



Murder Charges and the Opioid Epidemic

Author : Shea Denning

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Jeff [wrote on Monday](#) about efforts by North Carolina government officials to combat the opioid epidemic. The initiatives he highlighted, such as addiction treatment and needle exchange programs, primarily attack the problem from a public health perspective. Jeff noted the contrast between this approach and the criminal-drug-law enforcement response to the spread of crack cocaine in the 1990s.

That's not to say, however, that the criminal justice system isn't responding to the current crisis. In counties across the State, including [New Hanover](#), [Onslow](#), [Pender](#), [Pitt](#), [Union](#), and [Wake](#), prosecutors are pursuing second-degree murder charges against defendants who are alleged to have provided the opioids leading to victims' deaths.

This post explores the basis for murder charges based on the unlawful distribution of drugs and what the State must prove at trial to establish a defendant's guilt.

Murder by drugs. [G.S. 14-17\(b\)\(2\)](#) defines as second degree murder a murder that was proximately caused by the unlawful distribution of opioids, cocaine or its derivatives, or methamphetamine, if the ingestion of that substance caused the user's death. Second degree murder under this theory is punished as a Class B2 felony.

To establish a defendant's guilt under [G.S. 14-17\(b\)\(2\)](#), the State must prove four elements beyond a reasonable doubt:

- The victim's death was caused by ingesting opium, cocaine, or one of their derivatives, or methamphetamine;
- The defendant intentionally and unlawfully distributed the specified substance;
- The defendant's unlawful distribution of the substance was a proximate cause of the victim's death; and
- The defendant acted [with malice](#).

N.C.P.I. – Crim 206.31B (June 2014).

Identity of the drug. To support charges of second-degree murder under [G.S. 14-17\(b\)\(2\)](#), the victim's death must be caused by one of the following substances:

- opium or any synthetic or natural salt, compound, derivative, or preparation of opium;
- cocaine or any salt, isomer, salts of isomers, compound, derivative, or preparation thereof, or coca leaves and any salt, isomer, salts of isomers, compound, derivative, or preparation of coca leaves, or any salt, isomer, salts of isomers, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, with the exception of decocanized coca leaves or extraction of coca leaves that do not contain cocaine or ecgonine; or
- methamphetamine

The State may prove the identity of the drug through means other than a chemical analysis. In *State v. Pritchard*, ___ N.C. App. ___, 791 S.E.2d 284, 2016 WL 4091610 (2016) (unpublished op.), for example, the court of appeals deemed

testimony from the victim's girlfriend to be sufficient to establish that the defendant gave the victim morphine pills. The girlfriend testified that the victim told her he intended to obtain morphine before he got the pills from the defendant. The victim subsequently showed her what she believed to be morphine pills. She also said that when she used some of the pills, she had the same experiences she had on other occasions when she used morphine. Similarly, in *State v. Yelton*, 175 N.C.App. 349, 353–54 (2006), the court deemed evidence from a lay witness that the substance the defendant provided to the victim was methamphetamine to be sufficient to prove the identity of the drug when the witness had extensive personal knowledge of methamphetamine and had herself smoked the substance the defendant provided.

Pending legislation. House Bill 464, which has been ratified but has not yet become law, amends the types of drugs included in G.S. 14-17(b)(2) to include "any opium, opiate, or opioid; any synthetic or natural salt, compound, derivative, or preparation of opium, or opiate, or opioid; cocaine or other substance described in G.S. 90-90(1)d.; methamphetamine; or a depressant described in G.S. 90-92(a)(1)." If the bill becomes law, these amendments become effective December 1, 2017.

Cause of death. The State must prove that the victim's death was caused by ingesting the specified drug. In most cases, this will require expert testimony from a medical expert establishing the cause of death. *Cf. State v. Pack*, 421 S.W.3d 629, 642 (Tenn. Crim. App. 2013) (explaining, in an appeal from a second-degree murder conviction under a similar Tennessee statute, that "[w]hen the State must establish that the proximate cause of the victim's death was the use of a Schedule I or II controlled substance . . . expert medical proof will almost always be necessary to establish the cause in fact of the victim's death.")

To prove ingestion, the State **does not** have to show that the victim took the drug by mouth and swallowed it; instead the State simply must prove that the victim consumed the drug. *See State v. Parlee*, 209 N.C. App. 144, 149 (2011) (rejecting defendant's argument that the State's proof of second-degree murder was insufficient as there was no evidence as to how the victim consumed the Oxymorphone pill that the defendant provided; finding sufficient evidence of ingestion based on toxicology reports showing that lethal amounts of Oxymorphone were present in the victim's blood and a doctor's opinion that the cause of death was an acute Oxymorphone overdose). Consumption presumably can consist of swallowing the drug, snorting or inhaling the substance, receiving it intravenously, absorbing it through the skin, or receiving it into the body in any other manner.

Distribution of drug. The State must prove that the defendant knowingly and intentionally provided the specified drug to the victim without lawful authority to do so. *See State v. Miller*, ___ N.C. ___ (June 9, 2017) (noting that "any possession of a controlled substance offense contains an implied *knowledge* element, to wit, that the defendant must know he possesses the controlled substance and must also know the identity of the substance") (internal citations omitted). If the defendant introduces evidence that he did not know the identity of the substance he distributed, the jury must be instructed that the defendant must know that the substance he distributed was the specified substance. NCPI –Crim. 206.31B n.2. *See also State v. Lopez*, 176 N.C. App. 538, 546 (2006) (awarding the defendant a new trial on heroin trafficking charges based on the trial court's failure to give such an instruction when the defendant testified he did not know heroin was in the refrigerator he was paid to receive).

Proximate cause. The State must prove that the defendant's unlawful distribution of the drug proximately caused the victim's death. The defendant's actions do not have to be the immediate cause of death; the defendant is accountable if the distribution of the drug caused or directly contributed to the victim's death. *See State v. Parlee*, 209 N.C. App. 144, 149 (2011) (rejecting the defendant's argument that he did not proximately cause the victim's death by selling the Oxymorphone table to the victim and his friend since the victim's friend later broke the pill in half and handed half of it to the victim).

Malice. Finally, the State must show that the defendant acted with malice, meaning that he acted recklessly and wantonly so as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief. But what does that mean in the context of distributing a dangerous drug? The court in *State v. Linder*, 98 N.C. App. 600, 605 (1990), determined that the jury could reasonably infer that a defendant acted with malice when he

supplied Dilaudid hydrochlorine to the victim after he had seen two other people become violently ill after using the same substance.

In *Parlee*, the court found sufficient evidence of malice based on the defendant's warning before selling the pill to the victim and his friend that "it's pretty strong pain medication" and not to take a whole pill or "do anything destructive with it." 209 N.C. App. at 148. The court also relied upon the defendant's statement to a friend after selling the pill that he liked Oxymorphone because it "messe[d]" him up. *Id.*

In *Pritchard*, the court considered the following evidence sufficient to establish malice: The defendant had been prescribed morphine previously and the label on the prescription warned him that it was unsafe to take more than one tablet every eight hours. He provided 10 morphine pills to the victim, who he knew would likely abuse the substance. The defendant was familiar with morphine from using it himself and previously selling it to others unlawfully. The court explained that "[a]lthough this evidence is quite weak, a reasonable juror hearing this evidence could infer that Pritchard knew how dangerous it was to give so many morphine pills to the victim but recklessly disregarded this substantial risk to the victim's life." *Id.* at *3.

Some substances may be so inherently dangerous that malice can be inferred from nothing more than the act of their intentional distribution. For example, [news reports state](#) that a drug known as "gray death," which consists of a mix of heroin, an elephant tranquilizer, fentanyl, and a man-made opioid is being distributed in the Southeast and may be present in Western North Carolina. The drug has reportedly been linked to overdoses and deaths. Distribution of a substance of this sort might on its own provide sufficient evidence of malice. It isn't clear whether North Carolina's courts would adopt such an approach or, if they did, what kinds of drugs might be captured under this standard.

More than a decade ago, the Supreme Court of Pennsylvania in *Commonwealth v. Ludwig*, 874 A.2d 623, 632 (Pa. 2005), affirmed the dismissal of murder charges against a teenager who sold ecstasy to another teenager, who died after consuming the drug. The court rejected the proposition that supplying an "illegal and *potentially* dangerous substance of unknown quality to another," without more, supports a finding of malice. *Ludwig*, 874 A.2d at 632. The court explained: "Most drugs, even prescription drugs that are used illegally, may *potentially* harm. Thus, as an indication of wickedness, ill-will, cruelty, and extreme indifference to human life, the legality and mere *potential* dangerousness of a drug, without more, falls short." *Id.*

We are likely to learn more. Given the scope of the opioid epidemic, the numbers of deaths and the ensuing criminal prosecutions around the State, it seems reasonable to expect our appellate courts to further define the standard for malice as well as the other elements of proof under G.S. 14-17(b)(2) in the years to come.