24.2 Right to Jury Trial under North Carolina Constitution

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Article I, section 24 of the N.C. Constitution establishes a defendant's state constitutional right to a jury trial. It states:

> No person shall be convicted of any crime but by the unanimous verdict of a jury in open court, except that a person accused of any criminal offense for which the State is not seeking a sentence of death in superior court may, in writing or on the record in the court and with the consent of the trial judge, waive jury trial, subject to procedures prescribed by the General Assembly. The General Assembly may, however, provide for other means of trial for misdemeanors, with the right of appeal for trial de novo.

This right is also addressed in G.S. 15A-1201(a), which states that "[i]n all criminal cases the defendant has the right to be tried by a jury of 12 whose verdict must be unanimous." Our state constitutional right to a jury trial is broader in several respects than the federal constitutional right to a jury trial. Our state constitutional right should always be cited, along with the federal constitutional right, in objecting to an infringement of the right to a jury trial.

A. Scope of Right

Our state constitution confers a right to a jury trial for *all* crimes, not just serious ones. There are two exceptions to the jury trial right.

First, the General Assembly has provided for the initial trial of misdemeanors without a jury in district court. People tried without a jury must be afforded the right to appeal for a trial de novo before a jury. *See* N.C. CONST. art. I, § 24; G.S. 15A-1201(a); G.S. 15A-1431(b); *State v. Hudson*, 280 N.C. 74 (1971); *accord State v. Reaves*, 142 N.C. App. 629, 634 (2001); *see also Ludwig v. Massachusetts*, 427 U.S. 618, 625–26 (1976) (two-tier system of adjudication not constitutionally infirm where defendant afforded an absolute right to a jury trial in the second tier).

Second, it appears that a judge may hold a defendant in criminal contempt, without affording him or her a jury trial, as long as the punishment is six months or less. *See Blue Jeans Corp. v. Amalgamated Clothing Workers*, 275 N.C. 503, 511 (1969) (court stated

general six-month rule but on facts presented held only that defendant was not entitled to jury trial where he was charged with criminal contempt punishable by thirty days or less); *Reaves*, 142 N.C. App. 629, 635 (noting that *Blue Jeans* court only addressed criminal contempt punishable by thirty days or less); *see also Codispoti v. Pennsylvania*, 418 U.S. 506, 516–17 (1974) (holding that defendant entitled to jury trial under U.S. Constitution where charged with multiple counts of criminal contempt based on conduct during trial and aggregate punishment exceeded six months).

B. Waiver of Right

Generally. Before December 1, 2014, the right to a trial by jury in superior court guaranteed by article I, section 24 of the N.C. Constitution, was unwaivable, except by pleading guilty. *See, e.g.*, *State v. Hudson*, 280 N.C. 74 (1971); *State v. Bunch*, 196 N.C. App. 438, 440 (2009), *aff'd*, 363 N.C. 841 (2010); *see also State v. Muse*, 219 N.C. 226 (1941) (per curiam) (defendant who pled not guilty could not consent to judicial determination of facts in criminal case). That meant that a defendant could not relinquish the right to a jury trial and have a trial at which the judge determined his or her guilt or innocence, i.e., a "bench trial." *See* Jeffrey B. Welty & Komal K. Patel, *Understanding North Carolina's Proposed Constitutional Amendment Allowing Non-Jury Felony Trials* (UNC Sch. of Gov't, Aug. 2014). An amendment to this section of the constitution was approved by voters in November 2014. Article I, section 24 now provides that in noncapital cases, an accused may waive jury trial "in writing or on the record in the court and with the consent of the trial judge" subject to the procedures prescribed by the General Assembly. This amendment brings the law of North Carolina in line with that of the other forty-nine states and the federal criminal justice system. Welty & Patel, *supra*, at 8; *see also Adams v. United States ex rel. McCann*, 317 U.S. 269, 279–80 (1942) (defendant may waive Sixth Amendment right to jury trial and be tried by judge).

The decision whether to waive the fundamental right to a jury trial belongs to the defendant. *Florida v. Nixon*, 543 U.S. 175, 187 (2004). This decision should be made by a competent defendant, after full consultation with his or her defense counsel. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION, Standard 4-5.2(a)(iii) (3d ed. 1993).

Statutory procedures. G.S. 15A-1201 was rewritten in 2013 to allow a defendant to waive his or her right to a jury trial if voters approved a constitutional amendment permitting waiver. The amendment passed and G.S. 15A-1201, as rewritten, became effective December 1, 2014 and "applies to criminal cases arraigned in superior court on or after that date." *See* 2013 N.C. Sess. Laws Ch. 300, § 5. The amended statute permitted waiver by a defendant if made knowingly and voluntarily, in writing or on the record, and with the trial judge's consent.

G.S. 15A-1201 was subsequently amended to set out more detailed procedures that must be followed when a defendant knowingly and voluntarily waives the right to a jury trial. *See* 2015 N.C. Sess. Laws Ch. 289, § 1. The effective date of the amended act is October 1, 2015 and the procedures apply to all defendants waiving their rights to a jury trial on or

after that date. *See* 2015 N.C. Sess. Laws Ch. 289, § 4. The Governor did not sign the bill until October 29, 2015, so some uncertainty exists about the effect of the bill between October 1 and October 29. *See* Jeff Welty, *Changes to Jury Waiver Procedures*, N.C. CRIM. L. UNC SCH. OF GOV'T BLOG (November 4, 2015) (surmising that "if the issue were ever raised, a court would find that the bill was not law until October 29 and was not intended to apply retroactively").

A defendant who was arraigned prior to December 1, 2014, cannot waive his or her right to a jury trial even if the State stipulates to the waiver and the trial judge consents to a bench trial. *See State v. Boderick*, ___ N.C. ___, 812 S.E.2d 889, 894 (2018) (vacating conviction and remanding for a new trial after finding that because defendant was arraigned on February 24, 2014, he was not "constitutionally permitted to waive his right to a trial by jury").

Practice note: The revised procedures impose early deadlines, discussed in detail below, on a defendant who wants to waive the right to a jury trial or subsequently revoke a waiver. Counsel should consider these carefully in advising the defendant and in determining how to proceed.

Pursuant to G.S. 15A-1201(c), a defendant must give notice of intent to waive a jury trial. This notice can be given by one of three methods:

1. written stipulation, signed by both the defendant and the State and served on counsel for co-defendants, if any;
2. filing a written notice of intent to waive that was served on the State and counsel for co-defendants, if any, within the earliest of ten working days after
   a. arraignment;
   b. service of a calendar setting under G.S. 7A-49.4(b); or
   c. a definite trial date is set under G.S. 7A-29.4(c); or
3. giving oral notice of intent to waive on the record in open court by the earlier of
   a. arraignment; or
   b. calendar call under G.S. 7A-49.4(b) or (c).

Once a defendant has given notice of intent to waive jury trial, the State must schedule a hearing to determine whether the judge will agree to hear the case without a jury. G.S. 15A-1201(d). The statute does not set a time limit, however, within which the hearing must be set.

The decision whether to allow a waiver must be made by the judge who will actually preside over the trial. Before consenting to the defendant's waiver, the trial judge must:

- personally address the defendant and determine whether her or she fully understands and appreciates the consequences of the decision to waive the right to a trial by jury;
- determine whether the State objects to a waiver and, if so, why;
- consider arguments by the defendant and the State regarding the defendant's waiver.

G.S. 15A-1201(d). Unlike some jurisdictions, although the prosecutor may be heard on the issue, the prosecutor does not have to consent to the waiver. Jeffrey B. Welty & Komal K. Patel, *Understanding North Carolina's Proposed Constitutional Amendment Allowing Non-Jury Felony Trials* (UNC Sch. of Gov't, Aug. 2014). The N.C. Administrative Office of the Courts has created a "Waiver of Jury Trial" form, AOC-CR-405, which can be used to fulfill the procedural requirements of G.S. 15A-1201.

Scope of waiver. When a defendant waives a jury trial under this statute, "the jury is dispensed with," and the trial judge will hear and determine "the whole matter of law and fact" including all aggravating factors referred to in G.S. 20-179 and G.S. 15A-1340.16(a1) and (a3). G.S. 15A-1201(b); *see also* G.S. 15A-1340.16(a6); G.S. 20-179(a3).

Although G.S. 15A-1201 does not specifically address the "under supervision" point referred to in G.S. 15A-1340.14(b)(7) or other sentencing enhancements, a defendant appears to waive the jury determination of these sentencing factors when he or she waives the right to a jury trial. *See* G.S. 15A-1201(b) (stating that "the whole matter of law and fact" is heard by the trial judge when a defendant waives his or her right to a jury trial). For further discussion of the waiver of jury determination as to sentencing factors, see *supra* § 24.1E, Right to Jury Verdict on Every Element of Offense, Including "Sentencing" Factors.

It appears that a defendant may also opt to plead guilty to the underlying offense and then request a bench trial as to the aggravating factors. *See* G.S. 15A-1201(b) (referencing G.S. 15A-1340.16(a3), which provides for a jury determination of aggravating factors when a defendant pleads guilty to a felony but contests the existence of aggravating factors). While G.S. 15A-1201(b) does not specifically address the situation where a defendant desires a jury trial on the underlying offense but would like a bench trial on the aggravating factors, the "under supervision" point, or the sentencing enhancements, no statute prohibits this.

Co-defendants. In cases where a motion for joinder of co-defendants has been allowed, a jury trial is required unless all co-defendants waive the right to a trial by jury. The trial judge, in his or her discretion, can sever the case if not all co-defendants waive the right to a jury trial. G.S. 15A-1201(b).

Revocation of waiver by defendant. Once the waiver is consented to by the trial judge, a defendant can revoke his or her waiver one time as of right. The revocation must be within ten days business days of the defendant's initial notice of waiver. The revocation must be in open court with the State present or in writing to both the State and the trial judge. In all other circumstances, the waiver can only be revoked by the defendant if the trial judge finds the revocation would not cause unreasonable hardship or delay to the State. Once a revocation has been granted, "the decision is final and binding." G.S. 15A-1201(e).

Suppression of evidence. If the defendant who has waived the right to a jury trial makes a motion to suppress evidence under Chapter 15A, Article 53, the judge must make written findings of fact and conclusions of law. G.S. 15A-1201(f). For further discussion of the findings and conclusions required following a suppression hearing, see 1 NORTH CAROLINA DEFENDER MANUAL § 14.6F, Required Findings (2d ed. 2013).

If evidence is suppressed before trial, the judge who granted the motion may still serve as the judge at the bench trial. The N.C. Court of Appeals has held that because trial courts are presumed to disregard incompetent evidence in making decisions as finders of fact in bench trials, "no prejudice exists simply by virtue of the fact that such evidence was made known to them absent a showing by the defendant of facts tending to rebut this presumption." *State v. Jones*, ___ N.C. App. ___, 789 S.E.2d 651, 656 (2016) (finding that defendant chose to waive right to jury trial with full knowledge that the same judge who had granted his pretrial motion to suppress his confession would also serve as the judge at his bench trial, and defendant failed to make any showing rebutting the presumption that the trial judge disregarded the incompetent evidence in making his decision as finder of fact). However, "'this presumption is weakened when, over objection, the judge admits clearly incompetent evidence.'" 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 5, at 14–15 (7th ed. 2011) (quoting *State v. Davis*, 290 N.C. 511, 542 (1976)).

Possible benefits to waiving jury trial. There is some evidence that judges are more likely than juries to acquit defendants in some cases. *See* Jeffrey B. Welty & Komal K. Patel, *Understanding North Carolina's Proposed Constitutional Amendment Allowing Non-Jury Felony Trials* (UNC Sch. of Gov't, Aug. 2014); *see also* Paul Holland, *Sharing Stories: Narrative Lawyering in Bench Trials*, 16 CLINICAL L. REV. 195 (Fall, 2009) (citing Andrew Leipold, *Why Are Federal Judges So Acquittal Prone?*, 83 WASH. U. L.Q. 151, 219 (2005)). A defendant may want to consider requesting a bench trial in cases where:

- the evidence or defense is highly technical;
- the facts are particularly heinous or inflammatory;
- substantial adverse pretrial publicity about the case has permeated the community;
- the defendant's prior criminal record, attitude, unpopular views or beliefs, or appearance may cause a jury to look unfavorably upon him or her; or
- the complexity of the case will likely confuse jurors to the defendant's detriment.

See 3 DAVID S. RUDSTEIN, C. PETER ERLINDER, DAVID C. THOMAS, CRIMINAL CONSTITUTIONAL LAW § 14.06 (2016); *see also* Welty & Patel, *supra*, at 5.

C. Number of Jurors

Generally. North Carolina juries must be composed of twelve people. G.S. 15A-1201(a). "It is elementary that the jury provided by law for the trial of indictments is composed of twelve persons; a less number is not a jury." *State v. Hudson*, 280 N.C. 74, 79 (1971) (notwithstanding defendant's consent, a jury of eleven could not return valid verdict); *see*

also State v. Poindexter, 353 N.C. 440, 443 (2001) ("Article I, Section 24 of the North Carolina Constitution . . . contemplates no more or no less than a jury of twelve persons"; where juror was disqualified after guilt-innocence phase for misconduct during guilt-innocence phase, verdict violated defendant's constitutional right to jury of twelve qualified jurors); *State v. Bindyke*, 288 N.C. 608, 623 (1975) (finding alternate juror's presence in jury room during deliberations violated constitutional right to jury of twelve). The amendments to article I, section 24 and G.S. 15A-1201 in 2014 do not change the requirement that juries in North Carolina must be composed of twelve people.

Substituting alternate during deliberations. Once the jury has begun its deliberations, an alternate may not be substituted without violating the defendant's constitutional right to a jury of twelve. *See State v. Bunning*, 346 N.C. 253 (1997); *State v. Hardin*, 161 N.C. App. 530 (2003). *Bunning* reasoned that a substitution during deliberations results in an unconstitutional verdict of eleven jurors plus two jurors who each participate partially.

Instructions to less than all the jurors. Article I, section 24 of the N.C. Constitution requires that a trial judge instruct all twelve jurors simultaneously. *See State v. Ashe*, 314 N.C. 28 (1985) (trial judge erred in speaking only with foreperson about exhibits the jury wished to see; all the elements of a trial should be viewed and heard simultaneously by all twelve jurors); *see also* G.S. 15A-1233 (if jury requests review of testimony or other evidence after deliberations have begun, all jurors must be conducted to the courtroom); *State v. Wilson*, 363 N.C. 478, 487–88 (2009) (State failed to show harmless error where trial judge gave instructions to a single juror in violation of defendant's right to a unanimous jury verdict under article I, section 24).

For further discussion of the trial judge's responsibilities in giving additional instructions to the jury after it retires for deliberations, see *infra* § 32.5, Additional Instructions after Jury Retires (2d ed. 2012). For further discussion of the trial judge's responsibilities when the jury requests a review of exhibits or testimony, see *infra* § 34.2, Requests to Review Testimony and Exhibits During Deliberations (2d ed. 2012).

D. Jury Unanimity

Generally. All jury verdicts in North Carolina must be unanimous. *See* N.C. CONST. art. I, § 24; G.S. 15A-1201(a); G.S. 15A-1237(b); *State v. Baldwin*, 330 N.C. 446, 453–54 (1992). The jury must unanimously agree that the State has proven every element of an offense. *See State v. Jordan*, 305 N.C. 274 (1982); *see also State v. Lewis*, 274 N.C. 438, 442 (1968) (defendant entitled to jury verdict on every essential element of the crime charged); N.C. Pattern Jury Instruction—Crim. 101.35 (June 2011) ("All twelve of you must agree to your verdict. You cannot reach a verdict by majority vote."). The amendments to article I, section 24 and to G.S. 15A-1201 in 2014 do not change the requirement that jury verdicts in North Carolina must be unanimous. For further discussion of the unanimity requirement after the 2014 amendments, see Jeff Welty, *Non-Unanimous Verdicts in Criminal Cases?*, N.C. CRIM. L. UNC SCH. OF GOV'T BLOG (May 12, 2015).

Disjunctive jury instructions. The most common problem with jury unanimity occurs when jury instructions are given in the disjunctive—that is, when the instructions allow jurors to find that the defendant committed one act *or* another. Disjunctive jury instructions violate the defendant's state constitutional right to a unanimous jury verdict if the disjunctive alternatives state separate offenses. *See, e.g.*, *State v. Lyons*, 330 N.C. 298 (1991) (disjunctive instructions are fatally ambiguous if the alternatives constitute separate offenses for which the defendant could be separately punished; instruction that permitted jury to find that defendant assaulted one person or another person violated jury unanimity requirement); *State v. Diaz*, 317 N.C. 545, 554 (1986) (instruction that permitted jury to find that defendant possessed *or* transported marijuana was fatally defective because possession and transportation are separate offenses).

Jury instructions that disjunctively list alternative ways of committing the same offense are not erroneous; the jury need not be unanimous on the method of committing a single element. *See, e.g., State v. Taylor*, 362 N.C. 514 (2008) (trial judge properly instructed jury that it could convict defendant of felony murder if it found the predicate felony of armed robbery of either of two named victims); *State v. Bell*, 359 N.C. 1, 30 (2004) (disjunctive instructions on first-degree kidnapping were not fatally ambiguous even though jury did not have to agree on the particular purpose for which the victim was restrained, removed, or confined; alternative purposes offered were "numerous routes" by which defendant could be convicted of one particular offense); *State v. Bradley*, 181 N.C. App. 557, 562 (2007) (no error by trial judge in submitting a verdict sheet to the jury that did not differentiate between the two statutory definitions of the offense of impaired driving; defendant was convicted of "a single wrong that could be established alternatively through either of its elements"); *State v. Petty*, 132 N.C. App. 453, 462–63 (1999) (in first-degree sex offense case, disjunctive instructions on whether sex act was cunnilingus or penetration by object not error because offense could be committed in either of two ways); *see also Schad v. Arizona*, 501 U.S. 624 (1991) (jury unanimity not required as to whether defendant committed felony murder or premeditated murder; jury does not have to be unanimous on theory of crime).

However, reversal on appeal may still be required if the judge instructs the jury on alternative ways of committing the offense, there is insufficient evidence to support one of those theories, and the record does not indicate on which theory the jury relied. *See, e.g., State v. Pakulski*, 319 N.C. 562, 574 (1987) (granting a new trial where there was insufficient evidence to support one of two felonies submitted to jury in support of felony murder); *State v. Moore*, 315 N.C. 738, 749 (1986) (insufficient evidence to support one of three purposes submitted to jury in support of first-degree kidnapping); *State v. Johnson*, 183 N.C. App. 576, 584–85 (2007) (new trial granted due to insufficient evidence to support one of two purposes submitted to jury in support of second-degree kidnapping). *But see State v. Fowler*, __ N.C. App. ___, 800 S.E.2d 724 (2017) (Berger, J., concurring) (seeking guidance from N.C. Supreme Court on whether a defendant is automatically entitled to a new trial or whether the harmless error standard should be applied in cases where the trial judge, over objection, erroneously instructs on alternate theories, one of which is not supported by the evidence and it cannot be discerned from the record on which theory the jury relied), *disc. review granted*, 870 N.C. 276 (2017);

see also State v. Boyd, 222 N.C. App. 160 (2012) (Stroud, J., dissenting), *rev'd per curiam for reasons stated in dissent*, 366 N.C. 548 (2013) (finding that unpreserved instructional errors of the type discussed above were not plain error per se but must be reviewed to determine whether the error had a probable impact on the jury's finding of guilt).

In determining whether two alternatives constitute separate offenses or merely different ways of committing one offense, the court considers legislative intent. *See, e.g., State v. Creason*, 313 N.C. 122, 129–31 (1985) (General Assembly's intent in making it unlawful to possess a controlled substance with the intent to sell *or* deliver was to prevent the transfer of controlled substances from one person to another; requirement of jury unanimity was met even if six jurors found that defendant intended to "sell" the LSD and six jurors found that defendant intended to "deliver" the LSD because it was one crime).

For a collection of cases that discuss the use of disjunctive language in jury instructions and the unanimity of jury verdicts, see Robert L. Farb, *The "Or" Issue in Criminal Pleadings, Jury Instructions, and Verdicts; Unanimity of Jury Verdict* (UNC Sch. of Gov't, Feb. 2010).

Jury unanimity in capital sentencing. The unanimity requirement applies to certain jury sentencing decisions in capital cases. *See State v. McCarver*, 341 N.C. 364, 388–94 (1995). *McCarver* held that the jury must be unanimous on every "outcome determinative" issue in the sentencing decision. Outcome determinative issues are Issues I (existence of aggravating circumstances), III (mitigating circumstances do not outweigh aggravating circumstances), and IV (appropriateness of death as punishment). Jurors do not have to be unanimous on Issue II, the existence of mitigating circumstances. *See McKoy v. North Carolina*, 494 U.S. 433, 442–43 (1990) (Eighth Amendment requires that individual jurors be allowed to make their own findings with respect to the existence of reasons not to impose sentence of death).