

What Happens When the Jury Is Instructed on the Wrong Theory?

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Suppose the trial court, over the defendant's objection, instructs the jury on a theory of a crime that is not supported by the evidence. Is the defendant entitled to automatic reversal on appeal? Or, alternatively, must the appellate court evaluate whether the erroneous instruction prejudiced the defendant? The North Carolina Supreme Court answered these questions in [State v. Malachi](#), ___ N.C. ___ (2018), published last Friday, and applied its answer in [State v. Fowler](#), ___ N.C. ___ (2018), decided the same day.

State v. Malachi. Terance Germaine Malachi was charged with being a felon in possession of a firearm, carrying a concealed weapon, and having attained habitual felon status.

The facts. The evidence at trial showed that the Charlotte-Mecklenburg Police Department received an anonymous call from a person who stated that he had just seen an African-American male wearing a red shirt and black pants insert a handgun into his pants while in the parking lot of the Walker's Express convenience store on Freedom Drive in Charlotte. Two police officers arrived at the Walker's Express minutes later. They saw several people in the parking lot, including Malachi, who was the only person who matched the caller's description. The officers grabbed Malachi, frisked and handcuffed him, and removed a revolver from the waistband of his pants.

The instructions. At the charge conference during Malachi's trial, the State requested that the trial court instruct the jury using [N.C. Pattern Jury Instruction Crim. No. 104.41](#), "Actual-Constructive possession." Malachi objected to the State's request on the basis that the evidence established only actual possession, not constructive possession. The trial court overruled the objection and gave the requested instruction.

As it deliberated, the jury requested "a legal definition of possession of a firearm." Slip op. at 4. The trial court responded by repeating, over the defendant's objection, the instruction on actual and constructive possession.

The verdict. The jury found Malachi guilty of possession of a firearm by a felon, but acquitted him of carrying a concealed weapon. He subsequently pled guilty to attaining habitual felon status, was sentenced to 100 to 132 months imprisonment, and appealed.

Court of appeals. The court of appeals vacated Malachi's conviction, applying what it viewed as a "long established presumption" that the jury must have relied on an erroneous disjunctive instruction given over a defendant's objection. *State v. Malachi*, ___ N.C. App. ___, 799 S.E.2d 645, 648 (2017), *reversed*, ___ N.C. ___ (Dec. 7, 2018).

Supreme court. The state supreme court disagreed with the court of appeals' construction of precedent and reversed. The court held that erroneous jury instructions stating a legal theory not supported by the evidence are not per se reversible error—even when objected to by the defendant at trial. Instead, traditional harmless error analysis applies to the review on appeal of a trial in which such instructions are given. If the defendant objects, the question is whether there is a reasonable possibility that without the error there would have been a different result. See [G.S. 15A-1443](#). If the defendant fails to object at trial, the appellate court must consider whether there is a reasonable **probability** that

without the error the result would have been different.

Reasoning. The state supreme court's analysis was rooted in the notion that a defendant is not entitled to a perfect trial but instead to a fair trial free of prejudicial error. Only a limited number of errors are per se reversible, the court noted, including the failure to appoint two attorneys in a capital case, refusal to allow both of those attorneys to address the jury in such a case, and the presence of an alternate juror in the jury room during deliberations. Most other trial errors require a showing of prejudice to warrant relief on appeal. Errors in the latter category include the trial court's omission of elements of a crime in its jury instructions. The supreme court viewed the error in Malachi's case as akin to this sort of error. Thus, to be entitled to relief, the court held that Malachi was required to show a reasonable possibility that without the error, the jury would have reached a different result.

Was there a reasonable possibility that the error affected the outcome? Here, the justices' views diverged. A majority of the court concluded there was no reasonable possibility that in the absence of the erroneous constructive possession instruction, the jury would have acquitted the defendant.

The majority characterized this kind of instructional error as "exceedingly serious and merit[ing] close scrutiny to ensure that there is no 'reasonable possibility' that the jury convicted the defendant on the basis of [] an unsupported legal theory." Slip op. at 31. The court explained, however, that when the State presents "exceedingly strong evidence of defendant's guilt" based on a legal theory that has sufficient support, it is unlikely that a reasonable jury would elect to convict the defendant based on an unsupported legal theory. *Id.*

The court deemed the evidence about the officer's investigation and their discovery of a weapon in Malachi's waistband to be "undisputed." Slip op. at 32. And while Malachi suggested that the jury might have questioned the officers' credibility upon learning that one of the officers was fired for assaulting and injuring Malachi following his arrest, the majority was unconvinced that events occurring after Malachi's arrest cast doubt on the officers' version of what transpired beforehand. Nor did the jury's inquiry about the definition of possession undermine the majority's confidence in its verdict "given the absence of any explanation" for why the jury sought that clarification. Slip op. at 33.

Justice Morgan dissented from the majority opinion, noting his disagreement with this portion of the court's analysis. Justice Morgan viewed the majority's analysis as invading the province of the jury and opined that it was not "within a judicial forum's proper purview to sift through the evidence and to speculate as to which theory, between or among multiple ones, a jury considered to be persuasive to reach its verdict." Slip op. at 3 (Morgan, J., dissenting). The dissent also faulted the majority for conducting its own examination of witness credibility issues.

State v. Fowler. In Fowler's 2016 trial for driving while impaired, the prosecutor asked the trial court to instruct the jury on the .08 theory of impairment – even though Fowler refused a breath test and there was no evidence as to his alcohol concentration. Fowler objected to the instruction, but the trial court delivered it anyway. The court of appeals [vacated Fowler's conviction](#), concluding that it had to assume the jury relied upon the unsupported .08 theory rather than the appreciable impairment theory that had evidentiary support.

The state supreme court [in a per curiam opinion](#) reversed the court of appeals' decision and remanded the case for reconsideration in light of *State v. Malachi*.

On remand, the court of appeals must consider whether there is a reasonable possibility that the erroneous instruction affected the outcome. The intermediate appellate court previously noted that there was not "overwhelming evidence of [Fowler's] impaired driving," see *State v. Fowler*, ___ N.C. App. ___, 800 S.E.2d 724, 730 (2017), *vacated and remanded*, ___ N.C. ___ (Dec. 7, 2018), so it is possible that the appellate court's close scrutiny may lead to a different outcome from that in *Malachi*.