
22.4 Maintaining Order and Security in the Courtroom

A. Controlling Access to/Closure of the Courtroom

Generally. Article I, section 18 of the N.C. Constitution requires that "[a]ll courts shall be open," and section 24 provides that "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court." Additionally, the Sixth Amendment to the U.S. Constitution mandates that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." This right extends to the states through the Fourteenth Amendment. *See Presley v. Georgia*, 558 U.S. 209 (2010) (defendant's right to a public trial encompasses the jury selection phase). "The trial and disposition of criminal cases is the public's business and ought to be conducted in public in open court." *In re Edens*, 290 N.C. 299, 306 (1976).

In discussing public trials, the U.S. Supreme Court has stated:

> The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions. . . . In addition to ensuring that judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and discourages perjury.

Waller v. Georgia, 467 U.S. 39, 46 (1984) (citations and internal quotation marks omitted). A violation of the right to a public trial constitutes structural error and as such, is not subject to a harmless error analysis. *See State v. Rollins*, 221 N.C. App. 572 (2012) (finding structural error but remanding case for a hearing on the propriety of the closure of the courtroom; trial judge had failed to make findings of fact pursuant to *Waller* before closing courtroom during the alleged rape victim's testimony).

"Although the right of access to criminal trials is of constitutional stature, it is not absolute." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982). A trial

judge may, "in the interest of the fair administration of justice, impose reasonable limitations on access to a trial." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 n.18 (1980) (recognizing that the press and the public have an implicit right under the First Amendment to attend trials in criminal cases). Under certain circumstances, a "reasonable limitation" may include closure of the courtroom to the public. *See Waller*, 467 U.S. 39 (setting out a four-part test that trial judge must use in balancing the State's interest against the defendant's constitutional right to a public trial). "Such circumstances will be rare, however, and the balance of interests must be struck with special care." *Id.* at 45. Reasons that have been found to justify closure include threats to participants and observers and attempts by the defendant to escape. *See State v. Murray*, 154 N.C. App. 631 (2002).

Procedural requirements for closing a courtroom. Before closing a courtroom to the public in a criminal case, the trial judge must:

- determine whether the party seeking closure has advanced an overriding interest that is likely to be prejudiced;
- order closure no broader than necessary to protect that interest;
- consider reasonable alternatives to closing the proceeding; and
- make findings adequate to support the closure.

State v. Jenkins, 115 N.C. App. 520, 525 (1994) (citing *Waller v. Georgia*, 467 U.S. 39, 48 (1984)). The State has the burden of presenting sufficient evidence, either in its case-in-chief or by voir dire, to permit the trial judge to satisfy the four-part *Waller* test. *State v. Rollins*, 231 N.C. App. 451 (2013). The trial judge's findings of fact need not be exhaustive but must be sufficient for an appellate court to review the propriety of his or her decision to close the proceedings. *State v. Rollins*, 221 N.C. App. 572 (2012).

The trial judge should take care not to unduly restrict access to the courtroom. *Compare State v. Moctezuma*, 141 N.C. App. 90 (2000) (new trial awarded where trial judge made no findings of fact before closing the courtroom not only to the general public, but to defendant and defense counsel as well), *with State v. Godley*, 234 N.C. App. 562 (2014) (closure of the courtroom upheld where it was limited to the examination of the alleged victim and did not apply to essential court personnel, members of defendant's family, or witnesses), *and State v. Comeaux*, 224 N.C. App. 595 (2012) (closure of the courtroom was no broader than necessary where less than eight spectators were excluded, only one of whom was favorable to defendant and was already subject to sequestration order). The trial judge may order the courtroom closed for the entire trial or for only a portion of the proceedings. *See, e.g., State v. Clark*, 324 N.C. 146 (1989) (no impropriety found where trial judge limited public egress from the courtroom during closing arguments so as not to distract the jury).

Statutory authority for limiting access. Under G.S. 15A-1034(a), a judge "may impose reasonable limitations on access to the courtroom when necessary to ensure the orderliness of courtroom proceedings or the safety of persons present." G.S. 15-166 specifically provides that the trial judge may exclude bystanders in rape or sex offense

trials during the taking of the testimony of the prosecutrix. *See State v. Register*, 206 N.C. App. 629 (2010) (no abuse of discretion by trial judge in child sex offense case in excluding, pursuant to G.S. 15A-166 and G.S. 15A-1034, all spectators from the courtroom during the alleged victim's testimony except for the alleged victim's mother and stepfather, an investigator for each side, and a high school class that was observing court proceedings). The four-part *Waller* test must be applied in ruling on a request to close the courtroom made pursuant to G.S. 15-166. *See State v. Rollins*, 221 N.C. App. 572 (2012) (while G.S. 15-166 allows the closure of the courtroom during a rape victim's testimony, the trial judge must balance the interests of the prosecutor with defendant's constitutional right to a public trial).

Statutory authority for ordering search of persons in courtroom. G.S. 15A-1034(b) authorizes a trial judge to "order that all persons entering or any person present and choosing to remain in the courtroom be searched for weapons or devices that could be used to disrupt or impede the proceedings." The judge may also "require that belongings carried by persons entering the courtroom be inspected." If the judge orders a search pursuant to this subsection, he or she must enter it on the record.

Practice note: Although the denial of the right to a public trial is considered structural error generally necessitating a new trial, counsel must lodge a timely objection based on state and federal *constitutional* grounds to preserve the issue on appeal. *See generally State v. Rollins*, 221 N.C. App. 572 (2012) (acknowledging that the denial of the right to a public trial amounts to structural error); *see also State v. Sheets*, 239 N.C. App. 574 (2015) (unpublished) (refusing to review the merits of defendant's argument that his constitutional right to a public trial was violated where defendant failed to object when the State moved to exclude bystanders during the prosecuting witness' testimony). Counsel should also object on statutory grounds, if applicable, to any restriction of access to the courtroom.

B. Controlling Access to Other Areas

In especially unusual circumstances, the trial judge may restrict activities not only in the courtroom itself, but also in areas around the courthouse. *See, e.g., State v. Grant*, 19 N.C. App. 401, 414 (1973) (trial judge's prohibition of picketing, parading, and congregating in and around courthouse and requirement that spectators submit to a search for weapons before entering courtroom were proper where the case was "of a nature which would attract public attention" and "[i]t was necessary for the court to maintain discipline and decorum in the courtroom and its environs").

C. Removal of Disruptive Defendant

All criminal defendants have a constitutional right to be present at every stage of trial. This right can be waived by a non-capital defendant either expressly or by his or her disruptive behavior. When a defendant becomes disruptive, the trial judge has the authority to remove him or her from the courtroom, but strict procedures must be followed before doing so. For a detailed discussion of the defendant's right to be present,

and the procedures that must be followed in order to remove a disruptive defendant, see *supra* § 21.1F, Removal of Disruptive Defendant (describing personal rights of defendant).

D. Removal of Disruptive Witnesses or Spectators

G.S. 15A-1033 authorizes a trial judge, in his or her discretion, to order any person other than a defendant removed from a courtroom when his or her actions disrupt the conduct of the trial. *See also State v. Dawson*, 281 N.C. 645, 656 (1972) (no prejudicial error by trial judge in ejecting two disruptive spectators from the courtroom "until they decided to behave themselves" because the action was necessary in order for the trial to continue "under circumstances of judicial decorum and fairness to all concerned"); *State v. Dean*, 196 N.C. App. 180 (2009) (no abuse of discretion by trial judge in removing four spectators from the courtroom during defendant's trial for an allegedly gang-related murder where one spectator was a co-defendant, jurors had expressed concerns for their safety as had jurors in defendant's first trial, and the spectators had violated pretrial orders concerning decorum in the courtroom). The judge is not required to make findings of fact to support his or her removal of disruptive spectators from the courtroom. *Dean*, 196 N.C. App. 180, 189 (while a trial judge is required by G.S. 15A-1032 to enter in the record the reasons for removing a disruptive defendant from the courtroom, G.S. 15A-1033 "imposes no such requirement").

E. Restraint of Defendant and Witnesses During Trial

Restraint of defendant allowed only under extraordinary circumstances. The Fifth and Fourteenth Amendments to the U.S. Constitution prohibit the use of physical restraints visible to the jury unless the trial court has determined, in its discretion, that the restraints are justified by an essential state interest specific to a particular trial. *Deck v. Missouri*, 544 U.S. 622 (2005); *see also State v. Tolley*, 290 N.C. 349 (1976) (the Due Process Clause of the U.S. Constitution and article I, section 19 of the N.C. Constitution require the defendant to be tried free of all bonds or shackles except in extraordinary instances). G.S. 15A-1031 provides that a defendant may be physically restrained during his or her trial "when the judge finds the restraint is reasonably necessary to maintain order, prevent the defendant's escape, or provide for the safety of persons." For a detailed discussion of the defendant's right to appear at trial free from physical restraints and the procedures that must be followed before a defendant may be restrained, see *supra* § 21.6, Right to Appear Free of Physical Restraints (describing personal rights of defendant).

Restraint of witnesses during trial. In addition to allowing a defendant to be restrained under certain circumstances, G.S. 15A-1031 grants the trial judge the authority to restrain witnesses. The procedures applicable to the restraint of the defendant, described *supra* in § 21.6, Right to Appear Free of Physical Restraints, are also applicable to the restraint of witnesses. Whether to restrain a witness is a discretionary decision and will not be disturbed absent an abuse of discretion. *See State v. Abraham*, 338 N.C. 315 (1994) (no abuse of discretion or expression of opinion on credibility shown where trial judge

permitted incarcerated prosecuting witness to appear without shackles but required three incarcerated defense witnesses to be restrained while testifying).

Necessity for objection. Appellate review is waived if counsel fails to object to the trial judge's order of restraint. *See State v. Tolley*, 290 N.C. 349 (1976); *State v. Thomas*, 134 N.C. App. 560 (1999). Counsel must specifically assert a constitutional and statutory basis for the objection to preserve the issue on both grounds on appeal. *See State v. Holmes*, 355 N.C. 719 (2002) (where defendant failed to object on constitutional grounds, review of the trial judge's decision to restrain was limited to statutory error pursuant to the abuse of discretion standard). To preserve a challenge to the trial judge's failure to comply with the statutory requirements of G.S. 15A-1031, a defendant must object and specify the grounds on which the objection is based. *See State v. Paige*, 316 N.C. 630 (1986) (appellate review of the trial judge's failure to give instruction required by G.S. 15A-1031(3) was waived because defendant made no objection at trial).

Practice note: If the trial judge, over objection, orders the defendant or a defense witness to be physically restrained during trial, counsel should request that the jury's view of the restraints be obstructed and that the defendant or witness walk to and from the witness chair outside the presence of the jury. *See, e.g.*, *State v. Wilson*, 354 N.C. 493 (2001) (defendant's leg braces were hidden underneath his clothing); *State v. Atkins*, 349 N.C. 62 (1998) (cloth was draped over defense table to conceal defendant's leg restraints from jury); *State v. Wright*, 82 N.C. App. 450 (1986) (oversized briefcase placed by defendant's chair to obstruct jurors' view of his shackles). If the restraints are not visible to the jury, the risk is reduced that the restraints will create prejudice in the minds of the jurors. *See State v. Holmes*, 355 N.C. 719 (2002). However, the restraints may still impede the person's thought processes and ease of communication.

When a defendant or a defense witness is restrained, counsel also should consider whether an instruction to the jury regarding the restraints would be helpful or whether it would draw negative attention to the trial judge's determination to restrain that person during trial. If you do not want an instruction, you must object; otherwise, the trial judge is required by G.S. 15A-1031(3) to instruct the jurors "that the restraint is not to be considered in weighing evidence or determining the issue of guilt."

F. Conspicuous Use of Security Personnel

Occasionally a trial judge may order or allow the conspicuous deployment of security personnel in the courtroom during trial. *See, e.g., State v. Spaulding*, 288 N.C. 397 (1975), *vacated in part on other grounds*, 428 U.S. 904 (1976) (no abuse of discretion by trial judge in allowing use of armed prison guards and officers in and around the courthouse where three defendants were being tried for first degree murder of fellow prison inmate and many of the witnesses were convicts); *State v. Jackson*, 235 N.C. App. 384 (2014) (no abuse of discretion or violation of defendant's constitutional rights to a fair trial or due process where trial judge ordered additional security personnel, including one bailiff standing within arm's reach of defendant, after defendant had slipped out of his leg shackles and escaped from the courtroom during the lunch break on the first day

of testimony at his trial for first degree murder). "[I]t is within the judge's discretion, when necessary, to order armed guards stationed in and about the courtroom and courthouse to preserve order and for the protection of the defendant and other participants in the trial." *State v. Tolley*, 290 N.C. 349, 363 (1976).

Unlike the courtroom practices of shackling or requiring the defendant to appear in prison garb, the use of noticeably identifiable security officers in the courtroom has not been found to be the sort of inherently prejudicial practice that should be permitted only when justified by an essential state interest specific to each trial. *See Holbrook v. Flynn*, 475 U.S. 560 (1986) (finding no violation of respondent's Sixth Amendment right to a fair trial where four uniformed state troopers were brought in to cover for overextended courtroom security personnel; troopers sat in the front row of the spectator section not far behind the respondent and five co-defendants who were being tried for armed robbery). In *Holbrook*, the U.S. Supreme Court reasoned that allowing the noticeable deployment of security personnel differs from the inherently prejudicial courtroom practices of shackling and forced appearance in prison garb because there is a wider range of inferences that the jury might draw from the officers' presence. Shackling and prison clothes unmistakably indicate that the defendant needs to be separated from the community at large while the presence of guards in a courtroom may likely be taken for granted by the jury "so long as their numbers or weaponry do not suggest particular official concern or alarm." *Id*. at 569. Under the circumstances presented in *Holbrook*, the Court believed that the four officers sitting quietly in the front row were unlikely to be taken by the jury as a sign of anything other than a normal concern for the safety and order of the proceedings. Although the Court found no constitutional violation in *Holbrook*, it was careful to note that it did not minimize the threat that a roomful of uniformed and armed policemen might pose to a defendant's chance of receiving a fair trial. *See id.* at 570–71.

Practice note: If the trial judge orders or permits additional or conspicuous security personnel to be in the courtroom during trial such that the jury may be influenced negatively, counsel should object based on a violation of the client's constitutional rights to a fair trial and due process. Cite the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution and article I, §§ 19, 23, and 24 of the N.C. Constitution. If the objection is overruled, counsel should ensure that the record contains a detailed description of the security measures that were the basis for the objection.

Counsel may also want to consider whether to request (or object to) a cautionary instruction addressing the amount of security in the courtroom. As with jury instructions regarding clients who are restrained, counsel should consider whether it would be helpful or whether it would draw negative attention to the trial judge's determination that additional security was necessary in the case. *See State v. Jackson*, 235 N.C. App. 384 (2014) (finding no error in trial judge's failure to explicitly instruct the jury regarding the use of additional security measures because it would have drawn the jury's attention to those measures and alerted the jury to the fact that the measures specifically related to defendant's trial).

G. Contempt Powers and Inherent Authority

In addition to the use of the powers set out above, a presiding judge is authorized by G.S. 15A-1035 to maintain courtroom order through the use of his or her contempt powers as provided in G.S. Ch. 5A, Contempt, and through the use of other inherent powers of the court.

H. Additional Resources

For further discussion of courtroom closure and a trial judge's inherent authority to control the courtroom, see Michael Crowell, *Inherent Authority*, N.C. SUPERIOR COURT JUDGES' BENCHBOOK (Jan. 2015), and Michael Crowell, *Closing Court Proceedings*, N.C. SUPERIOR COURT JUDGES' BENCHBOOK (Nov. 2012).