Chapter 30
Motions to Dismiss Based on Insufficient Evidence

30.1 Legal Standard **30-2**

A. Question Presented by Motion
B. Definition of Substantial Evidence
C. Effect of the Defendant's Evidence
D. Circumstantial Evidence
E. Stacking of Inferences
F. Weight of the Evidence
G. Credibility of the Witnesses

30.2 Due Process Requirements **30-5**

30.3 Procedural Requirements **30-5**

A. In General
B. Provisions of G.S. 15-173
C. Provisions of G.S. 15A-1227
D. Motions to Dismiss after Verdict or to Set Aside Verdict under G.S. 15A-1414

30.4 Effect of Dismissal **30-12**

A. Application of Double Jeopardy
B. State's Right to Appeal from Dismissals Based on Insufficient Evidence

30.5 Fatal Variance **30-15**

A motion to dismiss is the procedural device used to test the sufficiency of the evidence presented at trial to convict the defendant. The motion should always be made outside the presence of the jury. The importance of making this motion at the appropriate times and in the appropriate manner cannot be overestimated.

The scope of this chapter is limited to motions to dismiss based on the insufficiency of the evidence. Other types of motions to dismiss are covered in other chapters of this manual. *See* NORTH CAROLINA DEFENDER MANUAL, VOL. 1, PRETRIAL (2d ed. 2013). These include:

- Motions to dismiss for pre-accusation delay or for violation of the right to a speedy trial. *See* Chapter 7 (Speedy Trial and Related Issues).
- Motions to dismiss based on defective pleadings. *See* Chapter 8 (Criminal Pleadings).

- Motions to dismiss based on improper grand jury procedures. *See* Chapter 9 (Grand Jury Proceedings).
- Motions to dismiss based on lack of jurisdiction (other than lack of jurisdiction as a result of a defective pleading). *See* Chapter 10 (Jurisdiction).
- Motions to dismiss based on improper venue. *See* Chapter 11 (Venue).
- Motions to dismiss on double jeopardy grounds or for vindictive or selective prosecution. *See* Chapter 13 (Motions Practice).

30.1 Legal Standard

A. Question Presented by Motion

State's burdens of proof. In all criminal cases, the State has two burdens of proof—a burden of persuasion and a burden of production. *See* 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 30, at 132 (8th ed. 2018) (defining the terms "burden of producing evidence" and "burden of persuasion"). To meet its burden of persuasion, the State must prove to the finder of fact, beyond a reasonable doubt, all facts necessary to establish the defendant's guilt of the charged offense. *See Mullaney v. Wilbur*, 421 U.S. 684 (1975); *In re Winship*, 397 U.S. 358 (1970). The State must meet a parallel burden of production to have the offense submitted to the finder of fact. Thus, the trial court must find that a rational finder of fact could accept the evidence as proof of the defendant's guilt beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307 (1979) (stating constitutional requirement, discussed further *infra* in § 30.2); 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 32, at 134 (8th ed. 2018) (burden of production is virtually always on State). A motion to dismiss for insufficiency of the evidence tests whether the State has met this burden of production.

Standard for determining whether to grant motion to dismiss. In ruling on a defendant's motion to dismiss, the question before the trial judge is whether the State has produced substantial evidence of (1) each essential element of the offense charged or of a lesser included offense and (2) defendant's being the perpetrator of the offense. *State v. Powell*, 299 N.C. 95, 98 (1980). This is a question of law for the trial judge to determine. *See State v. Cockerham*, 155 N.C. App. 729 (2003). The definition of "substantial evidence" is discussed further in subsection B., below.

The State is aided in meeting its burden by the principle that the evidence must be considered in the light most favorable to the State, with the State being entitled to every reasonable inference of fact arising from the evidence. *See State v. Brown*, 310 N.C. 563 (1984); *State v. Easterling*, 300 N.C. 594 (1980). This is true even if that same evidence also would support reasonable inferences of the defendant's innocence. *State v. Scott*, 356 N.C. 591 (2002). Discrepancies and contradictions, even in the State's evidence, are for the jury to resolve and do not warrant a dismissal. *State v. Henderson*, 276 N.C. 430, 438 (1970). The ultimate question for the trial judge is "whether a reasonable inference of defendant's guilt may be drawn from the circumstances." *State v. Lee*, 348 N.C. 474, 488 (1998); *see also infra* § 30.2, Due Process Requirements (noting that North Carolina

courts have held that this standard is the same in substance as the federal due process standard).

Practice note: The courts have often said that in ruling on a motion to dismiss, the trial judge may consider all admitted evidence, whether competent or incompetent. The courts have reasoned that, if the trial judge had not allowed the incompetent evidence, the State might have offered other, admissible evidence. *See State v. Spencer*, 192 N.C. App. 143, 148 n.3 (2008). In light of this rationale, if you believe that the trial judge erroneously admitted certain evidence and that without that evidence the State's evidence is insufficient, ask the trial judge to reconsider his or her earlier ruling in addressing your motion to dismiss. At that stage of the proceedings, the trial judge can allow the State to reopen its case pursuant to G.S. 15A-1226(b), putting the State to the test of whether it actually has admissible evidence to offer in lieu of the incompetent evidence. *Cf. State v. Fleming*, 350 N.C. 109, 143 (1999) (appellate court did not address constitutionality of trial judge considering incompetent evidence on motion to dismiss for insufficient evidence; constitutional argument was not presented to trial judge).

B. Definition of Substantial Evidence

Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78 (1980). "The substantial evidence test requires that the evidence must be existing and real, not just seeming and imaginary." *State v. Irwin*, 304 N.C. 93, 97–98 (1981). Evidence is not substantial if it arouses only a suspicion about the fact to be proved, even if the suspicion is strong. *State v. Malloy*, 309 N.C. 176 (1983).

C. Effect of the Defendant's Evidence

The courts have often stated that only evidence favorable to the State will be considered on a motion to dismiss for insufficient evidence. Accordingly, evidence offered by the defendant will generally not be considered if it relates to his or her defense or is in conflict with the State's evidence. *See State v. Earnhardt*, 307 N.C. 62 (1982); *State v. Henderson*, 276 N.C. 430 (1970). Nevertheless, if the defendant's evidence explains or clarifies the evidence offered by the State, the trial judge must consider it. The judge "must also consider the defendant's evidence which rebuts the inference of guilt when it is not inconsistent with the State's evidence." *State v. Bates*, 309 N.C. 528, 535 (1983).

D. Circumstantial Evidence

In ruling on a motion to dismiss, the trial judge may consider circumstantial as well as direct evidence. *State v. Salters*, 137 N.C. App. 553 (2000); *see also State v. Stone*, 323 N.C. 447, 452 (1988) ("Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence."). The test for sufficiency is the same whether the evidence is circumstantial, direct, or a combination of the two. *State v. Jones*, 303 N.C. 500 (1981); 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 39, at 151 (8th ed. 2018).

Whether the evidence presented is direct or circumstantial, the trial judge must determine whether a reasonable inference of the defendant's guilt may be drawn from the evidence. *State v. Scott*, 356 N.C. 591 (2002). "[W]hile the State may base its case on circumstantial evidence requiring the jury to infer elements of the crime, that evidence must be real and substantial and not merely speculative." *State v. Reese*, 319 N.C. 110, 139 (1987). Once the judge decides that the circumstances give rise to a reasonable inference of the defendant's guilt, it is for the jury to decide whether the facts shown, taken singly or in combination, satisfy it beyond a reasonable doubt that the defendant is guilty. *See Scott*, 356 N.C. at 596; *see also State v. Irwin*, 304 N.C. 93 (1981).

E. Stacking of Inferences

Until the N.C. Supreme Court's ruling in *State v. Childress*, 321 N.C. 226 (1987), trial judges were not permitted to stack an inference on an inference in determining the sufficiency of the evidence in circumstantial evidence cases. *See, e.g., State v. Holland*, 318 N.C. 602 (1986); *State v. Byrd*, 309 N.C. 132 (1983); *State v. LeDuc*, 306 N.C. 62 (1982). In *Childress*, the court found no reason to prohibit consideration of an inference that naturally arises from a fact proven by circumstantial evidence and overruled its prior decisions.

F. Weight of the Evidence

When the trial judge considers a motion to dismiss, he or she is "concerned only with the legal sufficiency of the evidence to support a verdict, not its weight, which is a matter for the jury." *State v. Blake*, 319 N.C. 599, 604 (1987); *see also State v. Garcia*, 358 N.C. 382, 412 (2004) ("A 'substantial evidence' inquiry examines the sufficiency of the evidence presented but not its weight."). Evidentiary contradictions and discrepancies are for the jury to resolve and do not warrant dismissal. *State v. Holton*, 284 N.C. 391 (1973).

G. Credibility of the Witnesses

Ordinarily, the credibility of witnesses and the proper weight to be given their testimony is to be determined by the jury, not by the judge on a motion to dismiss. *State v. Miller*, 270 N.C. 726, 730 (1967). In rare instances, where the testimony presented is inherently incredible, the evidence may be found to be insufficient to withstand a defendant's motion to dismiss. *Id.* at 732 (evidence was insufficient to support conviction where sole identification of defendant came from a State's witness who was at least 286 feet from the perpetrator where "it is apparent that the distance was too great for an observer to note and store in memory features which would enable him, six hours later, to identify a complete stranger with the degree of certainty which would justify the submission of the guilt of such person to the jury"); *see also Jones v. Schaffer*, 252 N.C. 368, 378 (1960) ("'As a general rule, evidence which is inherently impossible or in conflict with indisputable physical facts or laws of nature is not sufficient to take the case to the jury, and in case of such inherently impossible evidence, the trial court has the duty of taking the case from the jury.'" (citations omitted)).

30.2 Due Process Requirements

The federal constitutional right to due process of law requires that the State prove beyond a reasonable doubt every fact necessary for a criminal conviction. *In re Winship*, 397 U.S. 358 (1970). A conviction predicated on evidence insufficient to permit a reasonable juror to find that the State has proven beyond a reasonable doubt every element of the particular offense charged and that the defendant is the perpetrator of that offense violates the Fourteenth Amendment to the U.S. Constitution. *Jackson v. Virginia*, 443 U.S. 307 (1979).

The federal due process standard for sufficiency is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319 (emphasis in original). The North Carolina courts have held that the state standard for determining the sufficiency of the evidence, discussed *supra* in § 30.1, is the same in substance as the federal due process standard set out in *Jackson*. *See State v. Jones*, 303 N.C. 500 (1981); *see also* 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 39, at 147–51 (8th ed. 2018) (discussing the sufficiency of evidence).

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.

30.4 Effect of Dismissal

A. Application of Double Jeopardy

If the trial judge grants a motion to dismiss based on the insufficiency of the evidence, double jeopardy precludes the State from trying the defendant again on the charge. *See Smalis v. Pennsylvania*, 476 U.S. 140, 142 (1986) ("a judgment that the evidence is legally insufficient to sustain a guilty verdict constitutes an acquittal for purposes of the Double Jeopardy Clause"); *State v. Ausley*, 78 N.C. App. 791 (1986); *State v. Murrell*, 54 N.C. App. 342 (1981); *see also* G.S. 15-173 (dismissal for insufficiency of evidence has force and effect of not guilty verdict). Retrial on the charge is barred because "the case was dismissed on the merits and did involve a determination of guilt or innocence." *See Murrell*, 54 N.C. App. 342, 345. Likewise, double jeopardy bars a retrial if the defendant's conviction is reversed by an appellate court because of insufficiency of the evidence. *Burks v. United States*, 437 U.S. 1 (1978); *State v. Mason*, 174 N.C. App. 206 (2005).

Principles of double jeopardy bar further prosecution even if the trial judge erroneously grants the motion to dismiss for insufficient evidence based solely on his or her mistake of law. *See Evans v. Michigan*, 568 U.S. 313, 315–16 (2013) (holding retrial not permitted where "a directed verdict of acquittal" was entered by the trial judge based on the judge's erroneous view that the State had not provided sufficient evidence of a particular element of the offense when it "turns out that the unproven 'element' was not actually a required element at all").

If the trial judge's dismissal was not based on grounds of factual guilt or innocence, the subsequent prosecution of a previously-dismissed charge does not violate double jeopardy (although it may be barred for other reasons). *State v. Priddy*, 115 N.C. App. 547 (1994); *see also United States v. Scott*, 437 U.S. 82 (1978) (prosecution's appeal from judgment dismissing defendant's charges was permitted since further prosecution did not violate double jeopardy because the dismissal was based on pre-indictment delay and did not amount to an acquittal on the merits).

B. State's Right to Appeal from Dismissals Based on Insufficient Evidence

Generally. There is no common law right providing for appeal by the State—the right is purely statutory. *State v. Harrell*, 279 N.C. 464 (1971). The State may not appeal a judgment in favor of a criminal defendant in the absence of a statute that clearly confers that right. *State v. Dobson*, 51 N.C. App. 445 (1981). Statutes granting the State a right to appeal in criminal cases are to be strictly construed. *State v. Elkerson*, 304 N.C. 658 (1982).

Applicable statutes. G.S. 15A-1432 addresses the State's right to appeal to superior court from dismissals in district court, and G.S. 15A-1445 addresses the State's right to appeal to the appellate courts from dismissals in superior court. As discussed in detail below, the State is precluded by each of these statutes from appealing from a judgment dismissing the charges for insufficient evidence *if reversal by the reviewing court would result in further prosecution*. *Cf. United States v. Scott*, 437 U.S. 82, 91 (1978) (in accordance with double jeopardy principles, "[a] judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, may not be appealed and terminates the prosecution when a second trial would be necessitated by a reversal"). This is true even if the judge's ruling was clearly erroneous. *See State v. Morgan*, 189 N.C. App. 716 (2008); *see also Smith v. Massachusetts*, 543 U.S. 462, 473 (2005) (acknowledging "the well-established rule" that the double jeopardy bar will attach to a pre-verdict acquittal even if it is "patently wrong in law").

No appeal from district to superior court of a dismissal based on insufficient evidence. G.S. 15A-1432(a)(1) provides that the State may appeal from district to superior court when there has been a decision or judgment dismissing criminal charges as to one or more counts "[u]nless the rule against double jeopardy prohibits further prosecution." In non-jury trials in district court, jeopardy attaches when the trial judge begins to hear evidence or testimony. *See State v. Brunson*, 327 N.C. 244 (1990); *see also State v. Fowler*, 197 N.C. App. 1, 17 (2009) ("'[U]ntil a defendant is "put to trial *before the trier of the facts*, whether the trier be a jury or a judge," jeopardy does not attach.'" (emphasis in original) (citations omitted)). The rationale behind this rule is that the potential for conviction exists only when evidence or testimony against a defendant is presented to and accepted by the court. *See State v. Ward*, 127 N.C. App. 115, 121 (1997).

Under North Carolina law, motions to dismiss based on insufficient evidence cannot be made pretrial because only those defenses, objections, or requests that are capable of being determined without the trial of the general issue (for example, a motion to dismiss

for lack of jurisdiction or for a constitutional violation) may be resolved by pretrial motion. *See also* John Rubin, *Self-Defense Provides Immunity from Criminal Liability*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Oct. 4, 2016) (discussing statutory changes raising potential for pretrial determination of immunity based on use of defensive force). "[A] court can *only* consider a motion to dismiss for insufficient evidence *after* the State has had an opportunity to present all of its evidence to the trier of fact *during* trial." *See Fowler*, 197 N.C. App. 1, 28 (emphasis in original); *see also 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"). Accordingly, motions to dismiss on the grounds of insufficient evidence are made after the judge "begins to hear evidence or testimony," and jeopardy has attached by the time any ruling is made granting the motion to dismiss. Since a dismissal by a district court judge based on the insufficiency of the evidence has the effect of a not guilty verdict and constitutes an acquittal for double jeopardy purposes, the State may not appeal to the superior court from such a dismissal. *See State v. Morgan*, 189 N.C. App. 716 (2008).

No appeal from superior court to the appellate division of a pre-verdict dismissal based on insufficient evidence. G.S. 15A-1445(a)(1) provides that the State may appeal from superior court to the appellate division from a decision or judgment dismissing criminal charges as to one or more counts "[u]nless the rule against double jeopardy prohibits further prosecution." Jeopardy attaches in superior court "when a defendant in a criminal prosecution is placed on trial: (1) on a valid indictment or information, (2) before a court of competent jurisdiction, (3) after arraignment, (4) after plea, and (5) when a competent jury has been empaneled and sworn." *See State v. Cutshall*, 278 N.C. 334, 344 (1971). Thus, the critical time for jeopardy purposes in a jury trial is the empanelment and swearing of the jury, not the taking of testimony of the first witness.

Double jeopardy will prohibit further prosecution in cases where the trial judge grants a defendant's motion to dismiss based on insufficient evidence *before the verdict* because "a reversal at the appellate level would result in a new trial—requiring defendant to once again defend himself, with all the emotional and monetary burdens associated therewith." *See State v. Scott*, 146 N.C. App. 283, 286 (2001), *rev'd on other grounds*, 356 N.C. 591 (2002). Thus, as long as the motion to dismiss is granted after attachment of jeopardy and before a verdict is entered, the State is barred from appealing the decision.

Appeal permitted from superior court to the appellate division of a post-verdict dismissal based on insufficient evidence. If the trial judge grants a dismissal *after the verdict* is returned, the State is free to appeal and the conviction may be reinstated if the appellate court finds that the trial judge erroneously granted the motion. *See State v. Hernandez*, 188 N.C. App. 193 (2008). Double jeopardy does not prohibit an appeal in that instance because the jury has already rendered its verdict and, if the State is successful on appeal, the verdict could be reinstated without subjecting a defendant to retrial. *Id.*; *see also United States v. Jenkins*, 420 U.S. 358 (1975).

Additional resources. For further information on double jeopardy and the State's right to appeal, see Robert L. Farb, *Criminal Pleadings, State's Appeal from District Court, and Double Jeopardy Issues* (UNC School of Government, Feb. 1, 2010), and Robert L. Farb, *Double Jeopardy and Related Issues*, N.C. SUPERIOR COURT JUDGES' BENCHBOOK (Oct. 2013).

30.5 Fatal Variance

A fatal variance exists when the State's evidence differs from a material allegation contained in the indictment or other pleading. A fatal variance between the indictment and the proof at trial is a specific type of insufficiency problem. *See State v. Waddell*, 279 N.C. 442, 445 (1971) ("A variance between the criminal offense charged and the offense established by the evidence is in essence a failure of the State to establish the offense charged.").

An objection to a variance between the indictment and proof at trial is properly raised by a motion to dismiss for insufficient evidence because there is not sufficient evidence to support the particular charge alleged in the indictment or other pleading. *See State v. Faircloth*, 297 N.C. 100 (1979); *State v. Bell*, 270 N.C. 25 (1967). Such a dismissal precludes the State from further prosecution of the offense charged in the indictment or other pleading because the charged offense has been dismissed for insufficient evidence (*see supra* § 30.4, Effect of Dismissal); but, it ordinarily does not preclude further prosecution of an offense that was not properly pled in the charging document. *See State v. Stinson*, 263 N.C. 283 (1965); *State v. Wall*, 96 N.C. App. 45 (1989); *State v. Johnson*, 9 N.C. App. 253 (1970); *cf. State v. Teeter*, 165 N.C. App. 680 (2004) (double jeopardy bars retrial if indictment would have supported conviction and judge incorrectly dismisses charge for fatal variance).

A fatal variance is not the same as a fatally defective indictment. In a fatal variance case, the indictment is legally sufficient to confer jurisdiction on the trial court, but the State's evidence does not match the material allegations in the indictment. In a defective indictment case, the indictment is legally insufficient to confer jurisdiction on the trial court. While a fatal variance has to be preserved by motion to dismiss, a fatally defective indictment is preserved for appeal without objection at trial.

For further discussion of defective indictments and variances between pleading and proof, including a collection of cases finding fatal variance, see 1 NORTH CAROLINA DEFENDER MANUAL Ch. 8, Criminal Pleadings (2d ed. 2013), and Jessica Smith, *The Criminal Indictment: Fatal Defect, Fatal Variance, and Amendment*, ADMINISTRATION OF JUSTICE BULLETIN No. 2008/03 (UNC School of Government, July 2008).

Practice note: The N.C. Supreme Court has held that a defendant's motion to dismiss did not properly preserve a fatal variance issue for appellate review where the motion was based solely on insufficient evidence and the defense attorney did not specifically assert fatal variance. *See State v. Pickens*, 346 N.C. 628 (1997) (so holding but then addressing

issue assuming arguendo that it had been preserved); *see also State v. Hester*, 224 N.C. App. 353 (2012) (finding that defendant waived the right to appellate review of the issue of a fatal variance where he made only a general motion to dismiss and did not specifically raise the question of variance), *aff'd per curiam*, 367 N.C. 119 (2013). This approach seems at odds with decisions holding that "a fatal variance between the indictment and proof is properly raised by a motion for judgment as of nonsuit or a motion to dismiss, since there is not sufficient evidence to support the charge laid in the indictment." *See State v. Faircloth*, 297 N.C. 100, 107 (1979). It also is difficult to reconcile with cases holding that a pleading that does not support the offense of conviction deprives the court of jurisdiction over that offense, which may not be waived even if no motion is made at the trial level. ***Nevertheless,*** in cases in which you believe there is a fatal variance, you must specifically state that the motion to dismiss for insufficient evidence is based on a fatal variance between the charges alleged in the indictment or other pleading and the evidence presented at trial.

For sample language to use when moving to dismiss based on a fatal variance, see *supra* § 30.3D, Practice note. This language is recommended because it preserves a defendant's motion to dismiss on the grounds of both insufficient evidence *and* fatal variance.