

26.3 Other Common Types of Misconduct

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26.3 Other Common Types of Misconduct

A. Third Party Communication

It is misconduct for a juror during the trial to discuss the matter outside the court or to receive any information related to the case except in open court and in the manner provided by law. Thus, any pertinent communication between jurors and third parties including victims, defendants, counsel, courtroom personnel, witnesses, relatives, friends, etc., is prohibited. If allegedly improper contact with a juror is discovered, or if a prejudicial statement is inadvertently overheard by a juror, the trial judge must determine whether such contact resulted in substantial and irreparable prejudice to the defendant. It is within the discretion of the trial judge as to what inquiry to make. *State v. Burke*, 343 N.C. 129, 149 (1996) (citing *Remmer v. United States*, 347 U.S. 227 (1954)); *State v. Jacobs*, 172 N.C. App. 220 (2005).

If outside contacts are improperly brought to bear against a juror and are intended to influence the verdict, the trial judge abuses his or her discretion in denying a motion for a mistrial or new trial. *See State v. Lewis*, 188 N.C. App. 308 (2008) (granting defendant a new trial where the lead detective made comments during a break to a deputy sheriff serving as a juror that were intended to influence the verdict). “[B]rief, public, and nonprejudicial conversations between jurors and parties or their relatives will not vitiate the verdict or require that the jury be discharged” *O’Berry v. Perry*, 266 N.C. 77, 81 (1965) (citation omitted).

B. Intoxicated/Impaired Jurors

“The law requires that jurors, while in the discharge of their duties, shall be temperate, and in such condition of mind as to enable them to discharge those duties honestly, intelligently, and free from the influence and dominion of” impairing substances. *State v. Jenkins*, 116 N.C. 972, 974 (1895). If a juror, while hearing the evidence, argument of counsel, or charge, or while deliberating as to verdict, is so incapacitated by reason of intoxicants or otherwise as to be physically or mentally incapable of functioning as a competent, qualified juror, the trial judge may order a mistrial. *State v. Tyson*, 138 N.C. 627 (1905) (mistrial was proper where a juror was found to be intoxicated and unfit for

duty during the trial). However, use of impairing substances *outside* the courtroom does not justify granting a mistrial unless it is found that the juror is unfit to serve while present in court. *See State v. Crocker*, 239 N.C. 446 (1954) (although several jurors became intoxicated during an overnight recess, a mistrial was not warranted where there was no evidence or finding that any of those jurors were impaired upon the reconvening of the court on the following morning). Under G.S. 15A-1215(a), if a juror becomes incapacitated for any reason, an alternate may be substituted. *See infra* § 27.3, Substitution of Alternates.

C. Failure to Disclose Information During Voir Dire

If it is discovered after deliberations have begun or after a verdict has been rendered that a juror failed to disclose or misrepresented potentially important information during jury selection, a party may move for a mistrial or for a new trial. The moving party must show:

- the juror concealed material information during voir dire;
- the moving party exercised due diligence during voir dire to uncover the information; and
- the juror demonstrated actual bias or bias implied as a matter of law that prejudiced the moving party.

State v. Maske, 358 N.C. 40, 48 (2004) (adopting the three-part test set out by the court of appeals in *State v. Buckom*, 126 N.C. App. 368 (1997)). If the party meets this burden, the trial judge must grant the motion. For a discussion of the meaning of bias implied as a matter of law, see *Buckom*, 126 N.C. App. at 382.

If it is discovered before the jury is impaneled that a juror made an incorrect statement during voir dire:

- The judge may examine, or permit counsel to examine, the juror to determine whether there is a basis for a challenge for cause.
- If the judge determines there is a basis for a challenge for cause, he or she must excuse the juror or sustain any challenge for cause that has been made.
- If the judge determines there is no basis for a challenge for cause, any party who has not exhausted his or her peremptory challenges may challenge the juror.

G.S. 15A-1214(g). A trial judge, in his or her discretion, may reopen voir dire even after the jury has been impaneled to allow the examination and excusal of a juror who made misrepresentations during jury selection. *See supra* § 25.3F, Reopening Voir Dire (discussing the reopening of voir dire before deliberations begin).

D. Sleeping/Inattentive Juror

In superior court jury trials, a defendant has the right to be convicted by a unanimous jury of twelve. *See* N.C. CONST. art. I, § 24; G.S. 15A-1201(a); *State v. Hudson*, 280 N.C. 74

(1971). If a juror is sleeping during the trial or otherwise inattentive (working crossword puzzles, etc.), this right is violated and the defendant can move to substitute the juror or for a mistrial. The defendant must show by competent evidence that the juror was inattentive or sleeping and also that the defendant was prejudiced thereby. *State v. Lovin*, 339 N.C. 695 (1995) (no abuse of discretion in denial of defendant's motion to substitute a juror because the evidence was sufficient to support the conclusion that the juror, although inattentive to parts of the case, could nevertheless perform his duties); *State v. Williams*, 33 N.C. App. 397 (1977) (no error in trial judge's failure to grant a mistrial *ex mero motu* based on a sleeping juror because defendant did not show any prejudice). The misconduct should be brought to the attention of the trial judge immediately and supported by witness testimony or affidavits if possible. *See State v. Engle*, 5 N.C. App. 101 (1969) (court of appeals would not consider affidavits regarding a sleeping juror when presented for the first time on appeal).

E. Unauthorized Jury View of Crime Scene

Unless authorized by the trial judge (*see infra* § 27.2A, View of the Crime Scene or Large Objects), a view of the crime scene by a juror is considered misconduct. *State v. Perry*, 121 N.C. 533 (1897); *see also* N.C. Pattern Jury Instruction—Crim. 100.31 (June 2010) (Admonitions to Jurors at Recesses). However, the fact that a juror makes an unauthorized visit to the place of the crime is not grounds for a new trial unless it appears that some prejudice resulted to the defendant. *State v. Boggan*, 133 N.C. 761 (1903) (no undue influence shown where jurors passed through crime scene during their stay at a hotel pending the trial); *State v. Hawkins*, 59 N.C. App. 190 (1982) (although jurors used information about the lighting at the crime scene provided by a juror who visited scene, there was no constitutional violation because there was considerable testimony by an officer as to the lighting conditions); *State v. Smith*, 13 N.C. App. 583 (1972) (noting that courts in other jurisdictions have suggested that possible prejudice from unauthorized viewing by one juror can be removed by having the entire jury view the scene). Whether to grant relief is in the trial judge's discretion. *State v. Farris*, 13 N.C. App. 143 (1971).

F. Presence of Unauthorized Persons in Jury Room During Deliberations

Alternate jurors. The presence of an alternate juror in the jury room *during deliberations* violates a statutory mandate and the defendant's right to a jury trial as contemplated by article I, section 24 of the N.C. Constitution. *See* G.S. 15A-1215(a) (alternate jurors must be discharged on final submission of a case to the jury); *State v. Bindyke*, 288 N.C. 608 (1975) (new trial granted based on constitutional violation where alternate was present in the jury room for three to four minutes during deliberations).

The presence of an alternate in the jury room at any time *after deliberations begin* is reversible error *per se*. However, if the alternate's presence is inadvertent and momentary, and it occurs under circumstances from which it can clearly be determined that the jury has not begun its function, then the alternate's presence will not void the trial. If the trial judge believes it is probable that deliberations had not yet begun when the alternate was in the jury room, the trial judge may recall the jury and the alternate and

make limited inquiry as to whether there has been any discussion of the case or comment as to what the verdict should be. If the answer is yes, the judge must declare a mistrial. If the answer is no, the alternate will be excused and the jury returned to deliberate.

Bindyke, 288 N.C. 608; *State v. Jernigan*, 118 N.C. App. 240 (1995) (no mistrial warranted where alternate was present in jury room during selection of a foreman because this did not amount to “deliberation”); *see also State v. Locklear*, 180 N.C. App. 115 (2006) (no prejudicial error occurred where alternate spoke with trial jurors after deliberations had begun because the conversations did not take place in the deliberations room and the alternate did not express her feelings about the case to the other jurors).

A defendant cannot consent to a jury made up of more than or less than twelve jurors. *Bindyke*, 288 N.C. 608, 623 (“An unbroken line of North Carolina cases hold that in felony trials the accused must be tried by a jury of twelve and he cannot consent to a lesser number.”); *State v. Rowe*, 30 N.C. App. 115 (1976) (even though defendant refused trial judge’s offer of mistrial, a new trial was granted because an alternate was in the jury room for ten minutes and deliberations had begun; defendant could not consent to deliberations conducted by more than twelve jurors); *see also* G.S. 15A-1201(a) (“[i]n all criminal cases the defendant has the right to be tried by a jury of 12 whose verdict must be unanimous.”). This numerical requirement appears unchanged by the 2014 amendments to N.C. Constitution, article I, section 24, and to G.S. 15A-1201. *See supra* § 24.2B, Waiver of Right (discussing constitutional and statutory amendments that allow a defendant to waive the right to a jury trial in superior court and to have a bench trial); § 24.2C, Number of Jurors (discussing the North Carolina requirement that a jury be composed of twelve people).

Other nonjurors. The presence of a “stranger” in the jury room is improper, but it does not automatically invalidate a verdict. If the trial judge finds facts showing that neither the deliberations nor the verdict were in any manner influenced by the misconceived entrance of an outsider and that there was no communication between the outsider and any juror, he or she may refuse to set aside the verdict or deny the defendant’s motion for mistrial. *See State v. Hill*, 225 N.C. 74 (1945) (affirming the denial of defendant’s motion to set aside the verdict based on the presence of two reporters in the jury room for several minutes where inquiry showed that neither the deliberations nor the verdict were in any manner influenced by their unauthorized presence); *see also State v. Battle*, 271 N.C. 594 (1967) (no error in the denial of defendant’s motion to set aside the verdict where a juror from a different case mistakenly went into the jury room for a short time with defendant’s jury); *State v. Riera*, 6 N.C. App. 381 (1969) (no error in the denial of defendant’s motion for mistrial where record revealed that the jury became silent and said nothing when an unauthorized female mistakenly entered the jury room during deliberations), *rev’d on other grounds*, 276 N.C. 361 (1970).

Although older cases such as *Hill* and *Battle* state that a trial judge’s refusal to set aside the verdict or grant a mistrial is not reviewable on appeal, later cases utilize an abuse of discretion standard of review. *See State v. Billups*, 301 N.C. 607 (1981) (finding no abuse of discretion by trial judge in denial of defendant’s motion for mistrial where prosecuting witness entered the jury room during a recess at the conclusion of trial, but before the

charge of the court, to use the bathroom and did not communicate with any of the jurors); *State v. Washington*, 141 N.C. App. 354 (2000) (finding no abuse of discretion in trial judge's failure to declare a mistrial sua sponte where bailiff entered the jury room during deliberations to retrieve some magazines and did not communicate with any of the jurors nor did he hear any deliberations); *State v. Phillips*, 87 N.C. App. 246 (1987) (no abuse of discretion by trial court in failing to set aside the verdicts where the victim's wife was in the jury room before the opening of court one day and the sheriff took coffee cups to the jury in the jury room).