Chapter 32
Instructions to the Jury

The jury charge is a vital part of a criminal trial, and the content of the instructions can have a profound impact on the jury's determination of the defendant's guilt or innocence. Sections 15A-1231, 15A-1232, and 15A-1234 of the North Carolina General Statutes (hereinafter G.S.) contain the basic standards and procedures on instructions to the jury. This chapter addresses the general

requirements relating to jury instructions as well as the duties of the trial judge, special requests for instructions by the defendant, and the preservation of issues for appeal.

32.1 General Requirements

In instructing the jury, "[i]t is well established that a judge must declare and explain the law arising upon the evidence." *State v. Little*, 163 N.C. App. 235, 240 (2004); *see also State v. McLean*, 74 N.C. App. 224 (1985); G.S. 15A-1232. The chief purposes of the charge to the jury are clarification of the issues, elimination of extraneous matters, and declaration and explanation of applicable law. *State v. Jackson*, 228 N.C. 656 (1948).

A trial judge is not required to follow any particular form in giving instructions and has wide discretion in presenting the issues to the jury. *State v. Harris*, 306 N.C. 724, 727–28 (1982). Still, the defendant always has the right to receive instructions on the substantial features of the case and is entitled to special instructions when requested and warranted by the evidence. *See infra* §§ 32.3B through D, Substantial Features of the Case, Subordinate Features of the Case, and Lesser Included Offenses, and § 32.4B, Requests for Special Instructions.

Before 1985, G.S. 15A-1232 required judges to summarize the evidence of both parties to the extent necessary to explain the application of the law to the evidence. This statute was amended in 1985 to remove that requirement, although the judge may still elect to do so. *See State v. Blue*, 356 N.C. 79 (2002); *State v. Taylor*, 80 N.C. App. 500 (1986); *see also* N.C. Pattern Jury Instruction—Crim. 100.00 (April 2005). If the judge does elect to summarize the evidence or explain the application of the law thereto, he or she "must be vigilant not to express an opinion as to the quality of the evidence or as to the credibility of a witness." *State v. Artis*, 325 N.C. 278, 309 (1989), *vacated on other grounds*, 494 U.S. 1023 (1990).

Practice note: You should consider asking the judge to specifically explain the application of the law to the evidence in cases where the jury, by its questions, indicates confusion or concern about how the law relates to the evidence in a particular case. *See, e.g.*, *Blue*, 356 N.C. 79 (defendant argued that the trial judge erred in failing to specifically instruct the jury, in response to its question, that defendant had the same rights pertaining to self-defense and to the defense of habitation on his front porch as he did within his home); *State v. Moore*, 339 N.C. 456, 462 (1994) (defendant argued that the trial judge erred in failing to satisfy the jury's request for an explanation of the law on the felony-murder rule concerning the temporal link between the killing and the underlying felony of discharging a firearm into occupied property).

There are also mandatory and discretionary instructions about reaching a verdict, discussed *infra* Chapter 34, Deliberations and Verdict.

32.2 Charge Conference

Before closing arguments, a trial judge must conduct a conference to discuss proposed instructions out of the presence of the jury. G.S. 15A-1231(b); N.C. GEN. R. PRAC. SUPER. & DIST. CT. 21. Pursuant to G.S. 15A-1231(b), the charge conference must be recorded.

At the conference, the judge must inform the parties of the offenses, lesser included offenses, and affirmative defenses on which he or she will charge the jury. The parties must also be informed what, if any, parts of requested instructions will be given. On request, the judge must inform the parties whether he or she intends to include other particular instructions in the jury charge. G.S. 15A-1231(b).

The trial judge's failure to conduct a recorded charge conference in violation of G.S. 15A-1231(b) does not constitute grounds for appeal unless the judge's failure to comply was not corrected before the end of trial and it materially prejudiced the defendant's case. *See State v. Brunson*, 120 N.C. App. 571 (1995) (defendant unable to show material prejudice where trial judge held an informal, unrecorded charge conference).

Practice note: The charge conference is a significant stage of trial and counsel should prepare accordingly. Counsel should:

- file written requests for instructions as soon as possible so the trial judge will have time to read them before the charge conference;
- be prepared to argue in support of his or her tendered instructions and against detrimental ones submitted by the State or suggested by the trial judge;
- lodge specific objections to erroneous instructions at the charge conference;
- carefully listen to the instructions given during the jury charge and ask for corrections, additions, or modifications as necessary; and
- lodge or renew specific objections to erroneous instructions before the jury retires to deliberate.

32.3 Explanation of the Law

A. Pattern Jury Instructions

In instructing the jury, trial judges ordinarily use the North Carolina Pattern Jury Instructions for Criminal Cases, prepared by the North Carolina Conference of Superior Court Judges Committee on Pattern Jury Instructions. The Court of Appeals has stated generally that the use of the Pattern Jury Instructions is "the preferred method of jury instruction." *See Caudill v. Smith*, 117 N.C. App. 64, 70 (1994). The "Guide to the Use of this Book" that prefaces the Pattern Jury Instructions directs judges to review the pattern instructions and make adaptations as necessary before giving any instructions to the jury.

Practice note: The Pattern Jury Instructions are a good starting point in preparing instructions for the charge conference; however, counsel should always carefully review the pattern instructions to see if they need modification or clarification to fit the needs of the particular case. Do not rely on the judge to do it for you.

B. Substantial Features of the Case

The trial judge has considerable discretion in the manner in which the jury is charged, but he or she is always required to instruct the jury "on all substantial and essential features of the case embraced within the issue and arising on the evidence." *State v. Higginbottom*, 312 N.C. 760, 764 (1985); *State v. Young*, 16 N.C. App. 101 (1972). This is true regardless of requests by the parties. *State v. Harris*, 306 N.C. 724 (1982); *State v. McHone*, 174 N.C. App. 289 (2005). Under this principle, the trial judge must instruct not only on the crime charged in the indictment but also on lesser included offenses (discussed in subsection D., below), defenses (discussed in subsection E., below), and the identification of the defendant as the perpetrator when warranted by the evidence. *See State v. Shaw*, 322 N.C. 797, 803–04 (1988); *State v. Kinard*, 54 N.C. App. 443 (1981).

C. Subordinate Features of the Case

Instructions as to the significance of evidence not relating to the elements of the crime itself or to the defendant's criminal responsibility have been considered subordinate or nonessential features of the case. *State v. Hunt*, 283 N.C. 617 (1973). Absent a request by the defendant, the judge is not required to give instructions on these features. *State v. Lester*, 289 N.C. 239 (1976). However, when a defendant requests an instruction on a nonessential feature of a case and that instruction is correct in law and supported by the evidence, the judge must give the instruction in substance. *State v. Monk*, 291 N.C. 37, 54 (1976); *see also infra* § 32.4B, Requests for Special Instructions. A judge may elect to instruct on a subordinate feature even without a request by counsel. *Harris*, 306 N.C. 724, 727.

Examples. Some examples of subordinate features are:

- Alibi. *See State v. Hunt*, 283 N.C. 617 (1973); N.C. Pattern Jury Instruction—Crim. 301.10 (Mar. 2003); *see also infra* § 32.3E, Defenses (discussing practical considerations regarding alibi instruction and possible inconsistencies in case law).
- Accomplice testimony. *State v. Brinson*, 277 N.C. 286 (1970); N.C. Pattern Jury Instruction—Crim. 104.25 (June 2011).
- The absence of motive. *State v. Elliott*, 344 N.C. 242, 273 (1996); N.C. Pattern Jury Instruction—Crim. 104.10 (Apr. 2005).
- The credibility of an interested or biased witness. *State v. Dale*, 343 N.C. 71 (1996); N.C. Pattern Jury Instruction—Crim. 104.20 (June 2011).
- Evidence of the defendant's character for law-abidingness or other pertinent character trait. *See State v. Bogle*, 324 N.C. 190, 199–200 (1989); N.C. Pattern Jury Instruction—Crim. 105.30 (June 2011).
- Flight by the defendant. *State v. Lester*, 289 N.C. 239 (1976); N.C. Pattern Jury

Instruction—Crim. 104.35, 104.36 (Feb. 1994).

- Impeachment or corroboration of a witness by a prior statement. *State v. Detter*, 298 N.C. 604, 630–31 (1979); *State v. Borkar*, 173 N.C. App. 162 (2005); N.C. Pattern Jury Instruction—Crim. 105.20 (June 2011).
- The effect of the defendant's decision not to testify. *State v. Paige*, 272 N.C. 417 (1968); N.C. Pattern Jury Instruction—Crim. 101.30 (May 2005).
- Impeachment of defendant by evidence of prior convictions if elicited by the State. *State v. Jackson*, 161 N.C. App. 118 (2003) (defendant not entitled to limiting instruction where he voluntarily testified to prior convictions on direct examination); *State v. Gardner*, 68 N.C. App. 515 (1984), *aff'd*, 315 N.C. 444 (1986) (same); N.C. Pattern Jury Instruction—Crim. 105.40 (June 2011).

Reasonable doubt. Although "reasonable doubt" is not technically categorized as a subordinate feature of a criminal case, a trial judge need define it only if it is specifically requested by the defendant. *See infra* § 32.4B, Practice Note.

Practice note: Whether to request an instruction on a subordinate feature of the case is a tactical decision. Counsel should carefully consider the effect of the instruction on the jury since giving an instruction on a particular nonessential feature of the case may so concentrate attention on that subject "as to divert attention from unrelated weaknesses in the State's case." *Hunt*, 283 N.C. 617, 624. For example, if a prosecution witness has an emotional outburst during trial, counsel may decide not to request an instruction regarding the outburst because the instruction may further highlight the witness's emotional state. *See, e.g., State v. Blackstock*, 314 N.C. 232 (1985).

D. Lesser Included Offenses

Right to instruction. State and federal principles of due process require that a lesser included offense instruction be given when the evidence warrants such an instruction. *See Hopper v. Evans*, 456 U.S. 605 (1982); *State v. Arnold*, 329 N.C. 128 (1991); *State v. Ledwell*, 171 N.C. App. 328 (2005). The N.C. courts have often said 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, submission of a lesser included offense is not required. *See, e.g., State v. Millsaps*, 356 N.C. 556 (2002); *State v. Harvey*, 281 N.C. 1 (1972). However, where there is some evidence of a lesser included offense, the trial judge *must* instruct the jury on it even in the absence of a special request for such instruction. *State v. Lawrence*, 352 N.C. 1, 19–20 (2000); *State v. Montgomery*, 341 N.C. 553 (1995); *State v. Bumgarner*, 147 N.C. App. 409 (2001); *see also* G.S. 15-170 (when a defendant is indicted for a criminal offense, he or she may be convicted of the charged offense or of a lesser included offense). This rule applies even when the defendant does not present any evidence but the State's evidence is conflicting. *State v. Smallwood*, 78 N.C. App. 365 (1985).

Trial strategy considerations. As a matter of trial strategy, a defendant may prefer that an instruction on a lesser included offense not be given and go for "all or nothing." However, it appears that under North Carolina law, the defendant has no right to preclude an instruction on a lesser included offense if the evidence warrants an instruction. *See State v. Jones*, 149

N.C. App. 977 (2002) (unpublished). Nor can the defendant preclude the giving of an instruction by not requesting it if there is evidence supporting the instruction. *State v. Harris*, 306 N.C. 724 (1982).

Waiver. To preserve the issue of the trial judge's failure to instruct on a lesser included offense that is supported by the evidence, a defendant must have requested such an instruction or he or she must have objected to the charge as given. *See State v. Collins*, 334 N.C. 54 (1993) (finding waiver under N.C. R. App. P. 10(b)(2) [now, N.C. R. App. P. 10(a)(2)] where defendant failed to object to trial judge's failure to instruct on lesser included offense of attempted murder); *see generally State v. Smith*, 311 N.C. 287 (1984) (because defendant's written request for instruction regarding the State's identification testimony had been previously denied, he did not have to repeat his objection to the jury instructions, after the fact, to preserve the issue for appellate review). Without proper preservation of the issue at trial, appellate counsel is limited to seeking review of the issue under the rigorous "plain error" standard of review. *State v. Thomas*, 350 N.C. 315, 348 (1999); *see also infra* § 32.9, Preservation of Issues for Appeal.

Invited error. A defendant may not decline an opportunity for an instruction on a lesser included offense and then claim on appeal that failure to instruct on the lesser included offense was error. *State v. Sierra*, 335 N.C. 753 (1994).

Practice note: Be sure to specifically constitutionalize your objection to the trial judge's instruction or omission of an instruction on a lesser included offense; otherwise, appellate counsel will be precluded from arguing a due process violation on appeal. *See infra* § 32.9A, Necessity of Specific Objection. State on the record that the giving (or omission) of the instruction violates the Fourteenth Amendment to the U.S. Constitution as well as article I, section 19 of the N.C. Constitution.

E. Defenses

Generally. Defenses raised by the evidence constitute substantial features of the case; thus, where the evidence, if accepted, discloses facts sufficient in law to constitute a defense to the crime for which the defendant is indicted, the judge is required to instruct the jury on the legal principles applicable to that defense. *State v. Fields*, 324 N.C. 204 (1989) (new trial granted where defendant's evidence merited an instruction on unconsciousness or automatism and trial judge failed to give the requested instruction); *State v. Deck*, 285 N.C. 209 (1974) (where the State's evidence was sufficient to require the trial judge to instruct on the law of self-defense, the trial judge's failure to so do constituted prejudicial error).

"What weight, if any, is to be given such evidence, is for determination by the jury." *Fields*, 324 N.C. 204, 210 (citations omitted). When determining whether the evidence is sufficient to entitle a defendant to jury instructions on a defense**,** the trial judge must consider the evidence in the light most favorable to the defendant. *State v. Oliver*, 334 N.C. 513, 520 (1993).

Practice note: While the judge has a duty, notwithstanding the absence of a request, to instruct on defenses that are supported by the evidence (*State v. Loftin*, 322 N.C. 375 (1988)), always file a written request when you want an instruction on an applicable defense. This will ensure that the issue is properly preserved for appeal in the event that the judge fails or refuses to instruct on the defense. *See State v. Smith*, 311 N.C. 287 (1984).

In some circumstances, the giving of an instruction on a defense when not supported by the evidence may warrant reversal of a conviction—for example, in cases in which the judge gives an instruction on a defense not raised by the evidence and the instruction conflicts with the defendant's theory of defense. *See, e.g., State v. Tillman*, 36 N.C. App. 141 (1978) (defendant did not rely on and presented no evidence of entrapment; instruction conflicted with defendant's theory of defense and required new trial); *State v. Ransom*, 2 N.C. App. 613 (1968) (to same effect); *cf. State v. Bland*, 19 N.C. App. 560 (1973) (trial judge instructed on entrapment although not requested by defendant; not error to give instruction in light of State's evidence and argument by defendant's counsel during trial).

Alibi. Although alibi is often referred to as a defense, this is "inexact." *State v. Hunt*, 283 N.C. 617, 624 (1973) (overruling cases that held that a defendant is entitled to an instruction on alibi if the evidence supported it even in the absence of a specific request). Unlike evidence of "true" defenses, evidence that the defendant was elsewhere when the crime was committed should be considered a subordinate feature of the case because it has "nothing to do with the elements of or criminal responsibility for the crime for which the defendant is indicted." *Id.* at 624. *But cf. State v. Alston*, 294 N.C. 577, 590 (1978) (stating in passing that the defendant's "alibi defense" was a "substantial feature[] of the case" [this general comment by court likely does not affect ruling in *Hunt*]). In crimes requiring a defendant's personal presence at the scene of its commission, alibi evidence is "simply evidence contradictory of the State's evidence that defendant committed the alleged crime." *Hunt*, 283 N.C. 617, 624. Since alibi evidence is a subordinate feature of the case, a trial judge is not required to instruct the jury on alibi unless the defendant specifically requests it. *See State v. Williams*, 355 N.C. 501, 582 (2002).

Practice note: Counsel should carefully consider whether to request a specific instruction on alibi or whether to just rely on the instructions of burden of proof and reasonable doubt. Use of the term "alibi" may harm a defendant's case, as the jury may view it not as a reason for finding that the defendant was not involved in the crime but rather as an artifice to conceal the defendant's alleged involvement.

Additional resources. For further information regarding select defenses and instructions thereon, see School of Government publications authored by John Rubin entitled:

- *The Voluntary Intoxication Defense*, ADMINISTRATION OF JUSTICE MEMORANDUM No. 93/01 (Apr. 1993), *available at* www.sog.unc.edu/sites/www.sog.unc.edu/files/aojm9301.pdf;
- *The Diminished Capacity Defense*, ADMINISTRATION OF JUSTICE MEMORANDUM No.

92/01 (Sept. 1992), *available at* www.sog.unc.edu/sites/www.sog.unc.edu/files/aojm9201.pdf;

- THE ENTRAPMENT DEFENSE IN NORTH CAROLINA (2001); and
- THE LAW OF SELF-DEFENSE IN NORTH CAROLINA (1996).

See also JESSICA SMITH, NORTH CAROLINA CRIMES: A GUIDEBOOK ON THE ELEMENTS OF CRIME 18–24 (UNC School of Government, 7th ed. 2012).

F. Words of Common Usage or Meaning

In the absence of a request for special instructions, it is not error for a trial judge to fail to define and explain words of common usage or meaning to the general public. This is true even if the word at issue is an essential element of the crime charged. *State v. Jones*, 300 N.C. 363 (1980) (finding no error in the trial judge's failure to define "intent" because the word is self-explanatory). However, if the meaning of the word is not clear, the judge must define it in order to give the jury proper guidance. *See State v. Patton*, 18 N.C. App. 266 (1973) (finding in a "public intoxication" case that the trial judge's failure to define the words "drunk" or "intoxicated" was error entitling defendant to a new trial).

32.4 Requests for Instructions

A. In General

Parties may submit proposed jury instructions at the close of the evidence or at an earlier time if directed by the judge. The instructions must be in writing, and parties must furnish copies to opposing counsel. G.S. 15A-1231(a).

B. Special Instructions

Form of request. A defendant may request special instructions on subordinate or nonessential features of a case that do not relate to the elements of the offense or to the defendant's criminal responsibility. *See supra* § 32.3C, Subordinate Features of the Case. These requests must be:

- in writing,
- entitled in the cause, and
- signed by counsel submitting them.

G.S. 1-181(a); *State v. Broome*, 268 N.C. 298 (1966) (per curiam). If a request for a special instruction does not meet these requirements, it is within the discretion of the trial judge whether to give or refuse the instruction. *State v. Harris*, 67 N.C. App. 97 (1984).

Timing of request. Requests for special instructions must be submitted to the judge before the judge begins to give the jury charge. G.S. 1-181(b); *see also* N.C. GEN. R. PRAC. SUPER. & DIST. CT. 21 (providing that "[i]f special instructions are desired, they

should be submitted in writing to the trial judge at or before the jury instruction conference"); *State v. Long*, 20 N.C. App. 91 (1973) (holding that a request for special instruction is not timely if it is tendered after the jury retires to deliberate). However, the judge may, in his or her discretion, consider requests for special instructions regardless of the time they are made. G.S. 1-181(b).

Right to instruction. If a party requests a special instruction that is legally correct in itself and is pertinent to the evidence and the issues in the case, the judge must give the instruction at least in substance. *State v. Lamb*, 321 N.C. 633 (1988); *State v. Craig*, 167 N.C. App. 793 (2005). The judge need not give the instruction in the exact language of the request, but he or she may not change the sense of it or so qualify it as to weaken its force. *State v. Puckett*, 54 N.C. App. 576 (1981).

Practice note: If you would like an instruction defining reasonable doubt, you must specifically request it or the trial judge may not define the concept. *See State v. Miller*, 344 N.C. 658 (1996); *see also* N.C. Pattern Jury Instruction—Crim. 101.10 n.1 (June 2008), *citing State v. Shaw*, 284 N.C. 366, 374 (1973). For a discussion of other instructions that must be specifically requested, such as a defendant's decision not to testify, see *supra* § 32.3C, Subordinate Features of the Case.

32.5 Additional Instructions after Jury Retires

A. In General

After the jury has retired for deliberation, the trial judge may recall the jurors in order to give additional instructions to:

- respond to an inquiry of the jury made in open court; or
- correct or withdraw an erroneous instruction; or
- clarify an ambiguous instruction; or
- instruct on a point of law that should have been covered in the original instructions.

G.S. 15A-1234(a).

B. Repetition of Instructions

Whenever additional instructions are given, the judge may also give or repeat other instructions to avoid giving undue prominence to additional instructions. G.S. 15A-1234(b). The decision whether to repeat other instructions is within the trial judge's discretion. *State v. Prevette*, 317 N.C. 148 (1986). The trial judge is not required to repeat instructions that have been previously given absent an error in the charge. *State v. Hockett*, 309 N.C. 794 (1983). Courts have found needless repetition to be undesirable and have occasionally held it to be erroneous. *See State v. Dawson*, 278 N.C. 351 (1971).

C. Special Requirements

Notice requirement. Before giving additional instructions, the trial judge must inform the parties generally of the instructions he or she intends to give. The parties must be afforded an opportunity to be heard. G.S. 15A-1234(c). If a judge is merely repeating or clarifying an instruction at the jury's request, he or she does not have to give the parties an opportunity to be heard before reinstruction. *State v. Weathers*, 339 N.C. 441 (1994); *State v. Davidson*, 131 N.C. App. 276 (1998).

Right to additional arguments. If the additional instructions, by restriction or enlargement, change the permissible verdicts of the jury, the parties *must* be allowed additional jury arguments on request. Otherwise, whether to allow additional arguments by counsel is within the discretion of the trial judge. G.S. 15A-1234(c).

Procedural requirements. Under G.S. 15A-1234(d), all additional instructions must be given in open court and must be made a part of the record. The full jury must be returned to the courtroom when additional instructions are given under G.S. 15A-1234. *See State v. Tucker*, 91 N.C. App. 511 (1988) (finding that trial judge committed reversible error by summoning only the jury foreman to the courtroom and answering the jury's question regarding the law applicable to the case).

D. Instructions When Jury Indicates Deadlock

G.S. 15A-1235(c) provides that if the jury indicates a deadlock, the trial judge may give or repeat the instructions about reaching a verdict provided in G.S. 15A-1235(a) and (b). For discussion on further instructions to the jury when it has indicated its failure to reach a verdict, see *infra* § 34.5A, Deliberations and Verdict: Further Instructions.

32.6 Trial Judge's Authority to Provide Written Instructions to the Jury

The trial judge has the inherent authority to submit instructions to the jury in writing. This decision is a discretionary one and will not be reversed absent an abuse of that discretion. *See State v. McAvoy*, 331 N.C. 583, 591 (1992) (holding that trial judge erred in ruling as matter of law that he had no authority to give the jury written instructions, but finding no prejudicial error where trial judge orally repeated the requested instructions for the jury, thereby complying with the essence of the jury's request); *State v. Hester*, 111 N.C. App. 110 (1993) (holding that judge did not err in submitting written jury instructions to the jury and allowing them to take them into the jury room). The defendant's failure to object waives any alleged error on appeal. *State v. Bass*, 53 N.C. App. 40 (1981).

32.7 Disjunctive Jury Instructions

For a discussion on jury unanimity and the effect of disjunctive instructions thereon, see

supra § 24.2D, Jury Unanimity.

32.8 IDS Performance Guidelines: Practical Considerations

Several considerations and recommendations with respect to reviewing, requesting, and objecting to jury instructions are contained *infra* in Appendix A, N.C. COMM'N ON INDIGENT DEFENSE SERVS., PERFORMANCE GUIDELINES FOR INDIGENT DEFENSE REPRESENTATION IN NON-CAPITAL CRIMINAL CASES AT THE TRIAL LEVEL (Nov. 2004). The pertinent guideline is reprinted below:

Guideline 7.8 Jury Instructions

(a) Counsel should be familiar with the law and the individual judge's practices concerning ruling on proposed instructions, charging the jury, use of pattern charges, and preserving objections to the instructions.

(b) Pursuant to G.S. 15A-1231, counsel should submit in writing proposed special instructions or modifications of the pattern jury instructions in light of the particular circumstances of the case, including the desirability of seeking a verdict on a lesser included offense. Where possible, counsel should provide case law in support of the proposed instructions. Counsel should try to ensure that all jury instruction discussions are on the record.

(c) Where appropriate, counsel should object to and argue against improper instructions proposed by the prosecution.

(d) If the court does not adopt instructions requested by counsel, or gives instructions over counsel's objection, counsel should take all steps necessary to preserve the record for appeal, including filing a copy of proposed instructions pursuant to G.S. 15A-1231.

(e) During delivery of the charge, counsel should be alert to any deviations from the judge's planned instructions, object to deviations unfavorable to the client, and, if necessary, request additional or curative instructions.

(f) If there are grounds for objecting to any jury instructions, counsel should object before the verdict form is submitted to the jury and the jury is allowed to begin deliberations.

(g) If the court proposes giving supplemental instructions to the jury, either upon request of the jurors or upon their failure to reach a verdict, counsel should ask the judge to state the proposed charge to counsel before it is delivered to the jury. Counsel should also try to ensure that any supplemental instructions are given to the entire jury in open court pursuant to G.S. 15A-1234(d).

32.9 Preservation of Issues for Appeal

A. Necessity of Specific Objection

N.C. Appellate Rule 10(a)(2) states that "[a] party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict . . . ." This rule also states that in order to properly preserve an objection to an instruction or to the omission of an instruction, trial counsel must state "distinctly that to which objection is made and the grounds of the objection . . . ." However, an objection is not required after the jury has been instructed if defense counsel, before jury arguments, submitted a written request for particular instructions and the trial judge denied this request. *See State v. Smith*, 311 N.C. 287 (1984) (holding that where the trial judge had denied defendant's written request for a proposed jury instruction regarding the State's identification testimony, neither N.C. R. App. P. 10(b)(2) [now, N.C. R. App. P. 10 (a)(2)] nor Rule 21 of the General Rules of Practice for the Superior and District Courts required defendant to repeat his objection to the jury instructions, after the fact, to preserve the issue for appellate review).

Caution: Under G.S. 15A-1231(d), all instructions given to the jury and all instructions tendered but refused become part of the record. This subsection also provides that the "failure to object to an erroneous instruction or to the erroneous failure to give an instruction does not constitute a waiver of the right to appeal on that error in accordance with G.S. 15A-1446(d)(13)." ***This is incorrect!*** G.S. 15A-1446(d)(13) has been ruled unconstitutional because it is in direct conflict with Appellate Rule 10(b)(2) [now, Rule 10(a)(2)] as promulgated by the N.C. Supreme Court pursuant to its exclusive authority under article IV, section 13(2) of the North Carolina Constitution. *See State v. Bennett*, 308 N.C. 530 (1983). Always object with specificity on the record to any errors committed by the trial judge in instructing the jury.

B. Opportunity to Object

Rule 21 of the General Rules of Practice for the Superior and District Courts requires the trial judge to give counsel an opportunity outside the hearing of the jury, or on request outside the presence of the jury, to object on the record to the jury charge or omission therefrom. Appellate Rule 10(a)(2) prohibits a party from making as the basis of an issue on appeal any instructional mistake absent a specific objection by trial counsel "provided that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury." The purpose of these rules is to allow the trial judge to correct any mistakes he or she made prior to deliberations. *State v. Maske*, 358 N.C. 40 (2004).

C. Plain Error Rule

To mitigate the potential harshness of Appellate Rule 10(b)(2) [now, R. 10(a)(2)], appellate courts will review an instructional error that was not preserved by trial counsel, but the error will be reviewed under the rigorous "plain error" standard of review. *See*

State v. Odom, 307 N.C. 655 (1983). The plain error rule is only applied where the error was sufficiently fundamental and prejudicial so as to amount to a miscarriage of justice or the denial of a fair trial, or where it can be fairly said that the instructional mistake had a probable impact on the jury's finding that the defendant was guilty. *State v. Harris*, 315 N.C. 556 (1986).