30.3 Procedural Requirements

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30.3 Procedural Requirements

A. In General

Motions to dismiss, motions for judgment as in case of nonsuit (that is, motions for nonsuit), and motions for a directed verdict of not guilty all have substantially the same legal effect. *See, e.g., State v. Bruce*, 315 N.C. 273 (1985); *State v. Mize*, 315 N.C. 285 (1985); *State v. Vietto*, 297 N.C. 8 (1979). Although a challenge to the sufficiency of the evidence is properly made by either a motion to dismiss or a motion for nonsuit (*see State v. Mendez*, 42 N.C. App. 141 (1979)), the modern approach is to denominate the procedural device as a "motion to dismiss for insufficient evidence."

Both G.S. 15-173 and G.S. 15A-1227 address motions to dismiss based on insufficient evidence. "The motion for dismissal referred to in G.S. 15A-1227 is the same motion for dismissal referred to in G.S. 15-173. Therefore, there is but one motion for dismissal for insufficiency of the evidence to sustain a conviction, and that motion is governed by the provisions of both G.S. 15-173 and G.S. 15A-1227." *Mendez*, 42 N.C. App. 141, 146. The statutes are identical in that "both statutes allow counsel to make a motion challenging the sufficiency of the evidence at the close of the State's evidence or at the close of all the evidence." *State v. Earnhardt*, 307 N.C. 62, 65 (1982). Since the statutes are identical in that respect, "cases dealing with the sufficiency of the evidence . . . under the older statute, G.S. 15-173, are applicable when ruling on motions made under the more recent statute, G.S. 15A-1227." *Id.* There are minor differences between the statutes, however, and each statute is reviewed separately below.

B. Provisions of G.S. 15-173

Motion at the close of the State's evidence. G.S. 15-173 is entitled "Demurrer to the evidence" and provides that in any criminal action in superior or district court, the defendant may move to dismiss the action, "or for judgment as in case of nonsuit," after the State has introduced its evidence and rested its case. If the trial judge allows the motion pursuant to the statute, a judgment dismissing the case shall be entered and that judgment has the force and effect of a "not guilty" verdict. *See also State v. Murrell*, 54 N.C. App. 342 (1981); N.C. R. APP. P. 10(a)(3). If the motion is denied, and the defendant does not put on evidence, he or she may raise the denial of the motion as grounds for reversal on appeal "without the necessity of the defendant's having taken

exception to such denial," i.e., without taking further steps to preserve the issue. G.S. 15-173.

Introduction of defense evidence waives earlier motion. If the defendant introduces evidence, he or she waives the motion for dismissal made at the close of the State's evidence and cannot then raise the issue of sufficiency on appeal unless he or she renews the motion to dismiss at the close of all the evidence. G.S. 15-173; *see also State v. Bruce*, 315 N.C. 273 (1985) (because defendant offered evidence following the trial judge's denial of his motion for dismissal at the close of the State's evidence, the denial of that motion was not properly before the supreme court for review); *State v. Mendez*, 42 N.C. App. 141 (1979) (by presenting evidence, defendant waived his right to assert the denial of his motion to dismiss at the close of the State's evidence as a ground for appeal); N.C. R. APP. P. 10(a)(3).

Effect of introduction of evidence by co-defendant. Where defendants are tried jointly and one does not introduce evidence, the defendant who does not introduce evidence is entitled to have his or her motion to dismiss for insufficiency of the evidence considered on the basis of the facts in evidence when the State rested its case—that is, in resisting the moving defendant's motion, the State may not rely on any evidence introduced by the co-defendant. *See State v. Frazier*, 268 N.C. 249 (1966); *State v. Kirkwood*, 229 N.C. App. 656 (2013); *State v. Berryman*, 10 N.C. App. 649 (1971). This rule applies even if the attorney for the defendant who does not introduce evidence cross-examines the witnesses for the co-defendant (as long as the cross-examination does not constitute the "introduction" of evidence). *See State v. DiNunno*, 67 N.C. App. 316, 319 (1984) (defense counsel did not "introduce" evidence within the meaning of G.S. 15-173 when he cross-examined the co-defendant as to the events leading up to and surrounding the arrest where "he did not attempt to elicit substantive evidence beneficial to the defendant DiNunno"); *see also infra* § 33.5B, What Constitutes "Introduction" of Evidence (discussing what constitutes the "introduction" of evidence in determining whether the defendant has lost the right to last argument).

Motion at the close of all the evidence. The defendant may move to dismiss at the close of all the evidence regardless of whether he or she moved to dismiss at the close of the State's evidence. If the judge grants the motion at the close of all the evidence, a judgment dismissing the case shall be entered and that judgment has the force and effect of a "not guilty" verdict. If the motion is denied, the defendant may raise the denial of the motion as grounds for reversal on appeal without taking further steps to preserve the issue. G.S. 15-173; *see also* N.C. R. APP. P. 10(a)(3).

C. Provisions of G.S. 15A-1227

Timing of motion. G.S. 15A-1227 details additional times when a defendant may make a motion for dismissal for insufficiency of the evidence, but the requirements are essentially the same as under G.S. 15-173. Under G.S. 15A-1227(a), a motion to dismiss may be made:

- at the close of the State's evidence;
- at the close of all the evidence;
- after return of a verdict and before entry of judgment; and
- after discharge of the jury without a verdict and before the end of the session.

A motion to dismiss for insufficiency of the evidence may not be made any earlier than at the close of the State's evidence. *See State v. Seward*, 362 N.C. 210, 216 (2008) (once the grand jury has determined the sufficiency of evidence to support a charge, a trial judge "may not pass on the sufficiency of that evidence again until after the State has had an opportunity to present its case-in-chief").

If the defendant fails to make a motion to dismiss at the close of the State's evidence or after all the evidence, he or she may still make the motion for dismissal at the later times indicated in the statute. *See* G.S. 15A-1227(b).

Introduction of defense evidence waives earlier motion. Unlike G.S. 15-173, G.S. 15A-1227 does not have a specific provision stating that when a defendant introduces evidence, he or she waives any motion made at the close of the State's evidence and cannot thereafter raise that issue on appeal. Nevertheless, the courts have held that if a defendant introduces evidence, only his or her motion to dismiss made at the close of all the evidence will be considered on appeal. *See State v. Mendez*, 42 N.C. App. 141 (1979); *see also* N.C. R. APP. P. 10(a)(3).

Ruling on motion required. The trial judge must rule on a motion to dismiss for insufficient evidence before the trial may proceed further. G.S. 15A-1227(c). This rule of criminal procedure recognizes the potential injustice of permitting a judge to take the ruling on a motion to dismiss for insufficient evidence under advisement in order to wait and see what the jury does. *See State v. Kiselev*, 241 N.C. App. 144 (2015) (noting that if a criminal defendant is subjected to trial and has the charges dismissed before the jury returns a verdict, the State cannot appeal since double jeopardy prohibits further prosecution); *see also infra* § 30.4B, State's Right to Appeal from Dismissals Based on Insufficient Evidence.

If a trial judge fails to timely rule on the motion in violation of this statute, the appellate courts will review the error to see if the defendant was prejudiced by the judge's failure to do so. *See Kiselev*, 241 N.C. App. 144; *State v. Hernandez*, 188 N.C. App. 193 (2008). If there is a reasonable possibility that the trial judge would have granted the defendant's motion to dismiss, then the error will be found to be prejudicial. *Kiselev*, 241 N.C. App. 144 (prejudicial error found where trial judge deferred ruling on defendant's motion to dismiss and permitted jury to deliberate; dismissal of State's appeal was appropriate remedy where trial judge granted the motion to dismiss after the jury convicted defendant of the charge and indicated that the ruling would have been the same if made at the close of evidence); *cf. Hernandez*, 188 N.C. App. 193 (error, but not prejudicial, for judge to reserve ruling on defendants' motions to dismiss until after the jury returned its verdicts because it was more likely that the judge would have denied the motions had he not reserved ruling, and there was sufficient evidence to withstand defendants' motions to

dismiss); *State v. Garnett*, 4 N.C. App. 367, 371 (1969) (holding that judges should rule on every motion for nonsuit but the judge's failure to do so was not prejudicial error under the circumstances because "[t]here was ample evidence against this defendant to withstand the motion for judgment as of nonsuit and to require the submission of this case to the jury").

Motion required to preserve issue on appeal. G.S. 15A-1227(d) states that "[t]he sufficiency of all evidence introduced in a criminal case is reviewable on appeal without regard to whether a motion has been made during trial." G.S. 15A-1446(d)(5) likewise allows the sufficiency of the evidence to be reviewed on appeal "even though no objection, exception or motion has been made in the trial division." ***This is not correct!*** The N.C. Court of Appeals has held that the statutes conflict with N.C. Rule of Appellate Procedure 10(b)(3) [now, R. 10(a)(3)], which provided that a defendant had no right on appeal to raise the issue of the insufficiency of the evidence to prove the crime charged unless he or she moved to dismiss the action at trial. *See State v. O'Neal*, 77 N.C. App. 600 (1985). Likewise, the N.C. Supreme Court has held that "[t]o the extent that N.C.G.S. 15A-1446(d)(5) is inconsistent with N.C. R. App. P. 10(b)(3) [now, R. 10(a)(3)], the statute must fail." *State v. Stocks*, 319 N.C. 437, 439 (1987); *see also State v. Blackmon*, 208 N.C. App. 397, 400 n.1 (2010) ("The subsection of Rule 10 cited by the *Stocks* Court is now subsection (a)(3), pursuant to our revised Rules of Appellate Procedure that took effect on 1 October 2009.").

Accordingly, to preserve the issue for appeal, the defendant must make a motion to dismiss at the close of the State's evidence if the defendant does not introduce any evidence and must make a motion to dismiss at the close of all the evidence if he or she introduces evidence. As under G.S. 15-173, the defendant may make a motion to dismiss at the close of all the evidence without having made a motion to dismiss at the close of the State's evidence. *See* N.C. R. APP. P. 10(a)(3).

Uniform standard. Regardless of when it was made, a defendant's motion to dismiss under G.S. 15A-1227 is determined by the trial judge under a uniform standard. *See supra* § 30.1, Legal Standard (discussing the "substantial evidence" test). The same standard applies whether the motion to dismiss was made at the close of the State's evidence, at the close of all the evidence, after return of the verdict but before entry of judgment, or after discharge of the jury without a verdict and before the end of the session. *See State v. Scott*, 356 N.C. 591 (2002).

D. Motions to Dismiss after Verdict or to Set Aside Verdict under G.S. 15A-1414

Motion for appropriate relief based on insufficiency of the evidence. Under G.S. 15A-1414(b)(1)c., a defendant may file a motion for appropriate relief after return of the verdict asserting that "[t]he evidence, at the close of all the evidence, was insufficient to justify submission of the case to the jury." This ground may be asserted even if the defendant made no prior motion to dismiss based on insufficient evidence. *Id.* In reviewing the defendant's contention under this statute, the same "substantial evidence" test as set out *supra* in § 30.1 is used by the trial judge to determine whether the motion

should be granted. *See State v. Acklin*, 71 N.C. App. 261 (1984) (citing *State v. Earnhardt*, 307 N.C. 62 (1982)).

Motion to set aside the verdict as against the weight of the evidence. Under G.S. 15A-1414(b)(2), a defendant may file a motion for appropriate relief asserting that "[t]he verdict is contrary to the weight of the evidence." This motion is appropriately made when the State's evidence is legally sufficient to go to the jury but the evidence favorable to the defendant (whether offered by the defendant or the State) has greater probative force than the evidence introduced against him or her. *See Roberts v. Hill*, 240 N.C. 373 (1954). This type of motion requires the trial judge to appraise the testimony and exercise discretion in determining whether the verdict is contrary to the greater weight of the evidence. In ruling on the motion, the judge may consider "the number of witnesses, their intelligence, their opportunity of knowing the truth, their character, their behavior on the examination, and all the circumstances on both sides." *Id.* at 381 (citations omitted). Criminal appellate decisions in North Carolina have cited *Roberts*, a civil case, with approval. *See, e.g., State v. Puckett*, 46 N.C. App. 719 (1980).

Since this motion is addressed to the trial judge's discretion, the refusal to grant the motion will not be disturbed on appeal absent an abuse of that discretion. *See, e.g., State v. Acklin*, 71 N.C. App. 261 (1984) (comparing standards for motion for appropriate relief after verdict based on insufficiency of the evidence under G.S. 15A-1414(b)(1)c. and based on the verdict being against the weight of the evidence under G.S. 15A-1414(b)(2)); *State v. Cauthen*, 66 N.C. App. 630, 635 (1984) (finding no abuse of discretion by trial judge even though defense expert's testimony as to defendant's mental condition was not contradicted; "[a]n expert's diagnosis of mental illness is not conclusive, and the question of insanity is one for the jury") (citation omitted).

If the evidence is sufficient to take the case to the jury, an appellate court is unlikely to find an abuse of discretion in the trial judge's refusal to find the verdict to be against the weight of the evidence. *See State v. Batts*, 303 N.C. 155 (1981) (finding no abuse of discretion in those circumstances); *Puckett*, 46 N.C. App. 719, 724 (finding no abuse of discretion in light of the victim's identification of defendant even though defendant presented alibi witnesses whose testimony led to the conclusion that it would have been "virtually impossible" for him to have robbed her). Likewise, the granting of such a motion will not be disturbed on appeal absent an abuse of discretion. *See State v. Surles*, 55 N.C. App. 179 (1981) (court upheld district court's decision to set aside its own verdict of guilty; however, appellate court remanded case for new trial, holding that district court could not enter verdict of not guilty after setting aside verdict on ground that it was against weight of evidence); *accord State v. Morgan*, 108 N.C. App. 673 (1993) (following *Surles* and also discussing court's authority to modify sentence after verdict).

Timing of motions. Motions made under G.S. 15A-1414 must be filed after the verdict but not more than ten days after entry of judgment. G.S. 15A-1414(a). Motions may be made and acted on by the trial judge even if notice of appeal has already been given. G.S. 15A-1414(c).

Practice note:* *Always move to dismiss ***all*** of the charges at the close of the State's evidence and again at the close of all the evidence if you have presented evidence even if it appears the evidence is sufficient and you may not wish to be heard on all of the specific charges. If you do not move to dismiss all of the charges for insufficient evidence and the client is convicted on charges not covered by your motion, the appellate attorney is precluded from arguing insufficiency of the evidence with respect to those charges on appeal. Likewise, if you move to dismiss based only on the insufficiency of the evidence as to one element of the charge, or based on a particular legal theory, the appellate attorney is precluded from arguing insufficiency of the evidence with regard to the other elements or legal theories. *See, e.g., State v. Euceda-Valle*, 182 N.C. App. 268, 271 (2007) (appellate review waived where defendant argued on appeal that the State failed to prove that he possessed the vehicle with the cocaine in the trunk but his motion to dismiss at trial was based upon a lack of an ownership interest in the vehicle and a lack of actual knowledge that there was a controlled substance inside); *State v. Shelly*, 181 N.C. App. 196, 205 (2007) (defendant's appellate argument based on the rule of corpus delicti was waived where he had argued accident in his "motion for judgment of acquittal" in the court below).

If the judge does not automatically send the jury out after the State or the defendant rests in order to give you an opportunity to make the motion, ask to be heard outside the presence of the jury before making your motion. *See State v. Shore*, ___ N.C. App. ___, 814 S.E.2d 464 (2018) (rejecting defendant's argument that the trial judge expressed an opinion on the evidence when he denied defendant's motion to dismiss in the presence of the jury; defendant did not ask to have the ruling made outside the jury's presence, object to the ruling, or move for a mistrial on this account); *see also State v. Welch*, 65 N.C. App. 390 (1983) (same).

If you forget to move to dismiss at the close of the State's evidence, you can always move to dismiss at the close of all the evidence. It is always preferable to move to dismiss before the return of the verdict, but if you fail to move to dismiss during the trial, be sure to make a motion to dismiss for insufficiency of the evidence after return of a verdict against the defendant. (A post-verdict ruling that the evidence was insufficient, however, would not bar the State from appealing and potentially having the conviction reinstated. *See infra* § 30.4B, State's Right to Appeal from Dismissals Based on Insufficient Evidence.) To preserve the denial of a motion to dismiss for appellate purposes, you must make sure that your motion and the trial judge's ruling are made on the record and not at an unrecorded bench conference or in chambers. *See* N.C. R. APP. P. 10.

The N.C. Court of Appeals is continuing its trend of denying review after considering the reasons given by trial counsel in support of a motion to dismiss. *See, e.g., State v. Walker*, ___ N.C. App. ___, 798 S.E.2d 529 (2017) (holding that because defense counsel argued that the evidence was insufficient as to specific elements and did not make a general motion to dismiss challenging the sufficiency of each element of each charge, he could not "swap horses" on appeal and argue that the evidence was insufficient to prove a different element of the same charged offense); *see also State v. Scaturro*, ___ N.C. App. ___, 802 S.E.2d 500 (2017) (finding that defendant failed to preserve his right to

appellate review of his fatal variance argument where his motion to dismiss the charge at trial was based solely on the insufficiency of the evidence and defendant failed to allege a fatal variance between the indictment and the proof at trial). To ensure that appellate counsel can raise any meritorious insufficiency issue, trial counsel should always make a general, global motion to dismiss all charges before arguing additional specific reasons in support of the motion to dismiss. *See State v. Glisson*, ___ N.C. App. ___, 796 S.E.2d 124, 127 (2017) (holding that trial counsel's specific argument as to one aspect of insufficiency did not preclude defendant from challenging other insufficiencies of the evidence on appeal where trial counsel also made a "global" or "prophylactic" motion to dismiss the charges); *State v. Pender*, 243 N.C. App. 142, 152–53 (2015) (rejecting the State's argument that defendant was limited on appeal to raising insufficiency issues as to the two specific elements that he argued at trial; defendant preserved issues on all elements "because defendant's initial motion to dismiss was based on insufficient evidence and defendant referenced each of the crimes with which he was charged").

Counsel may use the following "magic words" to ensure preservation:

> Your Honor, the defense makes a general, global motion to dismiss all charges on the grounds that the evidence is insufficient as a matter of law on each and every element of each charge to support submission of the charge to the jury, AND that submission to the jury would therefore violate the Fourteenth Amendment to the U.S. Constitution and article I, § 19 of the N.C. Constitution. Further, the defense moves to dismiss each charge on the grounds that, as to each charge, there is a variance between the crime alleged in the indictment and any crime for which the State's evidence may have been sufficient to warrant submission to the jury, AND that submission to the jury would therefore violate the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution and article I, § 19 of the N.C. Constitution.

After making the above general motions to dismiss, then lay out the specific insufficiency arguments, as well as specific variance arguments, if there are any. If you make a specific insufficiency or variance argument, then say, "But I want to reiterate, your Honor, that the defense is also making a general, global motion to dismiss for insufficiency of the evidence as to all charges and all elements and a general, global motion to dismiss for fatal variance as to all charges and all elements."

If the trial judge questions your global motion to dismiss based on his or her opinion that your argument is disingenuous or frivolous due to the sufficiency of the evidence as to particular elements or to the absence of a variance, you can respectfully assure the judge that Appellate Rule 10, as interpreted by the Court of Appeals, requires a general motion to dismiss in order to preserve any meritorious insufficiency argument that can be made on appeal. You can cite the cases discussed above as supporting your assertion regarding Appellate Rule 10. If necessary, argue that while Rule 3.1 of the N.C. State Bar Rules of Professional Conduct states that an attorney may not assert a frivolous issue, it also states that "[a] lawyer for the defendant in a criminal proceeding . . . may nevertheless so

defend the proceeding as to require that every element of the case be established." Comment 3 to this rule also applies and states that "[t]he lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim that otherwise would be prohibited by this Rule."

For a discussion of the importance of moving to dismiss on both insufficiency of the evidence and fatal variance grounds, see *infra* § 30.5, Fatal Variance.