An Attempted Offense Is Not an Aggravated Offense

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A case from the court of appeals this week answered a longstanding question about which offenses are "aggravated" for sex offender registration and satellite-based monitoring (SBM) purposes.

In State v. Barnett, __ N.C. App. __ (Jan. 19, 2016), the defendant was convicted of attempted second-degree rape. The trial court found that conviction to be an "aggravated offense" as defined in G.S. 14-208.6(1a), and thus ordered lifetime sex offender registration and lifetime satellite-based monitoring. An aggravated offense, you'll recall, is one that involves vaginal, anal, or oral penetration, either by force or threat of serious violence, or with a victim who is less than 12. Aggravated offenders must indeed register (G.S. 14-208.21) and submit to SBM (G.S. 14-208.40(a)(1)) for life.

On appeal, the defendant argued that under our well-established rule for determining which offenses are aggravated, an *attempted* offense can never be an *aggravated* offense. That is because whether or not an offense is aggravated is determined solely by reference to the *elements* of the conviction offense; the trial court may not consider the underlying factual scenario giving rise to the conviction. State v. Davison, 201 N.C. App. 354 (2009). A completed rape necessarily (at the elemental level) involves vaginal penetration, but an attempted rape obviously does not.

The court of appeals agreed with the defendant and reversed the trial judge's orders for lifetime registration and lifetime SBM. The defendant will still have to register for 30 years, but it does not appear that he falls within any of the other categories requiring SBM.

So, add *attempts*—even attempted rape—to the list of offenses that can never be "aggravated" under our elements-based approach to that definition. As a reminder, other crimes that are never aggravated (no matter what actually happened in the case as a factual matter) include:

- Any sexual offense (forcible or statutory), because it is possible—at an elemental level—to commit that crime in ways that don't involve penetration. *See, e.g.*, State v. Green, 746 S.E.2d 457 (2013) (forcible); State v. Treadway, 208 N.C. App. 286 (2010) (statutory).
- Indecent liberties, again because it is possible—at an elemental level—to commit that crime in ways that don't involve penetration. *See* State v. Singleton, 201 N.C. App. 620 (2010).
- Sexual battery (no penetration element). State v. Brooks, 204 N.C. App. 193 (2010).
- Also, remember that offenses committed before October 1, 2001 can never be aggravated offenses, because of the effective date of the legislation that added the term "aggravated offense" to the General Statutes. S.L. 2001-373.

Incidentally, I was curious how many offenders listed as "aggravated" on North Carolina's sex offender registry might be impacted by the holding in *Barnett.* A spot check of the registry didn't reveal many offenders registered for attempted rape. I was, however, surprised by the large number of offenders who were listed as aggravated offenders (and thus lifetime registrants) for crimes like sexual offense, indecent liberties, and sexual battery. I obviously don't have all the details of each case, but it may be something worth further investigation.