

31.4 Mistrial Based on Prejudice to the Defendant

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Sometimes misconduct, disruptive events, or improprieties occur during trial that prejudice the defendant in the eyes of the jury. A motion for mistrial may be the appropriate remedy if the prejudice cannot be cured in some less drastic manner, such as instructions to the jury or replacement of a juror with an alternate.

A. Statutory Authority for Mistrial

G.S. 15A-1061 provides that “[u]pon motion of a defendant or with his concurrence the judge may declare a mistrial at any time during the trial.” Pursuant to this statute, a defendant’s motion for mistrial must be granted if, during the trial, an error or legal defect in the proceeding occurs or if conduct that results in “substantial and irreparable prejudice to the defendant’s case” occurs inside or outside the courtroom.

Not every disruptive event or impropriety occurring during the trial will automatically require the judge to declare a mistrial. *State v. Newton*, 82 N.C. App. 555, 559 (1986). “A mistrial should be granted only when there are improprieties in the trial so serious that they substantially and irreparably prejudice the defendant’s case and make it impossible for the defendant to receive a fair and impartial verdict.” *State v. Warren*, 327 N.C. 364, 376 (1990) (citation omitted).

B. Timing of Motion

The motion for mistrial must be made before the verdict. If made after the verdict, the motion would be for a new trial. *State v. Miller*, 271 N.C. 646 (1967). Additionally, if the motion for mistrial is not made in a timely manner, i.e., “at some time sufficiently close to the occurrence of the error to permit its correction,” then denial of the motion may not be preserved for appellate review. See G.S. 15A-1446 Official Commentary; see also *State v. Summers*, 177 N.C. App. 691, 695 (2006) (court of appeals refused to review the denial of defendant’s motion for mistrial based on improper photo identification testimony where defense counsel did not object to the testimony when it was offered but “waited until the testimony of an additional witness” before moving for mistrial); *State v. Smith*, 96 N.C. App. 352 (1989) (defendant waived appellate review where his motion for

mistrial based on the prosecutor's alleged improper opening statement was not made until after the jury began deliberation); *see also* N.C. R. APP. P. 10 (requiring a timely objection or motion to preserve the error for appellate review).

C. Concurrence of the Defendant in Declaration of Mistrial

Even if the defendant does not move for mistrial under G.S. 15A-1061, the trial judge may nevertheless declare one pursuant to this statute if he or she believes that an error occurred resulting in substantial and irreparable prejudice to the defendant *and* the defendant concurs in the declaration of mistrial. The appellate courts might consider a defendant's failure to object to be a "concurrence." *See, e.g., State v. Cummings*, 169 N.C. App. 249 (2005) (finding that an order of mistrial was appropriate under G.S. 15A-1061 and double jeopardy did not bar retrial where the trial judge, after hearing the State's evidence and realizing that he had a personal familiarity with the case, rescheduled the case and the defendant made no objection).

In instances where a defendant does not move for mistrial or concur in the declaration of mistrial under G.S. 15A-1061, a trial judge may grant a mistrial pursuant to G.S. 15A-1063(1) if the error or defect made it "impossible for the trial to proceed in conformity with law." *See infra* § 31.6, Impossibility of Proceeding in Conformity with the Law.

Practice note: If you do not want a mistrial to be declared, you should expressly object to the order of mistrial on the record so that it will be clear on review that the defendant did not concur under G.S. 15A-1061. An objection is also necessary to preserve a double jeopardy issue for appellate review in noncapital cases. *See infra* § 31.9E, Preservation of Double Jeopardy Issue for Appellate Review When Mistrial is Granted on State's Motion or by Trial Judge Ex Mero Motu.

D. Co-Defendants

If two or more defendants are joined for trial, G.S. 15A-1061 provides that a mistrial may not be granted under that statute as to a defendant who did not make or join in a motion for mistrial.

E. Misconduct by the Defendant

When a defendant moves for a mistrial based on his or her own misconduct, the argument in support of mistrial will not be given great weight. *State v. Perkins*, 181 N.C. App. 209 (2007) (no abuse of discretion by trial judge in denying defendant's motion for mistrial based on the ground that she was prejudiced when a juror overheard defense counsel in a stairwell trying to convince defendant not to leave her own trial); *State v. Marino*, 96 N.C. App. 506, 507 (1989) (no error in the denial of defendant's motion for mistrial where any prejudice was a result of his own open-court "intemperate and profane outburst," the evidence of defendant's guilt was overwhelming, and it was unlikely that the outburst prevented defendant from receiving a fair and impartial verdict); *see also State v. Weathers*, 219 N.C. App. 522 (2012) (no abuse of discretion by trial judge in

refusing to grant defendant's motion for mistrial made after judge excused a State's witness from testifying further during direct examination where witness broke down emotionally due to his fear for himself and his family caused by defendant's threats and intimidation).

F. Misconduct by a Juror

A mistrial may be the appropriate remedy to seek when a juror has engaged in inappropriate conduct. For a detailed discussion of issues related to misconduct by a juror and the exposure of jurors to extraneous information, see *supra* Chapter 26, Jury Misconduct.

G. Selected Examples

The following cases contain examples of disruptive events or improprieties resulting in requests for mistrial by a defendant. In many of these cases, the appellate court found that there was no error by the trial judge in failing to grant a mistrial on the facts presented. Nevertheless, these cases represent various situations in which a mistrial motion may be appropriate.

- Emotional outbursts by a witness, a spectator, a co-defendant, a prosecutor, or the alleged victim. *See, e.g., State v. Moore*, 335 N.C. 567 (1994) (prosecutor); *State v. Blackstock*, 314 N.C. 232 (1985) (prosecuting witness); *State v. McGuire*, 297 N.C. 69 (1979) (co-defendant); *cf. State v. Turner*, 330 N.C. 249 (1991) (victim's family; no indication the defendant moved for a mistrial).
- Exposure of jurors to news reports or extraneous information about the case. *See, e.g., State v. Woods*, 293 N.C. 58 (1977); *State v. Hines*, 131 N.C. App. 457 (1998) (error to deny defendant's motion for mistrial).
- Improper contact with the jury by a third person. *See, e.g., State v. Wilson*, 314 N.C. 653 (1985) (error to deny defendant's motion for mistrial where prosecutor's wife served as custodian in charge of the jury; prejudice conclusively presumed where a State's witness or an immediate family member of the prosecutor, defendant, defense counsel, or material witness oversees jurors); *cf. State v. Lewis*, 188 N.C. App. 308 (2008) (finding abuse of discretion by trial judge in denying defendant's motion for appropriate relief where lead detective made comments during break to deputy sheriff serving as juror that were intended to influence the verdict).
- Expressions of opinion or improper remarks by the trial judge in the jury's presence. *See, e.g., State v. Harris*, 308 N.C. 159 (1983).
- References to inadmissible evidence by a witness or prosecutor. *See, e.g., State v. Harris*, 323 N.C. 112 (1988); *State v. Moose*, 115 N.C. App. 707 (1994) (error to deny defendant's motion for mistrial); *cf. State v. Britt*, 288 N.C. 699 (1975) (prosecutor's improper cross-examination of defendant referencing that defendant had been on death row as a result of his prior conviction for the same murder was highly improper and incurably prejudicial).
- Misconduct by the prosecutor. *See, e.g., State v. Elliott*, 64 N.C. App. 525 (1983) (error to deny defendant's motion for mistrial).

- Appearance of the defendant in front of jurors while wearing some type of visible restraint. *See, e.g., State v. Montgomery*, 291 N.C. 235 (1976).
- Failure of the State to comply with discovery requirements. *See, e.g., State v. Walker*, 332 N.C. 520 (1992); *see also* G.S. 15A-910(a)(3a) (providing for mistrial as a possible remedy for discovery violations); Appendix A, *infra*, N.C. COMM’N ON INDIGENT DEFENSE SERVS., PERFORMANCE GUIDELINES FOR INDIGENT DEFENSE REPRESENTATION IN NON-CAPITAL CRIMINAL CASES AT THE TRIAL LEVEL, Guideline 7.5(g)(4) Confronting the Prosecution’s Case (Nov. 2004) (recommending that counsel request appropriate relief, including mistrial, if the prosecutor failed to properly provide copies of all prior statements of prosecution witnesses as required by G.S. 15A-903(a)).
- Inappropriate remarks by a prosecutor during opening statement or closing argument. *See, e.g., State v. Dorton*, 172 N.C. App. 759 (2005); *State v. Jordan*, 149 N.C. App. 838 (2002) (error to deny defendant’s motion for mistrial).

Practice note: When moving for a mistrial, assert not only the statutory basis for the motion but a constitutional basis as well. Argue that the legal defect or misconduct that occurred during trial violated your client’s rights to a fair and impartial trial as guaranteed by the Fourteenth Amendment to the U.S. Constitution and article I, section 19 of the N.C. Constitution, and to a fair and impartial jury pursuant to the Sixth Amendment to the U.S. Constitution and article I, section 24 of the N.C. Constitution. *See State v. Garcell*, 363 N.C. 10 (2009) (the absence of a fair and impartial jury would violate the Sixth Amendment to the U.S. Constitution and article I, § 24 of the N.C. Constitution); *State v. Williams*, 330 N.C. 579, 583 (1992) (“[d]ue process requires that a defendant have ‘a panel of impartial, ‘indifferent’ jurors’”) (citations omitted); *State v. Tolley*, 290 N.C. 349, 364 (1976) (“[e]ssential to the concept of due process is the principle” that every person accused of a crime is entitled to a fair and impartial trial) (citations omitted); *State v. Mebane*, 106 N.C. App. 516 (1992) (individual’s right to a fair trial by an impartial jury is guaranteed by the Sixth Amendment to the U.S. Constitution and by article I, § 24 of the N.C. Constitution).
