Chapter 32
Instructions to the Jury

The jury charge is a vital part of a criminal trial, and the content of the instructions can have a profound impact on the jury's determination of the defendant's guilt or innocence. G.S. 15A-1231, 15A-1232, and 15A-1234 contain the basic standards and procedures on instructions to the jury. This chapter addresses the general requirements relating to jury instructions as well as the

duties of the trial judge, special requests for instructions by the defendant, and the preservation of issues for appeal.

32.1 General Requirements

In instructing the jury, "[i]t is well established that a judge must declare and explain the law arising upon the evidence." *State v. Little*, 163 N.C. App. 235, 240 (2004); *see also State v. McLean*, 74 N.C. App. 224 (1985); G.S. 15A-1232. The chief purposes of the charge to the jury are clarification of the issues, elimination of extraneous matters, and declaration and explanation of applicable law. *State v. Jackson*, 228 N.C. 656 (1948); *see also State v. Williams*, 280 N.C. 132, 136 (1971) ("The chief purpose of a charge is to give a clear instruction which applies the law to the evidence in such manner as to assist the jury in understanding the case and in reaching a correct verdict.") (citations omitted).

A trial judge is not required to follow any particular form in giving instructions and has wide discretion in presenting the issues to the jury. *State v. Harris*, 306 N.C. 724, 727–28 (1982). Still, the defendant always has the right to receive instructions on the substantial features of the case and is entitled to special instructions when requested and warranted by the evidence. *See infra* §§ 32.3B through D, Substantial Features of the Case, Subordinate Features of the Case, and Lesser Included Offenses, and § 32.4B, Requests for Special Instructions.

Before 1985, G.S. 15A-1232 required judges to summarize the evidence of both parties to the extent necessary to explain the application of the law to the evidence. This statute was amended in 1985 to remove that requirement, although the judge may still elect to do so. *See State v. Blue*, 356 N.C. 79 (2002); *State v. Taylor*, 80 N.C. App. 500 (1986); *see also* N.C. Pattern Jury Instruction—Crim. 100.00 (April 2005). If the judge does elect to summarize the evidence or explain the application of the law thereto, he or she "must be vigilant not to express an opinion as to the quality of the evidence or as to the credibility of a witness." *State v. Artis*, 325 N.C. 278, 309 (1989), *vacated on other grounds*, 494 U.S. 1023 (1990).

Practice note: You should consider asking the judge to specifically explain the application of the law to the evidence in cases where the jury, by its questions, indicates confusion or concern about how the law relates to the evidence in a particular case. *See, e.g., State v. Blue*, 356 N.C. 79 (2002) (defendant argued that the trial judge erred in failing to specifically instruct the jury, in response to its question, that defendant had the same rights pertaining to self-defense and to the defense of habitation on his front porch as he did within his home); *State v. Moore*, 339 N.C. 456, 462 (1994) (defendant argued that the trial judge erred in failing to satisfy the jury's request for an explanation of the law on the felony-murder rule concerning the temporal link between the killing and the underlying felony of discharging a firearm into occupied property).

There are also mandatory and discretionary instructions about reaching a verdict, discussed *infra* Chapter 34, Deliberations and Verdict (2d ed. 2012).

32.2 Charge Conference

Before closing arguments, a trial judge must conduct a conference to discuss proposed instructions out of the presence of the jury. G.S. 15A-1231(b); N.C. GEN. R. PRAC. SUPER. & DIST. CT. 21. Pursuant to G.S. 15A-1231(b), the charge conference must be recorded. "The purpose of the charge conference is to allow the parties to discuss the proposed jury instructions to insure that the legal issues are appropriately clarified in a manner that assists the jury in understanding the case and in reaching the correct verdict" as well as "to enable counsel to know what instructions will be given so that counsel will be in a position to argue the facts in light of the law to be charged to the jury." *State v. Hill*, 235 N.C. App. 166, 170 (2014) (internal quotation marks and citations omitted). Since holding a charge conference is mandatory under G.S. 15A-1231(b), the failure to do so is reviewable on appeal even in the absence of an objection at trial. *Id.* at 171.

At the conference, the judge must inform the parties of the offenses, lesser included offenses, and affirmative defenses on which he or she will charge the jury. The parties must also be informed what, if any, parts of requested instructions will be given. On request, the judge must inform the parties whether he or she intends to include other particular instructions in the jury charge. G.S. 15A-1231(b).

The provisions of G.S. 15A-1231(b) apply not only to the guilt/innocence phase of a trial, but also to the sentencing phase of capital and noncapital trials where the jury determines the existence of aggravating or mitigating factors. *See, e.g.*, *State v. Bacon*, 326 N.C. 404 (1990) (no material prejudice shown where trial judge summarized unrecorded capital sentencing phase charge conference and gave defendant the opportunity to object); *Hill*, 235 N.C. App. 166 (rejecting State's argument that G.S. 15A-1231(b) does not apply to separate sentencing hearings on aggravating factors in noncapital cases).

The trial judge's failure to "comply fully" with the statutory provisions does not constitute grounds for appeal unless the judge's failure to comply was not corrected before the end of trial and it materially prejudiced the defendant's case. G.S. 15A-1231(b); *see also State v. Houser*, 239 N.C. App. 410 (2015) (no material prejudice shown by trial judge's failure to fully comply with G.S. 15A-1231(b) where trial judge conferred with counsel regarding the specific aggravating factors on which he would charge, asked counsel if either wished to be heard before giving the charge, and asked defense counsel if there was any objection before allowing deliberations to begin); *State v. Brunson*, 120 N.C. App. 571 (1995) (defendant unable to show material prejudice where trial judge held an informal, unrecorded charge conference). However, if the trial judge fails to conduct any charge conference at all as mandated by G.S. 15A-1231(b), the defendant is entitled to a new trial. *See Hill*, 235 N.C. App. 166 (trial judge's failure to hold a charge conference requires a new trial and defendant need not show prejudice); *State v. Clark*, 71 N.C. App. 55 (1984), *disapproved of on other grounds by State v. Moore*, 327 N.C. 378 (1990) (although court disapproved *Clark* on a different issue, it granted a new trial for trial judge's failure to hold a charge conference requested by defendant [decided under prior version of G.S. 15A-1231(b)]).

Practice note: The charge conference is a significant stage of trial and counsel should prepare accordingly. Counsel should:

- file written requests for instructions as soon as possible so the trial judge will have time to read them before the charge conference;
- be prepared to argue in support of his or her tendered instructions and against detrimental ones submitted by the State or suggested by the trial judge;
- lodge specific objections to erroneous instructions at the charge conference;
- lodge objections to the trial judge's failure to comply with the procedural requirements of G.S. 15A-1231(b);
- carefully listen to the instructions given during the jury charge and ask for corrections, additions, or modifications as necessary; and
- lodge or renew specific objections to erroneous instructions before the jury retires to deliberate.

32.3 Explanation of the Law

A. Pattern Jury Instructions

In instructing the jury, trial judges ordinarily use the North Carolina Pattern Jury Instructions for Criminal Cases, prepared by the North Carolina Conference of Superior Court Judges Committee on Pattern Jury Instructions. The N.C. appellate courts have encouraged trial judges to use the Pattern Jury Instructions "given the danger of distraction and prejudice and the desirability of uniform jury instructions for all trials, despite the unique features of each." *See State v. Morgan*, 359 N.C. 131, 169 (2004) (internal quotation marks and citation omitted); *see also Caudill v. Smith*, 117 N.C. App. 64, 70 (1994) (stating generally that the use of the Pattern Jury Instructions is "the preferred method of jury instruction"). The "Guide to the Use of this Book" that prefaces the Pattern Jury Instructions adds that judges should review the pattern instructions and make adaptations as necessary before giving any instructions to the jury.

Practice note: The Pattern Jury Instructions are a good starting point in preparing instructions for the charge conference; however, counsel should always carefully review the pattern instructions to see if they need modification or clarification to fit the needs of the particular case. Do not rely on the judge to do it for you.

B. Substantial Features of the Case

The trial judge has considerable discretion in the manner in which the jury is charged, but he or she is always required to instruct the jury "on all substantial and essential features of the case embraced within the issue and arising on the evidence." *State v. Higginbottom*, 312 N.C. 760, 764 (1985); *State v. Young*, 16 N.C. App. 101 (1972). This is true regardless of requests by the parties. *State v. Harris*, 306 N.C. 724 (1982); *State v. McHone*, 174 N.C. App. 289 (2005). Under this principle, the trial judge must instruct not only on the

crime charged in the indictment but also on lesser included offenses (discussed in subsection D., below), defenses (discussed in subsection E., below), and the identification of the defendant as the perpetrator when warranted by the evidence. *See State v. Shaw*, 322 N.C. 797, 803–04 (1988); *State v. Kinard*, 54 N.C. App. 443 (1981).

The trial judge must also explicitly instruct the jury that it must find the defendant not guilty if the State failed to satisfy its burden of proving the defendant's guilt beyond a reasonable doubt. *McHone*, 174 N.C. App. 289, 299 (finding that even though "the jury could not have genuinely misunderstood its role in passing on the guilt or innocence of defendant[,]" the trial judge's inadvertent omission of a not guilty option may have "tipped the scales of justice in favor of conviction and impermissibly suggested that the defendant must have been guilty of first degree murder on some basis").

C. Subordinate Features of the Case

Instructions as to the significance of evidence not relating to the elements of the crime itself or to the defendant's criminal responsibility have been considered subordinate or nonessential features of the case. *State v. Hunt*, 283 N.C. 617 (1973). Absent a request by the defendant, the judge is not required to give instructions on these features. *State v. Lester*, 289 N.C. 239 (1976). However, when a defendant requests an instruction on a nonessential feature of a case and that instruction is correct in law and supported by the evidence, the judge must give the instruction in substance. *State v. Monk*, 291 N.C. 37, 54 (1976); *see also infra* § 32.4B, Requests for Special Instructions. A judge may elect to instruct on a subordinate feature even without a request by counsel. *State v. Harris*, 306 N.C. 724, 727 (1982).

Examples. Some examples of subordinate features are:

- Alibi. *See State v. Hunt*, 283 N.C. 617 (1973); N.C. Pattern Jury Instruction—Crim. 301.10 (Mar. 2003); *see also infra* § 32.3E, Defenses (discussing practical considerations regarding alibi instruction and possible inconsistencies in case law).
- Accomplice testimony. *State v. Brinson*, 277 N.C. 286 (1970); N.C. Pattern Jury Instruction—Crim. 104.25 (June 2011).
- The absence of motive. *State v. Elliott*, 344 N.C. 242, 273 (1996); N.C. Pattern Jury Instruction—Crim. 104.10 (Apr. 2005).
- The credibility of an interested or biased witness. *State v. Dale*, 343 N.C. 71 (1996); N.C. Pattern Jury Instruction—Crim. 104.20 (June 2011).
- Evidence of the defendant's character for law-abidingness or other pertinent character trait. *See State v. Bogle*, 324 N.C. 190, 199–200 (1989); N.C. Pattern Jury Instruction—Crim. 105.30 (June 2011).
- Flight by the defendant. *State v. Lester*, 289 N.C. 239 (1976); N.C. Pattern Jury Instruction—Crim. 104.35, 104.36 (Feb. 1994).
- Impeachment or corroboration of a witness by a prior statement. *State v. Detter*, 298 N.C. 604, 630–31 (1979); *State v. Borkar*, 173 N.C. App. 162 (2005); N.C. Pattern Jury Instruction—Crim. 105.20 (June 2011).
- The effect of the defendant's decision not to testify. *State v. Paige*, 272 N.C. 417

(1968); N.C. Pattern Jury Instruction—Crim. 101.30 (May 2005).

- Impeachment of defendant by evidence of prior convictions if elicited by the State. *State v. Jackson*, 161 N.C. App. 118 (2003) (defendant not entitled to limiting instruction where he voluntarily testified to prior convictions on direct examination); *State v. Gardner*, 68 N.C. App. 515 (1984), *aff'd*, 315 N.C. 444 (1986) (same); N.C. Pattern Jury Instruction—Crim. 105.40 (June 2011).

Reasonable doubt. Although "reasonable doubt" is not technically categorized as a subordinate feature of a criminal case, a trial judge need define it only if it is specifically requested by the defendant. *See infra* "Practice note" in § 32.4B, Special Instructions.

Practice note: Whether to request an instruction on a subordinate feature of the case is a tactical decision. Counsel should consider the effect of the instruction on the jury since giving an instruction on a particular nonessential feature of the case may so concentrate attention on that subject "as to divert attention from unrelated weaknesses in the State's case." *State v. Hunt*, 283 N.C. 617, 624 (1973). For example, if a prosecution witness has an emotional outburst during trial, counsel may decide not to request an instruction regarding the outburst because the instruction may further highlight the witness's emotional state. *See, e.g.*, *State v. Blackstock*, 314 N.C. 232 (1985).

D. Lesser Included Offenses

Right to instruction. State and federal principles of due process require that a lesser included offense instruction be given when the evidence warrants such an instruction. *See Hopper v. Evans*, 456 U.S. 605 (1982); *State v. Arnold*, 329 N.C. 128 (1991); *State v. Ledwell*, 171 N.C. App. 328 (2005); *see also State v. Conner*, 335 N.C. 618 (1994) (when there is evidence of a lesser included offense, the trial judge *must* instruct the jury on it). This is true even in the absence of a special request for such instruction. *State v. Lawrence*, 352 N.C. 1 (2000); *State v. Montgomery*, 341 N.C. 553 (1995); *see also* G.S. 15-170 (when a defendant is indicted for a criminal offense, he or she may be convicted of the charged offense or of a lesser included offense). This rule applies even when the defendant does not present any evidence but the State's evidence is conflicting. *State v. Smallwood*, 78 N.C. App. 365 (1985).

However, if the State's evidence is positive as to each and every element of the crime charged and there is no conflicting evidence relating to any element, submission of a lesser included offense is not required. *See, e.g.*, *Evans*, 456 U.S. 605, 611; *State v. Millsaps*, 356 N.C. 556 (2002); *State v. Harvey*, 281 N.C. 1 (1972). This is true even though it is a well established principle of criminal law that "when a defendant is indicted for a criminal offense he may be convicted of the offense charged or of a lesser included offense when the greater offense in the bill includes all the essential elements of the lesser offense." *State v. Snead*, 295 N.C. 615, 622 (1978); *see also State v. McGee*, 197 N.C. App. 366, 371–72 (2009) (noting that a "[a] lesser-included offense is '[a] crime that is composed of some, but not all, of the elements of a more serious crime and that is necessarily committed in carrying out the greater crime[.]") (citing Black's Law Dictionary 1111 (8th ed. 2004)).

The "all or nothing" doctrine. In accordance with the legal principles discussed above, the State may try a case on an "all or nothing" basis, seeking a conviction only on the greater offense as long as the State's evidence is not conflicting and the defendant has not presented evidence of a lesser included offense. *See, e.g., State v. Bullard*, 97 N.C. App. 496, 498 (1990). Although the court in *Bullard* invited legislative intervention after noting that this practice "is an outmoded absurdity" and "encourages jurors to convict a defendant of a greater offense by not permitting them to consider its lesser elements . . . and [is] inconsistent with the precept that jurors are at liberty to believe all, none, or part of the evidence as they see fit," the law remains unchanged. *See id.* at 498. For an in-depth discussion of *Bullard* and the "all or nothing" approach, see Tracy L. Hamrick, Note, *Looking at Lesser Included Offenses on an "All or Nothing" Basis: State v. Bullard and the Sporting Approach to Criminal Justice*, 69 N.C. L. REV. 1470 (1991) (arguing that criminal defendants are denied a crucial procedural safeguard and therefore a fair trial when trial judges refuse to instruct juries on lesser included offenses).

As a matter of trial strategy, a defendant may prefer that an instruction on a lesser included offense not be given and go for "all or nothing." However, it appears that under North Carolina law, the defendant has no right to preclude an instruction on a lesser included offense if the evidence warrants an instruction. *See State v. Jones*, 149 N.C. App. 977 (2002) (unpublished); *see also State v. Gorham*, 212 N.C. App. 236 (2011) (unpublished) (declining defendant's request to disavow *Jones* and noting that defendant had failed to supply, and the court could not find any authority to support, the proposition that defendant had a right to require the trial judge to refrain from instructing on a lesser included offense when the instruction was supported by the evidence). Nor can the defendant preclude the giving of an instruction by not requesting it if there is evidence supporting the instruction. *State v. Harris*, 306 N.C. 724 (1982).

No "acquittal first" requirement in North Carolina. G.S. 15A-1237(e) states that "[i]f there are two or more offenses for which the jury could return a verdict, it may return a verdict with respect to any offense, including a lesser included offense on which the judge charged, as to which it agrees." Under the plain language of this statute, a jury is not required to return a unanimous verdict acquitting the defendant of a greater offense before it considers whether the defendant is guilty of a lesser included offense. *State v. Mays*, 158 N.C. App. 563 (2003) (finding error where trial judge instructed jury that it must unanimously agree to acquit defendant of first-degree murder before it could consider whether defendant was guilty of second-degree murder); *see also State v. Sanders*, 81 N.C. App. 438 (1986) (trial judge did not coerce a verdict when he correctly instructed the jury that it could return a unanimous verdict on a lesser offense without unanimously rejecting the greater offense). A judge is permitted to instruct the jury to consider the greater offense "first before continuing onto the lesser included offense" as long as the judge does not mandate a unanimous acquittal of the first offense before the jury may consider the lesser offense. *Mays*, 158 N.C. App. at 575.

If a jury expresses confusion with regard to whether it must unanimously acquit a defendant of a greater charge before considering lesser charges, the trial judge should give a "reasonable efforts" instruction informing the jury that it "should first consider the

primary offense, but it is not required to determine unanimously that the defendant is not guilty of that offense before it may consider a lesser included offense;" and "that if the jury's verdict as to the primary offense is not guilty, or if, after all reasonable efforts, the jury is unable to reach a verdict as to that offense, then it may consider whether the defendant is guilty of the lesser included offense." *Id.*; *see also* N.C. Pattern Jury Instruction—Crim. 101.39 (June 2015) (noting that the "reasonable efforts" instruction should only be provided if a question about unanimity on the principal charge is raised by the jury).

Waiver. To preserve the issue of the trial judge's failure to instruct on a lesser included offense that is supported by the evidence, a defendant must have requested such an instruction or he or she must have objected to the charge as given. *See State v. Collins*, 334 N.C. 54 (1993) (finding waiver under N.C. R. App. P. 10(b)(2) [now, N.C. R. App. P. 10(a)(2)] where defendant failed to object to trial judge's failure to instruct on lesser included offense of attempted murder); *see generally State v. Smith*, 311 N.C. 287 (1984) (because defendant's written request for instruction regarding the State's identification testimony had been previously denied, he did not have to repeat his objection to the jury instructions, after the fact, to preserve the issue for appellate review). Without proper preservation of the issue at trial, appellate counsel is limited to seeking review of the issue under the rigorous "plain error" standard of review. *State v. Thomas*, 350 N.C. 315, 348 (1999); *see also infra* § 32.9, Preservation of Issues for Appeal.

Invited error. A defendant may not decline an opportunity for an instruction on a lesser included offense and then claim on appeal that failure to instruct on the lesser included offense was error. *State v. Sierra*, 335 N.C. 753 (1994).

Practice note: Be sure to specifically constitutionalize your objection to the trial judge's instruction or omission of an instruction on a lesser included offense; otherwise, appellate counsel will be precluded from arguing a due process violation on appeal. *See infra* § 32.9A, Necessity of Specific Objection. State on the record that the giving (or omission) of the instruction violates the Fourteenth Amendment to the U.S. Constitution as well as article I, section 19 of the N.C. Constitution.

E. Defenses

Generally. Defenses raised by the evidence constitute substantial features of the case; thus, where the evidence, if accepted, discloses facts sufficient in law to constitute a defense to the crime for which the defendant is indicted, the judge is required to instruct the jury on the legal principles applicable to that defense. *See State v. Fields*, 324 N.C. 204 (1989) (new trial granted where defendant's evidence merited an instruction on unconsciousness or automatism and trial judge failed to give the requested instruction); *State v. Deck*, 285 N.C. 209 (1974) (where the State's evidence was sufficient to require the trial judge to instruct on the law of self-defense, the trial judge's failure to so do constituted prejudicial error).

When determining whether the evidence is sufficient to entitle a defendant to jury instructions on a defense, the trial judge must consider the evidence in the light most

favorable to the defendant. *State v. Oliver*, 334 N.C. 513, 520 (1993); *see also State v. Marshall*, 105 N.C. App. 518, 522 (1992) (finding that the trial judge must instruct on a defense if "the defendant's or the State's evidence when viewed in the light most favorable to the defendant discloses facts which are 'legally sufficient' to constitute a defense to the charged crime") (citations omitted). What weight, if any, is to be given such evidence of a defense, is for determination by the jury." *Fields*, 324 N.C. 204, 210 (citations omitted).

Practice note: While the judge has a duty, notwithstanding the absence of a request, to instruct on defenses that are supported by the evidence (*State v. Loftin*, 322 N.C. 375 (1988)), always file a written request when you want an instruction on an applicable defense. This will ensure that the issue is properly preserved for appeal in the event that the judge fails or refuses to instruct on the defense. *See State v. Smith*, 311 N.C. 287 (1984).

In some circumstances, the giving of an instruction on a defense when not supported by the evidence may warrant reversal of a conviction—for example, in cases in which the judge gives an instruction on a defense not raised by the evidence and the instruction conflicts with the defendant's theory of defense. *See, e.g., State v. Tillman*, 36 N.C. App. 141 (1978) (defendant did not rely on and presented no evidence of entrapment; instruction conflicted with defendant's theory of defense and required new trial); *State v. Ransom*, 2 N.C. App. 613 (1968) (to same effect); *cf. State v. Bland*, 19 N.C. App. 560 (1973) (trial judge instructed on entrapment although not requested by defendant; not error to give instruction in light of State's evidence and argument by defendant's counsel during trial).

Invited error. A defendant may not decline an opportunity for an instruction on a defense supported by the evidence and then claim on appeal that the failure to instruct on the defense was error. *See State v. Hope*, 223 N.C. App. 468 (2012) (finding that defendant waived his right to appellate review of issue pertaining to self-defense where he requested an incorrect instruction, objected to the trial judge's offer to give the correct instruction, and chose to forego any self-defense instruction at all when the trial judge refused to give the instruction requested).

Alibi. Although alibi is often referred to as a defense, this is "inexact." *State v. Hunt*, 283 N.C. 617, 624 (1973) (overruling cases that held that a defendant is entitled to an instruction on alibi if the evidence supported it even in the absence of a specific request). Unlike evidence of "true" defenses, evidence that the defendant was elsewhere when the crime was committed should be considered a subordinate feature of the case because it has "nothing to do with the elements of or criminal responsibility for the crime for which the defendant is indicted." *Id.* at 624. *But cf. State v. Alston*, 294 N.C. 577, 590 (1978) (stating in passing that the defendant's "alibi defense" was a "substantial feature[] of the case" [this general comment by court likely does not affect ruling in *Hunt*]). In crimes requiring a defendant's personal presence at the scene of its commission, alibi evidence is "simply evidence contradictory of the State's evidence that defendant committed the alleged crime." *Hunt*, 283 N.C. 617, 624. Since alibi evidence is a subordinate feature of

the case, a trial judge is not required to instruct the jury on alibi unless the defendant specifically requests it. *See State v. Williams*, 355 N.C. 501, 582 (2002).

Practice note: Counsel should carefully consider whether to request a specific instruction on alibi or whether to just rely on the instructions of burden of proof and reasonable doubt. Use of the term "alibi" may harm a defendant's case, as the jury may view it not as a reason for finding that the defendant was not involved in the crime but rather as an artifice to conceal the defendant's alleged involvement.

Additional resources. For further information regarding select defenses and instructions thereon, see School of Government publications authored by John Rubin entitled:

- *The Voluntary Intoxication Defense*, ADMINISTRATION OF JUSTICE MEMORANDUM No. 93/01 (Apr. 1993);
- *The Diminished Capacity Defense*, ADMINISTRATION OF JUSTICE MEMORANDUM No. 92/01 (Sept. 1992);
- THE ENTRAPMENT DEFENSE IN NORTH CAROLINA (2001); and
- THE LAW OF SELF-DEFENSE IN NORTH CAROLINA (1996).

See also JESSICA SMITH, NORTH CAROLINA CRIMES: A GUIDEBOOK ON THE ELEMENTS OF CRIME 18–24 (UNC School of Government, 7th ed. 2012).

F. Words of Common Usage or Meaning

In the absence of a request for special instructions, it is not error for a trial judge to fail to define and explain words of common usage or meaning to the general public. This is true even if the word at issue is an essential element of the crime charged. *State v. Jones*, 300 N.C. 363 (1980) (finding no error in the trial judge's failure to define "intent" because the word is self-explanatory). However, if the meaning of the word is not clear, the judge must define it in order to give the jury proper guidance. *See State v. Patton*, 18 N.C. App. 266 (1973) (finding in a "public intoxication" case that the trial judge's failure to define the words "drunk" or "intoxicated" was error entitling defendant to a new trial).

G. Use of Term "Victim"

The use of the term "victim" by the State and especially by the trial judge "is conclusive in nature and connotes a predetermination that the person referred to had in fact been wronged." *See State v. Nomura*, 903 P.2d 718, 721–22 (Haw. Ct. App. 1995) (holding that "the reference to a complaining witness as 'the victim' in criminal jury instructions is inaccurate and misleading where the jury must yet determine from the evidence whether the complaining witness was the object of the offense and whether the complaining witness was acted upon in the manner required under the statute to prove the offense charged"). "A judicial reference to the jury that a complaining witness is a 'victim' implicitly tells the jury that the judge believes that a crime has been committed." *See Fritzinger v. Delaware*, 10 A.3d 603, 610 (Del. 2010). Nevertheless, the N.C. Supreme Court has held that the use of the term "victim" in the charge to the jury is not improper and does not intimate an

opinion that the defendant committed the crime. *See State v. Hill*, 331 N.C. 387 (1992); *see also State v. Gaines*, 345 N.C. 647 (1997) (citing *Hill* and holding that trial judge did not impermissibly express an opinion in violation of G.S. 15A-1222, G.S. 15A-1232, or the Fourteenth Amendment when he referred to the deceased as the "victim" during the jury charge). While the defendant has no absolute right to the use of an alternative term such as "prosecuting witness" or "complainant," the trial judge always has the discretion to do so and in some instances, the failure to do so might be considered prejudicial error.

In *State v. Walston*, 367 N.C. 721 (2014), approximately twenty years after the incidents allegedly occurred, the defendant was charged with first degree rape, first degree sexual offense, and taking indecent liberties with two minor sisters. At trial, the defendant objected to the trial judge's use of the pattern jury instructions that included the term "victim" and asked the judge to substitute the phrase "alleged victim" during the charge to the jury. The judge refused to modify the pattern instructions. The N.C. Court of Appeals found error in the judge's failure to modify the pattern instructions "because whether the prosecuting witnesses were victimized 'was a disputed issue of fact for the jury to resolve,' given the lack of physical evidence." *Id*. at 730. The N.C. Supreme Court, after reviewing its decisions in *Hill* and *Gaines*, reversed the court of appeals' decision and held that "in this case . . . the trial court did not err in using the word 'victim' in the pattern instructions to describe the complaining witness." *Id*. at 732. However, the court stressed that "when the State offers no physical evidence of injury to the complaining witness and no corroborating eyewitness testimony, the best practice would be for the trial court to modify the pattern jury instructions at defendant's request to use the phrase 'alleged victim' or 'prosecuting witness' instead of 'victim.'" *Id.* The court noted that the pattern instructions themselves state that "all pattern instructions should be carefully read and adaptions made, if necessary, before any instruction is given to the jury." *Id*. (citing 1 N.C.P.I.—Crim. at xix ("Guide to the Use of this Book") (2014)) (emphasis omitted).

Practice note: Since *Walston* stresses that there are circumstances where the best practice would be for the trial judge to modify the pattern instructions to use a neutral term to describe the deceased or the complaining witness, counsel should consider submitting proposed jury instructions reflecting that modification whenever the alleged victim's status as a victim is at issue. A trial judge may be particularly inclined to grant a defendant's request to modify the instructions in cases where the defendant asserts that that no crime ever occurred, the complaining witness was the aggressor and that defendant acted in self-defense, or that the victim consented to sexual activity. *See generally Fritzinger v. Delaware*, 10 A.3d 603, 610 (Del. 2010) (stating that "[f]or a judge to communicate to the jury that witnesses were victimized, in a case where the defense is that the conduct about which the complaining witness testified never occurred, prejudices that defendant unfairly"); *State v. Devey*, 138 P.3d 90, 95 (Utah Ct. App. 2006) (agreeing with defendant "that in cases such as this—where a defendant claims that the charged crime did not actually occur, and the allegations against that defendant are based almost exclusively on the complaining witness's testimony—the trial court, the State, and all witnesses should be prohibited from referring to the complaining witness as "the victim"); *State v. Cortes*, 885 A.2d 153, 158 n.4 (Conn. 2005) (finding that State's

contention that the judge's seventy-six references to the complainant as the "victim" in his jury charge was harmless error was "at best, dubious," and agreeing with other courts "that have deemed references to the complainant as the 'victim' inappropriate where the very commission of a crime is at issue."); *Talkington v. Texas*, 682 S.W.2d 674, 675 (Tex. Ct. App. 1984) (reference to complainant in a rape case as "victim" in the jury charge violated statutory prohibition against expression of opinion as to the weight of the evidence and constituted reversible error where sole issue was whether the sexual intercourse was consensual or not; "[i]f the complainant consented . . . as testified by appellant . . ., she was not the object of a crime, and she was not a 'victim'"); *People v. Davis*, 423 N.Y.S.2d 229, 230 (N.Y. App. Div. 1979) (trial judge's referral to complainant as the "victim" and to the defendant as the "perpetrator" "impermissibly insinuated to the jury that the complainant was the victim of injuries resulting from acts committed by the defendant"; this error "patently deprived the defendant of a fair trial"); *see also* N.C. Pattern Jury Instruction—Crim. 0002.95 (Memorandum from PJI Committee on the Use of "Victim" Language) (June 1, 2015) (acknowledging that in light of *Walston*, the best practice is for trial judges to modify the pattern jury instructions to use a neutral term instead of "victim" in cases when the State offers no physical evidence of injury to the complaining witness and no corroborating eyewitness testimony).

32.4 Requests for Instructions

A. In General

Parties may submit proposed jury instructions at the close of the evidence or at an earlier time if directed by the judge. If submitted, the instructions must be in writing and the requesting party must furnish a copy to opposing counsel. G.S. 15A-1231(a).

Practice note: Although the language of the above statute is not mandatory, the better practice is to always submit a written request for instructions with copies of the instructions attached. File the request for instructions as soon as possible so the trial judge will have time to read them before the charge conference. Special instructions, discussed below, must always be *in writing* and filed *before* the charge conference.

B. Requests for Special Instructions

Form of request. A defendant may request special instructions on subordinate or nonessential features of a case that do not relate to the elements of the offense or to the defendant's criminal responsibility. *See supra* § 32.3C, Subordinate Features of the Case. These requests must be:

- in writing,
- entitled in the cause, and
- signed by counsel submitting them.

G.S. 1-181(a); *see also* N.C. GEN. R. PRAC. SUPER. & DIST. CT. 21 (providing that "[i]f special instructions are desired, they should be submitted in writing to the trial judge at or before the jury instruction conference"). Although G.S. 1-181 is located in Chapter 1 entitled Civil Procedure, N.C. appellate courts have long cited it as controlling in criminal cases. *See, e.g.*, *State v. Broome*, 268 N.C. 298 (1966) (per curiam); *State v. Gettys*, 243 N.C. App. 590 (2015); *State v. Long*, 20 N.C. App. 91 (1973).

If a request for a special instruction does not meet the requirements of G.S. 1-181(a), it is within the discretion of the trial judge whether to give or refuse the instruction. *Broome*, 268 N.C. 298; *State v. Mewborn*, 178 N.C. App. 281 (2006). Additionally, the trial judge's denial of an oral request for special instruction will not be found to be error on appeal. *See State v. Martin*, 322 N.C. 229 (1988) (holding that because defendant did not submit his request for instructions on his good character and reputation in writing, it was not error for the judge to decline to charge on that feature of the case).

N.C. Pattern Jury Instructions on substantial features of the case are generally not considered "special instructions." However, a request for modifications of pattern instructions is "tantamount to a request for special instructions" so it must comply with the requirements for special instructions. *See State v. McNeill*, 346 N.C. 233 (1997) (no error by trial judge in denying defendant's oral request to modify the pattern instruction for premeditation and deliberation).

Timing of request. Requests for special instructions must be submitted to the judge before the judge begins to give the jury charge. G.S. 1-181(b); *see also* N.C. GEN. R. PRAC. SUPER. & DIST. CT. 21 (providing that "[i]f special instructions are desired, they should be submitted in writing to the trial judge at or before the jury instruction conference"); *State v. Long*, 20 N.C. App. 91 (1973) (holding that a request for special instruction is not timely if it is tendered after the jury retires to deliberate). However, the judge may, in his or her discretion, consider requests for special instructions regardless of the time they are made. G.S. 1-181(b); *see also State v. Broome*, 268 N.C. 298 (1966) (per curiam); *State v. Gettys*, 243 N.C. App. 590 (2015).

Right to instruction. If a party requests a special instruction that is legally correct in itself and is pertinent to the evidence and the issues in the case, the judge must give the instruction at least in substance. *State v. Lamb*, 321 N.C. 633 (1988); *State v. Craig*, 167 N.C. App. 793 (2005). The judge need not give the instruction in the exact language of the request, but he or she may not change the sense of it or so qualify it as to weaken its force. *State v. Puckett*, 54 N.C. App. 576 (1981).

Practice note: If you would like an instruction defining reasonable doubt, you must specifically request it or the trial judge may not define the concept. *See State v. Miller*, 344 N.C. 658 (1996); *see also* N.C. Pattern Jury Instruction—Crim. 101.10 n.1 (June 2008), *citing State v. Shaw*, 284 N.C. 366, 374 (1973). For a discussion of other instructions that must be specifically requested, such as a defendant's decision not to testify, see *supra* § 32.3C, Subordinate Features of the Case.

32.5 Additional Instructions after Jury Retires

A. In General

After the jury has retired for deliberation, the trial judge may recall the jurors in order to give additional instructions to:

- respond to an inquiry of the jury made in open court; or
- correct or withdraw an erroneous instruction; or
- clarify an ambiguous instruction; or
- instruct on a point of law that should have been covered in the original instructions.

G.S. 15A-1234(a). Merely repeating previously given instructions at the jury's request does not constitute "additional instructions" within the meaning of this statute. *See State v. Buchanan*, 108 N.C. App. 338, 341 (1992); *see also State v. Weathers*, 339 N.C. 441 (1994) (agreeing with *Buchanan* court's interpretation of G.S. 15A-1234).

Whether to give additional instructions is a matter within the discretion of the trial judge because he or she "is in the best position to determine whether further additional instruction will aid or confuse the jury in its deliberations, or if further instruction will prevent or cause in itself an undue emphasis being placed on a particular portion of the court's instructions." *State v. Prevette*, 317 N.C. 148, 164 (1986); *see also State v. Bartlett*, 153 N.C. App. 680 (2002). However, it will be deemed prejudicial error for the trial judge to fail to give further instructions answering a jury's question on an important point of law. *See State v. Hockett*, 309 N.C. 794 (1983) (reversing case and remanding for new trial where trial judge refused to answer the jury's questions about the difference between the threat of and use of a deadly weapon).

B. Repetition of Instructions

Whenever additional instructions are given, the judge may also give or repeat other instructions to avoid giving undue prominence to additional instructions. G.S. 15A-1234(b). The decision whether to repeat other instructions is within the trial judge's discretion. *State v. Prevette*, 317 N.C. 148 (1986). The trial judge is not required to repeat instructions that have been previously given absent an error in the charge. *State v. Hockett*, 309 N.C. 794 (1983). Courts have found needless repetition to be undesirable and have occasionally held it to be erroneous. *See State v. Dawson*, 278 N.C. 351 (1971).

C. Special Requirements

Notice requirement. Before giving additional instructions, the trial judge must inform the parties generally of the instructions he or she intends to give. The parties must be afforded an opportunity to be heard. G.S. 15A-1234(c). If a judge is merely repeating or clarifying an instruction at the jury's request, he or she does not have to give the parties

an opportunity to be heard before reinstruction. *State v. Weathers*, 339 N.C. 441 (1994); *State v. Davidson*, 131 N.C. App. 276 (1998).

Right to additional arguments. If the additional instructions, by restriction or enlargement, change the permissible verdicts of the jury, the parties *must* be allowed additional jury arguments on request. Otherwise, whether to allow additional arguments by counsel is within the discretion of the trial judge. G.S. 15A-1234(c); *see also State v. Davidson*, 131 N.C. App. 276 (1998).

Procedural requirements. Under G.S. 15A-1234(d), all additional instructions must be given in open court and must be made a part of the record. The full jury must be returned to the courtroom when additional instructions are given under G.S. 15A-1234. *See State v. Tucker*, 91 N.C. App. 511 (1988) (finding that trial judge committed reversible error by summoning only the jury foreman to the courtroom and answering the jury's question regarding the law applicable to the case); *cf. State v. Wilson*, 363 N.C. 478 (2009) (finding a violation of defendant's right to a unanimous verdict under N.C. Const. art. I, sec. 24 where the trial judge gave additional instructions to less than the entire jury).

D. Instructions When Jury Indicates Deadlock

G.S. 15A-1235(c) provides that if the jury indicates a deadlock, the trial judge may give or repeat the instructions about reaching a verdict provided in G.S. 15A-1235(a) and (b). For discussion on further instructions to the jury when it has indicated its failure to reach a verdict, see *infra* § 34.5A, Deliberations and Verdict: Further Instructions (2d ed. 2012).

32.6 Trial Judge's Authority to Provide Written Instructions to the Jury

The trial judge has the inherent authority to submit instructions to the jury in writing. This decision is a discretionary one and will not be reversed absent an abuse of that discretion. *See State v. McAvoy*, 331 N.C. 583, 591 (1992) (holding that trial judge erred in ruling as matter of law that he had no authority to give the jury written instructions, but finding no prejudicial error where trial judge orally repeated the requested instructions for the jury, thereby complying with the essence of the jury's request); *State v. Hester*, 111 N.C. App. 110 (1993) (holding that judge did not err in submitting written jury instructions to the jury and allowing them to take them into the jury room). The defendant's failure to object waives any alleged error on appeal. *State v. Bass*, 53 N.C. App. 40 (1981).

32.7 Disjunctive Jury Instructions

For a discussion on jury unanimity and the effect of disjunctive instructions thereon, see *supra* § 24.2D, Jury Unanimity.

32.8 IDS Performance Guidelines: Practical Considerations

Several considerations and recommendations with respect to reviewing, requesting, and objecting to jury instructions are contained *infra* in Appendix A, N.C. COMM'N ON INDIGENT DEFENSE SERVS., PERFORMANCE GUIDELINES FOR INDIGENT DEFENSE REPRESENTATION IN NON-CAPITAL CRIMINAL CASES AT THE TRIAL LEVEL (Nov. 2004). The pertinent guideline is reprinted below:

Guideline 7.8 Jury Instructions

(a) Counsel should be familiar with the law and the individual judge's practices concerning ruling on proposed instructions, charging the jury, use of pattern charges, and preserving objections to the instructions.

(b) Pursuant to G.S. 15A-1231, counsel should submit in writing proposed special instructions or modifications of the pattern jury instructions in light of the particular circumstances of the case, including the desirability of seeking a verdict on a lesser included offense. Where possible, counsel should provide case law in support of the proposed instructions. Counsel should try to ensure that all jury instruction discussions are on the record.

(c) Where appropriate, counsel should object to and argue against improper instructions proposed by the prosecution.

(d) If the court does not adopt instructions requested by counsel, or gives instructions over counsel's objection, counsel should take all steps necessary to preserve the record for appeal, including filing a copy of proposed instructions pursuant to G.S. 15A-1231.

(e) During delivery of the charge, counsel should be alert to any deviations from the judge's planned instructions, object to deviations unfavorable to the client, and, if necessary, request additional or curative instructions.

(f) If there are grounds for objecting to any jury instructions, counsel should object before the verdict form is submitted to the jury and the jury is allowed to begin deliberations.

(g) If the court proposes giving supplemental instructions to the jury, either upon request of the jurors or upon their failure to reach a verdict, counsel should ask the judge to state the proposed charge to counsel before it is delivered to the jury. Counsel should also try to ensure that any supplemental instructions are given to the entire jury in open court pursuant to G.S. 15A-1234(d).

32.9 Preservation of Issues for Appeal

A. Necessity of Specific Objection

N.C. Appellate Rule 10(a)(2) states that "[a] party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict . . . ." This rule also states that in order to properly preserve an objection to an instruction or to the omission of an instruction, trial counsel must state "distinctly that to which objection is made and the grounds of the objection . . . ." However, an objection is not required after the jury has been instructed if defense counsel, before jury arguments, submitted a written request for particular instructions and the trial judge denied this request. *See State v. Smith*, 311 N.C. 287 (1984) (holding that where the trial judge had denied defendant's written request for a proposed jury instruction regarding the State's identification testimony, neither N.C. R. App. P. 10(b)(2) [now, N.C. R. App. P. 10(a)(2)] nor Rule 21 of the General Rules of Practice for the Superior and District Courts required defendant to repeat his objection to the jury instructions, after the fact, to preserve the issue for appellate review).

Caution: Under G.S. 15A-1231(d), all instructions given to the jury and all instructions tendered but refused become part of the record. This subsection also provides that the "failure to object to an erroneous instruction or to the erroneous failure to give an instruction does not constitute a waiver of the right to appeal on that error in accordance with G.S. 15A-1446(d)(13)." ***This is incorrect!*** G.S. 15A-1446(d)(13) has been ruled unconstitutional because it is in direct conflict with Appellate Rule 10(b)(2) [now, Rule 10(a)(2)] as promulgated by the N.C. Supreme Court pursuant to its exclusive authority under article IV, section 13(2) of the North Carolina Constitution. *See State v. Bennett*, 308 N.C. 530 (1983). Always object with specificity on the record to any errors committed by the trial judge in instructing the jury.

B. Opportunity to Object

Rule 21 of the General Rules of Practice for the Superior and District Courts requires the trial judge to give counsel an opportunity outside the hearing of the jury, or on request outside the presence of the jury, to object on the record to the jury charge or omission therefrom. Appellate Rule 10(a)(2) prohibits a party from making as the basis of an issue on appeal any instructional mistake absent a specific objection by trial counsel "provided that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury." The purpose of these rules is to allow the trial judge to correct any mistakes he or she made prior to deliberations. *State v. Maske*, 358 N.C. 40 (2004).

C. Plain Error Rule

To mitigate the potential harshness of Appellate Rule 10(a)(2), appellate courts will review an instructional error that was not preserved by trial counsel, but the error will be reviewed under the rigorous "plain error" standard of review. *See State v. Lawrence*, 365

N.C. 506, 512 (2012) (noting that "[b]ecause the plain error standard of review imposes a heavier burden on the defendant than the harmless error standard, it is to the defendant's advantage to object at trial and thereby preserve the error for harmless error review") (citation omitted); *State v. Odom*, 307 N.C. 655, 660 (1983) (holding that the plain error rule is "always to be applied cautiously and only in the exceptional case") (citation omitted).