Chapter 27
Miscellaneous Jury Procedures

27.1	**Note-Taking by the Jury**	**27-1**
27.2	**Authorized Jury View**	**27-2**
A.	View of the Crime Scene or Large Objects	
B.	View of the Defendant's Appearance or Physical Characteristics Compelled by the State	
C.	View of the Defendant's Appearance or Physical Characteristics to Rebut the State's Case	
27.3	**Substitution of Alternates**	**27-8**
27.4	**Questioning of Witnesses by the Jury**	**27-9**
27.5	**Sequestration of Jurors During Trial**	**27-11**
27.6	**Polling of the Jury**	**27-11**
A.	In General	
B.	Noncapital Cases and Guilt-Innocence Phase of Capital Cases	
C.	Sentencing Phase of Capital Cases	
D.	Equivocation by Juror During Polling	

This chapter deals with miscellaneous procedural issues related to jurors. Issues dealing with jury misconduct are covered *supra* in Chapter 26, jury instructions are covered *infra* in Chapter 32, and issues related to deliberations and verdict are covered *infra* in Chapter 34.

27.1 Note-Taking by the Jury

Jurors may make notes and take them into the jury room unless the trial judge, on his or her own motion or the motion of any party, directs otherwise. G.S. 15A-1228. Whether jurors are allowed to take notes is within the trial judge's discretion, and that decision will not be reversed absent an abuse of that discretion. *State v. Crawford*, 163 N.C. App. 122 (2004) (after noting that G.S. 15A-1228 no longer contained the mandatory requirement that the trial judge instruct jurors not to take notes if a party objected, court found no abuse of discretion in the denial of the parties' request to prohibit the jury from taking notes during closing arguments); *accord United States v. Maclean*, 578 F.2d 64 (3rd Cir. 1978) (setting out arguments for and against note-taking by jurors before holding that the decision whether to allow jurors to take notes was within trial judge's discretion); *State v. Jumpp*, 619 A.2d 602, 607 (N.J. Super. Ct. App. Div. 1993)

(collecting cases and adopting the position that the majority of jurisdictions have taken "accord[ing] general approval to the practice of juror note-taking in criminal cases and vest[ing] the trial court with discretion to permit the same").

Trial judges may also be faced with determining whether to allow jurors to use electronic devices to take notes instead of pen and paper. *See State v. Pace*, 240 N.C. App. 63 (2015) (finding no plain error in trial judge's failure to specifically instruct the jury concerning the appropriate use of tablet computers that he had authorized for note-taking where the judge had previously instructed jurors not to look up topics on Internet or visit any social media site); *see also In re Korfmann*, ___ N.C. App. ___, 786 S.E.2d 768, 770 (2016) (juror who recorded notes on a cell phone was found to be in direct contempt because trial judge felt that he had "made it crystal clear that the jury is to rely on their recollection, not their notes, not a cell phone, but their recollection"). Whether to authorize the use of iPads or tablet computers appears to be a decision that is within the trial judge's discretion. *See Pace*, 240 N.C. App. at 67 (citing *State v. Rhodes*, 290 N.C. 16, 23 (1976), for the proposition that, in the absence of a controlling statute or rule, matters relating to the orderly conduct of trial or to the proper administration of justice in the court are within trial judge's discretion).

Practice note: If the trial judge allows the jury to take notes during the trial, either on paper or electronically, counsel may request an instruction in accordance with N.C. Pattern Jury Instruction—Crim. 100.30 (June 2008), which directs the jurors to use their notes to help refresh their recollection but not give them undue significance. If the jurors are permitted to take notes on electronic devices, counsel may want to request that the jury be specifically admonished not to use the devices for any improper purpose such as accessing the Internet to obtain or disclose information about the case or to supplement the trial judge's instructions in the case by consulting an online dictionary or website. It may also be advisable to request that the instructions on note-taking be repeated immediately before jury deliberations. *See accord United States v. Maclean*, 578 F.2d 64, 67 (3rd Cir. 1978).

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 (7th ed. 2011) (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 (7th ed. 2011) (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) (7th ed. 2011). *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.

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).

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 (2d ed. 2012).

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.

27.3 Substitution of Alternates

G.S. 15A-1215(a) authorizes a trial judge to replace a juror with an alternate juror if any juror dies, becomes incapacitated or disqualified, or is discharged for any reason at any time before final submission of the case to the jury. The exercise of this power rests in the sound discretion of the trial judge and is not reversible error absent a showing of an abuse of discretion. *State v. Nelson*, 298 N.C. 573 (1979). For example, no abuse of discretion was found where the trial judge discharged a juror and substituted an alternate juror before the beginning of deliberations where the original juror:

- Exhibited a "lack of attention." *State v. Barbour*, 43 N.C. App. 38, 43 (1979).
- Telephoned defense counsel at home and persisted in discussing personal matters with him, including his marital status, before counsel was able to end the conversation. *State v. Price*, 301 N.C. 437 (1980).
- Could not attend the trial on Saturday where it was apparent the case would not be concluded on Friday and court was not going to be convened the following Monday and Tuesday due to religious holidays. *Nelson*, 298 N.C. 573.
- Failed, with explanation, to return to the courtroom after the lunch break and defendant did not object to the substitution. *State v. Carr*, 54 N.C. App. 309 (1981).
- Overheard something about the case that conceivably could have affected his impartiality. *State v. Harrington,* 335 N.C. 105 (1993).
- Was unable to obtain child care for her sick child. *State v. Davis*, 325 N.C. 607 (1989).

An alternate must be discharged on final submission of the case to the jury and cannot be substituted for a juror after the jury has begun its deliberations. *See* G.S. 15A-1215(a); *State v. Bunning*, 346 N.C. 253 (1997) (substitution of an alternate juror for an incapacitated juror after jury deliberations had started violated the defendant's right to a trial by a jury of twelve as guaranteed by article I, section 24 of the N.C. Constitution because it resulted in a verdict rendered by eleven jurors plus two jurors who each participated partially).

If a juror is replaced by an alternate *after deliberations have begun*, trial counsel need not object to preserve the issue for appeal because "[a] trial by a jury which is improperly constituted is so fundamentally flawed that the verdict cannot stand." *Bunning*, 346 N.C. 253, 257. A violation of a defendant's state constitutional right to have the verdict determined by twelve jurors constitutes error per se. *Id.*

G.S. 15A-2000(a)(2) authorizes a trial judge to replace a juror with an alternate juror if any juror dies, becomes incapacitated or disqualified, or is discharged for any reason before the beginning of deliberations at a capital sentencing hearing. As in noncapital cases, a trial judge's decision relating to the competency and service of a juror in a capital case is not reviewable on appeal absent a showing of abuse of discretion. *See State v. Tirado*, 358 N.C. 551 (2004) (trial judge did not abuse his discretion when, prior to the start of deliberations in the guilt-innocence phase, he discharged and replaced a juror who had pending felony warrants against her); *State v. Holden*, 321 N.C. 125 (1987) (no abuse of discretion found where trial judge replaced a juror with an alternate after learning before starting the sentencing phase of a capital case that the juror would not impose the death penalty under any circumstances).

Practice note: If you are opposed to the trial judge's ruling on the substitution of an alternate, you should object and state your reasons on the record in order to ensure preservation of the issue for appellate purposes. Although G.S. 15A-1215(a) does not require the trial judge to make specific findings to support his or her decision, you should request that the judge place the reasons for the ruling on the record. *Cf. State v. Carr*, 54 N.C. App. 309 (1981) (finding that even though defendant did not object to the seating of an alternate juror, did not request additional findings, and did not move for mistrial, either then or at the conclusion of the trial, statements made by the trial judge were sufficient for appellate court to find no abuse of discretion).

You also may want to move for a mistrial if you believe that the error resulted "in substantial and irreparable prejudice to the defendant's case," G.S. 15A-1061, or if "[i]t is impossible for the trial to proceed in conformity with law" due to the trial judge's ruling. G.S. 15A-1063(1); *see also State v. Nelson*, 298 N.C. 573 (1979); *Carr*, 54 N.C. App. 309.

27.4 Questioning of Witnesses by the Jury

A trial judge, in his or her discretion, may allow a juror to question a testifying witness as long as the question is legally permissible. *See State v. Kendall*, 143 N.C. 659 (1907). However, in *State v. Howard*, 320 N.C. 718, 726 (1987), the N.C. Supreme Court recognized that possible prejudice may arise if counsel is put in "the untenable position of having to choose between not objecting to an incompetent or prejudicial question, thus letting the testimony in, or objecting to the question with the potential result of offending a juror." To alleviate this concern when juror questioning is an issue, the court stated that the better practice is for:

- the juror to submit written questions to the judge;
- the judge to hold a bench conference to rule on any objections outside the presence of the jury; and
- the judge to read the jurors' questions to the witness.

Id. at 726; *see also State v. Elliott*, 360 N.C. 400 (2006) (noting that the trial judge followed the "better practice" set out in *Howard* when he had the jurors write down their questions and gave each request due consideration).

The trial judge should exercise due care to see that the jurors' questions are limited to ones that clarify the testimony. *Howard*, 320 N.C. 718. The judge's decision whether to allow juror questioning will not be reversed absent an abuse of discretion. *See State v. Jones*, 158 N.C. App. 465 (2003).

Additional resources. For further discussion of this topic, including possible benefits and disadvantages of juror questioning, see Thomas Lundy, *Jury Instruction Corner: Propriety of permitting jurors to submit questions for witnesses; Instructional safeguards to consider if juror-authored questions are allowed*, CHAMPION, Dec. 26, 2002, at 48; Mitchell J. Frank, *The Jury Wants to Take the Podium—But Even With the Authority to Do So, Can It? An Interdisciplinary Examination of Jurors' Questioning of Witnesses at Trial*, 38 Am. J. Trial Advoc. 1 (2014).

For a discussion of jury questioning and cautionary instructions if jurors are allowed to question witnesses in a civil trial, see ABA CIVIL TRIAL PRACTICE STANDARDS, at 3–5 (Aug. 2007). *See also* ABA PRINCIPLES FOR JURIES AND JURY TRIALS, Principle 13C (2016) (offering guidance to trial judges who are faced with deciding whether to allow juror questioning in civil and criminal cases).

Practice note: To preserve an issue for appellate review regarding a trial judge's ruling on a juror's request to question a witness, you will need to take affirmative steps. Although cases indicate that it is not necessary for counsel to object to the jurors' questions when actually asked at trial in order to preserve the issue for appeal (*see, e.g., State v. Howard*, 320 N.C. 718, 726 (1987)), counsel should always object at a bench conference if one is held before the questions are asked or at the next available opportunity when the jury is not present. *See DiBenedetto v. Goodyear Tire & Rubber Co.*, 754 F.2d 512, 515 (4th Cir. 1985) (discounting appellants' assertion that they failed to object because they did not want to alienate the jury, and stating that "counsel certainly must have had opportunities during a three-week trial to object and put on the record—outside the presence of the jury—their objection to an individual question or to the entire practice of juror questioning"). Because bench conferences are not often recorded, make sure there is a clear record of any discussion or objection to the juror's request and to the trial judge's decision.

Likewise, if you would like the trial judge to allow a juror's request to question a witness but the request is denied, you will need to object to the denial to preserve it as an issue on appeal. *See State v. Goodman*, ___ N.C. App. ___, 808 S.E.2d 791, 794 (2017) (defendant's failure to object when trial judge categorically denied a juror's request to question a witness "render[ed] unpreserved any issue arising from that denial"); *State v. Parmaei*, 180 N.C. App. 179, 184 (2006) (issue regarding trial judge's denial of the jury's request to question witnesses was not preserved for appellate review where defendant failed to object and "agreed it was not the role of the jury to ask questions"). In

order to be able to show prejudice on appeal, you will need to request that the proposed questions be placed on the record and that the answers be placed on the record outside the jury's presence. *See Goodman*, ___ N.C. App. ___, 808 S.E.2d at 795 (on appeal, defendant conceded and court agreed that it was impossible to determine what questions the jurors would have asked or what additional evidence might have been elicited; therefore, the court was unable to determine exactly how the trial judge's alleged error might have been prejudicial and would not review defendant's "purely speculative" argument).

27.5 Sequestration of Jurors During Trial

Jurors may be sequestered, i.e., kept separate and apart, during trial if so directed by the trial judge in his or her discretion. *See* G.S. 15A-1236(b); *see also* G.S. 9-17 ("The presiding judge, in his discretion, may direct any jury to be sequestered while it has a case or issue under consideration."); *State v. Wilson*, 322 N.C. 117 (1988) (decision whether to sequester jurors is a discretionary one and will not be disturbed absent a showing of an abuse of that discretion). G.S. 15A-1236(b) authorizes either complete sequestration, which includes separate lodging facilities at night, or partial sequestration during lunch or while in the vicinity of the courthouse. *See* G.S. 15A-1236 Official Commentary. When sequestration is ordered in a criminal case, the State must pay for all accommodations of jurors. G.S. 9-17. According to the N.C. Judicial Branch website, it is extremely rare for a jury to be sequestered or to be kept in a hotel during trial. *See Jury Service* (last visited Aug. 16, 2018).

A defendant does not have a federal constitutional right to have the jurors sequestered during trial. Sequestration is a matter of state procedural law and does not reach constitutional proportions. *Baldwin v. Blackledge*, 330 F. Supp. 183 (E.D.N.C. 1971).

If sequestration is ordered during deliberations in a capital case, the alternate jurors must be sequestered in the same manner as the trial jurors. The alternates must also be sequestered from the trial jury. G.S. 15A-1215(b).

For further discussion of jury sequestration, including summaries of relevant cases, see Jeff Welty, *Jury Sequestration*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Sept. 20, 2011) (noting that due to the logistical headaches involved and the toll that sequestration takes on jurors, the National Center for State Courts recommends that it "should be used only in the most serious cases, and even then for the shortest possible period of time").

27.6 Polling of the Jury

A. In General

"To poll the jury means to ascertain by questions addressed to the jurors, individually, whether each juror assented and still assents to the verdict tendered to the court." *State v.*

Boger, 202 N.C. 702, 704 (1932). The right to poll the jury in criminal cases is firmly established by article I, section 24 of the N.C. Constitution and by statute. *See, e.g., State v. Lackey*, 204 N.C. App. 153 (2010).

By polling the jury, the judge gives each juror an opportunity, before the verdict is recorded, to declare in open court his or her assent to the verdict that the foreman has returned and thus enables the judge and the parties "to ascertain *with certainty* that a unanimous verdict has been in fact reached and that no juror has been coerced or induced to agree to a verdict to which he [or she] has not fully assented." *Davis v. State*, 273 N.C. 533, 541 (1968) (emphasis in original); *see also State v. Black*, 328 N.C. 191, 198 (1991) ("The purpose of polling the jury is to ensure that the jurors unanimously agree with and consent to the verdict at the time it is rendered."); *State v. Young*, 77 N.C. 498, 499 (1877) (the right to poll the jury "is surely one of the best safeguards for the protection of the accused" since it is the mode of "ascertaining the *fact* that it is the verdict of the whole jury") (emphasis in original).

In both capital and noncapital cases, the poll must be conducted individually. *See* G.S. 15A-1238; G.S. 15A-2000(b). It is error for the trial judge to ask the jury collectively if they assented to and still assent to the verdict. *See Boger*, 202 N.C. 702, 704 (trial judge erred by requesting the jury to "stand up" if they assented to the verdict of manslaughter); *State v. Holadia*, 149 N.C. App. 248 (2002) (error to question the jury collectively and have them respond collectively by raising their hands).

The appellate courts have approved of three questions to be asked of individual jurors at the time of polling:

1. Was this your verdict?
2. Is this now your verdict?
3. Do you still agree and assent thereto?

See, e.g., State v. Asbury, 291 N.C. 164 (1976); *State v. Norris*, 284 N.C. 103 (1973). The first question is asked to ensure that no improper influence or coercion took place in the jury room during deliberations and the latter two are asked to confirm that the juror still assents in open court to the jury verdict. *See Asbury*, 291 N.C. 164.

Although jurors must be polled individually, they do not necessarily have to be questioned about each conviction separately. For example, if the jury returns verdicts against a defendant finding him or her guilty of kidnapping and second-degree murder, G.S. 15A-1238 has been interpreted as not requiring that the jurors be polled about the kidnapping and then polled separately about the murder. Instead, the judge may direct the clerk to recite all of the verdicts and ask each juror if they were his or her verdicts and whether he or she still assents. *See, e.g., State v. Ramseur*, 338 N.C. 502 (1994); *State v. Hunt*, 198 N.C. App. 488 (2009); *State v. Sutton*, 53 N.C. App. 281 (1981).

Likewise, the jury does not necessarily have to be questioned about each theory of conviction separately. For example, if the jury returns a verdict against a defendant

finding him or her guilty of first-degree murder, G.S. 15A-1238 has been interpreted as not requiring that the jurors be polled separately about the theories underlying the murder conviction. Instead, the judge may direct the clerk to recite the verdict and underlying theories and ask each juror if that was his or her verdict and whether he or she still assents. *See State v. Carroll*, 356 N.C. 526, 545 (2002) (holding that jury was properly polled where record revealed that the jury was thoroughly aware of the requirement of a unanimous verdict on each theory of first-degree murder; both theories were clearly represented on the verdict sheet; and "following the clerk's announcement that the jury unanimously found defendant 'guilty of first degree murder on the basis of malice, premeditation and deliberation and under the first degree felony murder rule,' each juror individually affirmed that this was indeed his verdict").

Practice note: If you would like the jurors to be polled separately as to each individual conviction or as to each underlying theory of a conviction, you should specifically request the judge to do so during your motion to poll and offer reasons why it is important in your particular case. Be sure your request and, if denied, the judge's ruling are both on the record.

B. Noncapital Cases and Guilt-Innocence Phase of Capital Cases

Need for motion. The jury must be polled on the motion of any party or on the trial judge's own motion. G.S. 15A-1238. Pursuant to this statute:

- The poll must be conducted after verdict but before the jury has been dispersed.
- The poll may be conducted by the judge or by the clerk by asking each juror individually whether the verdict announced is his or her verdict.
- If the poll reveals that there is not unanimous concurrence, the jury must be directed to retire for further deliberations.

"[W]hile best practice dictates that the trial judge explicitly inquire as to whether either party wishes to poll the jury, it is not required; ultimately, the responsibility lies with trial counsel." *State v. Govan*, 240 N.C. App. 89 (2015) (unpublished) (citing *State v. Carmon,* 156 N.C. App. 235, 245 (2003), which found no error where the trial judge dismissed the jury without asking the defendant if he wished to poll the jury; "[i]t was the responsibility of defendant to make this request, even if at an inopportune time").

Although not specifically addressed in the statute, G.S. 15A-1238 appears to authorize the polling of the jury as to both general and special verdicts. If polling of the jury with regard to a special verdict is desired, this should be made clear in the motion for polling. *See State v. Long*, 230 N.C. App. 411 (2013) (unpublished) (finding defendant's request that "the jury be polled" made immediately after clerk had read both the general and special verdicts to be a request for polling as to the general verdict only; defendant waived appellate review where he failed to make a timely request for polling or object to the trial judge's collective poll of the jury as to the special verdict finding the presence of two statutory aggravating factors). For a general discussion of general and special verdicts, see *infra* § 34.7B, Types of Verdicts (2d ed. 2012).

For further discussion of jury polling, including a collection of cases dealing with the topic as well as a recommended colloquy for judges to follow, see Jessica Smith, *Polling the Jury*, N.C. SUPERIOR COURT JUDGES' BENCHBOOK, at 8–12 (UNC School of Government, Feb. 2015).

Timeliness of motion. A defendant waives his or her right to request a polling of the jury pursuant to G.S. 15A-1238 where he or she does not make the request before the jury's discharge. *State v. Baynard*, 79 N.C. App. 559 (1986). The rationale behind requiring that the polling occur before dispersal of the jury is to ensure that nothing extraneous to the jury's deliberations can cause any of the jurors to change their minds. *See State v. Black*, 328 N.C. 191, 198 (1991) (defendant's motion to poll came too late where it was made after the jury had entered its verdict and was given a thirty-minute recess during which it was free to leave the courtroom and go into the streets); *see also State v. Ballew*, 113 N.C. App. 674 (1994) (defendant waived right to poll jury where request was made after the jury had been released to the jury room and had been told that they could discuss the case with anyone if they wished), *aff'd per curiam*, 339 N.C. 733 (1995); *State v. Froneberger*, 55 N.C. App. 148 (1981) (defendant waived right to poll jury where motion was not made until after the jury was discharged and court had recessed for lunch).

Practice note: Counsel should *always* request that the jury be polled after a defendant is convicted and, if applicable, after the jury has rendered a special verdict. A juror who was struggling with the verdict or feeling pressured by the other jurors may welcome the opportunity to say so in open court. It is especially important to timely request polling because, as a general rule, once a verdict has been rendered and received in open court, it may not later be impeached—that is, a juror may not testify nor may evidence be received as to matters occurring during deliberations or calling into question the reasons on which the verdict was based. *See, e.g., State v. Martin*, 315 N.C. 667 (1986). For a discussion of the anti-impeachment rule and its limited exceptions, see *supra* § 26.2B, Discovered After Verdict.

Counsel should also object to any error in the polling procedure at the time it occurs in order to ensure that the issue is preserved for appellate review. *See State v. Osorio,* 196 N.C. App. 458 (2009) (refusing to review defendant's contention that the trial judge erred by failing to individually poll the jurors where defendant neither requested a jury poll nor objected to the collective polling of the jury by the show of hands); *see also State v. Flowers*, 347 N.C. 1, 22 (1997) (defendant waived the right to individual polling because he made no request that the jury be polled; procedure used by the trial judge asking the jurors to respond collectively regarding the verdicts was proper because it "merely served to insure that before the verdicts were accepted, the record reflected the facts that the written verdicts were returned in open court and were unanimous").

C. Sentencing Phase of Capital Cases

After delivery of the sentence recommendation by the foreman of the jury in a capital case, the jury must be individually polled to establish whether each juror concurs and agrees to the sentence recommendation returned. G.S. 15A-2000(b). Since this right to a

jury poll is statutorily mandated, it is not dependent on a defendant's request for polling. *State v. Buchanan*, 330 N.C. 202 (1991). The trial judge's error in failing to properly poll a capital jury is not waived by the defendant's failure to object. *Id.*; *see also State v. Tirado*, 358 N.C. 551 (2004) (granting defendant a new sentencing hearing where trial judge deferred polling the jury on the verdict in defendant's case until the jury heard additional evidence and rendered a verdict in a co-defendant's case; although defense counsel made no contemporaneous objection to the trial judge's deferral of the polling, trial judge should have granted defendant's motion for mistrial made after co-defendant's verdict was returned).

D. Equivocation by Juror During Polling

If, during polling in a noncapital case, there is not unanimous concurrence by all jurors, the judge must direct the jury to retire for further deliberations. G.S. 15A-1238; *see also* G.S. 15A-1235(c) (if the jury has been unable to agree on a verdict, "the judge may require the jury to continue its deliberations and may give or repeat the instructions provided in subsections (a) and (b)"). If it ultimately appears "that there is no reasonable possibility of agreement, the judge may declare a mistrial and discharge the jury." G.S. 15A-1235(d); *see also infra* § 31.7, Juror Deadlock (2d ed. 2012).

G.S. 15A-2000(b) is silent as to what the judge must do when the polling reveals a nonunanimous sentencing recommendation in a capital case. It does not contain language mandating further deliberations as in G.S. 15A-1238; however, the N.C. Supreme Court has held that when "an inconsistency arises between the verdict and the responses of jurors during the polling process, the trial court must nevertheless allow the jury a reasonable opportunity to attempt to reach a unanimous sentence recommendation." *State v. Maness*, 363 N.C. 261, 288 (2009) (approving of trial judge's decision to order the jury to resume deliberations where a poll revealed nonunanimity in the verdict after one-and-a-half hours of deliberations). If the judge concludes under G.S. 15A-2000(b) that "the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation," he or she is authorized to impose a life sentence. *Id.*

For a collection of cases that consider or decide whether the declaration of a mistrial or the granting of a new trial is warranted where a juror who has assented to a verdict of guilty in a criminal case equivocates upon being polled after verdict, see M. J. Greene, Annotation, *Juror's Reluctant, Equivocal, or Conditional Assent to Verdict, on Polling, as Ground for Mistrial or New Trial in Criminal Case*, 25 A.L.R.3d 1149 (1969 & Supp. 2010).