
26.2 Exposure to Extraneous Information

Juror misconduct encompasses a wide range of improper activities. Misconduct is determined by the facts and circumstances in each case. Exposure to extraneous information has occupied the courts' attention in numerous cases and is discussed here. Other common types of misconduct are discussed *infra* in § 26.3.

A. Discovered Before Verdict

A fundamental aspect of a criminal defendant's constitutional right to confront witnesses and evidence against him or her is that a jury's verdict must be based on evidence produced at trial, not on extrinsic evidence that has escaped the rules of evidence, supervision of the court, and other procedural safeguards of a fair trial. *See, e.g.*, *Parker v. Gladden*, 385 U.S. 363 (1966); *Turner v. Louisiana*, 379 U.S. 466 (1965). "'[W]hen there is a *substantial reason to fear* that the jury has become aware of improper and prejudicial matters, the trial court must question the jury as to whether such exposure has occurred and, if so, whether the exposure was prejudicial.'" *State v. Campbell*, 340 N.C. 612, 634 (1995) (emphasis added) (citation omitted); *see also State v. Hines*, 131 N.C. App. 457 (1998) (defendants' right to confrontation violated and motion for mistrial should have been granted where prosecutor's notes and typewritten list of statements defendants made, including hearsay statements, were mistakenly published to the jury without being admitted into evidence). "It is within the discretion of the trial judge as to what inquiry to make." *State v. Willis*, 332 N.C. 151, 173 (1992); *see also State v. Jackson*, 235 N.C. App. 384 (2014) (individual inquiry of jurors not necessary where the general inquiry of the jury by the bailiff and by the trial judge was sufficient to ensure that jury had not been exposed to improper or prejudicial material regarding defendant's attempted escape from the courthouse during trial).

When information or evidence that would not be admissible at trial reaches the jury, the trial judge must weigh all the circumstances and determine in his or her discretion whether or not a defendant's right to a fair trial has been violated. *State v. Jones*, 50 N.C. App. 263, 268 (1981). The denial of a motion for a mistrial based on alleged misconduct affecting the jury is equivalent to a finding by the trial judge that prejudicial misconduct has not been shown, and the decision will be reversed only on a clear showing that the trial judge abused his or her discretion. *State v. Bonney*, 329 N.C. 61 (1991); *State v. Degree*, 114 N.C. App. 385, 392 (1994).

B. Discovered After Verdict

Generally. As a general rule, once a verdict is rendered, it may not 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 State v. Cherry*, 298 N.C. 86 (1979). "However, harsh injustice has sometimes resulted from the view that jury verdicts are beyond challenge. Thus, as an 'accommodation between policies designed to safeguard the institution of trial by jury and policies designed to insure a just result in [an] individual case,' certain exceptions to the rule have been carved out." *State v. Lyles*, 94 N.C. App. 240, 244 (1989) (citation omitted). G.S. 15A-1240 and N.C. Rule of Evidence 606(b) provide limited exceptions to the anti-impeachment rule when outside influences affect the deliberative process. For further discussion of the anti-impeachment rule including an exception that applies where clear racial bias is shown to have played a part in jury deliberations, see *infra* § 34.7K, Impeachment of the Verdict.

Application of statute. G.S. 15A-1240(c)(1) allows impeachment of a verdict only in a criminal case and only when matters not in evidence came to the attention of one or more jurors under circumstances that would violate the defendant's constitutional right to confront the witnesses against him or her. If the challenged evidence does not implicate the defendant's right to confront under the Sixth Amendment to the U.S. Constitution or article I, section 23 of the N.C. Constitution, G.S. 15A-1240(c)(1) does not apply. *Compare State v. Rosier*, 322 N.C. 826, 832 (1988) (defendant's right to confront not violated where jury foreman watched a program on child abuse contrary to the trial judge's instructions and foreman told other jurors about a young friend of his who had been raped; jurors' affidavits concerning these events should not have been considered by the court because "[p]arties do not have the right to cross examine jurors as to the arguments they make during deliberation as the foreman did in this case"), *with State v. Heavner*, 227 N.C. App. 139, 149 (2013) (conversation between defendant's mother and juror in courthouse hallway before trial violated defendant's confrontation right because "matters not in evidence" dealing with defendant and the case were discussed).

Under subsection (c)(2) of G.S. 15A-1240, a verdict may also be impeached after the jury has been dispersed when there is evidence of bribery, intimidation, or attempted bribery or intimidation of a juror.

Application of rule. N.C. Rule of Evidence 606(b), which applies in both criminal and civil cases, provides that a juror is competent to testify when the validity of a verdict is challenged, but only on the question (1) whether extraneous prejudicial information was improperly brought to the jury's attention or (2) whether any outside influence was improperly brought to bear upon any juror. Jurors can testify as to objective events set out in the above rule but cannot testify as to the subjective effect that the matters had on their verdict. *State v. Lyles*, 94 N.C. App. 240, 244 (1989).

Extraneous information under Rule 606(b) has been interpreted to mean information that reaches a juror without being introduced into evidence and that deals specifically "with

the defendant or the case which is being tried." *Compare State v. Rosier*, 322 N.C. 826, 832 (1988) (judge's consideration of jurors' affidavits found improper where the affidavits related that jury foreman watched a program on child abuse contrary to the trial judge's instructions and told jurors about a young friend of his who had been raped because that information was not "extraneous information" within the meaning of Rule 606 since it did not deal with defendant or the case being tried), *with State v. Heavner*, 227 N.C. App. 139, 149 (2013) (conversation between defendant's mother and juror in courthouse hallway about defendant and the case contained "extraneous information" within the meaning of Rule 606(b)).

General information that a juror has gained in his or her day-to-day experiences does not constitute "extraneous information." *Compare State v. Heatwole*, 344 N.C. 1 (1996) (juror's exchange with his professor about violent tendencies of paranoid schizophrenics was not "extraneous information" because it did not deal with defendant or with the case being tried), *with State v. Lyles*, 94 N.C. App. 240 (1989) (testimony by jurors was proper under both Rule 606(b) and G.S. 15A-1240(c)(1) where a juror peeled paper from the bottom of an exhibit during deliberations and uncovered information that implied that defendant had prior criminal involvement and that directly contradicted the defendant's alibi witnesses; jurors' exposure to the information was found to entitle the defendant to a new trial). *See also* 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 148, at 550–54 (8th ed. 2018) (discussing the anti-impeachment rule).

Steps to resolve allegation of juror exposure to improper information. Where a defendant claims that he or she is entitled to relief under G.S. 15A-1240(c) or Rule 606(b), the judge first must determine whether the type of misconduct alleged falls within the purview of the statute or evidence rule (as discussed above). If the judge finds that the verdict may be impeached within the terms of the statute or rule, then the judge must decide whether the exposure to the information violated the defendant's constitutional rights. If a constitutional violation is found, the error is presumed prejudicial and the burden is on the State to show that the jury's exposure to the improper information was harmless beyond a reasonable doubt. *See State v. Lyles*, 94 N.C. App. 240 (1989).

The test for determining harmlessness is "whether there was 'no reasonable possibility' that an 'average juror' could have been affected" by the exposure. *Id.* at 249 (citations omitted). The court in *Lyles* set out a four-part test for trial judges to use in assessing whether the exposure to extraneous information is harmless beyond a reasonable doubt. The judge should consider:

1. the nature of the extraneous information and the circumstances under which the information was brought to the attention of the jury;
2. the nature of the State's case;
3. the defense presented at trial; and
4. the connection between the extrinsic information and a material issue in the case.

Id. (citation omitted). If the State fails to meet its burden of proof, the defendant will be granted a new trial. *See State v. Hines*, 131 N.C. App. 457 (1998) (finding an abuse of

discretion by trial judge in denying defendant's motion for mistrial based on jury's exposure to portions of the prosecutor's case file where State failed to show that the inadvertent exposure was harmless beyond a reasonable doubt).

C. Selected Examples

Dictionaries/reference materials. It is improper for a juror to consult a dictionary or similar reference material to determine the meaning of legal or other terms associated with the case. *See State v. Langley*, ___ N.C. App. ___, 803 S.E.2d 166, 168–70 (2017) (acknowledging that undisputed juror misconduct occurred where a juror "Google'd intent to kill on the internet to try to understand the law" but holding that defendant had failed to show error in the denial of his motion for mistrial because he invited any error that occurred when he declined the trial judge's offer to continue the inquiry into the misconduct), *rev'd and remanded on other grounds*, ___ N.C. ___, 817 S.E.2d 191 (2018); *State v. McLain*, 10 N.C. App. 146, 148 (1970) ("It was improper for the jury to obtain and read a dictionary definition of one of the offenses charged in the bill of indictment.") (decided before adoption of N.C. Rule of Evidence 606(b) and G.S. 15A-1240(c)); *see also United States v. Lawson*, 677 F.3d 629 (4th Cir. 2012) (holding that a rebuttable presumption of prejudice applies "when a juror uses a dictionary or similar resource to research the definition of a material word or term at issue in a pending case"); Jean E. Maess, Annotation, *Prejudicial Effect of Jury's Procurement or Use of Book During Deliberations in Criminal Cases*, 35 A.L.R.4th 626 § 5 (assuming that jury action in consulting dictionary is improper and collecting cases where the question was whether the defendant had been prejudiced by the misconduct); N.C. Pattern Jury Instruction--Crim. 100.31, Admonitions to Jurors (June 2010) (prohibiting information from outside sources and independent inquiry or investigation).

However, when a juror's misconduct in consulting a dictionary is discovered *after* verdict, the verdict may only be impeached if the requirements of N.C. Rule of Evidence 606(b) or G.S. 15A-1240(c) are met, as discussed in B., above. In *Lindsey v. Boddie-Noell Enterprises, Inc.*, 355 N.C. 487 (2002), the N.C. Supreme Court reversed per curiam the decision of the N.C. Court of Appeals, 147 N.C. App. 166 (2001), and adopted the reasoning of the dissenting opinion, which held that the dictionary definitions at issue were not "extraneous information" within the meaning of Rule 606(b) because the definitions of the words "willful" and "wanton" did not specifically concern the defendant or the evidence presented in the case. According to the court, these definitions were simply matters of common knowledge that jurors were supposed to possess. The court then held that even if the dictionary definitions were "extraneous information" within the meaning of Rule 606(b), there was no actual prejudice to the defendant in that case due to the trial judge's sufficient instructions.

In a later case, *State v. Bauberger*, 176 N.C. App. 465 (2006), the court of appeals majority held that even though dictionary definitions appear to fall within the extraneous information exception of N.C. Rule of Evidence 606(b), the court was bound to find otherwise based on the supreme court's decision in *Lindsey*. The majority also held that juror affidavits concerning dictionary use could not be used to impeach the jury's verdict

under G.S. 15A-1240 because the dictionary definitions considered by the jury "concerned legal terminology" and did not discredit the defendant's testimony or witnesses; thus, the defendant's right to confrontation was not implicated.

Judge Geer dissented, stating that she and the majority "firmly disagree[d]" with the supreme court's conclusion in *Lindsey* that dictionary definitions do not constitute "extraneous information" and urging the supreme court to revisit the issue. *Bauberger*, 176 N.C. App. at 475 (Geer, J., dissenting). She noted that the *Lindsey* holding appears to stand alone since "the universal rule appears to be that a dictionary constitutes extraneous material that may not be consulted by a jury" and that the only debate is whether prejudice must be shown and, if so, how. *Id.* at 478 (citation omitted). Judge Geer further found that the jury's consultation of a dictionary violates a defendant's constitutional rights under the Sixth and Fourteenth Amendments to the U.S. Constitution and under article I, section 23 of the N.C. Constitution to be present at every stage of his or her trial and to a trial by fair and impartial jurors; *see also United States v. Lawson*, 677 F.3d 629, 646 (4th Cir. 2012) (verdict could be impeached under Fed. R. Evid. 606(b) because juror's consultation of Wikipedia for the definition of "sponsor," an element of the crimes charged, injected an "extrinsic influence" into the trial, "the content of which [wa]s beyond the trial court's ability to control" in violation of the Sixth Amendment right to a fair trial); *Bauberger v. Haynes*, 632 F.3d 100, 111 (4th Cir. 2011) (Keith, J., dissenting) (U.S. Supreme Court precedent makes it clear that when a jury relies on a source outside its knowledge or beliefs that was not presented at trial or by the judge in his or her instructions to determine what relevant law to apply, the jury has been subject to an "external influence" in violation of a defendant's Sixth Amendment rights).

The N.C. Supreme Court affirmed the decision of the court of appeals in *State v. Bauberger*, 361 N.C. 105 (2006). The court, however, was evenly split, three to three, leaving the court of appeals' decision undisturbed and without precedential value. Thus, it appears that the law with regard to the jury's use of dictionaries may not be completely settled, and it is still worthwhile to move for a mistrial pursuant to G.S. 15A-1061 or for appropriate relief pursuant to G.S. 15A-1414 (within ten days of verdict) or G.S. 15A-1415 (more than ten days after verdict) based on the jury's consultation of reference materials during trial.

Both statutory and constitutional grounds for the motion must be asserted for the issues to be preserved on appeal. *See State v. Salentine*, 237 N.C. App. 76 (2014) (refusing to review defendant's claim that his constitutional right to an impartial jury was violated when juror allegedly conducted online research and asked a family member who was an attorney to define malice since defendant had not raised this argument at trial).

Practice note: When attempting to impeach the jury's verdict under N.C. Rule of Evidence 606(b) because the jury consulted reference materials such as dictionaries, you can argue that:

- The holding in *Lindsey v. Boddie-Noell Enterprises, Inc.*, 355 N.C. 487 (2002), that dictionary definitions are not "extraneous information" under Rule 606(b), does not

control in criminal cases because a criminal defendant in North Carolina, unlike a civil litigant, has state and federal constitutional rights to be present, to a fair and impartial jury, and to confront the witnesses and evidence against him or her. *See State v. Bauberger*, 176 N.C. App. 465, 475 (2006) (Geer, J., dissenting), *aff'd by an equally divided court*, 361 N.C. 105 (2006).

- *Lindsey's* holding that dictionary definitions are not "extraneous information" goes against the universal rule that a dictionary constitutes extraneous material that may not be consulted by a jury, and *Bauberger's* holding (based on *Lindsey*) stands without precedential value since it was decided by an equally divided court.
- Later cases relying on *Bauberger* for the proposition that dictionary definitions are not extraneous information under Rule 606(b), should not control since *Bauberger* stands without precedential value. *See State v. Patino*, 207 N.C. App. 322 (2010) (relying on court's non-binding holding in *Bauberger*); *see also State v. Salentine*, 237 N.C. App. 76, 83 (2014) (relying on court's holding in *Patino*).

When attempting to impeach the jury's verdict under G.S.15A-1240(c) because the jury consulted reference materials such as dictionaries, you can argue that:

- *Bauberger's* holding that the verdict could not be impeached under G.S. 15A-1240(c) because the jury's consultation of a dictionary did not violate the defendant's right to confront was erroneous and stands without precedential value since the affirming court was equally divided.
- The court's holding in *State v. Patino*, 207 N.C. App. 322, 329 (2010), that defendant was not entitled to relief under G.S. 15A-1240(c) because the legal terms looked up by several jurors "did not deal directly with the defendant or with the evidence introduced in the case" was erroneous. A jury's exposure to definitions of terms relevant to the defendant's case that differ substantially from that of the legal definitions may directly influence the jury's determination of the defendant's guilt. *See Bauberger v. Haynes*, 632 F.3d 100, 111 (4th Cir. 2011) (Keith, J., dissenting) (setting out the five-part test used by some federal jurisdictions in considering whether a jury's consultation of a dictionary was prejudicial).
- When the jury consults a dictionary during deliberations, the defendant's right to be present at every stage of the trial, a right arising out of his or her right to confront under the Sixth Amendment to the U.S. Constitution and article I, section 23 of the N.C. Constitution, is violated. *See State v. Buchanan*, 330 N.C. 202 (1991) (citing *Íllinois v. Allen*, 397 U.S. 337 (1970), and noting that one of the most basic rights guaranteed by the Confrontation Clause is the defendant's right to be present in the courtroom at every stage of the trial); *State v. Bauberger*, 176 N.C. App. 465, 476 (2006) (Geer, J., dissenting) (defendant has constitutional right to be present whenever the jury is instructed; "[w]hen a jury engages in self-help and consults with sources other than the trial judge to clarify the governing . . . law, it is effectively instructing itself"), *aff'd by an equally divided court*, 361 N.C. 105 (2006).

Bibles. The presence of a Bible in the jury room during deliberations may be misconduct depending on the circumstances of its use. Because a defendant has the right to be tried before an impartial jury and a verdict based only on the evidence presented at trial,

"[c]ourts throughout the United States have generally concluded that a jury's reliance on extraneous sources during deliberations is error." *See State v. Barnes*, 345 N.C. 184, 226 (1997) (citations omitted); *see also Oliver v. Quarterman*, 541 F.3d 329, 339 (5th Cir. 2008) (discussing jurisdictions that have held that a Bible in the jury room is an external influence on the jury's deliberations, and stating that "when a juror brings a Bible into the deliberations and points out to her fellow jurors specific passages that describe the very facts at issue in the case, the juror has crossed an important line"); Amanda C. Shoffel, *The Theocratic Jury Room:* Oliver v. Quarterman *and the Burgeoning Circuit Split on Biblical Reference and Influence in Capital Sentencing*, 36 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 113 (2010) (arguing that the physical presence of a Bible in a jury room during the sentencing phase in a capital case should create an irrebuttable presumption of prejudice under the Sixth Amendment).

With regard to a jury's consideration of the Bible discovered after verdict, the questions before the trial judge will be whether the Bible falls within the definition of extraneous information under N.C. Rule of Evidence 606(b) and whether the jury's consultation of the Bible violates the defendant's constitutional rights. *See supra* § 26.2B, Discovered After Verdict. These questions have not been squarely decided by the North Carolina appellate courts. *Cf. State v. Barnes*, 345 N.C. 184, 228 (1997) (finding no abuse of discretion in the trial judge's failure to inquire of the jury regarding defense counsel's unsubstantiated assertion that the jury consulted a Bible before deliberations "[a]s there is no evidence that the alleged Bible reading was in any way directed to the facts or governing law at issue in the case").

Media reports. The courts have recognized that the exposure of jurors to news media reports during trial has been a "very real problem for a long time." *State v. Jones*, 50 N.C. App. 263, 268 (1981). When there is a *substantial reason to fear* that the jury has become aware of improper and prejudicial matters such as media reports, inquiry by the trial judge is required. *See State v. Barts*, 316 N.C. 666, 683 (1986) (no abuse of discretion in denying motion for mistrial where defendant made no showing that jury had been exposed to highly prejudicial newspaper article about defendant and inquiry revealed no violation of the judge's instruction to avoid exposure to the news media); *State v. McVay*, 279 N.C. 428 (1971) (holding that while inquiry was not required because there was no evidence that the jury was actually exposed to the newspaper article, it is the better practice for the judge to inquire of the jurors to see if they had been exposed or influenced by it).

If a jury has been exposed to media coverage, the trial judge may still properly deny a motion for mistrial if the coverage was merely an objective account of what has occurred at trial and was not prejudicial to the defendant. *See State v. Woods*, 293 N.C. 58 (1977). However, where the jurors have been exposed to prejudicial matters and the error is not cured by a subsequent instruction by the court, a new trial is warranted. *See State v. Reid*, 53 N.C. App. 130 (1981).

Practice note: If the jury is exposed to extraneous material, counsel should immediately bring it to the attention of the trial judge. Counsel should not merely assert that the

exposure occurred but should also substantiate the claim, if possible, by presenting affidavits or testimony. *See State v. Barnes*, 345 N.C. 184 (1997) (in reviewing defendant's argument that the trial judge erred in failing to conduct an investigation into alleged Bible-reading by a juror in the jury room, court noted that counsel had failed to substantiate the claim).

Failure to object to extraneous material being taken into the jury room may also result in the waiver of appellate review of the issue. *See, e.g.*, *State v. Jones*, 339 N.C. 114 (1994) (defendant's assent to allowing the jury to use a dictionary during its deliberations waived any error by the trial judge in giving the jury the dictionary definition of "mitigate"); *State v. Poole*, 154 N.C. App. 419 (2002) (defendant waived right to argue on appeal that the trial judge erred in reading a definition from dictionary and allowing jury to use dictionary during its deliberations where defendant stated no objections to the jury's use of the dictionary when asked by the trial judge).