UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 69 | Number 5 Article 8

6-1-1991

Looking at Lesser Included Offenses on an All Or Nothing Basis: State v. Bullard and the Sporting Approach to Criminal Justice

Tracy L. Hamrick

Looking at Lesser Included Offenses on an "All or Nothing" Basis: *State v. Bullard* and the Sporting Approach to Criminal Justice

The North Carolina Court of Appeals characterized the practice used to convict the defendants in *State v. Bullard*[1] as "unfair,"[2] an "outmoded absurdity,"[3] and "detrimental to the public safety."[4] The absurdity to which the court referred was the trial courts' categorical denial of defendants' requests to instruct the jury regarding lesser offenses included within the charges brought against them, unless defendants offer contradictory evidence or the State's evidence is inconsistent.[5] The court of appeals concluded that such a system, aptly termed the "all or nothing" approach,[6] perpetuates unwarranted risks to society and degrades the role of the jury. The court declined to take remedial action, however, finding the issue better suited for legislative reform.[7]

This Note investigates the statutory and common-law origins of the all or nothing approach and analyzes the restrictions enforced against the availability of jury instructions regarding lesser included offenses. The Note contends that the courts' refusal to instruct juries regarding lesser included offenses in cases like *Bullard* is indefensible. This practice, the Note argues, denies criminal defendants a crucial procedural safeguard and, by extension, a fair trial. The all or nothing approach also is unsound as a matter of policy because it both facilitates unearned acquittals that threaten the public safety and stifles juries' freedom to fashion the verdict that most accurately reflects their perceptions of the evidence presented. In conclusion, the Note disputes the *Bullard* court's decision to abdicate responsibility to the legislature and argues instead that the responsibility for correction rests with the courts.

When Shelby Willetts' car ran off the road and overturned in a ditch on the night of July 2, 1987, brothers Danny and David Bullard stopped to offer assist-

1. 97 N.C. App. 496, 389 S.E.2d 123, *disc. rev. denied*, 327 N.C. 142, 394 S.E.2d 181 (1990).

2. *Id.* at 498, 389 S.E.2d at 124.

3. *Id.*

4. *Id.*

5. For general discussions of judicial and legislative treatment of criminal defendants' entitlement to lesser included offense instructions, see Ettinger, *In Search of a Reasoned Approach to the Lesser Included Offense*, 50 BROOKLYN L. REV. 191 (1984); Mascolo, *Procedural Due Process and the Lesser-Included Offense Doctrine*, 50 ALB. L. REV. 263 (1986); Comment, *Jury Deliberations and the Lesser Included Offense Rule: Getting the Courts Back in Step*, 23 U.C. DAVIS L. REV. 375 (1990); Comment, *Improving Jury Deliberations: A Reconsideration of Lesser Included Offense Instructions*, 16 U. MICH. J.L. REF. 561 (1983); Note, *Criminal Procedure—Recognizing the Jury's Province to Consider the Lesser Included Offense:* State v. Ogden, 58 OR. L. REV. 572 (1980).

6. *Bullard*, 97 N.C. App. at 498, 389 S.E.2d at 124. Courts applying the all or nothing approach decline to give lesser included offense instructions even when the evidence clearly supports the charge, unless defendants offer conflicting evidence that, if believed, would support the lesser verdict, or the State's evidence is conflicting. For a discussion of this doctrine's historical development, see *infra* notes 30-57 and accompanying text. For criticisms of its current application, see *infra* notes 74-96 and accompanying text.

7. *Bullard*, 97 N.C. App. at 498, 389 S.E.2d at 124.

ance.[8] Instead of driving Willetts to a place where she could engage a tow truck, however, Danny Bullard drove to an isolated area and then left Willetts alone in the car with David.[9] David threatened Willetts[10] and ordered her to perform fellatio on him; she resisted by sounding the horn and attempting to start the car, and in the resulting struggle both David and Willetts jumped out of the car.[11] David pursued Willetts, caught her, and forced her to perform the sexual act.[12] Willetts testified that "[s]he [then] asked David where Danny was and he said he did not know, but a moment later Danny Bullard was there and David was gone."[13] Danny then "asked her if she had performed fellatio on David[,] . . . called her a liar [when she said she had not] and then forced her to perform fellatio on him."[14]

At trial, the State's evidence showed that Willetts "did not know where Danny was when the sexual act with David occurred, or where David was when the sexual act with Danny occurred."[15] The defendants did not take the stand and offered no evidence.[16] The defendants asked the court to instruct the jury regarding the lesser crime of second degree sexual offense,[17] but the district attorney argued that "the verdict alternatives should be guilty or not guilty of first-degree sexual offense."[18] Because the defendants failed to offer any conflicting evidence that would support a lesser verdict if believed, the court declined to give the instruction.[19] The jury convicted both defendants of first-degree sexual offense,[20] finding that each engaged in a sexual act with Shelby Willetts by force

8. *Id.* at 497, 389 S.E.2d at 123.

9. Danny told Willetts and David that he needed to go to the bathroom and disappeared from sight. *Id.*

10. Specifically, David told Willetts "to perform fellatio on him or he would kill her, that both defendants had just been released from prison, and that Danny had been in prison for killing his father." *Id.*

11. *Id.*

12. *Id.* at 497, 389 S.E.2d at 123-24.

13. *Id.* at 497, 389 S.E.2d at 124.

14. *Id.*

15. *Id.* For a discussion of the significance of Willetts' uncertainty, see *infra* notes 58-65 and accompanying text.

16. *Bullard*, 97 N.C. App. at 498, 389 S.E.2d at 124.

17. *Id.* at 496, 389 S.E.2d at 123. North Carolina General Statute § 14-27.5 provides:

> (a) A person is guilty of a sexual offense in the second degree if the person engages in a sexual act with another person:
>
> (1) By force and against the will of the other person; or
>
> (2) Who is mentally defective, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know that the other person is mentally defective, mentally incapacitated, or physically helpless.
>
> (b) Any person who commits the offense defined in this section is guilty of a Class D felony.

N.C. GEN. STAT. § 14-27.5 (1986).

18. *Bullard*, 97 N.C. App. at 496-97, 389 S.E.2d at 123. For a discussion of the likelihood that prosecutorial discretion exacerbates the risks of unearned acquittals, convictions, or unduly severe sentences when juries do not receive lesser included offense instructions, see *infra* notes 88-89 and accompanying text.

19. *Bullard*, 97 N.C. App. at 496, 389 S.E.2d at 123.

20. *Id.* North Carolina General Statutes § 14-27.4 provides, in relevant part:

and against her will and that each defendant aided and abetted the other.[21]

On appeal the defendants contended that the trial court's refusal to instruct the jury regarding second-degree sexual offense constituted reversible error. The defendants relied on the well-established premise that the trial judge must instruct the jury on lesser included offenses when there is evidence that would support a finding of guilty of that lesser offense.[22] The *Bullard* court conceded that this statement was "clear and unambiguous,"[23] but went on to explain that decisions of the North Carolina courts have made it clear that "the statement does not quite mean what it says."[24] Only when the State's evidence is conflicting or the defendant presents evidence that conflicts with the State's must there be a lesser included offense instruction. When there is no conflict, the state can seek a conviction on an all or nothing basis.[25] Given that the State tried the case on an all or nothing basis, the defendants presented no evidence, and the State's evidence was not conflicting, the *Bullard* court felt compelled to overrule defendants' assignment of error.[26]

The court qualified its holding by noting that it had serious misgivings about the all or nothing approach, due to the "obvious drawbacks"[27] of any principle that systematically facilitates paradoxical risks. Either the jury's doubt as to an enhancing element of the greater offense might prompt them to acquit the defendant completely, or, alternatively, their certainty that the defendant committed some lesser degree of the crime might encourage them to find the defendant guilty as charged in order to ensure that the defendant receives some punishment.[28] The court concluded:

> It seems plain to us that a practice under which a defendant can be acquitted of lesser included charges about which there is no doubt because doubt exists as to an enhancing element is an outmoded absurdity and detrimental to the public safety; a practice that encourages jurors to convict a defendant of a greater offense by not permitting them to consider its lesser elements is unfair and inconsistent with the

---

(a) A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:

. . . .

(2) With another person by force and against the will of the other person, and:

. . . .

c. The person commits the offense aided and abetted by one or more other persons.

(b) Any person who commits an offense defined in this section is guilty of a Class B felony.

N.C. GEN. STAT. § 14-27.4 (1986).

21. *Bullard*, 97 N.C. App. at 496, 389 S.E.2d at 123. For a discussion of the element of aiding and abetting and its application in *Bullard* and similar cases, see *infra* notes 59-62 & 68-72 and accompanying texts.

22. *Bullard*, 97 N.C. App. at 497, 389 S.E.2d at 124 (citations omitted) (quoting State v. Hicks, 241 N.C. 156, 160, 84 S.E.2d 545, 548 (1954)).

23. *Id.*

24. *Id.* at 498, 389 S.E.2d at 124.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

> precept that jurors are at liberty to believe all, none, or part of the evidence as they see fit.[29]

The all or nothing approach depends on the courts' reading of section 15-170 of the North Carolina General Statutes, which stipulates that "[u]pon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime."[30] Lesser included offenses are present when the State proves all the essential elements of the lesser crime in the process of attempting to prove the greater offense.[31] Thus, because the charge includes both the greater and all lesser included offenses, the jury may acquit as to the greater and convict on the lesser charge.[32]

The current judicial definition of lesser included offenses first appeared in *State v. Weaver*,[33] in which the North Carolina Supreme Court stated:

> [T]he *facts* of a particular case [do not] determine whether one crime is a lesser included offense of another. Rather, the *definitions* accorded the crimes determine whether one offense is a lesser included offense of another crime. In other words, all of the essential elements of the lesser crime must also be essential elements included in the greater crime. If the lesser crime has an essential element which is not completely covered by the greater crime, it is not a lesser included offense. The determination is made on a *definitional*, not a factual basis.[34]

A purist's application of this standard would seem to suggest that judges would almost always give the jury instructions regarding lesser included offenses.[35] The standard is simple: an instruction on the lesser included offense

---

29. *Id.*

30. N.C. GEN. STAT. § 15-170 (1983). The issue of lesser included offenses commonly arises in cases involving assaults on the person because the degree of a defendant's culpability may depend on contested factual questions pertaining to defendant's intent or knowledge. Section 15-170 applies to convictions for lesser degrees or attempts, and immediately follows § 15-169, which stipulates that:

> On the trial of any person for any felony whatsoever, when the crime charged includes an assault against the person, it is lawful for the jury to acquit of the felony and to find a verdict of guilty of assault against the person indicted, if the evidence warrants such finding.

Id. § 15-169. These statutes apply most commonly to indictments for varying degrees of murder, robbery, and rape. *See generally id.* §§ 15-169 to -170 case notes (reporting cases applying §§ 15-169 and -170).

31. State v. Bell, 284 N.C. 416, 419, 200 S.E.2d 601, 603 (1973); *see, e.g.*, State v. White, 322 N.C. 506, 513, 369 S.E.2d 813, 817 (1988) (quoting *Bell*, 284 N.C. at 419, 200 S.E.2d at 603); State v. Weaver, 306 N.C. 629, 633-34, 295 S.E.2d 375, 377-78 (1982) (same); State v. Banks, 295 N.C. 399, 415-16, 245 S.E.2d 743, 754 (1978) (same); State v. Riera, 276 N.C. 361, 368, 370, 172 S.E.2d 535, 540, 541 (1970) (noting that the rule is "well recognized in North Carolina" and explaining that the lesser offense need not be separately named in the indictment).

32. *See, e.g.*, State v. Daniels, 51 N.C. App. 294, 301, 276 S.E.2d 738, 742 (1981) (" 'It is established in the criminal law that the greater crime includes the lesser, so that where an offense is alleged in an indictment, and the jury acquits as to that one, it may convict of the lesser offense when the charge is inclusive of both offenses.' ") (quoting State v. Craig, 35 N.C. App. 547, 549, 241 S.E.2d 704, 705 (1978)).

33. 306 N.C. 629, 295 S.E.2d 375 (1982).

34. *Id.* at 635, 295 S.E.2d at 378-79 (citation omitted). This Note contends that the determination must be made on a factual basis in some instances, wherein the defendant is either guilty of the exact offense charged or not guilty. *See infra* notes 68-71 and accompanying text.

35. *See, e.g.*, State v. Haith, 48 N.C. App. 319, 323, 269 S.E.2d 205, 208 (1980) (" 'defendant is entitled to have the different permissible verdicts arising on the evidence presented to the jury under proper instructions' ") (quoting State v. Wrenn, 279 N.C. 676, 681, 185 S.E.2d 129, 132 (1971)), *cert.*

need only be given when there is evidence sufficient to sustain a finding of guilt.[36] Given that lesser offenses are included by definition within the applicable greater offense, proof of the more severe offense almost always proves the lesser.[37]

The courts, however, have qualified the statutory right to an instruction. Most references to the statute are paired with the explanation that when "the State's evidence is positive as to each and every element of the crime charged and there is no conflicting evidence relating to any element, no instruction on a lesser included offense is required."[38] In 1931, the North Carolina Supreme Court ruled in *State v. Cox*[39] that the lesser included offenses statute

> does not confer upon a jury in the trial of a criminal action the power arbitrarily to disregard the uncontradicted evidence tending to show that the crime charged in the indictment was committed as alleged therein and in the absence of evidence to sustain such conviction, to convict the defendant of a crime of less degree.[40]

The term "absence of evidence" came to mean the absence of any evidence *affirmatively offered* by a defendant, in rebuttal of the evidence offered by the

---

denied, 301 N.C. 403, 273 S.E.2d 449 (1980); State v. Griffin, 280 N.C. 142, 145, 185 S.E.2d 149, 151 (1971) ("It is firmly established by decisions of this Court that a defendant is entitled to have the different permissible verdicts *arising on the evidence* presented to the jury under proper instructions."); State v. Riera, 276 N.C. 361, 368, 172 S.E.2d 535, 540 (1970) (It is "well recognized in North Carolina" that defendant can be convicted of the crime charged or of any lesser offense proven by the same evidence.).

36. State v. Hall, 305 N.C. 77, 84, 286 S.E.2d 552, 556 (1982). Identical language regularly appears in North Carolina cases. *See, e.g.*, State v. Jones, 304 N.C. 323, 330-31, 283 S.E.2d 483, 487-88 (1981) (lesser offense must be supported by the evidence); State v. Simpson, 299 N.C. 377, 381, 261 S.E.2d 661, 663 (1980) (same).

The courts occasionally phrase this standard somewhat differently, ordering the trial court to instruct the jury as to lesser included offenses "when, and only when, there is evidence from which the jury could find that defendant committed the lesser included offense." State v. Boykin, 310 N.C. 118, 121, 310 S.E.2d 315, 317 (1984); *see also* State v. White, 322 N.C. 506, 512, 369 S.E.2d 813, 816 (1988) (quoting *Boykin*); State v. Rhinehart, 322 N.C. 53, 59, 366 S.E.2d 429, 432 (1988) (same). Courts sometimes interpret this standard to mean that there must be *positive* evidence which suggests the defendant did commit the lesser crime, and did not commit the greater crime; in other words, the "mere possibility that the jury might believe part but not all of the testimony of the prosecuting witness is not sufficient to require the Court to submit to the jury the issue of the defendant's guilt or innocence of a lesser offense." State v. Lampkins, 286 N.C. 497, 504, 212 S.E.2d 106, 110 (1975), *cert. denied*, 428 U.S. 909 (1976).

37. Proof of the greater offense may not prove the lesser where the facts and evidence show that the defendant either committed the specific crime charged, or committed no crime at all. *See infra* notes 68-71 and accompanying text. *But cf.* State v. Weaver, 306 N.C. 629, 635, 295 S.E.2d 375, 378-79 (1982) (holding that lesser included offenses exist, as such, by definition, without reliance on varying facts). For the text of *Weaver*'s holding, see *supra* text accompanying note 34.

38. *Hall*, 305 N.C. at 84, 286 S.E.2d at 556. *See Jones*, 304 N.C. at 330, 283 S.E.2d at 488; State v. Drumgold, 297 N.C. 267, 271, 254 S.E.2d 531, 533 (1979); State v. Carnes, 279 N.C. 549, 554, 184 S.E.2d 235, 238 (1971); State v. Hicks, 241 N.C. 156, 159, 84 S.E.2d 545, 547 (1954).

39. 210 N.C. 357, 160 S.E. 358 (1931). In *Cox*, the defendants offered an alibi but did not offer any conflicting evidence regarding any element of the charge of highway robbery. *Id.* at 361, 160 S.E. at 360.

40. *Id.* The court concluded that in such cases, the statute (then C. S. 4640, now N.C. GEN. STAT. § 15-170 (1983)) did not apply. *Id.* While the jury may not be entitled to *disregard* the State's evidence, surely it may acquit a defendant when it does not *believe* all or part of the State's evidence. For criticisms of the overinclusive nature of the courts' interpretation of this language, see *infra* notes 74-87 and accompanying text.

State.[41] This restriction derives from four early North Carolina Supreme Court cases which set forth the key evidentiary standards.

In *State v. Sawyer*[42] and *State v. Bell*[43] the court determined that when *only* the State offered evidence, and the evidence tended to show the commission of the crime as charged, the trial court correctly instructed the jury to return either a verdict of guilty of the crime charged, or not guilty.[44] Alternatively, when the evidence conflicted, or when other positive evidence offered by the defendant—if believed—would support a conviction of the lesser crime, then the case would be "within the rule of *S[tate] v. Holt* and *S[tate] v. Lunsford*," requiring the trial judges to instruct the jury as to the applicable lesser offense, rather than that of *Sawyer* and *Bell*.[45]

In a 1954 decision, *State v. Hicks*,[46] the North Carolina Supreme Court described the two views discussed above and addressed the apparent contradiction between the rule and its application:

> The distinction is this: The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The *presence of such evidence* is the determinative factor. Hence, there is no such necessity if the State's evidence tends to show a completed [crime] and there is *no conflicting evidence* relating to elements of the crime charged. Mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice.[47]

Thus, a trial judge need not instruct the jury to consider lesser included offenses when a defendant does not contradict the State's positive evidence that, if believed by the jury, shows the defendant to be guilty of the crime as

41. *See infra* notes 42-54 and accompanying text.

42. 224 N.C. 61, 29 S.E.2d 34 (1944). The State's evidence in *Sawyer* showed the defendants' participation in a completed robbery, and the defendants offered no conflicting evidence as to any element, so the trial judge instructed the jury to return a verdict of guilty of robbery or not guilty. *Id.* at 66-67, 29 S.E.2d at 38.

43. 228 N.C. 659, 46 S.E.2d 834 (1948), *overruled on other grounds*, State v. Hurst, 320 N.C. 589, 359 S.E.2d 776 (1987), *overruled on other grounds*, State v. White, 322 N.C. 506, 369 S.E.2d 813 (1988). The *Bell* decision reaffirmed the principle set forth in *Sawyer*; see *supra* note 42.

44. *Bell*, 228 N.C. at 663-64, 46 S.E.2d at 837-38; *Sawyer*, 224 N.C. at 66-67, 29 S.E.2d at 38.

45. State v. Hicks, 241 N.C. 156, 159, 84 S.E.2d 545, 547 (1954) (citing State v. Holt, 192 N.C. 490, 135 S.E. 324 (1926), and State v. Lunsford, 229 N.C. 229, 49 S.E.2d 410 (1948)). The defendants in both *Lunsford* and *Holt* appealed their convictions for common-law robbery and received new trials. The reviewing courts noted that common-law robbery requires both an assault and a taking of money; because the jury could have found the victims guilty of assault only, the courts held that the trial courts should have given lesser included offense instructions. *Lunsford*, 229 N.C. at 231-32, 49 S.E.2d at 412 (jury could have found absence of intent, an element of the higher crime); *Holt*, 192 N.C. at 493, 135 S.E. at 325-26 (jury could have concluded crime did not take place on highway, a required element of the crime).

The *Hicks* court identified these four cases, *Holt*, *Lunsford*, *Bell*, and *Sawyer*, as illustrative of the two "rules" which determine whether the "*evidence warrants such finding* [that the defendant is guilty of the lesser offense]." *Hicks*, 241 N.C. at 159, 84 S.E.2d at 547.

46. 241 N.C. 156, 84 S.E.2d 545 (1954).

47. *Id.* at 159-60, 84 S.E.2d at 547. For the argument that the possibility that a jury might accept or reject the State's evidence in part actually is a compelling reason to instruct regarding lesser included offenses, see *infra* text accompanying note 82.

charged.[48] Neither the cases nor the statute they construe explicitly require a defendant to come forward with positive evidence that he did not commit all of the acts fulfilling the requisite elements of the crime charged *and that he did* commit acts which, if believed by the jury, would confirm his guilt of a lesser offense.[49] This requirement, however, is implicit in the courts' application of the statute.[50]

This affirmative obligation effectively forestalls defendants' "[reliance] on the possibility that the jury may believe only a part of the *state's* evidence as a ground for submission of a lesser included offense."[51] Therefore, a defendant cannot rely on the possibility that a jury might not believe the "enhancing" elements urged by the State in order to obtain an instruction regarding a lesser included offense.[52] If a defendant offers no evidence at all, "there is no positive, contradictory evidence of a lesser offense and the jury need decide only whether defendant was indeed the perpetrator."[53] In addition, of course, the jury cannot "arbitrarily . . . disregard [otherwise] uncontradicted evidence."[54]

Courts disallow lesser included instructions in other contexts as well. When a defendant relies on an alibi, for example, the courts routinely hold that jury instructions as to lesser included offenses are inappropriate.[55] Similarly, a

48. State v. Hall, 305 N.C. 77, 84, 286 S.E.2d 552, 556-57 (1982); State v. Simpson, 299 N.C. 377, 381, 261 S.E.2d 661, 663 (1980); State v. Drumgold, 297 N.C. 267, 271-72, 254 S.E.2d 531, 533-34 (1979) (granting new trial because evidence conflicted on essential element, and jury could have found defendant guilty of a lesser degree of rape); State v. Faircloth, 297 N.C. 388, 393-94, 255 S.E.2d 366, 370 (1979); State v. Gray, 58 N.C. App. 102, 106, 293 S.E.2d 274, 277, *cert. denied*, 306 N.C. 746, 295 S.E.2d 482 (1982).

49. *But see* State v. Cox, 201 N.C. 357, 361, 160 S.E. 358, 360 (1931). In *Cox*, the court explained:

> The [lesser included offenses] statute is not applicable, where, as in the instant case, all the evidence for the State, uncontradicted by any evidence for the defendant, if believed by the jury, shows that the crime charged in the indictment was committed as alleged therein. In the instant case there was no evidence tending to support a contention that the defendants, if not guilty of the crime charged in the indictment, *were* guilty of a crime of less degree.

Id. at 361, 160 S.E. at 360 (emphasis added).

50. The requirement is antithetical to the presumption of innocence, to which all criminal defendants are entitled. "There is no need for the defendant to put forth affirmative evidence of innocence since the presumption exists independent of any factual evidence of innocence." Mascolo, *supra* note 5, at 269 (footnote omitted). This practice is characterized as an unjust burden on the defendant *infra* at notes 75-81 and accompanying text. *See* Doucette, *The Presumption of Innocence*, 93 CASE & COM., 24 (Sept.-Oct. 1988) (short essay reviewing development of presumption and assessing its invulnerability).

51. *Faircloth*, 297 N.C. at 398-99, 255 S.E.2d at 373 (Exum, J., dissenting).

52. *See* State v. Jones, 304 N.C. 323, 331-32, 283 S.E.2d 483, 488 (1981). In *Jones*, the court explained that "[t]he proposition that the jury could believe all, part, or none of the evidence is of no avail to the [defendant]" because "[n]o matter how much of either side's evidence the jury believed, it could not arrive at a conclusion that defendant [was guilty of the lesser offense]. No combination of the evidence offered by both sides allows such a determination." *Id.*

In *Bullard*, however, if the jury believed only part of the State's evidence and concluded that defendants did sexually assault the victim, but did not aid and abet each other in the process, their findings could support verdicts of second degree sexual offense. *See Bullard*, 97 N.C. App. at 497, 389 S.E.2d at 124; N.C. GEN. STAT. §§ 14-27.4, .5(a)(1) (1986).

53. *Faircloth*, 297 N.C. at 399, 255 S.E.2d at 373 (Exum, J., dissenting) (citation omitted).

54. State v. Cox, 201 N.C. 357, 361, 160 S.E. 358, 360 (1931).

55. *See, e.g.*, State v. Griffin, 280 N.C. 142, 146, 185 S.E.2d 149, 152 (1971) (alibi defense precluded jury instruction as to lesser included offenses of assault with intent to commit rape or assault on a female); State v. Smith, 201 N.C. 494, 497, 160 S.E. 577, 579 (1931) (defendant was

defendant charged with a greater crime on grounds that he aided and abetted another party in the commission of the offense may be guilty of the greater crime, or none at all. In *State v. Barnette*[56] the court explained that when the charge against the defendant rests solely on the theory that defendant aided and abetted another person during a sexual offense but did not actually commit a sexual offense himself, the defendant may not be charged with a lesser degree of the crime: "Under the [sexual offense] statute, when aiding and abetting is proven, the offense is first degree; it can never be a second degree offense."[57]

In recognition of the conditional availability of jury instructions regarding lesser included offenses, the *Bullard* court plainly identified the applicable limitations and upheld the trial judge's denial of defendants' requested instruction.[58] One could argue, however, that the State's evidence as to the aiding and abetting element was not persuasive enough to justify exclusion of the instruction.[59] The victim testified that during each of two separate assaults, she was not aware of the other assailant's location.[60] While the evidence taken in its entirety seems convincing,[61] the jury could have concluded that defendants did not aid and abet each other during commission of the crimes.[62]

---

charged with rape and offered alibi defense; given that his argument was that he was guilty of no offense at all, there was "no aspect of the case that would justify a verdict merely of a simple assault"). *But see* State v. Hicks, 241 N.C. 156, 160, 84 S.E.2d 545, 548 (1954) (even though State can ask solely for conviction and defendant solely for acquittal, trial judge must instruct on lesser included offenses supported by the evidence).

56. 304 N.C. 447, 284 S.E.2d 298 (1981).

57. *Id.* at 463, 284 S.E.2d at 308 (citation omitted). For a more extensive discussion of aiding and abetting and its unique place in the treatment of lesser included offenses, see *infra* notes 68-71 and accompanying text.

58. *Bullard*, 97 N.C. App. at 498, 389 S.E.2d at 124.

59. If the "definitional" test set forth in State v. Weaver, 306 N.C. 629, 635, 295 S.E.2d 375, 378-79 (1982), is to be applied consistently, then defendants like the Bullards should be entitled automatically to have the jury instructed as to the lesser included offenses. For the text of the *Weaver* standard, see *supra* text accompanying note 34.

60. *Bullard*, 97 N.C. App. at 497, 389 S.E.2d at 124.

61. The facts could support a jury conclusion that defendants aided and abetted one another. *See supra* notes 8-14 and accompanying text for the *Bullard* facts. In *Barnette*, the court enumerated a number of the factors which support a charge of aiding and abetting. The court explained that "[a]n aider and abettor is a person who is actually or constructively present at the scene of the crime and who aids, advises, counsels, instigates, or encourages another to commit the offense." 304 N.C. at 458, 284 S.E.2d at 305. Further, the defendants must share a "common unlawful purpose," but "[i]t is not necessary for each to have full knowledge of all acts committed by the other." *Id.* at 461, 284 S.E.2d at 307.

62. In *Barnette*, for example, the court held that the evidence was insufficient to convict a defendant of first degree sexual offense when the State's evidence showed that the defendant performed a sexual act upon the victim by force while another person sat in the room, watching. 304 N.C. at 468, 284 S.E.2d at 311. Both the defendant and victim were aware of the other person's presence; he had entered the room with the defendant and laughed in response to comments made by the victim to the defendant. *Id.* at 453-54, 284 S.E.2d at 302. The court vacated the judgment entered against the defendant on the first-degree charge and concluded that the jury's verdict should be recognized as a finding of guilt of the lesser included offense instead because "[m]ere presence is not enough to constitute aiding and abetting; it must also be shown that the alleged aider and abettor knowingly encouraged, instigated, or aided [defendant] to commit the crime." *Id.* at 468, 284 S.E.2d at 311.

Significantly, in *Bullard* the State did not prove even the defendants' concurrent presence, in the immediate sense of the word. The victim testified that she "did not know where Danny was when the sexual act with David occurred, or where David was when the sexual act with Danny occurred." *Bullard*, 97 N.C. App. at 497, 389 S.E.2d at 124.

The *Bullard* court identified this concern as an "obvious drawback[ ]" to the established fact that "permitting cases like this to be tried on an all or nothing basis has long been approved and is in keeping with the sporting concept of justice that used to prevail."[63] The court considered the likelihood that the jury might not find that the defendants aided and abetted each other during the commission of the offenses: "[I]n this case the jury, though believing all the State's evidence, could have acquitted the defendants of all charges by merely doubting, as they easily could have, that the evidence established that either defendant needed or expected the other's help."[64] The court characterized this risk as "detrimental to the public safety."[65]

In addition, the *Bullard* court concluded that refusal to instruct the jury as to lesser included offenses degrades the traditional factfinding role of the jury because "the jury's knowledge that the defendant will be released unless they vote for the greater offense [may serve as] a determining factor in that vote being made."[66] The danger is obvious; if the jury believed that defendants committed the offenses but that they did not aid and abet each other in the process, the jury would have been forced to choose between convicting defendants of a charge more serious than they thought warranted, and outright acquittal.[67]

While there are many obvious drawbacks to the established system, trying cases on an all or nothing basis does have a useful purpose in some contexts not mentioned by the court. For example,[68] Defendant *A* may face charges of first-degree sexual offense when there is evidence that Defendant *A* aided and abetted Defendant *B* in the commission of the offense, but did not personally commit such an offense himself.[69] The first-degree charge entered against Defendant *A* derives from the theory that the aider and abettor is equally as guilty as the principal.[70] Thus, if a jury finds that Defendant *B* committed an offense that satisfied all the elements listed for a second-degree offense, and that Defendant *A*

63. *Bullard*, 97 N.C. App. at 498, 389 S.E.2d at 124.

64. *Id.*

65. *Id.* The public has a valid interest in the detention of persons who commit criminal assaults upon others. If the *Bullard* jury did not believe that the defendants aided and abetted each other in the commission of the crimes, it would have been obligated to find defendants not guilty of first-degree sexual offense. The absence of a lesser included offense charge and instruction precluded the jury from finding defendants guilty of second-degree sexual offense even if the jury accepted the State's evidence pertaining to the individual offenses; the defendants, of course, could then go free despite their active involvement in the assaults.

66. *Id.*

67. Forcing a jury to choose between these alternatives is criticized *infra* at notes 83-87 and accompanying text.

68. This illustration uses the North Carolina first-degree and second-degree sexual offense statutes at issue in *Bullard* as examples. For the text of North Carolina General Statutes §§ 14-27.4 & .5, see *supra* notes 20 & 17, respectively.

69. Comparable facts were present in State v. Polk, 309 N.C. 559, 567, 308 S.E.2d 296, 300 (1983) (gang rape) and in State v. Barnette, 304 N.C. 447, 463, 284 S.E.2d 298, 308 (1981) (multiple defendants convicted of rape, sexual offense, or both).

70. "It is well established that a person who is present and aids and abets another in the commission of a criminal offense is as guilty as the principle perpetrator of the crime." *Polk*, 309 N.C. at 567, 308 S.E.2d at 300; *see* State v. McKinnon, 306 N.C. 288, 300, 293 S.E.2d 118, 125 (1982); *Barnette*, 304 N.C. at 461, 284 S.E.2d at 307 ("aider and abettor is fully responsible for the act of the other done in perpetration of the crime").

aided and abetted Defendant *B*, then Defendant *B* is guilty of the first-degree offense because it was committed with the assistance of *A*. By extension, the jury should find Defendant *A* equally culpable. Defendant *A* may be charged with first-degree sexual offense, but not second-degree.[71] In this limited context, the all or nothing approach works fairly. In contrast, the *Bullard* court noted that the jury could have concluded that the defendants did not aid and abet one another in order to commit the offenses and could have convicted each defendant of second degree sexual offense based upon their individual offenses.[72]

The North Carolina Supreme Court recently observed that "[t]he worthy goals of economy, efficiency, accuracy and fairness in judicial proceedings are furthered by placing all options raised by the indictment and the evidence before the same jury in a single trial."[73] Given this view, it is difficult to understand why trial courts condone the all or nothing approach.

The approach is deficient in several aspects. The *Bullard* court pointed out several of the most damaging consequences.[74] Furthermore, the cases offer no reason why a defendant must shoulder the burden of offering contradictory evidence in order to "deserve" a lesser included offense instruction.[75] Even if they did, the arguments would certainly fail constitutional scrutiny.[76] In *United States v. Coffin*,[77] the United States Supreme Court characterized the presumption of innocence as "the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."[78]

---

71. "Under the statute [N.C. GEN. STAT. §§ 14-27.4(a) & .5(a) (1981)], when aiding and abetting is proven, the offense is first degree; it can never be a second degree offense. Thus, [defendant] could be tried only for a first degree sexual offense and the instruction on the lesser included offense was error." *Barnette*, 304 N.C. at 463, 284 S.E.2d at 308 (citation omitted).

Clearly, the *Weaver* "definitional" approach to lesser included offenses is inapplicable in this context, which diminishes its usefulness as a bright line rule. State v. Weaver, 306 N.C. 629, 635, 295 S.E.2d 375, 378-79 (1982). Conversely, the rule retains all of its advantages when defendants' culpability derives from their own acts, as it does in most situations.

72. *Bullard*, 97 N.C. App. at 498, 389 S.E.2d at 124.

73. State v. White, 322 N.C. 506, 518, 369 S.E.2d 813, 819 (1988).

74. The *Bullard* court specifically pointed out that the approach is "detrimental to the public safety," unfair to defendants, and "inconsistent with the precept that jurors are at liberty to believe all, none, or part of the evidence as they see fit." *Bullard*, 97 N.C. App. at 498, 389 S.E.2d at 124.

75. The courts agree that juries must receive instruction as to lesser included offenses when a defendant does offer contradictory evidence which, if believed, would support a conviction of the lesser included offense. *See, e.g.*, State v. Hall, 305 N.C. 77, 84, 286 S.E.2d 552, 556-57 (1982); State v. Simpson, 299 N.C. 377, 381, 261 S.E.2d 661, 663 (1980); State v. Drumgold, 297 N.C. 267, 271-72, 254 S.E.2d 531, 533 (1979) (granting new trial because evidence conflicted on essential element, and jury could have found defendant guilty of a lesser degree of rape); State v. Faircloth, 297 N.C. 388, 393-94, 255 S.E.2d 366, 370 (1979); State v. Gray, 58 N.C. App. 102, 106, 293 S.E.2d 274, 277, *cert. denied*, 306 N.C. 746, 295 S.E.2d 484 (1982).

The affirmative obligation to instruct in the one instance, however, should not be equated with the obligation *not* to do so in trials in which the defendant chooses not to put on any evidence at all.

76. *See* Estelle v. Williams, 425 U.S. 501, 503 (1976) ("presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice"); *In re* Winship, 397 U.S. 358, 363 (1970) (discussing vital role of reasonable doubt and its close relation to presumption of innocence).

For a more thorough discussion of the procedural due process questions raised by the trial courts' failure to give lesser included offenses instructions, see Mascolo, *supra* note 5, at 287-94.

77. 156 U.S. 432 (1895).

78. *Id.* at 453. The *Coffin* Court even described the presumption of innocence as "evidence in favor of the accused, introduced by the law in his behalf." *Id.* at 460. The Court quickly qualified

These principles derive from "Deuteronomy through Roman law, [ecclesiastical law,] English common law, and the common law of the United States."[79] In light of such compelling precedent, the implicit requirement that a defendant make some affirmative offering of contradictory evidence before a trial judge must instruct the jury as to lesser included offenses *that the evidence does support* is wholly unfounded.[80] If the *Weaver* "definitional" view is to be given any weight, such instructions do not need to be earned; they also are not generous boons, handed down in a court's discretion.[81] Thus, the basic requirement that the lesser included offense be supported by the evidence is justified: the courts' parsed interpretation of what "supported by the evidence" means, is not.

When a defendant elects not to offer any evidence, the decision likely reflects a variety of practical factors that may or may not relate to the defendant's culpability for a greater or lesser offense. For instance, the choice may be based on a lack of witnesses, the danger of confusing a jury, the defendant's belief that the evidence as forecast by the State will lead to conviction only of the lesser charge, or the defendant's tactical decision to avoid the risk of opening any evidentiary doors. The defendant has the right to make such choices, unhindered by the possibility that the exercise of this right will result in the forfeiture of another.

Further, no sound reason exists to apply any rule that would deny a defendant's request for an instruction as to a lesser included offense on grounds that defendants cannot rely on the possibility that a jury may not believe all of the evidence offered by the State.[82] The issue ought not be miscategorized as a question of defendants' "reliance"; rather, the pertinent question is whether the jury should have full access to the information it needs to assess the evidence against the defendant and to enter the verdict that most accurately reflects their conclusions. That a jury may believe all, part, or none of the evidence is certainly beyond dispute. If a jury believes enough of the State's evidence to find a defendant guilty of a lesser degree of the crime charged but remains unconvinced as to the State's proof of an enhancing element, then the all or nothing approach will force either an unearned acquittal or an unearned conviction. Acquittal, of course, releases a culpable, dangerous individual back into the public, free from criminal sanctions. Conviction injures not only the particular defendant charged, but also dishonors the jury system by corrupting the precepts of fairness from which it draws validation. These improperly omitted instructions un-

---

this particular language, however, due to its tendency to "mislead." *See* Holt v. United States, 218 U.S. 245, 253 (1910); Agnew v. United States, 165 U.S. 36, 51-52 (1897).

79. Taylor v. Kentucky, 436 U.S. 478, 483 (1978).

80. Unfortunately, the Supreme Court itself does not recognize any inconsistency between the *Coffin* language and the holding: "A lesser-included instruction is only proper where the charged greater offense requires the jury to find a *disputed* factual element which is not required for conviction of the lesser included offense." Sansone v. United States, 380 U.S. 343, 350 (1965) (emphasis added).

81. State v. Weaver, 306 N.C. 629, 635, 295 S.E.2d 375, 378-79 (1982) (discussed *supra* notes 33-34 and accompanying text, and notes 59 & 71).

82. *See* State v. Faircloth, 297 N.C. 388, 399, 255 S.E.2d 366, 373 (1979) (Exum, J., dissenting).

dermine the credibility of a system that purports to operate under the strictures of accuracy and fairness.

In *Beck v. Alabama*,[83] the United States Supreme Court pointed out that

> [a]t common law the jury was permitted to find the defendant guilty of any lesser offense necessarily included in the offense charged. This rule originally developed as an aid to the prosecution in cases in which the proof failed to establish some element of the crime charged. But it has long been recognized that it can also be beneficial to the defendant because it affords the jury a less drastic alternative than the choice between conviction of the offense charged and acquittal.[84]

The Court cautioned that it had "never held that a defendant is entitled to a lesser included offense instruction as a matter of due process,"[85] but still concluded that "the nearly universal acceptance of the rule in both state and federal courts establishes the value to the defendant of this procedural safeguard."[86] Lesser included offense instructions are so valuable, the Court said, because only by giving the jury an alternative between conviction and acquittal can the trial court alleviate the risk of unwarranted conviction.[87]

The risk is obvious. District attorneys have broad discretion in selecting the charges they intend to pursue. Understandably, they charge defendants with the highest offense supported by the evidence.[88] The *Beck* Court pointed out concerns that ring true in this context as well; the jury faces an express choice of conviction or acquittal, and implicit in that decision is a choice of a lengthy sentence or none at all.[89] As the Supreme Court observed in *Keeble v. United*

---

83. 447 U.S. 625 (1980).

84. *Id.* at 633.

85. *Id.* at 637. *But see* Mascolo, *supra* note 5, at 264 (arguing that "the lesser-included offense doctrine has evolved from a mere procedural device into a basic component of the due process right to a fair trial").

86. *Beck*, 447 U.S. at 637.

87. The *Beck* Court emphasized the importance of a lesser included offense instruction to the defendant, Beck, because he stood convicted of a capital offense. *Id.* at 627-28. The Court expressly declined to decide if the due process clause mandated similar instructions in noncapital cases. *Id.* at 638 n.14.

In a noncapital case, Keeble v. United States, 412 U.S. 205 (1973), however, the Court intimated that even absent an "[explicit holding] that the Due Process Clause of the Fifth Amendment guarantees the right of a defendant to have the jury instructed on a lesser included offense, it is nevertheless clear that a construction of [a federal statute] to preclude such an instruction would raise difficult constitutional questions." *Id.* at 213.

88. "[W]hen prosecutors are asked to describe their charging philosophies in general terms, they invariably report that they charge the 'highest and most' that the evidence permits." Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 88-89 (1968). The basic tenet involved here is obvious: "Just as the government has no legitimate interest in securing an unwarranted conviction of the charged greater offense, the defendant has no right to an acquittal when the evidence sufficiently supports a conviction of a lesser-included offense." Mascolo, *supra* note 5, at 282.

89. The jury convicted the *Bullard* defendants of first-degree sexual offense, a Class B felony which is punishable by life imprisonment. N.C. GEN. STAT. § 14-1.1(a)(2) (1986). The life sentence is mandatory for first-degree sexual offenses. State v. Higgenbotham, 312 N.C. 760, 763-64, 324 S.E.2d 834, 837 (1985). In *Bullard*, the defendants requested that the trial judge instruct the jury as to second-degree sexual offense. *Bullard*, 97 N.C. App. at 496, 389 S.E.2d at 123. Second-degree sexual offense is a Class D felony for which the presumptive sentence is "imprisonment up to 40 years, or a fine, or both." N.C. GEN. STAT. § 14-1.1(a)(4).

States:[90] "Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction."[91] If the trial judge incorrectly refuses to instruct the jury that the evidence supports a conviction of a lesser included offense, then the error irreparably taints a conviction of the greater crime.[92] The North Carolina Supreme Court explained:

> Erroneous failure to submit the question of defendant's guilt of lesser degrees of the same crime is not cured by a verdict of guilty of the offense charged because, in such case, it cannot be known whether the jury would have convicted of a lesser degree if the different permissible degrees arising on the evidence had been correctly presented in the court's charge.[93]

Given the risk of certain reversal when appellate courts determine that a trial judge inaccurately omitted lesser included offense instructions, one wonders what governmental interest prompts the courts to hazard the omission. The "cost" of giving the instruction measures only the few minutes of time required to explain the differing degrees of the crime to the jury and to guide their efforts to correlate the verdict with the evidence they choose to believe.[94]

Unfortunately, the flawed premise at work in *Bullard* and its predecessors is of far-reaching scope, because lesser included offenses lie subsumed within most crimes involving assaults on the person.[95] In *Bullard*, the North Carolina Court of Appeals suggested that corrective action should originate in the legislature.[96] This Note contends that the necessary remedy should come from the courts.

North Carolina General Statute section 15-170 is clear that "[u]pon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime."[97] As stipulated in *State v. Hicks*, the trial judge must instruct the jury that it may find a defendant guilty of a lesser degree of the crime charged, if the evidence supports such a finding.[98] Still, the *Bullard* court explained, "the *decisions* . . . establish that the statement does not quite mean what it says."[99] Thus, through interpretation of this stat-

---

90. 412 U.S. 205 (1973).

91. *Id.* at 212-13.

92. *See* State v. Weaver, 306 N.C. 629, 633-34, 295 S.E.2d 375, 377-78 (1982); State v. Banks, 295 N.C. 399, 415-16, 245 S.E.2d 743, 754 (1978); State v. Bell, 284 N.C. 416, 419, 200 S.E.2d 601, 603 (1973).

93. State v. Wrenn, 279 N.C. 676, 681, 185 S.E.2d 129, 132 (1971).

The phrase "arising under the evidence" is subject to more than one interpretation. For a discussion of the prevailing and problematic judicial construction, see *supra* notes 36-50 and accompanying text.

94. Mascolo, *supra* note 5, at 293-94 (pointing out the "minimal economic barriers").

95. See *supra* note 30 for a short discussion of the relationship between lesser included offense charges and crimes including intent or physical assault elements.

96. *Bullard*, 97 N.C. App. at 498, 389 S.E.2d at 124.

97. N.C. GEN. STAT. § 15-170 (1983).

98. 241 N.C. 156, 160, 84 S.E.2d 545, 548 (1954). The *Hicks* case is often cited for this proposition; *see, e.g.*, State v. Carnes, 279 N.C. 549, 554, 184 S.E.2d 235, 238 (1971); State v. Norman, 14 N.C. App. 394, 398, 188 S.E.2d 667, 670 (1972); State v. McLean, 2 N.C. App. 460, 463, 163 S.E.2d 125, 126 (1968); State v. LeGrande, 1 N.C. App. 25, 27, 159 S.E.2d 265, 267 (1968).

99. *Bullard*, 97 N.C. App. at 498, 389 S.E.2d at 124 (emphasis added).

ute, the courts have formulated the all or nothing approach.

Indeed, in *State v. White*,[100] Justice Webb explained that the very definition of a lesser included offense is "a definition which was developed in our common law and is not a legislative creation."[101] The courts, not the legislature, have promulgated the various restrictions on availability of jury instructions regarding lesser included offenses. The courts elected to encumber defendants with the burden of offering contradictory evidence, and the courts are responsible for the fact that "supported by the evidence" does not really mean what it says. It should. Given that the current practice of denying the instruction derives from judicial interpretation, it seems clear that primary remedial responsibility rests with the courts. Absent any corrective action by the judiciary, perhaps the legislature should revisit the applicable statutes and specify, even more clearly, that when a jury can find a criminal defendant guilty of a lesser included offense, under any supported version of either party's evidence, the trial judge shall so instruct the jury. Defendants' right to a fair trial depends on it.

TRACY L. HAMRICK

100. 322 N.C. 506, 369 S.E.2d 813 (1988).
101. *Id.* at 519, 369 S.E.2d at 820 (Webb, J., dissenting). .