
29.5 Presentation of the Evidence

A. Order of Proceedings

Suppression hearings. The party with the burden of proof is generally the party that should present evidence first. *State v. Temple*, 302 N.C. 1 (1981). At hearings on a defendant's motion to suppress, the defendant has the initial burden of showing that his or her motion is timely and in proper form but once the defendant has done so, the burden ordinarily is on the State to show admissibility of the evidence sought to be suppressed. *See State v. Williams*, 225 N.C. App. 636 (2013) (stating that since the State had the burden of proof at the hearing on defendant's motion to suppress, it should have proceeded first in presenting evidence to the court). *But see* 1 NORTH CAROLINA DEFENDER MANUAL § 14.6E, Conduct of Evidentiary Hearing (2d ed. 2013) (discussing partial exception to rule that State has burden of proof when police act under a warrant).

However, the order of presentation of evidence is a rule of practice, not law, so the trial judge may depart from it whenever he or she, exercising discretion, believes it necessary to promote justice. *Temple*, 302 N.C. 1, 5 (finding no merit to defendant's argument that he was prejudiced in having to present evidence first at his suppression hearing; although the inversion of proof made it necessary for defendant to call the Chief of Police as his own witness, State was not allowed to ask the witness any question that it would not have been in a position to ask if the witness had been called by the State, and there was no "indication that defendant was denied permission to ask any question on direct examination that he would have been allowed to ask on cross-examination."). For one perspective on the order of proceedings at suppression hearings, see Jonathan Holbrook, *Who Goes First?*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (June 12, 2018).

Jury trials. The order in which a criminal jury trial proceeds is governed by G.S. 15A-1221. After a jury is impaneled and an opportunity for opening statements is given, the State must present evidence of the defendant's guilt, that is, its "case-in-chief." *See* G.S. 15A-1221(a)(5). The State goes first because it has the burden of proof. *See State v. Temple*, 302 N.C. 1 (1981) (party with the burden of proof generally is the first to put on evidence).

After the State has rested, the defendant, if he or she desires, may present evidence, that is, his or her "case-in-chief." *See* G.S. 15A-1221(a)(6); *see also State v. Fair*, 354 N.C. 131, 149 (2001) ("The right to present evidence in one's own defense is protected under both the United States and North Carolina Constitutions.").

Thereafter, the State and the defendant may offer successive rebuttals concerning matters elicited in the evidence in chief of the other party. *See* G.S. 15A-1221(a)(7); G.S. 15A-1226. The defendant's rebuttal evidence is sometimes referred to as "surrebuttal."

G.S. 15A-1221 sets the usual order of presentation of evidence, but the Official Commentary to this section notes that this "does not preclude a differing order if authorized by the common law or other applicable statutes or rules of court." *See also* N.C. R. EVID. 611(a) ("The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . make the interrogation and presentation effective for the ascertainment of the truth . . . ."). For example, in *State v. Britt*, 291 N.C. 528 (1977), the court found no gross abuse of discretion by the trial judge in varying the order of proof by allowing the State's witnesses to testify as rebuttal witnesses when their testimony did not rebut the defendant's evidence but would have been admissible during the State's case-in-chief.

B. Rebuttal

Statutory authorization. The introduction of rebuttal evidence is governed by G.S. 15A-1226(a), which provides:

> Each party has the right to introduce rebuttal evidence concerning matters elicited in the evidence in chief of another party. The judge may permit a party to offer new evidence during rebuttal which could have been offered in the party's case in chief or during a previous rebuttal, but if new evidence is allowed, the other party must be permitted further rebuttal.

Scope of State's rebuttal. During the State's rebuttal of the defendant's evidence (if presented), it may offer evidence "to impeach defendant's witnesses or to explain, modify or contradict defendant's evidence." 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 166, at 598 (7th ed. 2011); *see also State v. Anthony*, 354 N.C. 372 (2001) (questions posed by prosecutor to rebuttal witnesses were properly formulated to rebut matters presented during defendant's case-in-chief and as such did not exceed the scope of rebuttal).

Scope of defendant's surrebuttal. After the State presents its rebuttal evidence, the defense then may be entitled to offer evidence on surrebuttal. "[I]n determining whether a defendant is entitled to present surrebuttal evidence, the dispositive issue is whether the state presented new evidence on rebuttal." *State v. Clark*, 128 N.C. App. 87, 98 (1997) (defendant had no right to surrebuttal where the State's rebuttal witness presented no new evidence regarding the State's version of the case); *see also State v. Yancy*, 58 N.C. App. 52 (1982) (defendant did not have the right to put on surrebuttal evidence where the State's evidence on rebuttal did not add primarily to its original case but only impeached the defendant's testimony and corroborated the earlier testimony of a State's witness).

Admission of new evidence during rebuttal or surrebuttal. Although the scope of rebuttal and surrebuttal is generally limited, G.S. 15A-1226(a) allows a trial judge, in his or her

discretion, to permit a party to offer new evidence during rebuttal that could have been offered during the party's case-in-chief. *See State v. Anthony*, 354 N.C. 372 (2001); *see also State v. Lowery*, 318 N.C. 54 (1986) (double jeopardy principles are not applicable at the rebuttal phase of a trial, and due process rights are not violated when the State is allowed to introduce new evidence during the rebuttal phase as long as the defendant is given the opportunity to rebut the new evidence offered by the State); *State v. Boykin*, 298 N.C. 687 (1979) (State's witness properly allowed to testify as to new evidence during rebuttal; order of proof is within the trial judge's discretion).

If the judge allows the introduction of new evidence during the rebuttal phase, the other party must be permitted further rebuttal. G.S. 15A-1226(a); *see also State v. Quick*, 323 N.C. 675 (1989); *State v. Clark*, 128 N.C. App. 87 (1997).

Practice note: If the State presents new evidence during its rebuttal, object on the grounds that the evidence exceeds the scope of rebuttal. If the judge exercises his or her discretion and allows the testimony, you are entitled to further rebuttal. Assert in support of further rebuttal the defendant's statutory rights under G.S 15A-1226(a) and his or her due process rights to present a defense under the state and federal constitutions. If the judge denies further rebuttal, be sure to put the statutory and constitutional grounds for your request on the record and make an offer of proof of the evidence you intended to present.

C. Reopening the Case to Present Additional Evidence

Statutory authority. G.S. 15A-1226(b) authorizes a trial judge, in his or her discretion, to permit any party to introduce additional evidence at any time before verdict. *See also State v. Quick*, 323 N.C. 675, 681 (1989). Under this statute, a judge may allow a party to reopen its case to present new evidence at any stage of the trial, even after the jury has begun its deliberations. *See State v. Riggins*, 321 N.C. 107 (1987); *State v. Goldman*, 311 N.C. 338 (1984); *State v. Allen*, 19 N.C. App. 660 (1973). Once the verdict has been entered, however, the trial judge does not have the discretion to allow a party to reopen its case to introduce additional evidence. *State v. Murray*, 154 N.C. App. 631, 637 (2002) ("[T]he applicable statute and case law are clear that any additional evidence must be introduced prior to entry of the verdict.").

Essential elements of the crime. It appears that the trial judge has the discretionary authority to allow the State to reopen its evidence to introduce evidence of an essential element of the crime charged that was omitted during its case-in-chief. *See State v. Wise*, 178 N.C. App. 154 (2006) (no abuse of discretion by trial judge in allowing State to reopen its case to produce evidence of defendant's release date from prison to show defendant was required to register as a sex offender under G.S. 14-208.11); *see also State v. Miles*, 193 N.C. App. 611 (2008) (unpublished) (finding no abuse of discretion by trial judge in allowing "the State to reopen its case for the purpose of showing ownership of the property alleged to have been stolen"; court rejected defendant's argument that if allowed to reopen its case, the State is limited to introducing additional evidence that "clears up a misunderstanding or corroborates evidence already presented" and may not introduce evidence that is used to establish an element of the offense).

Significant factors. While the appellate courts of North Carolina have not specifically described the factors that are significant in ruling on a party's motion to reopen the evidence, other jurisdictions have. Factors that have been considered important by the Fourth Circuit Court of Appeals in reviewing rulings on motions to reopen include:

1. whether the party moving to reopen provided a reasonable explanation for failing to present the evidence in its case-in-chief;
2. whether the evidence was relevant, admissible, or helpful to the jury; and
3. whether reopening the case would have infused the evidence with distorted importance, prejudiced the opposing party's case, or precluded the opposing party from meeting the evidence.

See United States v. Abbas, 74 F.3d 506, 510–11 (4th Cir. 1996); *see also United States v. Crawford*, 533 F.3d 133 (2d Cir. 2008) (expressing approval of 4th Circuit's approach and finding that the trial judge erred in reopening the evidence during jury deliberations to allow the government to introduce a trace report); *People v. Newton*, 87 Cal. Rptr. 394, 409–10 (Cal. Ct. App. 1970) (factors to consider in reviewing decisions on motions to reopen include the stage of the proceedings that had been reached when the motion was made, the diligence shown by the moving party in discovering the new evidence, the prospect that the jury would accord the evidence undue emphasis, and the significance of the evidence).

Illustrative cases. A review of North Carolina cases that address rulings on motions to reopen reveals that our appellate courts implicitly consider factors similar to the ones described above. For example, the granting of a motion to reopen was upheld in the following cases:

- The State did not know of the evidence before the parties rested their cases, the timing of the introduction did not appear to be prejudicial to the defendants, and the defendants were not denied the opportunity to offer testimony in rebuttal if they had so desired. *State v. Perry*, 231 N.C. 467 (1950).
- The judge allowed the State, after resting its case but before the defendant presented evidence, to introduce stipulated evidence concerning the results of a medical examination of the rape victim because the defendant could not have been surprised by its admission. *State v. Revelle*, 301 N.C. 153 (1980).
- The additional evidence was presented in response to a question by the jury regarding the date of a pretrial identification procedure; the defendant did not object to the State's recalling of the officer to the stand; and the question concerned an incidental aspect of the case and did not involve a necessary element or feature of the State's case-in-chief or that of the defendant. *State v. Riggins*, 321 N.C. 107, 109 (1987); *see also State v. Jackson*, 306 N.C. 642, 645 (1982) (finding that trial judge's ruling allowing State to reopen its case was not prejudicial to defendant because evidence did not relate to essential element of the case).

The denial of a motion to reopen was upheld in the following cases:

- The party seeking to reopen the case was at fault. *See, e.g., State v. Davis*, 317

N.C. 315 (1986) (no abuse of discretion in denying defendant's motion to reopen to allow the playing of a tape recording made after defendant rested his case where defense counsel had more than adequate opportunity to timely produce equipment to play the tape and substantially the same evidence was presented to the jury through a transcription); *State v. Mutakbbic*, 317 N.C. 264 (1986) (defendant's motion to reopen during jury deliberations in order to admit a DSS report properly denied where defendant knew about the report and chose not to introduce it during trial); *State v. McClaude*, 237 N.C. App. 350 (2014) (no abuse of discretion by trial judge in denying defendant's motion to reopen to allow a witness to testify where motion was made after judge learned the jury had just reached a verdict, attorney had ample opportunity to locate the witness during trial since, while not under subpoena, the witness had been present before both sides rested, and witness was still absent from the courtroom when motion was made); *State v. Perkins*, 57 N.C. App. 516 (1982) (defendant's motion to reopen after judge had concluded his charge to the jury because the defendant decided he wanted to testify was properly denied because defendant had the opportunity to present evidence and could have testified then); *see also United States v. Bayer*, 331 U.S. 532 (1947) (no reversible error for judge to refuse defendants' request to reopen their case after four hours of jury deliberations to admit corroborating evidence where no excuse was offered for the untimeliness of the offer of the evidence, the existence and importance of which should have been well-known to defendants, and the evidence was easily obtainable before trial).

- The evidence was merely cumulative. *See, e.g., State v. Hoover*, 174 N.C. App. 596 (2005) (no abuse of discretion in refusing to allow defendant to reopen his case to admit testimony from a witness about driving defendant to and from work because testimony about defendant's work schedule had already been admitted); *State v. Phillips*, 171 N.C. App. 622 (2005) (defense counsel was not dilatory in immediately moving to reopen to introduce newly discovered evidence, but no abuse of discretion in denial of motion because the evidence would have been merely cumulative of other evidence that had already been presented by defendant).

Special consideration of defendant's motion to reopen. If a trial judge denies a defendant's motion to reopen to present evidence that is crucial to his or her defense, the appellate courts may find an abuse of discretion. *See, e.g., State v. Allen*, 19 N.C. App. 660, 662–63 (1973) (trial judge abused discretion in denying defendant's motion to reopen to present an alibi witness's testimony that was newly discovered after jury deliberations had begun where the possibility of mistaken identification was obviously present under the identification procedures followed in the case); *see also State v. Lang*, 301 N.C. 508, 511–12 (1980) (although ruling on other grounds, court noted its "particular concern" about the trial judge's denial of defendant's motion to reopen to present a time card because the time card corroborated the "crucial testimony" of defendant's alibi witness).

Although not discussed in either of the above cases, there were also constitutional implications in the denial of the motions. The rights of a defendant charged with a crime to

make a defense by confronting the evidence against him or her, presenting his or her own witnesses, and placing before the jury his or her own version of the facts are fundamental elements of due process of law as guaranteed by the Sixth and Fourteenth Amendments to the federal constitution and by article I, sections 19 and 23 of the state constitution. *See, e.g.*, *Faretta v. California*, 422 U.S. 806 (1975); *Washington v. Texas*, 388 U.S. 14 (1967); *State v. Locklear*, 309 N.C. 428 (1983). These constitutional grounds may apply to a motion to reopen along with the statutory grounds authorized by G.S. 15A-1226. *See State v. Carter*, 636 A.2d 821 (Conn. 1994) (trial judge abused his discretion in a murder case when he denied defendant's motion to reopen to introduce the victim's criminal record to show the victim's character for violence; the exclusion deprived defendant of his Sixth Amendment right to present his version of the facts, including his defense of self-defense; error not harmless beyond a reasonable doubt because the evidence was highly relevant and might well have influenced the jury's decision); *see also Blaikie v. Callahan*, 691 F.2d 64, 68 (1st Cir. 1982) (for a trial judge's adverse ruling on a defendant's motion to reopen to violate the Sixth Amendment "it must be shown that the proffered evidence was of such importance to the achievement of a just result that the need for admitting it overrides the presumption favoring enforcement of the state's usual trial procedures").

Although there are North Carolina cases stating that "there is no constitutional right to have one's case reopened" (*see, e.g.*, *State v. Hoover*, 174 N.C. App. 596, 599 (2005); *see also State v. Perkins*, 57 N.C. App. 516, 520 (1982)), this is not exactly true. *Hoover* and *Perkins* can be traced back to the court's holding in *State v. Shelton*, 53 N.C. App. 632 (1981), as support for the above assertion; however, *Shelton* did not hold that a constitutional right could *never* be the basis of a motion to reopen. In *Shelton*, the defendant argued that the trial judge's denial of his motion to reopen to present the testimony of a co-defendant who had pled guilty mid-trial violated his state and federal constitutional rights to due process and to fairly present one's evidence. The Court of Appeals held that "*under the facts and circumstances of this particular case*," the defendant did not have a constitutional right to have his case reopened. *Id.* at 647 (emphasis added). The court reasoned that the defendant had "ample opportunity" to present evidence in his defense and the witness in question had been available and could have been called as a witness at any time before the defendant rested.

Practice note: If you move to reopen the evidence pursuant to G.S. 15A-1226(b) because you mistakenly failed to introduce evidence or you discovered new evidence that was unavailable before resting your case, you should be prepared to offer an explanation for the untimeliness of the evidence. Tell the judge exactly what the evidence entails, why it is admissible, and the reasons why it is material or significant to the defendant's case. Also explain why the reopening of the evidence will not unduly delay the trial and why the State will not be unduly prejudiced by its late admission. Cite both the statutory and constitutional grounds for your motion, discussed above. If your motion is denied, make an offer of proof so that the denial of your motion can be properly reviewed on appeal.

If the State moves to reopen to introduce further evidence, object and assert (where applicable) that

- the State's failure to offer the evidence earlier was the result of a lack of due diligence;
- the evidence is merely cumulative;
- the evidence unfairly surprised the defendant; and
- due to the timing of the offer, the jury may give the evidence undue weight.

Base your objection on statutory grounds and, if the admission of the additional evidence would violate the defendant's constitutional rights to due process and to confront witnesses, state that those bases as well. *Cf. United States v. Nunez*, 432 F.3d 573, 580–81 (4th Cir. 2005) (finding an abuse of discretion based on Confrontation Clause concerns where trial judge allowed the government to reopen its case and (1) the government offered no "reasonable explanation" for its failure to timely introduce the report in question; (2) the defendants were not permitted to cross-examine witnesses about the report; and (3) the late introduction "infused the evidence with distorted importance," prejudiced the defendants' case, and denied them a fair opportunity to respond).

Right to present additional evidence if State is permitted to reopen its case. If the judge grants the State's motion to reopen its case, a judge's refusal to grant the defendant's request to present additional evidence in response may be reversible error. *See State v. Thompson*, 19 N.C. App. 693, 696 (1973) (stating that the judge's refusal to allow defendant to present material evidence in rebuttal after State was allowed to reopen its case to present further testimony "cannot be considered harmless error"); *see also United States v. Peay*, 972 F.2d 71 (4th Cir. 1992) (trial judge committed reversible error by allowing government to reopen its case to present new testimony of a witness who had testified for the defense while denying defendant the opportunity to impeach the witness with testimony of a new witness). If permission to offer further evidence is denied, the defendant must make an offer of proof to preserve the issue for appellate review.

Effect of sequestration orders on request to reopen. The trial judge has the discretion to grant a motion to reopen a party's evidence to recall a witness even if a sequestration order was in effect during the trial and that witness remained in the courtroom after his or her initial testimony. *See State v. Noblett*, 47 N.C. 418 (1855) (finding that a judge has the discretion to permit witnesses who already have been examined to be called again at any time before a verdict is rendered even though the witnesses had been sequestered before their first examination and had since had an opportunity to speak with each other).

Practice note: If the State is allowed to reopen its case to recall a witness who was originally subject to a sequestration order and who remained in the courtroom after testifying, you should consider requesting an instruction to the jury that the witness's presence in the courtroom during the testimony of other witnesses can be considered by the jury in determining his or her credibility. *See Gresham v. State*, 420 S.E.2d 71 (Ga. Ct. App. 1992).
