Ban on Gun Possession by Defendants Convicted of a "Domestic Violence Misdemeanor"

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Federal law makes it illegal for a person to possess a gun after having been "convicted in any court of a misdemeanor crime of domestic violence." 18 U.S.C. § 922(g)(9). A "misdemeanor crime of domestic violence" is a misdemeanor that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by" a person with one of several specified relationships to the victim. 18 U.S.C. § 921(a)(33). In North Carolina, the most common misdemeanor charges used in domestic violence cases are simple assault and assault on a female. Is a person convicted of one of those crimes as a result of domestic violence prohibited from possessing a gun?

One might think not, on the theory that neither simple assault nor assault on a female "has, as an element" any particular relationship between the defendant and the victim. But in *United States v. Hayes*, __ U.S. __, 129 S.Ct. 1079 (2009), the Supreme Court held that while a domestic relationship between the defendant and the victim of the prior domestic violence crime must be established beyond a reasonable doubt in order to convict a defendant under section 922(g)(9), a domestic relationship need not be an element of the prior conviction. In other words, it interpreted the "has, as an element" language in section 921(a)(33) to apply only to the phrase "the use or attempted use of physical force, or the threatened use of a deadly weapon," and not to the part of the definition of "misdemeanor crime of domestic violence" directed to the relationship between the defendant and the victim.

But there is another legal issue here. In *United States v. White*, 606 F.3d 144 (4th Cir. 2010), the Fourth Circuit reversed a conviction under section 922(g)(9) where the defendant's predicate misdemeanor was a Virginia conviction for "domestic assault and battery." The court reasoned as follows. (1) Virginia follows the common law of assault and battery, under which offensive touching, no matter how gentle, is a battery. (2) Offensive touching that doesn't cause or risk physical harm doesn't constitute "physical force" as required by the definition of "misdemeanor crime of domestic violence" in section 921(a)(33). (The court acknowledged a circuit split on this issue, but felt bound by *Johnson v. United States*, __ U.S. __, 130 S.Ct. 1265 (2010), in which the Supreme Court held that a Florida battery was not a "violent felony" for purposes of the Armed Career Criminal Act because it did not require "physical force," which the Court construed to mean violent force.) Therefore, a conviction for "domestic assault and battery" does not automatically qualify as a misdemeanor crime of domestic violence. (3) The court then applied a "modified categorical approach" that allowed it to consider not only of the definition of the Virginia crime, but also "the trial record – including charging documents, plea agreements, transcripts of plea colloquies, findings of fact and conclusions of law from a bench trial, and jury instructions and verdict forms." However, the sparse state record did not allow the court to determine whether the defendant's prior conviction involved mere unconsented touching or something more, so the conviction could not serve as a predicate to the federal conviction under section 922(g)(9).

So, how might *White* apply to North Carolina offenses like simple assault or assault on a female? Like Virginia, North Carolina does not have a statutory definition of "assault." Instead, the meaning of the term is established by common law. Jessica Smith, *North Carolina Crimes* 84 (6th ed. 2007). And although most of the relevant cases are either very old or unpublished, it appears that any unconsented touching is a battery, and that any battery is an assault. *See*, *e.g.*, *State v. West*, 146 N.C. App. 741 (2001) (noting that "[a]ssault on a female may be proven by finding either an assault on or a battery of the victim," and defining battery as any "unlawful touching" or the application of "any force, however slight" to the victim). *See also State v. Williams*, 2008 WL 4635507 (N.C. Ct. App. Oct. 21, 2008) (unpublished) ("[The

victim] testified that defendant touched her several times and that the touching was unwanted. Since the evidence indicates an actual battery took place, the State had no burden to prove the victim was put in fear or apprehension of harmful or offensive contact."); *State v. Clay*, 2005 WL 3046634 (N.C. Ct. App. Nov. 15, 2005) (unpublished) ("[I]f a criminal defendant intentionally touches or applies force to another in a manner that is neither consensual nor privileged, that defendant has committed a battery and, necessarily then, an assault."); *State v. Bozeman*, 2005 WL 2277055 (N.C. Ct. App. Sept. 20, 2005) (unpublished) ("At trial the State presented [evidence] that defendant had poked Farrar, clearly applying force to her person. There was no evidence presented that Farrar had authorized defendant to touch her or that defendant was in some way privileged to do so. Therefore, defendant's poking of Farrar was unlawful."). *But cf. State v. Hemphill*, 162 N.C. 632 (1913) ("It may be true that every touching of the person of another, however slight or trifling the force may be, if done in an angry, rude, or hostile manner, will constitute an assault and battery, but not so if there was no intention to hurt or injure, and it was so understood by the other party, and there was in fact no injury."); *State v. Corbett*, 196 N.C. App. 508 (2009) (holding that simple assault is not a lesser included of sexual battery, and arguably suggesting that a mere unwanted touching isn't an assault unless it involves the possibility of injury or bodily harm) (citation added after post originally published).

Further evidence that a non-violent but unconsented touching is an assault under North Carolina law comes from our pattern jury instructions. The basic pattern jury instruction for simple assault is N.C.P.I. – Crim. 208.40. It defines an assault as "an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm." It doesn't refer to battery at all. But in 2010, a new pattern jury instruction, N.C.P.I. – Crim. 208.41, was promulgated, to be used in assault cases "involving physical contact." It reads in part:

Provided there is a battery involved, choose the most appropriate definition of assault as follows: (An assault is an intentional application of force, however slight, directly or indirectly, to the body of another person without that person's consent.) (An assault is an intentional, offensive touching of another person without that person's consent.)

Thus, N.C.P.I. – Crim. 208.41 supports the idea that any unconsented touching constitutes an assault under North Carolina law, even if the touching does not involve violent force. So I don't think that North Carolina convictions for simple assault or assault on a female arising in a domestic setting are *automatically* "misdemeanor crime[s] of domestic violence" under federal law, at least under the Fourth Circuit's interpretation.

However, I believe that the vast majority of such assaults will qualify as misdemeanor crimes of domestic violence under the "modified categorical approach." The AOC arrest warrant form for simple assault is AOC-CR-102. The charging language states that the defendant did "assault and strike" the victim. (Likewise, the charging language for assault on a female states that the defendant did "assault and strike" the victim.) It seems to me that under the modified categorical approach, the use of the word "strike" is sufficient to imply the use of violent force. The Court's opinion in *Johnson* hints at that conclusion, and in any event, *Webster's New World Collegiate Dictionary* (4th ed. 2007) defines "strike" as "to hit with the hand or a tool, weapon, etc.; smite . . . to give a blow to; hit with force. . . . [or to cause] violent or forceful contact." Even if "strike" doesn't do the trick, the form includes room for a description of the assault, e.g., "by hitting her on the head with his fist," which may establish the required violent force.

The upshot is that even after *White*, most defendants convicted of simple assault or assault on a female arising out of a domestic dispute are likely barred by federal law from owning a gun. And judges, when asked to return guns to such defendants under G.S. 50B-3.1(f) (allowing for the return of firearms surrendered pursuant to a domestic violence protective order once the order expires and all criminal charges have been addressed), should refuse when the charging documents in the defendant's assault case reflect the use or threat of violent force.