Don't Instruct the Jury on a Theory that's Not Supported by the Evidence

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Some offenses can be proved by alternative theories. For example, impaired driving occurs when a person drives while (1) while under the influence of an impairing substance, (2) after consuming a sufficient quantity of alcohol that the person has an alcohol concentration of 0.08 or more at any relevant time after the driving, or (3) with any amount of a Schedule I controlled substance or its metabolites in his or her blood or urine. *See* Jessica Smith, North Carolina Crimes: A Guidebook on the Elements of Crime (7th ed. 2012). The three options noted above constitute three separate theories upon which an impaired driving conviction can rest. Similarly, kidnapping occurs when a person (1) confines, (2) restrains, or (3) removes a person and other elements are satisfied. *Id.* The three options—confines, restrains, or removes—constitute three separate theories upon which a kidnapping conviction can rest. Sometimes alternative theories are bound up in the definition of an element of an offense. For example, first-degree sexual assault with a child requires, among other things, that the defendant engage in a "sexual act" with the victim. *Id.* The term sexual act is defined to include, in part, (1) cunnilingus, (2) analingus, (3) fellatio, and (4) anal intercourse. *Id.* These acts constitute separate theories that can support a sex offense conviction.

Cases involving crimes that may be proved through separate theories present a variety of tricky issues. One rule, however, is perfectly clear: When an offense can be proved through alternative theories, the trial court errs if it instructs the jury on a theory that's not supported by the evidence. That rule was reiterated in a pair of cases recently decided by the NC Court of Appeals, *State v. Martinez* and *State v. Fowler*. In *Martinez,* the defendant was charged with, among other things, first-degree sexual offense with a child and sex offense in a parental role. Both offenses require the jury to find that the defendant engaged in a "sexual act" with the victim. As noted above, "sexual act" is defined to include cunnilingus, fellatio, analingus, or anal intercourse. At trial in *Martinez*, the evidence showed that the defendant engaged in fellatio and anal intercourse with the victim. Although no evidence indicated that the defendant engaged in analingus with her, the trial court instructed the jury that it could find the defendant guilty if it found that he committed fellatio, anal intercourse, or analingus with the victim. No special verdict sheet was used. The defendant was convicted and he appealed. The Court of Appeals held that the trial court erred when it instructed the jury on a theory—analingus—not supported by the evidence.

Fowler, is an impaired driving case. At trial, the State introduced evidence that the defendant was driving under the influence of an impairing substance. No evidence was presented about the defendant's blood-alcohol level. Nevertheless, the trial court instructed the jury that it could find the defendant guilty if he was driving under the influence of an impairing substance or if he had a blood alcohol concentration of .08 or more. No special verdict sheet was used. The defendant was convicted and he appealed. As in *Martinez*, *Fowler* held that the trial court erred by instructing the jury on a theory—.08 or more—that wasn't supported by the evidence.

This pair of cases raises a couple of other really interesting issues, including the proper standard of review that applies when these errors are asserted on appeal and the relationship between the jury instruction rule and the unanimity rule. But in this post I'm keeping it simple, focusing on a clear rule for the trial court: It is error to instruct the jury on a theory that's not supported by the evidence.

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