

## **27.2 Authorized Jury View**

- A. View of the Crime Scene or Large Objects
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## **27.2 Authorized Jury View**

### **A. View of the Crime Scene or Large Objects**

Under G.S. 15A-1229, a trial judge may permit a jury view of a location or of an object that logistically cannot be brought into the courtroom. This decision is a discretionary one and will not be disturbed absent an abuse of that discretion. *State v. Fleming*, 350 N.C. 109 (1999) (no abuse of discretion in allowing jury view of the crime scene over defendant's objections that only a piece of crime tape secured the area and that tampering was a possibility); *State v. Tucker*, 347 N.C. 235, 240 (1997) (no abuse of discretion in allowing a jury view of a police vehicle even though photographs of it had been introduced into evidence "[b]ecause defendant's intent when he fired shots into the vehicle was at issue and because the condition of the damaged vehicle is indicative of such intent").

If a view is ordered pursuant to G.S. 15A-1229(a):

- an officer must accompany the jury to the location;
- no person is permitted to communicate with the jury on any subject connected to the trial;
- the judge, prosecutor, and defense counsel must be present; and
- the defendant is entitled to be present.

The trial judge must direct the officer who accompanies the jurors not to communicate with the jurors or to allow others to communicate with them "on any subject connected with the trial," and to return the jurors to the courtroom "without unnecessary delay or at a specified time." G.S. 15A-1229(a). The officer who accompanies the jurors should not have participated in the investigation of the case or have testified as a witness. *See State v. Taylor*, 226 N.C. 286 (1946).

Although the defendant has the right to be present at the jury view, he or she can waive this right in noncapital cases. *See* G.S. 15A-1229 Official Commentary; *see also supra* § 21.1C, Trial Proceedings (discussing defendant's statutory and state constitutional rights to be present at jury views); § 21.1E, Express and Inferred Waivers of Right (discussing a noncapital defendant's right to waive presence).

A witness may testify at the site of the view and point out objects and physical characteristics material to his or her testimony if permitted by the court. This testimony must be recorded. G.S. 15A-1229(b).

G.S. 15A-1229 does not specifically address how the evidence and sense impressions gathered by the trier of fact during the jury view should be treated, but it appears that they should be considered as both substantive and illustrative evidence. *See* 1 ROBERT P. MOSTELLER, ET AL., NORTH CAROLINA EVIDENTIARY FOUNDATIONS § 12-4(A) (3d ed. 2014); *see also Williams v. Bethany Volunteer Fire Dep't*, 307 N.C. 430, 435-36 (1983) (the evidence produced by the jury view of the fire truck, its red flashing lights, and the sound of the siren, was relevant to illustrate the witness' testimony and "was also competent as real evidence."); 2 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 251 at 1008 (8th ed. 2018) (although not "a complete procedural blueprint," G.S. 15A-1229 "is detailed enough to indicate that the view should be regarded as a part of the trial and as taking place in a courtroom without walls").

The press is allowed to be present at a jury view because criminal trials in North Carolina are open to the press and to the public. N.C. CONST. art. I, § 24; *State v. Davis*, 86 N.C. App. 25 (1987) (no prejudice shown from allowing press to attend the jury view where judge kept press quiet and gave adequate instructions to the jury concerning the publicity surrounding the trial).

Unless authorized by the trial judge, a view of the crime scene by a juror is considered misconduct. *See supra* § 26.3E, Unauthorized Jury View of Crime Scene.

For further discussion of jury views, including a list of factors that may be considered by the trial judge in exercising his or her discretion, see Jessica Smith, [Jury View](#), N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Jan. 10, 2013); *see also* 1 ROBERT P. MOSTELLER, ET AL., NORTH CAROLINA EVIDENTIARY FOUNDATIONS § 12-4(B) (3d ed. 2014) (discussing the elements of the foundation when making a motion for a jury view).

## **B. View of the Defendant's Appearance or Physical Characteristics Compelled by the State**

**Generally.** The State may require a defendant to stand or otherwise exhibit himself or herself before the jury as long as the act is relevant and is not of a testimonial or communicative nature. Such an exhibition does not offend the Due Process Clause of the Fourteenth Amendment, nor does it violate the Fifth Amendment's protection against self-incrimination. Both federal and state courts have usually held that the privilege against self-incrimination "offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture" because these acts are not considered to be "communications" or "testimony." *Schmerber v. California*, 384 U.S. 757, 764 (1966) (stating that a compulsion that makes an accused "the source of 'real or physical evidence'" does not violate the privilege against self-incrimination); *see also State v. Suddreth*, 105 N.C. App. 122 (1992) (requiring defendant

to put on a mask before the jury did not violate defendant's constitutional rights against self-incrimination or due process); 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 126 (8th ed. 2018) (discussing the privilege against self-incrimination).

**Selected examples.** Courts have found no constitutional violation or error where the defendant was required to:

- Stand before the jury and don apparel or accessories relevant to the case. *Holt v. United States*, 218 U.S. 245 (1910) (blouse); *United States v. Turner*, 472 F.2d 958 (4th Cir. 1973) (wig and sunglasses); *State v. Perry*, 291 N.C. 284 (1976) (mask); *State v. Suddreth*, 105 N.C. App. 122 (1992) (mask).
- Remove his shirt and show scars on cross-examination to impeach or corroborate his testimony that the victim cut him with a razor. *State v. Sanders*, 280 N.C. 67 (1971); see also *State v. Thomas*, 20 N.C. App. 255 (1973) (no error where defendant required to take off jacket and show “track marks” in possession of heroin case).
- Speak a word or phrase for purposes of voice identification in court. *State v. Thompson*, 129 N.C. App. 13, 21 (1998) (defendant required to ask “Who’s the manager on duty?”); *State v. Locklear*, 117 N.C. App. 255, 257 (1994) (defendant ordered to say, among other things, “This is a stick up”).
- Display his teeth to the jury. *State v. Summers*, 105 N.C. App. 420 (1992) (victim had described her assailant as missing some teeth).
- Exhibit himself to the jury for the purpose of allowing a witness to identify certain physical characteristics on his person. *State v. Sanders*, 280 N.C. 67 (1971) (scars); *State v. Netcliff*, 116 N.C. App. 396 (1994) (tattoo), *overruled on other grounds by State v. Patton*, 342 N.C. 633 (1996); *State v. McNeil*, 47 N.C. App. 30 (1980) (scar).
- Give a signature sample in court to compare with a signature on a motel registration card. *State v. Valentine*, 20 N.C. App. 727 (1974).

Although not necessarily unconstitutional, the manner of exhibition may be more prejudicial than probative and may not be permissible under N.C. Rule of Evidence 403. Cf. *State v. Moore*, 242 N.C. App. 679 (2015) (unpublished) (rejecting defendant’s argument that Rule 403 was violated by trial judge’s order requiring defendant to stand bare-chested before the jury for the purpose of showing the presence or absence of a tattoo; victim had described her assailant as having a chest tattoo but apparently did not offer a detailed description).

**Additional resources.** For further discussion of this topic, see 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 126 (discussing the defendant’s privilege against self-incrimination, including identification evidence), § 133 (discussing the competency of accused persons as witnesses) (8th ed. 2018). See also Timothy E. Travers, Annotation, *Propriety of Requiring Criminal Defendant to Exhibit Self, or Perform Physical Act, or Participate in Demonstration, During Trial and in Presence of Jury*, 3 A.L.R. 4th 374.

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**Practice note:** To preserve the issue for appeal when a defendant is made to exhibit himself or herself in some manner before the jury, you must object and specifically state the basis for your objection. If applicable, you should object on the grounds that the exhibition or demonstration of the defendant violates the defendant's constitutional right against self-incrimination under the Fifth Amendment to the U.S. Constitution and under article I, section 23 of the N.C. Constitution, the right to due process under the Fourteenth Amendment to the U.S. Constitution and under article I, section 19 of the N.C. Constitution, and the statutory right not to be compelled to testify set out in G.S. 8-54. You should also object based on any other evidentiary grounds that apply in the case, including that the manner of exhibition is more prejudicial than probative.

If your objection to the exhibition or demonstration is overruled, a request for a limiting instruction may be appropriate. *See State v. Locklear*, 117 N.C. App. 255, 259–60 (1994) (approving of trial judge's limiting instruction that the voice demonstration by defendant was for the purpose of illustrating and demonstrating his voice to the witness and jury, was not "indicative of any fact that he may have been present on that occasion[.]" and was "in no way indicative of any substantive fact"); *see also State v. Thompson*, 129 N.C. App. 13 (1998) (same).

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### **C. View of the Defendant's Appearance or Physical Characteristics to Rebut the State's Case**

**Generally.** Since the State can compel a defendant to exhibit himself or herself before the jury in certain instances without violating the defendant's constitutional rights (discussed above), the defendant should also be allowed to do so for the purpose of challenging evidence introduced by the State. As long as the display is not of a testimonial or communicative nature, the defendant does not waive the right against self-incrimination and should not be subject to cross-examination or impeachment. *See United States v. Bay*, 762 F.2d 1314, 1315 (9th Cir. 1984) (holding that trial judge erred in ruling that if defendant showed the jury the tattoos on the backs of his hands in order to raise a reasonable doubt about identification, the defendant would be subject to cross-examination; court was "convinced that this is one case in which it is proper to apply the 'sauce for the goose is sauce for the gander' maxim."); *see also* John B. Spitzer, Annotation, *Display of Physical Appearance or Characteristic of Defendant for Purpose of Challenging Prosecution Evidence as "Testimony" Resulting in Waiver of Defendant's Privilege Against Self-Incrimination*, 81 A.L.R. Fed. 892.

Although North Carolina courts have not addressed this situation, many other jurisdictions have. *See, e.g., State v. Fivecoats*, 284 P.3d 1225 (Or. Ct. App. 2012) (finding reversible error where trial judge ruled that a demonstration of defendant's "peculiar" walk to show the jury the difference between it and the walk of the thief in surveillance video would have been testimonial so as to waive his right against self-incrimination); *State v. Gaines*, 937 P.2d 701 (Ariz. Ct. App. 1997) (trial judge erred in ruling that defendant would be subject to cross-examination if he displayed his eyebrows to the jury to rebut identification testimony concerning the perpetrator's "distinctive eyebrows"); *State v. Martin*, 519 So. 2d 87 (La. 1988) (trial judge committed reversible

error by ruling that defendant was subject to limited cross-examination if he displayed his tattoos to the jury to challenge identification testimony; the principles of due process and reciprocity require that the rule that a display of a defendant's physical characteristic is not testimony applies equally regardless of whether it is the State or the defendant who desires the demonstration); *State v. Suddeth*, 306 N.W.2d 786 (Iowa 1981) (trial judge erred in ruling that defendant could be cross-examined if he tried on shoes worn by the robber; this act was not testimonial in nature and fundamental fairness mandates that if the State can compel the action, the defendant should have been permitted to do so without being sworn as a witness and subjected to cross-examination).

**Evidentiary foundation required.** While a display or demonstration of the type described above is not considered testimonial evidence, some cases from other jurisdictions have held that since it is real evidence, the relevancy of the evidence must be established before it is allowed. *See, e.g., Wilson v. State*, 526 S.E.2d 381, 385 (Ga. Ct. App. 1999) (upholding trial court's denial of defendant's request to show his torso to the jury; defendant waived any complaints about the exclusion of evidence of his abdominal tattoo because he "failed to present, or even proffer, foundation evidence at trial"); *State v. Hart*, 412 S.E.2d 380, 381 (S.C. 1991) (finding error in the trial judge's ruling that defendant would be subject to cross-examination if he exhibited his physical characteristics but noting that the exhibition is "like any other evidence" and "is subject to challenge by the State on the ground that a proper foundation has not been laid, i.e. that there is no evidence before the jury that the physical characteristics proffered were present at the time the offense was committed"); *State v. Martin*, 519 So. 2d 87 (La. 1988) (reversing trial judge's denial of defendant's request to show his arm tattoos because the display of the tattoos was material and relevant; victim's testimony alone constituted sufficient evidentiary foundation to allow display of defendant's arms because her testimony put in question whether defendant had a particular tattoo on his right arm and no others; in addition, defendant had presented witness testimony that he did not have a tattoo like the one described by the victim, he had a number of others which he had had for years, and that he had never had a tattoo removed); *Thomas v. State*, 439 So. 2d 245 (Fla. Dist. Ct. App. 1983) (finding no error where trial judge denied defendant's motion to silently exhibit his torso to the jury because defendant made no proffer regarding the purpose of the proposed display and did not offer testimony from any source to explain or establish the relevance of defendant's physical appearance); *People v. Shields*, 81 A.D.2d 870 (N.Y. App. Div. 1981) (trial court abused its discretion in refusing to permit defendant to establish the relevancy of real evidence, the presence of a large abdominal scar, other than by defendant taking the stand; defendant had offered to prove existence of his scar before the date of the crime by hospital records and through witness testimony).

**Effect on final closing argument.** A defendant in a noncapital case or a defendant in the guilt-innocence phase of a capital case who does not introduce evidence is entitled as a matter of right to open and close argument to the jury. *See* N.C. GEN. R. PRAC. SUPER. & DIST. CT. 10. If the defendant introduces evidence within the meaning of Rule 10, the State has the right to the open and final closing arguments. *State v. Battle*, 322 N.C. 69 (1988). Eliciting evidence by the cross-examination of a State's witness is usually not

considered the “introduction” of evidence by the defendant and does not deprive him or her of the right to last argument. *See State v. English*, 194 N.C. App. 314 (2008); *see also United States ex rel. Mitchell v. Pinto*, 438 F.2d 814, 816 (3d Cir. 1971) (finding that “technically [defendant] rested without offering any evidence whatever” where, during cross-examination, defendant rose and stood next to a co-defendant’s witness to demonstrate a resemblance between them in order to refute identification evidence). However, what constitutes the “introduction” of evidence in North Carolina is not always easy to determine and in some instances, a defendant’s cross-examination of a State’s witness or a display of a physical characteristic may be deemed an “introduction” of evidence causing him or her to lose last argument. *See, e.g., State v. Pinkard*, 617 S.E.2d 397 (S.C. Ct. App. 2005) (affirming trial judge’s ruling that defendant’s exhibition of his tattoo to the jury, while non-testimonial, would constitute the introduction of evidence causing defendant to lose the right to final argument). For an in-depth discussion of what constitutes “introduction” of evidence in this context, see *infra* § 33.5B.

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**Practice note:** If you would like to display defendant’s physical appearance or a particular characteristic without subjecting him or her to cross-examination or impeachment, you should inform the court and argue that since the exhibition is not “testimonial,” the defendant is not waiving the right against self-incrimination. You can argue that the defendant’s exhibition or demonstration is allowed because he or she has the right to present a defense under the Due Process Clause of the constitutions of the United States and North Carolina. Be prepared to specifically proffer the reasons why the display or demonstration is relevant.

If the judge denies your request, make an offer of proof in order to preserve the record for appellate review. If the judge allows your request and you would like to preserve the right to final closing argument, you will need to request a ruling on whether the display would waive that right.

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