

Jessie's Top Five Indictment Errors

Author : Jessica Smith

Categories : [Procedure](#), [Uncategorized](#)

Tagged as : [indictments](#)

Date : October 20, 2011

An indictment defect is a boon for the defense and a disaster for the prosecution. Simply put an indictment is defective when it fails to allege an essential element of the crime. Because fatal defects are jurisdictional, they can be raised at any time—at trial, on appeal, or post-conviction—and can never be waived. A closely related problem is fatal variance. A fatal variance occurs when the evidence doesn't match up with the allegations in the indictment. If a fatal variance occurs, the defendant gets a dismissal. A lot of these errors can be spotted with a careful look at the indictment up front. But what should you look for? Unfortunately this area is quite technical and there are a lot of issues that can trip you up. If you want a detailed analysis, check out my lengthy paper on the issue [here](#). But if you're looking for some quick tips, read on for my top five indictment errors.

#5. Failing to properly allege a deadly weapon assault. For a deadly weapon assault, the indictment either has to allege that the weapon was a deadly weapon (e.g., "a handgun, a deadly weapon") or must allege facts demonstrating its deadly character (e.g., "a 3 foot long steel pipe weighing 10 pounds"). *State v. Palmer*, 293 N.C. 633, 634-44 (1977). If the indictment fails to do this, it can't support a conviction for a deadly weapon assault.

#4. Failing to allege the buyer/recipient of a drug sale or delivery and/or getting the drug name wrong. Indictments alleging sale and delivery of a controlled substance must allege the name of the purchaser or recipient if known; if that person's name is unknown, the indictment should allege that fact. *See, e.g.*, *State v. Bennett*, 280 N.C. 167, 168-69 (1971). Also, the indictment must correctly identify the controlled substance at issue. *See, e.g.*, *State v. LePage*, ___ N.C. App. ___, 693 S.E.2d 157 (2010) (indictments identifying the controlled substance as "BENZODIAZEPINES, which is included in Schedule IV of the North Carolina Controlled Substances Act[.]" were defective; Benzodiazepines is not listed in Schedule IV; additionally, benzodiazepine describes a category of drugs, some of which are listed in Schedule IV and some of which are not).

#3. Alleging too much. Not everything needs to be included in the indictment and there is a danger in alleging too much. In many instances, if the prosecution alleges facts that aren't required, it may find itself bound by those allegations. Take for example, *State v. Yarborough*, 198 N.C. App. 22 (2009), holding that although a kidnapping indictment need not allege the felony intended, if it does, the State is bound by that allegation. *State v. Clark*, ___ N.C. App. ___, 702 S.E.2d 324 (2010), is similar; in that case the court held that although the State is not required to allege the felony or larceny intended in an indictment charging breaking or entering a vehicle, if it alleges a specific crime, the State will be bound by that allegation.

#2. In a kidnapping case, failing to allege the correct theory. Kidnapping indictments must allege that the defendant confined, restrained, or removed the victim. Many times the kidnapping indictment alleges one or two of these acts but fails to allege the conduct shown by the evidence. When this is the case, the judge may not instruct on

theories not alleged in the indictment. See *State v. Tucker*, 317 N.C. 532, 536-40 (1986) (plain error to instruct on restraint when indictment alleged only removal); *State v. Bell*, 166 N.C. App. 261, 263-65 (2004) (trial court erred in instructing on restraint or removal when indictment alleged confinement and restraint but not removal); *State v. Smith*, 162 N.C. App. 46 (2004) (trial court erred in instructing the jury that it could find the defendant guilty of kidnapping if he unlawfully confined, restrained, or removed the victim when the indictment only alleged unlawful removal); *State v. Dominie*, 134 N.C. App. 445, 447 (1999) (when the indictment alleged only removal, trial judge improperly instructed that the jury could convict if the defendant confined, restrained, or removed the victim).

And the #1 indictment error . . .

In a larceny case, failing to allege or messing up the name of the possessor. For larceny and other crimes that interfere with the right of possession, the indictment must allege the person in lawful possession of the property. If it doesn't do this, it is defective. See, e.g., *State v. McNeil*, ___ N.C. App. ___, 707 S.E.2d 674 (2011) (an indictment for felonious larceny that failed to allege ownership in the stolen handgun was fatally defective). Additionally, the allegation must make clear that the named possessor is either a natural person (e.g., Jessie Smith) or an entity capable of possessing property. See, e.g., *State v. Patterson*, 194 N.C. App. 608 (2009) (larceny indictment alleging victim's name as "First Baptist Church of Robbinsville" was fatally defective because it did not indicate that the church was a legal entity capable of owning property). If the victim is a corporation, this requirement is satisfied by alleging the corporation's full corporate name with a designation as to the entity's corporate status (e.g., "Inc."). If there is no short form for designating that the entity is capable of possessing property, the indictment should expressly state that the entity has that capability (e.g., "First Baptist Church of Robbinsville, an entity capable of possessing property").