Chapter 27

Miscellaneous Jury Procedures

This chapter deals with miscellaneous procedural issues related to jurors. Issues dealing with jury misconduct are covered *supra* in Chapter 26, jury instructions are covered *infra* in Chapter 32, and issues related to deliberations and verdict are covered *infra* in Chapter 34.

27.1 Note Taking by the Jury

Jurors may make notes and take them into the jury room unless the trial judge, on his or her own motion or the motion of any party, directs otherwise. N.C. GEN. STAT. § 15A-1228 (hereinafter G.S.). Whether jurors are allowed to take notes is within the trial judge's discretion, and that decision will not be reversed absent an abuse of that discretion. *State v. Crawford*, 163 N.C. App. 122 (2004).

Practice note: If the trial judge allows the jury to take notes during the trial, counsel may request an instruction in accordance with N.C. Pattern Jury Instruction—Crim. 100.30 (June 2008), which directs the jurors to use their notes to help refresh their recollection but not give them undue significance.

27.2 Authorized Jury View

A. View of the Crime Scene

Under G.S. 15A-1229, a trial judge may permit a jury view. This decision is a discretionary one and will not be disturbed absent an abuse of that discretion. *State v. Fleming*, 350 N.C. 109 (1999). If a view is ordered pursuant to G.S. 15A-1229(a):

- an officer must accompany the jury to the location;
- no person is permitted to communicate with the jury on any subject connected to the trial;
- the judge, prosecutor, and defense counsel must be present; and
- the defendant is entitled to be present.

A witness may testify at the site of the view and point out objects and physical characteristics material to his or her testimony if permitted by the court. This testimony must be recorded. G.S. 15A-1229(b).

The press is allowed to be present at a jury view because criminal trials in North Carolina are open to the press and to the public. N.C. CONST. art. I, § 24; *State v. Davis*, 86 N.C. App. 25 (1987) (no prejudice shown from allowing press to attend the jury view where judge kept press quiet and gave adequate instructions to the jury concerning the publicity surrounding the trial).

Unless authorized by the trial judge, a view of the crime scene by a juror is considered misconduct. *See supra* § 26.3E, Unauthorized Jury View of Crime Scene.

B. View of the Defendant

Generally. The State may require a defendant to stand or otherwise exhibit himself or herself before the jury as long as the act is not of a testimonial or communicative nature. Such an exhibition does not offend the Due Process Clause of the Fourteenth Amendment, nor does it violate the Fifth Amendment's protection against self-incrimination. Both federal and state courts have usually held that the privilege against self-incrimination "offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture." *Schmerber v. California*, 384 U.S. 757, 764 (1966); *see also* 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 126 (7th ed. 2011) (discussing the privilege against self-incrimination)**.**

Selected examples. Courts have found no constitutional violation where the defendant was required to:

- Stand before the jury and place a stocking mask over his head and face in the manner

described by the robbery victim. *State v. Perry*, 291 N.C. 284 (1976).

- Remove his shirt and show scars on cross-examination to impeach or corroborate his testimony that the victim cut him with a razor. *State v. Sanders*, 280 N.C. 67 (1971).
- Speak a word or phrase for purposes of voice identification in court. *State v. Locklear*, 117 N.C. App. 255 (1994).
- Display his teeth to the jury. *State v. Summers*, 105 N.C. App. 420 (1992).
- Exhibit himself to the jury for the purpose of allowing a witness to identify certain physical characteristics on his person. *State v. McNeil*, 47 N.C. App. 30 (1980).
- Give a signature sample in court to compare with a signature on a motel registration card. *State v. Valentine*, 20 N.C. App. 727 (1974).

27.3 Substitution of Alternates

G.S. 15A-1215(a) authorizes a trial judge to replace a juror with an alternate juror if any juror dies, becomes incapacitated or disqualified, or is discharged for any reason at any time before final submission of the case to the jury. The exercise of this power rests in the sound discretion of the trial judge and is not reversible error absent a showing of an abuse of discretion. *State v. Nelson*, 298 N.C. 573 (1979).

An alternate must be discharged on final submission of the case to the jury and cannot be substituted for a juror after the jury has begun its deliberations. *See* G.S. 15A-1215(a); *State v. Bunning*, 346 N.C. 253 (1997) (substitution of an alternate juror for an incapacitated juror after jury deliberations had started violated the defendant's right to a trial by a jury of twelve as guaranteed by article I, section 24 of the N.C. Constitution because it resulted in a verdict rendered by eleven jurors plus two jurors who each participated partially).

If a juror is replaced by an alternate after deliberations have begun, trial counsel need not object to preserve the issue for appeal because "[a] trial by a jury which is improperly constituted is so fundamentally flawed that the verdict cannot stand." *Bunning*, 346 N.C. 253, 257. A violation of a defendant's constitutional right to have the verdict determined by twelve jurors constitutes error per se. *Id.*

G.S. 15A-2000(a)(2) authorizes a trial judge to replace a juror with an alternate juror if any juror dies, becomes incapacitated or disqualified, or is discharged for any reason before the beginning of deliberations at a capital sentencing hearing.

27.4 Questioning of Witnesses by the Jury

A trial judge, in his or her discretion, may allow a juror to question a testifying witness. *State v. Kendall*, 143 N.C. 659 (1907). However, in *State v. Howard*, 320 N.C. 718, 726 (1987), the N.C. Supreme Court recognized that possible prejudice may arise if counsel is put in "the untenable position of having to choose between not objecting to an

incompetent or prejudicial question, thus letting the testimony in, or objecting to the question with the potential result of offending a juror." To alleviate this concern, the court stated that the better practice is:

- for the juror to submit written questions to the judge;
- for the judge to hold a bench conference to rule on any objections outside the presence of the jury; and
- for the judge to read the jurors' questions to the witness.

The trial judge should exercise due care to see that the jurors' questions are limited to ones that clarify the testimony. *Id.* The judge's decision whether to allow juror questioning will not be reversed absent an abuse of discretion. *See State v. Jones*, 158 N.C. App. 465 (2003).

Practice note: Although cases indicate that it is not necessary for counsel to object to the jurors' questions when actually asked at trial in order to preserve the issue for appeal (*see, e.g.*, *Howard*, 320 N.C. 718, 726), counsel should always object at a bench conference if one is held before the questions are asked or at the next available opportunity when the jury is not present.

27.5 Sequestration of Jurors During Trial

Jurors may be sequestered during trial if so directed by the trial judge in his or her discretion. G.S. 15A-1236(b). This statute authorizes either complete sequestration, which includes separate lodging facilities at night, or partial sequestration during lunch or while in the vicinity of the courthouse. *See* G.S. 15A-1236 Official Commentary. When sequestration is ordered in a criminal case, the State must pay for all accommodations of jurors. G.S. 9-17.

A defendant does not have a federal constitutional right to have the jurors sequestered during trial. Sequestration is a matter of state procedural law and does not reach constitutional proportions. *Baldwin v. Blackledge*, 330 F. Supp. 183 (E.D.N.C. 1971).

If sequestration is ordered during deliberations in a capital case, the alternate jurors must be sequestered in the same manner as the trial jurors. The alternates must also be sequestered from the trial jury. G.S. 15A-1215(b).

27.6 Polling of the Jury

A. In General

"To poll the jury means to ascertain by questions addressed to the jurors, individually, whether each juror assented and still assents to the verdict tendered to the court." *State v.*

Boger, 202 N.C. 702, 704 (1932). The right to poll the jury in criminal cases is firmly established by article I, section 24 of the N.C. Constitution and by statute. *See, e.g., State v. Lackey*, 204 N.C. App. 153 (2010).

By polling the jury, the judge gives each juror an opportunity, before the verdict is recorded, to declare in open court his or her assent to the verdict that the foreman has returned and thus enables the judge and the parties "to ascertain *with certainty* that a unanimous verdict has been in fact reached and that no juror has been coerced or induced to agree to a verdict to which he [or she] has not fully assented." *Davis v. State*, 273 N.C. 533, 541 (1968) (emphasis in original); *see also State v. Black*, 328 N.C. 191, 198 (1991) ("The purpose of polling the jury is to ensure that the jurors unanimously agree with and consent to the verdict at the time it is rendered."); *State v. Young*, 77 N.C. 498, 499 (1877) (the right to poll the jury "is surely one of the best safeguards for the protection of the accused" since it is the mode of "ascertaining the *fact* that it is the verdict of the whole jury") (emphasis in original).

In both capital and non-capital cases, the poll must be conducted individually. *See* G.S. 15A-1238; G.S. 15A-2000(b). It is error for the trial judge to ask the jury collectively if they assented to and still assent to the verdict. *See State v. Boger*, 202 N.C. 702 (1932) (trial judge erred by requesting the jury to "stand up" if they assented to the verdict of manslaughter); *State v. Holadia*, 149 N.C. App. 248 (2002) (error to question the jury collectively and have them respond collectively by raising their hands).

The appellate courts have approved of three questions to be asked of individual jurors at the time of polling:

1. Was this your verdict?
2. Is this now your verdict?
3. Do you still agree and assent thereto?

See, e.g., State v. Asbury, 291 N.C. 164 (1976); *State v. Norris*, 284 N.C. 103 (1973). The first question is asked to ensure that no improper influence or coercion took place in the jury room during deliberations and the latter two are asked to confirm that the juror still assents in open court to the jury verdict. *See Asbury*, 291 N.C. 164.

Although jurors must be polled individually, they do not necessarily have to be questioned about each conviction separately. For example, if the jury returns verdicts against a defendant finding him or her guilty of kidnapping and second-degree murder, G.S. 15A-1238 has been interpreted as not requiring that the jurors be polled about the kidnapping and then polled separately about the murder. Instead, the judge may direct the clerk to recite all of the verdicts and ask each juror if they were his or her verdicts and whether he or she still assents. *State v. Ramseur*, 338 N.C. 502 (1994); *State v. Hunt*, 198 N.C. App. 488 (2009); *State v. Sutton*, 53 N.C. App. 281 (1981).

Practice note: If you would like the jurors to be polled separately as to each individual conviction, you should specifically request the judge to do so during your motion to poll

and offer reasons why it is important in your particular case. Be sure your request and, if denied, the judge's ruling are both on the record.

B. Noncapital Cases

Need for motion. The jury must be polled on the motion of any party or on the trial judge's own motion. G.S. 15A-1238. Pursuant to this statute:

- The poll must be conducted after verdict but before the jury has been dispersed.
- The poll may be conducted by the judge or by the clerk by asking each juror individually whether the verdict announced is his or her verdict.
- If the poll reveals that there is not unanimous concurrence, the jury must be directed to retire for further deliberations.

Waiver. A defendant waives his or her right to request a polling of the jury pursuant to G.S. 15A-1238 where he or she does not make the request before the jury's discharge. *State v. Baynard*, 79 N.C. App. 559 (1986). The rationale behind requiring that the polling occur before dispersal of the jury is to ensure that nothing extraneous to the jury's deliberations can cause any of the jurors to change their minds. *See State v. Black*, 328 N.C. 191, 198 (1991) (defendant's motion to poll came too late where it was made after the jury had entered its verdict and was given a thirty-minute recess during which it was free to leave the courtroom and go into the streets); *see also State v. Ballew*, 113 N.C. App. 674 (1994) (defendant waived right to poll jury where request was made after the jury had been released to the jury room and had been told that they could discuss the case with anyone if they wished), *aff'd per curiam*, 339 N.C. 733 (1995); *State v. Froneberger*, 55 N.C. App. 148 (1981) (defendant waived right to poll jury where motion was not made until after the jury was discharged and court had recessed for lunch).

Practice note: Counsel should *always* request that the jury be polled after a defendant is convicted in a noncapital case. A juror who was struggling with the verdict or feeling pressured by the other jurors may welcome the opportunity to say so in open court. It is especially important to timely request polling because, as a general rule, once a verdict has been rendered and received in open court, it may not later be impeached—that is, a juror may not testify nor may evidence be received as to matters occurring during deliberations or calling into question the reasons on which the verdict was based. *See, e.g.*, *State v. Martin*, 315 N.C. 667 (1986). For a discussion of the anti-impeachment rule and its limited exceptions, see *supra* § 26.2B, Exposure to Extraneous Information Discovered After Verdict.

C. Capital Cases

After delivery of the sentence recommendation by the foreman of the jury in a capital case, the jury must be individually polled to establish whether each juror concurs and agrees to the sentence recommendation returned. G.S. 15A-2000(b). Since the right to a jury poll in a capital case is statutorily mandated, it is not dependent on a defendant's

request for polling. *State v. Buchanan*, 330 N.C. 202 (1991). The trial judge's error in failing to properly poll a capital jury is not waived by the defendant's failure to object. *Id.*

D. Equivocation by Juror During Polling

If, during polling in a non-capital case, there is not unanimous concurrence by all jurors, the judge must direct the jury to retire for further deliberations. G.S. 15A-1238; *see also* G.S. 15A-1235(c) (if the jury has been unable to agree on a verdict, "the judge may require the jury to continue its deliberations and may give or repeat the instructions provided in subsections (a) and (b)"). G.S. 15A-2000(b) is silent as to what the judge must do when the polling reveals a nonunanimous sentencing recommendation in a capital case; however, the N.C. Supreme Court has held that when "an inconsistency arises between the verdict and the responses of jurors during the polling process, the trial court must nevertheless allow the jury a reasonable opportunity to attempt to reach a unanimous sentence recommendation." *State v. Maness*, 363 N.C. 261, 288 (2009). If the judge concludes under G.S. 15A-2000(b) that "the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation," he or she is authorized to impose a life sentence. *Id.*

For a collection of cases that consider or decide whether the declaration of a mistrial or the granting of a new trial is warranted where a juror who has assented to a verdict of guilty in a criminal case equivocates upon being polled after verdict, see M. J. Greene, Annotation, *Juror's Reluctant, Equivocal, or Conditional Assent to Verdict, on Polling, as Ground for Mistrial or New Trial in Criminal Case*, 25 A.L.R.3d 1149 (1969 & Supp. 2010).