I felony. G.S. 14-34.7(c).

Notes

Element (1). See the note on Element (1) to “Simple Assault,” above.

Element (2). See the note on Element (3) to “Assault with a Firearm on a Law Enforcement Officer, Probation or Parole Officer, or Detention Facility Employee,” above.

Element (2)(a). For a discussion of the term “law enforcement officer” as used in a related offense, see the note on Element (2)(a) to “Assault with a Firearm on a Law Enforcement Officer, Probation or Parole Officer, or Detention Facility Employee,” above.

Element (3). See the note on Element (4) to “Assault with a Firearm or Other Deadly Weapon on a Governmental Officer or Employee or Company or Campus Police Officer,” above.

Element (4). The term “physical injury” includes “cuts, scrapes, bruises, or other physical injury which does not constitute serious injury.” G.S. 14-34.7(c).

Charging issues. See this note to “Simple Assault,” above.

Multiple convictions and punishments. See this note to “Simple Assault” and “Assault Inflicting Serious Injury,” both above.

Related Offenses Not in This Chapter

See the offenses listed under “Assault on a Governmental Officer or Employee,” above.

Assault Inflicting Serious Injury or Serious Bodily Injury on a Law Enforcement   
Officer, Probation or Parole Officer, or Detention Facility Employee

Statute

See G.S. 14-34.7(a) & (b), reproduced under “Assault Inflicting Physical Injury on a Law Enforcement Officer, Probation or Parole Officer, or Detention Facility Employee,” above.

Elements

A person guilty of this offense

(1) commits an assault

(2) on a

(a) law enforcement officer,

(b) probation officer,

(c) parole officer, or

(d) state or local government detention facility employee

(3) who is discharging or attempting to discharge his or her official duties and

(4) inflicts serious injury or serious bodily injury on the officer or employee.

Punishment

Class F felony. G.S. 13-34.7.

Notes

Generally. This offense is the same as “Assault Inflicting Physical Injury on a Law Enforcement Officer, Probation or Parole Officer, or Dentention Facility Employee,” above, except with respect to Element (4) pertaining to the injury inflicted. Thus, the relevant notes to that offense apply here as well.

Element (4). Notwithstanding the statutory language requiring serious bodily injury, the North Carolina Court of Appeals has ruled that the statute can be satisfied with proof of either serious injury or serious bodily injury. State v. Crawford, 167 N.C. App. 777 (2005). For a definition of “serious injury,” see the note on Element (3) to “Assault Inflicting Serious Injury,” above. Although the term “serious bodily injury” is not defined, a court would likely use the definition of that term in G.S. 14-32.4. For a discussion of that statutory definition, see the note on Element (3) to “Assault Inflicting Serious Bodily Injury,” above.

Greater and lesser-included offenses. Because all of the elements of (1) simple assault; (2) assault inflicting serious injury; and (3) assault inflicting serious bodily injury are included in this offense, all three of those offenses are lesser-included offenses of this crime.

Multiple convictions and punishments. See this note to “Simple Assault” and “Assault Inflicting Serious Injury,” both above.

Related Offenses Not in This Chapter

See the offenses listed under “Assault on a Governmental Officer or Employee,” above.

Malicious Conduct by a Prisoner

Statute

**§14-258.4**. Malicious conduct by prisoner.

(a) Any person in the custody of the Department of Correction, the Department of Juvenile Justice and Delinquency Prevention, any law enforcement officer, or any local confinement facility (as defined in G.S. 153A-217, or G.S. 153A-230.1), including persons pending trial, appellate review, or presentence diagnostic evaluation, who knowingly and willfully throws, emits, or causes to be used as a projectile, bodily fluids or excrement at a person who is an employee of the State or a local government while the employee is in the performance of the employee’s duties is guilty of a Class F felony. The provisions of this section apply to violations committed inside or outside of the prison, jail, detention center, or other confinement facility.

(b) Reserved.

Elements

A person guilty of this offense

(1) while in the custody of

(a) the Department of Correction,

(b) the Department of Juvenile Justice and Delinquency Prevention,

(c) any law enforcement officer, or

(d) any local confinement facility

(2) knowingly and willfully

(3) throws, emits, or causes to be used as a projectile

(4) bodily fluids or excrement

(5) at a person who is a state or local government employee

(6) while the employee is in the performance of his or her duties.

Punishment

Class F felony. G.S. 14-258.4.

Notes

Element (1). Proof of a defendant’s being in “custody” is satisfied by showing that a reasonable person in the defendant’s position would have believed he or she was not free to leave. State v. Ellis, 168 N.C. App. 651 (2005); State v. Noel, \_\_\_ N.C. App. \_\_\_, 690 S.E.2d 10, 16 (2010) (quoting Ellis). For example, the defendant was in custody when he was handcuffed, seated on a curb, and told that he was not free to leave. Noel, \_\_\_ N.C. App. \_\_\_, 690 S.E.2d at 16.

This offense applies to violations committed inside or outside of a prison, jail, or other confinement facility as long as the person is in custody at the time of the incident. G.S. 14-258.4(a).

Element (1)(d). G.S. 153A-217 defines a “local confinement facility” to include a county or city jail, a local lockup, a regional or district jail, a juvenile detention facility, a detention facility for adults operated by a local government, and any other facility operated by a local government for confinement of persons awaiting trial or serving sentences. It further provides that the term does not include a “county satellite jail/work release unit.” G.S. 153A-217(5). A “satellite jail/work release unit” means a building or designated portion of a building primarily designed, staffed, and used for the housing of misdemeanants participating in a work release program; the units may house misdemeanants only, except that the Sheriff may accept responsibility from the Department of Correction for the housing of certain felons. G.S. 153A-230.1

Element (2). See “Knowingly” and “Willfully” in Chapter 1 (States of Mind). Inadvertent conduct is not covered because the prisoner must act knowingly and willfully. G.S. 14-258.4(a). The evidence was sufficient to establish this element when the defendant was uncooperative with and belligerent toward officers and immediately before the incident said to an approaching officer, “F--k you, n----r. I ain’t got nothing. You ain’t got nothing on me.” Noel, \_\_\_ N.C. App. \_\_\_, 690 S.E.2d at 16.

Element (4). Spitting is covered by the statute. Noel, \_\_\_ N.C. App. \_\_\_, 690 S.E.2d 10.

Element (5). Intentional conduct by a prisoner toward another prisoner or a visitor is not covered; the statute requires that the conduct be directed at a state or local government employee.

Charging issues. See this note to “Simple Assault,” above. For an additional case on point decided after publication of the bulletin cited in that note, see State v. Noel, \_\_\_ N.C. App. \_\_\_, 690 S.E.2d 10 (2010) (indictment charging malicious conduct by prisoner under G.S. 14-258.4 need not allege the specific duty the officer was performing; if it does, it is surplusage).

Greater and lesser-included offenses. Assault on a governmental officer is not a lesser-included offense of malicious conduct by a prisoner. State v. Crouse, 169 N.C. App. 382, 386 (2005).

Multiple convictions and punishments. See this note to “Simple Assault,” above.

Related Offenses Not in This Chapter

“Resisting, Delaying, or Obstructing an Officer” (Chapter 21)

Assault on an Executive, Legislative, or Court Officer

Statute

**§14-16.6**. Assault on executive, legislative, or court officer.

(a) Any person who assaults any legislative officer, executive officer, or court officer, or any person who makes a violent attack upon the residence, office, temporary accommodation or means of transport of any one of those officers in a manner likely to endanger the officer, shall be guilty of a felony and shall be punished as a Class I felon.

(b) Any person who commits an offense under subsection (a) and uses a deadly weapon in the commission of that offense shall be punished as a Class F felon.

(c) Any person who commits an offense under subsection (a) and inflicts serious bodily injury to any legislative officer, executive officer, or court officer, shall be punished as a Class F felon.

**§14-16.9**. Officers-elect to be covered.

Any person who has been elected to any office covered by this Article but has not yet taken the oath of office shall be considered to hold the office for the purpose of this Article and G.S. 114-15.

**§14-16.10**. Definitions.

The following definitions apply in this Article:

(1) Court officer.—Magistrate, clerk of superior court, acting clerk, assistant or deputy clerk, judge, or justice of the General Court of Justice; district attorney, assistant district attorney, or any other attorney designated by the district attorney to act for the State or on behalf of the district attorney; public defender or assistant defender; court reporter; juvenile court counselor as defined in G.S. 7B‑1501(18a); any attorney or other individual employed by or acting on behalf of the department of social services in proceedings pursuant to Subchapter I of Chapter 7B of the General Statutes; any attorney or other individual appointed pursuant to G.S. 7B‑601 or G.S. 7B‑1108 or employed by the Guardian ad Litem Services Division of the Administrative Office of the Courts.

(2) Executive officer.—A person named in G.S. 147-3(c).

(3) Legislative officer.—A person named in G.S. 147-2(1), (2), or (3).

Elements

A person guilty of this offense

(1) assaults

(2) any

(a) executive officer,

(b) legislative officer, or

(c) court officer.

Punishment

Class I felony. G.S. 14-16.6(a).

Notes

Element (1). See the note on Element (1) to “Simple Assault,” above.

Element (2) generally. It is not clear whether the defendant must know or have reasonable grounds to believe that the victim was a covered officer. Compare, e.g., “Assault on a Child under 12,” discussed above (for this offense it is immaterial whether the defendant believed that the child was over 12), with “Simple Assault on a Handicapped Person,” also discussed above (for this offense the defendant must know or have reasonable grounds to believe that the victim is handicapped). The N.C. Pattern Jury Committee determined that such knowledge is required. N.C. Pattern Jury Instructions—Crim. 208.01.

Element (2)(a). The term “executive officer” includes:

* the Governor,
* the Lieutenant Governor,
* the private secretary for the Governor,
* the Secretary of State,
* the Auditor,
* the Treasurer,
* the Attorney General,
* the Superintendent of Public Instruction,
* members of the Governor’s Council,
* the Commissioner of Agriculture,
* the Commissioner of Labor, and
* the Commissioner of Insurance.

G.S. 14-16.10(2) (incorporating G.S. 147-3(c)). Individuals who have been elected to a covered office but not yet taken the oath are covered as well. G.S. 14-16.9.

Element (2)(b). “Legislative officers” include:

* senators,
* members of the House of Representatives, and
* the House Speaker.

G.S. 14-16.10(3) (incorporating G.S. 147-2(1) through (3)). Individuals who have been elected to a covered office but not yet taken the oath are covered as well. G.S. 14-16.9.

Element (2)(c). A “court officer” is defined in G.S. 14-16.10(1) as a:

* magistrate;
* clerk or acting clerk of superior court;
* assistant or deputy clerk;
* judge or justice of the General Court of Justice;
* district attorney, assistant district attorney, or any other attorney designated by the district attorney to act for the State or on behalf of the district attorney;
* public defender or assistant defender;
* court reporter;
* juvenile court counselor as defined in G.S. 7B‑1501(18a);
* any attorney or other individual employed by or acting on behalf of the department of social services in proceedings pursuant to Subchapter I of Chapter 7B of the General Statutes; and
* any attorney or other individual appointed pursuant to G.S. 7B‑601 or G.S. 7B‑1108 or employed by the Guardian ad Litem Services Division of the Administrative Office of the Courts.

Individuals who have been elected to a covered office but not yet taken the oath are covered as well. G.S. 14-16.9.

Unlike other assaults on public officials discussed in this chapter, this offense does not require that a court officer be performing a duty of office when assaulted.

Additional conduct included within statute. The statute also prohibits a violent attack upon the residence, office, temporary accommodation, or means of transport of any covered officer in a manner likely to endanger the officer. G.S. 14-16.6(a).

Charging issues. See this note to “Simple Assault,” above.

Greater and lesser-included offenses. Because all of the elements of simple assault are included in this offense, simple assault is a lesser-included offense.

Multiple convictions and punishments. See this note to “Simple Assault,” above.

Related Offenses Not in This Chapter

“Threat to Kill or Inflict Serious Injury on Executive, Legislative, or Court Officers” (Chapter 8)

Assault on an Executive, Legislative, or Court Officer Using a Deadly Weapon or Inflicting Serious Injury

Statute

See G.S. 14-16.6(b) and (c), reproduced under “Assault on an Executive, Legislative, or Court Officer,” above.

Elements

A person guilty of this offense

(1) assaults

(2) any

(a) executive officer,

(b) legislative officer, or

(c) court officer and

(3) (a) uses a deadly weapon or

(b) inflicts serious bodily injury.

Punishment

Class F felony. G.S. 14-16.6(b) and (c).

Notes

Generally. This offense is the same as “Assault on an Executive, Legislative, or Court Officer,” above, except that this offense contains an additional element—Element (3). Thus, the relevant notes to that offense apply here as well.

Element (3). For a definition of “deadly weapon,” see the note on Element (3) to “Assault with a Deadly Weapon,” above. The statute does not define the term “serious bodily injury.” For a definition of “serious bodily injury” that applies in another assault offense, see the note on Element (3) to “Assault Inflicting Serious Bodily Injury,” above.

Greater and lesser-included offenses. Because all of the elements of (1) simple assault; and (2) assault on an executive, legislative, or court officer are included in this offense, both are lesser-included offenses of this crime.

Related Offenses Not in This Chapter

“Threat to Kill or Inflict Serious Injury on Executive, Legislative, or Court Officers” (Chapter 8)

Assault on School Personnel

Statute

See G.S. 14-33(c)(6), reproduced under “Simple Assault,” above.

Elements

A person guilty of this offense

(1) commits an assault

(2) on a school employee or school volunteer

(3) (a) who is discharging or attempting to discharge his or her duties or

(b) as a result of the employee’s or volunteer’s discharge or attempt to discharge his or her duties.

Punishment

Class A1 misdemeanor. G.S. 14-33(c).

Notes

Element (1). See the note on Element (1) to “Simple Assault,” above.

Element (2). The terms “employee” and “volunteer” mean:

* an employee of a local board of education, a charter school authorized under G.S. 115C‑238.29D, or a nonpublic school which has filed intent to operate under Part 1 or Part 2 of Article 39 of G.S. Chapter 115C;
* an independent contractor or an employee of an independent contractor of a local board of education, charter school authorized under G.S. 115C‑238.29D, or a nonpublic school which has filed intent to operate under Part 1 or Part 2 of Article 39 of G.S. Chapter 115C, if the independent contractor carries out duties customarily performed by employees of the school; and
* an adult who volunteers his or her services or presence at any school activity and is under the supervision of an individual listed under (1) or (2) above.

G.S. 14-33(c)(6)b.

Element (3). The term “duties” means all activities:

* on school property;
* wherever occurring, during a school authorized event or the accompanying of students to or from that event; and
* relating to the operation of school transportation.

G.S. 14-33(c)(6)a. An assault committed because of a duty discharged by the employee or volunteer is covered by this offense.

Charging issues. See this note to “Simple Assault,” above.

Greater and lesser-included offenses. Because all of the elements of simple assault are included in this offense, simple assault is a lesser-included offense of this crime.

Multiple convictions and punishments. See this note to “Simple Assault” and “Assault Inflicting Serious Injury,” both above.

Relation to other offenses. This offense, to the extent it includes governmental employees such as teachers, overlaps with “Assault on a Governmental Officer or Employee,” above. However, that offense, unlike this one, does not cover an assault on a teacher committed as a result of the discharge of his or her duties (for example, a parent assaulting a teacher at a shopping mall because the teacher had disciplined his child at school). See Element (3)(b), above.

Related Offenses Not in This Chapter

None

Assault and Battery on a Sports Official

Statute

See G.S. 14-33(b)(9), reproduced under “Simple Assault,” above.

Elements

A person guilty of this offense

(1) commits an assault and battery

(2) against a sports official

(3) when the sports official is discharging or attempting to discharge official duties

(4) at a sports event or immediately after a sports event at which the sports official discharged official duties.

Punishment

Class 1 misdemeanor. G.S. 14-33(b).

Notes

Element (1). This offense requires an assault and a battery. For an explanation of those terms, see the note on Element (1) and the note entitled “Battery” to “Simple Assault,” above.

Element (2). A “sports official” is “a person at a sports event who enforces the rules of the event, such as an umpire or referee, or a person who supervises the participants, such as a coach.” G.S. 14-33(b)(9).

Element (4). A “sports event” includes

* any interscholastic or intramural athletic activity in a primary, middle, junior high, or high school, college, or university;
* any organized athletic activity sponsored by a community, business, or nonprofit organization;
* any athletic activity that is a professional or semiprofessional event; and
* any other organized athletic activity in the State.

G.S. 14-33(b)(9).

Charging issues. See this note to “Simple Assault,” above.

Greater and lesser-included offenses. Because all of the elements of simple assault are included in this offense, simple assault is a lesser-included offense of this crime.

Multiple convictions and punishments. See this note to “Simple Assault” and “Assault Inflicting Serious Injury,” both above.

Related Offenses Not in This Chapter

“Throwing Objects at Sporting Events” (Chapter 19)

Assault on a Public Transit Operator

Statute

See G.S. 14-33(c)(7), reproduced under “Simple Assault,” above.

Elements

A person guilty of this offense

(1) assaults a public transit operator

(2) when the operator is discharging or attempting to discharge his or her duties.

Punishment

Class A1 misdemeanor. G.S. 14-33(b).

Notes

Element (1). A “public transit operator” includes a “public employee or a private contractor employed as a public transit operator, when the operator is discharging or attempting to discharge his or her duties”. G.S. 14-33(c)(7).

Charging issues. See this note to “Simple Assault,” above.

Greater and lesser-included offenses. Because all of the elements of simple assault are included in this offense, simple assault is a lesser-included offense of this crime.

Multiple convictions and punishments. See this note to “Simple Assault” and “Assault Inflicting Serious Injury,” both above.

Relation to other offenses. When the public transit officer is a public employee, the defendant could be charged with this offense or, alternatively, with “Assault on a Governmental Officer or Employee,” above, another Class A1 misdemeanor.

Related Offenses Not in This Chapter

None

Assaults on Firefighters and Emergency and Medical Personnel

Assault on a Firefighter or Medical Personnel

Statute

**§14-34.6**. Assault or affray on a firefighter, an emergency medical technician, medical responder, and emergency department personnel.

(a) A person is guilty of a Class I felony if the person commits an assault or an affray causing physical injury on any of the following persons who are discharging or attempting to discharge their official duties:

(1) An emergency medical technician or other emergency health care provider.

(2) A medical responder.

(3) The following emergency department personnel: physicians, physicians assistants, nurses, and licensed nurse practitioners.

(5) A firefighter.

(b) Unless a person’s conduct is covered under some other provision of law providing greater punishment, a person is guilty of a Class H felony if the person violates subsection (a) of this section and (i) inflicts serious bodily injury or (ii) uses a deadly weapon other than a firearm.

(c) Unless a person’s conduct is covered under some other provision of law providing greater punishment, a person is guilty of a Class F felony if the person violates subsection (a) of this section and uses a firearm.

Note: 2011 legislation, S.L. 2011-356, amended G.S. 34.6(a), deleting subsection (4). However, that legislation did not renumber subsection (5). Presumably, this issue will be remedied by the codifier of statutes but has not been resolved as of the writing of this book.

Elements

A person guilty of this offense

(1) commits an assault or affray

(2) on

(a) a firefighter,

(b) an emergency medical technician,

(c) any other emergency health care provider,

(d) a medical responder, or

(e) an emergency department physician, physician’s assistant, nurse, or licensed nurse practitioner

(3) who is discharging or attempting to discharge an official duty and

(4) inflicts physical injury.

Punishment

Class I felony. G.S. 14-34.6(a).

Notes

Element (1). See the note on Element (1) to “Simple Assault,” above, and the discussion of “Simple Affray” in Chapter 19 (Disorderly Conduct, Riot, and Gang Offenses).

Element (2)(a). The statute does not define the term “firefighter.”

Element (2)(b). The statute does not define the term “emergency medical technician.” However, it is defined in G.S. 131E-155(10) as “an individual who has completed an educational program in emergency medical care approved by the Department and has been credentialed as an emergency medical technician by the Department.”

Element (2)(d). The statute does not define the term “medical responder.” However, it is defined in G.S. 131E-155(14a) as “an individual who has completed an educational program in emergency medical care and first aid approved by the Department and has been credentialed as a medical responder by the Department.”

Element (4). The statute does not define the term “physical injury.” Although that term is used in other assault offenses, see “Assault Inflicting Physical Injury by Strangulation,” above, and “Habitual Misdemeanor Assault,” below, it is not defined in those offenses either. Note that in 2011, the General Assembly amended a different assault statute creating a new crime, “Assault Inflicting Physical Injury on a Law Enforcement Officer, Probation or Parole Officer, or Detention Facility Employee,” discussed above. S.L. 2011-356, sec. 1. For purposes of that new crime, the General Assembly defined the term “physical injury” to include cuts, scrapes, bruises, or other physical injury which does not constitute serious injury. Id.; G.S. 14-34.7(c).

Charging issues. See this note to “Simple Assault,” above.

Greater and lesser-included offenses. Because all of the elements of simple assault are included in this offense, simple assault is a lesser-included offense of this crime.

Multiple convictions and punishments. See this note to “Simple Assault,” above.

Related Offenses Not in This Chapter

“Aggravated Misdemeanor Affray” (Chapter 19)

“Simple Affray” (Chapter 19)

Assault on a Firefighter or Medical Personnel Inflicting Serious Injury or   
Using a Deadly Weapon Other Than a Firearm

Statute

See G.S. 14-34.6(a) and (b), reproduced under “Assault on a Firefighter or Medical Personnel,” above.

Elements

A person guilty of this offense

(1) commits an assault or affray

(2) on

(a) a firefighter,

(b) an emergency medical technician,

(c) any other emergency health care provider,

(d) a medical responder, or

(e) an emergency department physician, physician’s assistant, nurse, or licensed nurse practitioner

(3) who is discharging or attempting to discharge an official duty and

(4) (a) inflicts serious bodily injury or

(b) uses a deadly weapon.

Punishment

Class H felony. G.S. 14-34.6(a) and (b).

Notes

Generally. This offense is the same as “Assault on a Firefighter or Medical Personnel,” above, except for Element (4). Thus, the relevant notes to that offense apply here as well.

Element (4)(a). Although “serious bodily injury” is not defined, a court would likely use the definition of that term in G.S. 14-32.4(a). For a discussion of that statute, see the note on Element (3) to “Assault Inflicting Serious Bodily Injury,” above.

Element (4)(b). For a discussion of the meaning of the term “deadly weapon,” see the note on Element (3) to “Assault with a Deadly Weapon,” above. Note that G.S. 14-34.6 does not cover firearms. G.S. 14-34.6(b).

Greater and lesser-included offenses. Because all of the elements of (1) simple assault; (2) assault on a firefighter or medical personnel; (3) assault inflicting serious injury; and (4) assault with a deadly weapon are included in this offense, all four of those offenses are lesser-included offenses of this crime.

Multiple convictions and punishments. See this note to “Simple Assault” and “Assault Inflicting Serious Injury,” both above.

Related Offenses Not in This Chapter

“Aggravated Misdemeanor Affray” (Chapter 19)

“Simple Affray” (Chapter 19)

Assault on a Firefighter or Medical Personnel with a Firearm

Statute

See G.S. 14-34.6(a) and (c), reproduced under “Assault on a Firefighter or Medical Personnel,” above.

Elements

A person guilty of this offense

(1) commits an assault or affray

(2) on

(a) a firefighter,

(b) an emergency medical technician,

(c) any other emergency health care provider,

(d) a medical responder, or

(e) an emergency department physician, physician’s assistant, nurse, or licensed nurse practitioner

(3) who is discharging or attempting to discharge an official duty and

(4) uses a firearm.

Punishment

Class F felony. G.S. 14-34.6(c).

Notes

Generally. This offense is the same as “Assault on a Firefighter or Medical Personnel,” above, excpet for Element (4). Thus, the relevant notes to that offense apply here as well.

Element (4). See the note on Element (2) to “Discharging a Barreled Weapon or Firearm into Occupied Property,” above.

Greater and lesser-included offenses. Because all of the elements of simple assault are included in this offense, simple assault is a lesser-included offense of this crime.

Multiple convictions and punishments. See this note to “Simple Assault” and “Assault Inflicting Serious Injury,” both above.

Related Offenses Not in This Chapter

“Aggravated Misdemeanor Affray” (Chapter 19)

“Simple Affray” (Chapter 19)

Assault on Emergency Personnel Inflicting Physical Injury

Statute

**§14-288.9.** Assault on emergency personnel; punishments.

(a) An assault upon emergency personnel is an assault upon any person coming within the definition of “emergency personnel” which is committed in an area:

(1) In which a declared state of emergency exists; or

(2) Within the immediate vicinity of which a riot is occurring or is imminent.

(b) The term “emergency personnel” includes law-enforcement officers, firemen, ambulance attendants, utility workers, doctors, nurses, and other persons lawfully engaged in providing essential services during the emergency.

(c) Any person who commits an assault causing physical injury upon emergency personnel is guilty of a Class I felony. Any person who commits an assault upon emergency personnel with or through the use of any dangerous weapon or substance shall be punished as a Class F felon.

Elements

A person guilty of this offense

(1) commits an assault

(2) on

(a) a law enforcement officer,

(b) a firefighter,

(c) a doctor,

(d) a utility worker, or

(e) any other person providing essential services

(3) (a) in an area in which a state of emergency has been declared or

(b) within the immediate vicinity of a riot or an imminent riot and

(4) the assault causes physical injury on the emergency personnel.

Punishment

Class I felony. G.S. 14-288.9(c).

Notes

Element (1). See the note on Element (1) to “Simple Assault,” above.

Element (2). For a discussion of the term “law enforcement officer,” see the note on Element (3)(a) to “Assault with a Firearm on a Law Enforcement Officer, Probation or Parole Officer, or Detention Facility Employee,” above. “Emergency personnel” has generally meant paramedics and officials who respond to accidents, fires, and other life-threatening events in everyday life. That, however, is not the group of people covered by this statute. To be covered by this statute, the person who is assaulted must be providing service during a declared state of public emergency. The statute covers assaults on any person providing essential services during the emergency; thus it may include persons such as utility workers or Red Cross workers. It is not clear whether the defendant must know that the victim is a designated kind of emergency worker to commit this offense. See generally State v. Avery, 315 N.C. 1 (1985) (interpreting a statute concerning assault on law enforcement officers, the court ruled that the State must prove that the defendant knew that the person assaulted was a law enforcement officer); State v. Singletary, 163 N.C. App. 449 (2004) (for assault on a handicapped person, the State must prove that the defendant knew or had reasonable grounds to know that the victim was handicapped).

Element (3). A state of emergency may be declared by certain city and county officials and by the governor under the authority of the Riot and Civil Disorder Act, G.S. Ch. 14, Art. 36A, when an emergency exists because of civil disorder or natural disaster. See the notes under “Misdemeanor Riot” in Chapter 19 (Disorderly Conduct, Riot, and Gang Offenses) for the elements of the offense of riot.

Element (4). The statute does not define the term “physical injury.” Although that term is used in other assault offenses, see “Assault Inflicting Physical Injury by Strangulation,” above, and “Habitual Misdemeanor Assault,” below, it is not defined in those offenses either. Note that in 2011, the General Assembly amended a different assault statute creating a new crime, “Assault Inflicting Physical Injury on a Law Enforcement Officer, Probation or Parole Officer, or Detention Facility Employee,” discussed above. S.L. 2011-356, sec. 1. For purposes of that new crime, the General Assembly defined the term “physical injury” to include cuts, scrapes, bruises, or other physical injury which does not constitute serious injury. Id.; G.S. 14-34.7(c).

Charging issues. See this note to “Simple Assault,” above.

Greater and lesser-included offenses. Because all of the elements of simple assault are included in this offense, simple assault is a lesser-included offense of this crime.

Multiple convictions and punishments. See this note to “Simple Assault,” above.

Relation to other offenses. For possible offenses involving emergency personnel acting outside of a state of emergency, see “Assault on a Firefighter or Medical Personnel,” “Assault on a Firefighter or Medical Personnel Inflicting Serious Injury or Using a Deadly Weapon Other than Firearm,” and “Assault on a Firefighter or Medical Personnel with a Firearm,” all above.

Related Offenses Not in This Chapter

“Disorderly Conduct” (Chapter 19)

See riot (various offenses) in Chapter 19 (Disorderly Conduct, Riot, and Gang Offenses).

“Aggravated Misdemeanor Affray” (Chapter 19)

“Resisting, Delaying, or Obstructing an Officer” (Chapter 21)

Interference with firefighters. G.S. 58-82-1.

Assault on Emergency Personnel with a Dangerous Weapon

Statute

See G.S. 14-288.9, reproduced under “Assault on Emergency Personnel,” above.

Elements

A person guilty of this offense

(1) commits an assault

(2) on a

(a) law enforcement officer,

(b) firefighter,

(c) doctor,

(d) utility worker, or

(e) other person who is providing essential services

(3) (a) in an area where a state of emergency has been declared or

(b) within the immediate vicinity of a riot or an imminent riot and

(4) uses a dangerous weapon or substance to commit the assault.

Punishment

Class F felony. G.S. 14-288.9(c).

Notes

Generally. This offense is the same as “Assault on Emergency Personnel Inflicting Physical Injury,” above, except for Element (4). Thus, the relevant notes to that offense apply here as well.

Element (4). G.S. 14-288.1(2) defines “dangerous weapon or substance” to include “any deadly weapon, ammunition, explosive, incendiary device, radioactive material . . . or any instrument or substance designed for a use that carries a threat of serious bodily injury or destruction of property; or any instrument or substance . . . capable of being used to inflict serious bodily injury, when the circumstances indicate a probability [that it] will be so used; or any part or ingredient in any instrument or substance . . . when the circumstances indicate a probability that such part or ingredient will be so used.”

Related Offenses Not in This Chapter

See the offenses listed under “Assault on Emergency Personnel Inflicting Physical Injury,” above.

Habitual Misdemeanor Assault

Statute

**§14‑33.2**. Habitual misdemeanor assault.

A person commits the offense of habitual misdemeanor assault if that person violates any of the provisions of G.S. 14‑33 and causes physical injury, or G.S. 14‑34, and has two or more prior convictions for either misdemeanor or felony assault, with the earlier of the two prior convictions occurring no more than 15 years prior to the date of the current violation. A conviction under this section shall not be used as a prior conviction for any other habitual offense statute. A person convicted of violating this section is guilty of a Class H felony.

Elements

A person guilty of this offense

(1) (a) (i) violates G.S. 14-33 and

(ii) causes physical injury or

(b) violates G.S. 14-34 and

(2) has two or more prior felony or misdemeanor assault convictions and

(3) the earlier of the convictions occurred no more than fifteen years before the date of the offense in Element (1).

Punishment

Class H felony. G.S. 14-33.2.

Notes

Element (1)(a)(i). The following offenses (all of which are discussed above) are included in G.S. 14-33:

* “Simple Assault,” G.S. 14-33(a),
* “Assault and Battery on a Sports Official,” G.S. 14-33(b)(9),
* “Assault Inflicting Serious Injury,” G.S. 14-33(c)(1),
* “Assault with a Deadly Weapon,” id.,
* “Assault on a Female,” G.S. 14-33(c)(2),
* “Assault on a Child under 12,” G.S. 14-33(c)(3),
* “Assault on a Governmental Officer or Employee,” G.S. 14-33(c)(4),
* “Assault on School Personnel,” G.S. 14-33(c)(6),
* “Assault on a Public Transit Operator,” G.S. 14-33(c)(7),
* “Assault on a Company or Campus Police Officer,” G.S. 14-33(c)(8), and
* “Assault in the Presence of a Minor,” G.S. 14-33(d).

Element (1)(a)(ii). It is not enough that the defendant violates G.S. 14-33; the violation also must cause physical injury. The statute, however, does not define the term “physical injury.” Although this term also is used in the offense of “Assault Inflicting Physical Injury by Strangulation,” discussed above, it is not defined there either. Physical injury would appear to require more proof than mere physical contact. Note that in 2011, the General Assembly amended a different assault statute creating a new crime, “Assault Inflicting Physical Injury on a Law Enforcement Officer, Probation or Parole Officer, or Detention Facility Employee,” discussed above. S.L. 2011-356, sec. 1. For purposes of that new crime, the General Assembly defined the term “physical injury” to include cuts, scrapes, bruises, or other physical injury which does not constitute serious injury. Id.; G.S. 14- 34.7(c).

Element (1)(b). G.S. 14-34 is “Assault by Pointing a Gun,” discussed above.

Element (2). This element requires that the person have at least two prior assault convictions. The convictions may be felony or misdemeanor convictions. G.S. 14-33.2.

Under the previous version of the law, it was permissible to count as separate convictions prior convictions that occurred on the same date. State v. Forrest, 168 N.C. App. 614 (2005).

Element (3). This element prohibits the use of a prior conviction that occurred more than fifteen years before the current offense.

Relation to habitual felon status. The offense of habitual misdemeanor assault constitutes a separate substantive felony offense, unlike being a habitual felon, G.S. 14-7.1, which is a status, not a crime.

Constitutional issues. The use of a prior conviction that occurred before the date of the enactment of G.S. 14-33.2 to prove the offense of habitual misdemeanor assault is not an ex post facto violation. State v. Smith, 139 N.C. App. 209 (2000); State v. McCree, 160 N.C. App. 200 (2003).

The habitual misdemeanor assault statute does not violate double jeopardy; the statute punishes the defendant for the current offense and does not impose a second punishment for the prior convictions that are elements of the crime. State v. Carpenter, 155 N.C. App. 35 (2002). Neither Apprendi v. New Jersey, 530 U.S. 466 (2000), nor Blakely v. Washington, 542 U.S. 296 (2004), affect this ruling. State v. Massey, 179 N.C. App. 803 (2006).

Limitation on later use of conviction of habitual misdemeanor assault. A conviction of habitual misdemeanor assault for conduct committed on or after December 1, 2004, may not be used for any other habitual offense statute, such as habitual felon. G.S. 14-33.2. The statute contains no prohibition, however, on the prosecution of a person as a habitual felon when the current felony is habitual misdemeanor assault.

Charging issues. See this note to “Simple Assault,” above.

Multiple convictions and punishments. See this note to “Simple Assault,” above.

A person may be convicted and punished for habitual misdemeanor assault and malicious conduct by a prisoner based on the same assault of an officer. State v. Artis, 174 N.C. App. 668 (2005).

Related Offenses Not in This Chapter

None

Ethnic Intimidation

Statute

**§14-401.14**. Ethnic intimidation; teaching any technique to be used for ethnic intimidation.

(a) If a person shall, because of race, color, religion, nationality, or country of origin, assault another person, or damage or deface the property of another person, or threaten to do any such act, he shall be guilty of a Class 1 misdemeanor.

(b) A person who assembles with one or more persons to teach any technique or means to be used to commit any act in violation of subsection (a) of this section is guilty of a Class 1 misdemeanor.

Elements

A person guilty of this offense

(1) because of race, color, religion, nationality, or country of origin

(2) (a) assaults another person,

(b) damages property of another,

(c) defaces property of another, or

(d) threatens to do (a), (b), or (c).

Punishment

Class 1 misdemeanor. G.S. 14-401.14(a).

Notes

Element (1). The statutory language supports charging this offense when the underlying assault or property damage offense is done because of (1) the victim’s race, color, religion, or country of origin; or (2) the race, color, religion, or country of origin of a person other than the victim of the underlying offense.

An e-mail message sent to an African-American school administrator in protest of her alleged differing treatment of the defendant as compared to others who were African American was sent for a racially motivated purpose; the message contained a racial epithet and stated that the KKK would retaliate against the victim if she continued her course of action. In re B.C.D., 177 N.C. App. 555 (2006).

Element (2)(d). An e-mail message sent to an African-American school administrator and signed “KKK” communicated an intent to inflict harm on the victim; the sender promised to show up on the victim’s doorstep unless the victim stopped suspending students who used a particular racial slur. Id.

Teaching ethnic intimidation made an offense. Subsection (b) of the statute provides that it is a Class 1 misdemeanor for a person to “assemble” with one or more people to “teach any technique or means to be used to commit any act” of ethnic intimidation.

Sentencing enhancement for ethnic animosity. G.S. 14-3(c) creates a sentencing enhancement that applies to misdemeanors committed because of the victim’s race, color, religion, nationality, or country of origin. For a discussion of that statute, see “Prejudice Enhancement” under special misdemeanor sentencing provisions in Chapter 4 (Punishment under Structured Sentencing). The G.S. 14-3(c) sentencing enhancement is limited to situations in which a crime is committed because of the victim’s personal characteristics. Ethnic intimidation, however, can be committed because of the race, color, religion, nationality, or country of origin of a person other than the victim of the crime (for example, if an offender committed simple assault against a person because of the race of that person’s spouse, this sentencing enhancement would not apply).

Constitutional issues. This statute raises issues of First Amendment rights of free speech and assembly that have not yet been tested in North Carolina’s courts. However, the United States Supreme Court has found a similar statute in Wisconsin to be constitutional. Wisconsin v. Mitchell, 508 U.S. 476 (1993).

Related Offenses Not in This Chapter

See the offenses in Chapter 18 (Trespass, Property Damage, and Littering).

See the offenses in Chapter 8 (Threats, Harassment, Stalking, and Violation of Domestic Violence Protective Orders).

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

Malicious Injury by Use of an Explosive or Incendiary

Statute

**§14-49**. Malicious use of explosive or incendiary; punishment.

(a) Any person who willfully and maliciously injures another by the use of any explosive or incendiary device or material is guilty of a Class D felony.

Subsections (b), (b1), (b2), and (c) are not reproduced here.

Elements

A person guilty of this offense

(1) willfully and maliciously

(2) injures another

(3) by use of an explosive or incendiary device or material.

Punishment

Class D felony. G.S. 14-49.

Notes

Element (1). See “Willfully” and ”Maliciously” in Chapter 1 (States of Mind).

Element (2). This offense apparently can be charged even when the injury is not serious.

Element (3). G.S. 14-50.1 defines “explosive or incendiary device or material” as “nitroglycerine, dynamite, gunpowder, other high explosive, incendiary bomb or grenade, other destructive incendiary device, or any other destructive incendiary or explosive device, compound, or formulation; any instrument or substance capable of being used for destructive explosive or incendiary purposes against persons or property, when the circumstances indicate some probability that such instrument or substance will be so used; or any explosive or incendiary part or ingredient in any instrument or substance included above, when the circumstances indicate some probability that such part or ingredient will be so used.”

Related Offenses Not in This Chapter

“Burglary with Explosives” (Chapter 15)

“Making a False Bomb Report” (Chapter 20)

Malicious damage (various offenses) (Chapter 20)

“Manufacture, Possession, etc. of a Machine Gun, Sawed-Off Shotgun, or Weapon of Mass Destruction” (Chapter 20)

Malicious castration. G.S. 14-28.

Malicious maiming. G.S. 14-30.

Malicious throwing of corrosive acid or alkali. G.S. 14-30.1.

Transporting dangerous weapon or substance during emergency; possession off premises; exceptions. G.S. 14-288.7.