Chapter 34
Deliberations and Verdict

This chapter addresses two related topics. Sections 34.1 through 34.6 deal with issues surrounding jury deliberations leading up to the verdict, including instructions about reaching a verdict, juror requests, coercion, and deadlock. Section 34.7 addresses the return of the verdict, including the procedures and issues surrounding its return.

34.1 Instructions to the Jury about Reaching a Verdict

G.S. 15A-1235 sets out mandatory and discretionary instructions to give to the jury on how to reach a verdict. The mandatory instruction is set out in G.S. 15A-1235(a), and it states: "Before the jury retires for deliberation, the judge must give an instruction which informs the jury that in order to return a verdict, all 12 jurors must agree to a verdict of guilty or not guilty."

G.S. 15A-1235(b) provides that before the jury retires to deliberate, the judge also may give an instruction that:

- jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
- each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;
- in the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and
- no juror should surrender his or her honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors or for the mere purpose of returning a verdict.

A trial judge is not required, even on request, to give the instructions set out in G.S. 15A-1235(b), but he or she may give them in his or her discretion. *See State v. Beasley*, 118 N.C. App. 508 (1995). However, if the judge decides to give the jury any of the instructions authorized by that subsection, whether given before the jury initially retires for deliberation or after the trial judge concludes that the jury is deadlocked, he or she must give all of them. *State v. Williams*, 315 N.C. 310 (1986). The judge does not have to read the statute verbatim as long as he or she gives the substance of the four instructions. *State v. Fernandez*, 346 N.C. 1 (1997).

Practice note: If the trial judge gives some, but not all, of the instructions found in G.S. 15A-1235(b), you must specifically object to preserve the issue for appeal. Otherwise, the appellate court will review the omission using the rigorous "plain error" standard of review.

For a further discussion of instructions to the jury, see *supra* Chapter 32, Instructions to the Jury.

34.2 Requests to Review Testimony and Exhibits During Deliberations

A. Review of Testimony and Exhibits in Open Court

During deliberations, juries will frequently send requests to the trial judge seeking a review of testimony or exhibits introduced at trial. Before hearing and ruling on such

requests, the trial judge must summon all jurors to the courtroom. G.S. 15A-1233(a); *State v. McLaughlin*, 320 N.C. 564 (1987) (trial judge erred when he sent a message through the bailiff to the jury denying its request to review trial testimony of two witnesses); *see also State v. Ashe*, 314 N.C. 28 (1985) (finding statutory error in trial judge's summoning only the foreperson to the courtroom to address the jury's request to review a portion of the testimony and also holding under article I, section 24 of the N.C. Constitution that all the elements of a trial should be viewed and heard simultaneously by all twelve jurors).

Practice note: The lack of an objection to the trial judge's failure to return the jury to the courtroom after a jury request for review of evidence pursuant to G.S. 15A-1233(a) will not preclude the defendant from raising the issue on appeal. *See State v. McLaughlin*, 320 N.C. 564 (1987). However, if you *consent* to a procedure that does not comply with the statutory mandate, it may be extremely difficult for the appellate attorney to show that the statutory violation prejudiced the defendant. *See State v. Nobles*, 350 N.C. 483, 506 (1999) (trial judge erred in failing to conduct the jury to the courtroom after jury requested to see evidence but defendant failed to show prejudice since (1) his counsel agreed "with the trial court when it erroneously thought it had discretion whether to bring the jury to the courtroom"; (2) there was unanimous agreement by all concerning the items requested by the jury; and (3) "the prosecution and the defense consented to permitting the jury to have those items"). The N.C. Court of Appeals later stated in *State v. Pointer*, 181 N.C. App. 93, 99 (2007), that "when a defendant's lawyer consents to the trial court's communication with the jury in a manner other than bringing the jury back into the courtroom, the defendant waives his right to assert a ground for appeal based on failure to bring the jury back to the courtroom." This holding appears to be inconsistent with *Nobles* because in that case the N.C. Supreme Court granted review of the issue even though the defendant consented to the procedure in that case. *See State v. Williams*, 215 N.C. App. 412, 423 n.2 (2011) ("consistent with *Nobles*," court of appeals addressed merits of defendant's argument and found error in trial judge's failure to return jury to courtroom to discuss exhibit request, but defendant failed to meet burden of showing prejudice where he consented to the jury's receiving the items and had no objection to submitting the items to the jury without bringing them to the courtroom); *accord State v. Harrison*, 218 N.C. App. 546 (2012) (to same effect).

G.S. 15A-1233(a) also requires the trial judge, after hearing the jury's request, to exercise his or her discretion in deciding whether or not to grant the request. *State v. Helms*, 93 N.C. App. 394 (1989); *see also Ashe*, 314 N.C. 28 (the statutory requirement that the trial judge exercise discretion in deciding whether to allow the jury's request to review evidence is a codification of the common law rule). After exercising discretion, and after giving notice to the prosecutor and to the defendant, the trial judge may direct that parts of the testimony be read to the jury and permit the jury to reexamine the requested materials. The reexamination of requested materials must take place in open court (unless the parties consent as discussed under subsection B., below). The judge, in his or her discretion, may also have the jury review other evidence that relates to the same factual issue so as not to give undue prominence to the evidence requested. G.S. 15A-1233(a).

When the trial judge fails to exercise his or her discretion under G.S. 15A-1233(a) under the erroneous belief that he or she has no power to grant the jury's request, error has been committed. *See State v. Johnson*, 346 N.C. 119 (1997); *see also State v. Chapman*, 244 N.C. App. 699 (2016); *State v. Long*, 196 N.C. App. 22 (2009). This failure to exercise discretion, like the failure to summon all jurors to the courtroom when a request to review testimony or exhibits is made (discussed above), is preserved even when the defendant fails to object. *See State v. Starr*, 365 N.C. 314 (2011). If the error is prejudicial to the defendant, he or she is entitled to a new trial. *See State v. Lang*, 301 N.C. 508 (1980); *see also Ashe*, 314 N.C. 28, 35 (finding reversible error where trial judge failed to exercise discretion in denying jury's request to review testimony; judge apparently felt he could not grant the request because he stated, "There is no transcript at this point. You and the other jurors will have to take your recollection of the evidence . . . ."); *State v. Hatfield*, 225 N.C. App. 765 (2013) (finding trial judge's failure to exercise discretion in denying jury's request to hear the female prosecuting witness's testimony amounted to prejudicial error where defendant had directly contradicted her testimony at trial and she was the only eyewitness to the alleged crimes).

It is also considered a failure to exercise discretion and so a violation of G.S. 15A-1233(a) for a trial judge to make statements that preemptively foreclose the jury from making a request to review testimony or evidence. If the purpose of the statute is violated, error will be found even in the absence of a jury request for review. *See State v. Lyons*, ___ N.C. App. ___, 793 S.E.2d 755, 762 (2016) (finding that trial judge failed to exercise discretion where his comments made before closing arguments suggested to the jury that it would be futile to request review of witness testimony; his "unequivocal statement that jurors '[would not] have the option,' during deliberations, to ask the court 'what . . . [a] witness really [said]' suggested the court lacked the ability to even consider such a request"); *State v. Johnson*, 164 N.C. App. 1 (2004) (finding error where trial judge told the jury prior to trial that they should play close attention to the evidence because he did not have the ability to give them a transcript of what was said during trial); *see also State v. Haqq*, 232 N.C. App. 690 (2014) (unpublished) (same).

The trial judge has no authority to permit the jury to review exhibits or other materials if the requested items have not been received into evidence. *See State v. Bacon*, 326 N.C. 404 (1990) (trial judge correctly refused jury's request to see police report that was not introduced into evidence); *State v. Combs*, 182 N.C. App. 365 (2007) (trial judge erred in sending police report to jury room for review where the report had not been admitted into evidence).

B. Review of Exhibits in the Jury Room

Unlike jury review of exhibits or testimony in open court, consent of all parties is required before the jury may take requested exhibits into the jury room. G.S. 15A-1233(b); *see also State v. Barnett*, 307 N.C. 608 (1983). The rationale behind the rule against exhibits in the jury room without consent of all parties is that the jury should make its decision based on what was offered in open court, and not on comparisons or inferences made about the evidence in the jury room, "'because the opposite party ought to have an

opportunity to reply to any suggestion of an inference contrary to what was made in open court.'" *See Doby v. Fowler*, 49 N.C. App. 162, 163 (1980) (quoting *Watson v. Davis*, 52 N.C. 178, 181 (1859)).

A trial judge does not have the "consent of all parties" under G.S. 15A-1233(b) if the defendant objects to the exhibit going back to the jury room. *See State v. Mason*, 222 N.C. App. 223 (2012). However, a failure to object to the trial judge's decision to allow the jury to review exhibits in the jury room will constitute consent by implication. *See State v. Rogers*, 52 N.C. App. 676, 688 (1981) (stating that "defendant impliedly consented to this action when he failed to object to the jury's request to take the exhibits into the jury room"); *see also State v. Byrd*, 50 N.C. App. 736, 743 (1981) ("While we believe that the better practice should be for the trial judge to determine whether or not the parties consent before allowing the jury request, we nevertheless hold that having failed to enter an objection or otherwise indicate his lack of consent, the defendant waived his right to object.").

Allowing the jury to view exhibits without the consent of all parties is not reversible error per se, and the party asserting the error on appeal must demonstrate that he or she was prejudiced thereby. *State v. Thomas*, 132 N.C. App. 515 (1999); *see also State v. Poe*, 119 N.C. App. 266 (1995) (finding prejudicial error where trial judge sent a statement by a State's witness to jury room over defendant's objection); *State v. Platt*, 85 N.C. App. 220 (1987) (same).

Whether jurors are allowed to take requested exhibits into the jury room is within the trial judge's discretion even if all the parties consent. If the judge permits the jury to take the exhibits or materials into the jury room, he or she may also have the jury take additional material or first review other evidence relating to the same factual issue so as not to give undue prominence to the evidence taken to the jury room, and, on request, must instruct the jury not to conduct any experiments with the exhibits while in the jury room. G.S. 15A-1233(b); *see also Poe*, 119 N.C. App. 266, 274 (finding prejudicial error where trial judge denied jury's request to hear testimony of the two co-defendants and State's witness Carter but allowed the jury to take Carter's written statement into the jury room over objection; court stated that "we believe there exists a reasonable possibility and a reasonable assumption that the jury may have inadvertently given more weight to Mr. Carter's statement"). G.S 15A-1233(b) only applies to exhibits and writings and does not prohibit the jury from taking the judge's written instructions into the jury room during deliberations. *See State v. Bass*, 53 N.C. App. 40 (1981).

Practice note: Before consenting to the jury taking an exhibit into the jury room, you should carefully consider how the jury may use the exhibit during its deliberations and whether it would be in the defendant's best interest to consent. If the trial judge, without obtaining consent from all parties, sends an exhibit to the jury room that you believe is harmful to the defendant's case, object on the record to ensure preservation of the issue on appeal.

34.3 Coercion of the Verdict by the Trial Judge

A. In General

Every person charged with a crime in North Carolina has an absolute right to a fair trial "before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm." *State v. Carter*, 233 N.C. 581, 583 (1951). Article I, section 24 of the N.C. Constitution prohibits a trial judge from coercing a jury to return a verdict. *State v. Patterson*, 332 N.C. 409 (1992).

In an effort to avoid coerced verdicts from jurors who are having a difficult time reaching a decision, the General Assembly enacted G.S. 15A-1235. *State v. Evans*, 346 N.C. 221 (1997). The instructions contained in that statute are set out *supra* in § 34.1, Instructions to the Jury about Reaching a Verdict. G.S. 15A-1235 borrows from the standards approved by the American Bar Association and is the "proper reference for standards applicable to charges which may be given a jury that is apparently unable to agree upon a verdict." *State v. Easterling*, 300 N.C. 594, 608 (1980). The instructions given to a deadlocked jury must conform to those standards. *Id.*

Although *Easterling* held that a trial judge's instructions to a deadlocked jury must conform to those set out in G.S. 15A-1235, the mere failure by the trial judge to precisely follow those instructions is not itself reversible error. *See State v. Peek*, 313 N.C. 266 (1985); *State v. Massenburg*, 234 N.C. App. 609 (2014). In determining whether a judge has coerced a verdict, the appellate court must consider the totality of the circumstances under which the instructions were made and the probable impact of the instructions on the jury. *State v. Beaver*, 322 N.C. 462 (1988); *Peek*, 313 N.C. 266. If the circumstances suggest to a juror that he or she should surrender well-founded convictions conscientiously held or his or her own free will and judgment in deference to the views of the majority, then coercion has occurred. *See State v. Holcomb*, 295 N.C. 608 (1978); *State v. Roberts*, 270 N.C. 449 (1967).

Some of the factors to be considered in weighing the totality of circumstances are whether the judge

- conveyed an impression to the jurors that he or she was irritated with them for not reaching a verdict;
- intimated to the jurors that he or she would hold them until they reached a verdict; and
- told the jurors that a retrial would burden the court system if the jury did not reach a verdict.

Beaver, 322 N.C. 462, 464. Additional considerations include "the amount of time the jury deliberated, the complexity of the case, and the content and tone of the court's instructions to the jury." *State v. Cox*, ___ N.C. App. ___, 808 S.E.2d 339, 349 (2017) (citation omitted). If the judge's instructions merely served as a catalyst for further deliberations and did not encourage the jurors to concur in what is really a majority

verdict rather than a unanimous verdict, then coercion has not occurred. *See Peek*, 313 N.C. 266; *State v. Dexter*, 151 N.C. App. 430 (2002), *aff'd per curiam*, 356 N.C. 604 (2002).

B. Inquiry into Numerical Split

A trial judge's inquiry as to the division of the jury, without asking which votes were for conviction or acquittal, is not inherently coercive and does not constitute a per se violation of the defendant's right to a jury trial as guaranteed by article I, section 24 of the N.C. Constitution. *State v. Fowler*, 312 N.C. 304 (1984). Likewise, such an inquiry does not violate a defendant's rights under the Due Process Clause or the Sixth Amendment to the U.S. Constitution. *Id.* (interpreting the decision in *Brasfield v. United States*, 272 U.S. 448 (1926), which found reversible error in a trial judge's inquiry into the numerical division of a jury deadlock, as based on the U.S. Supreme Court's supervisory power over the *federal* courts and not on the defendant's constitutional rights). The making of an inquiry into the numerical division of the jury lies within the sound discretion of the trial judge. *State v. Mann*, 317 N.C. 164 (1986); *State v. Rasmussen*, 158 N.C. App. 544 (2003).

C. Length of Deliberations

G.S. 15A-1235(c) states that the trial judge "may not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals." There is no bright-line rule setting an outside time-limit on jury deliberations; nor is there a rule that deliberations for a certain length of time, in relation to the length of time spent by the State presenting its evidence, is too long. *State v. Baldwin*, 141 N.C. App. 596 (2000) (finding no coercion where the trial judge, after being informed that the jury was at an impasse after only two and one-half hours of deliberations, ordered the jury to continue deliberating, and the jury reached a verdict at 11:04 p.m. after about seven hours of deliberations).

A verdict is coerced if the trial judge's comments and actions, along with the length of deliberations, improperly influenced the jury to reach a decision. *See, e.g., State v. Dexter*, 151 N.C. App. 430 (2002) (holding that jury could have reasonably felt coerced where the jury had deliberated for three days and sent out three notes informing the judge it could not reach a verdict, and the judge did not respond in the presence of the jury to a juror's note asking for time off for his wife's surgery and only gave the instructions set out in G.S. 15A-1235 after the second note), *aff'd per curiam*, 356 N.C. 604 (2002); *State v. McEntire*, 71 N.C. App. 720 (1984) (finding jury coercion where, after five hours of deliberations and being told that the jury would probably not be able to agree, the judge instructed them to continue deliberating without giving the instructions set out in G.S. 15A-1235).

Practice note: Always request that the record reflect the exact amount of time spent by the jury in deliberations in the event that coercion becomes an issue on appeal. Court reporters do not always note this important information in the transcript.

D. Comment on the Inconvenience or Expense of Retrial

Due to the danger of coercion, a deadlocked jury may not be advised of the potential expense and inconvenience of retrying the case. *State v. Easterling*, 300 N.C. 594 (1980); *see also* G.S. 15A-1235 Official Commentary ("The Commission deleted from its draft a provision previously sanctioned under North Carolina case law which would have authorized the judge to inform the jurors that if they do not agree upon a verdict another jury may be called upon to try the case."); *State v. Lipfird*, 302 N.C. 391 (1981) (granting new trial where trial judge violated G.S. 15A-1235 by instructing the deadlocked jury on the inconvenience of a retrial); *State v. Buckom*, 111 N.C. App. 240 (1993) (trial judge committed prejudicial error by instructing the jury, as part of an anti-deadlock instruction, that the "main purpose" of trying to reconcile differences in further deliberations was to avoid an expensive retrial), *aff'd per curiam*, 335 N.C. 765 (1994); *State v. Johnson*, 80 N.C. App. 311 (1986) (finding prejudicial error where the judge knew the jury was deadlocked 11-1 and his instructions, inter alia, mentioned the potential inconvenience and use of the court's time). If the jury is not deadlocked, an isolated mention of the expense and inconvenience of retrying the case may be harmless error. *See Easterling*, 300 N.C. 594; *State v. Mack*, 53 N.C. App. 127 (1981). However, once the trial judge knows that a jury is deadlocked, "the mention of inconvenience and additional expense may well be prejudicial and harmful to the defendant, and must be scrutinized with extraordinary care." *Mack*, 53 N.C. App. 127, 129.

E. Preservation of Issue on Appeal

If the trial judge instructs the jury in a coercive manner and does not comply with the requirements of G.S. 15A-1235, the defendant must object in order to preserve the issue for appellate review. In order to properly preserve the issue on both statutory and constitutional grounds, the objection should specifically note that the judge's instructions violate G.S. 15A-1235 and article I, section 24 of the N.C. Constitution. *See State v. May*, 368 N.C. 112 (2015).

If no objection is lodged, the appellate court will review the issue using the more stringent "plain error" standard of review. *See, e.g.*, *May*, 368 N.C. 112, 122 (assuming error in the trial judge's unobjected-to instructions regarding the expense of a retrial and requiring the jury to continue their deliberations after deadlock had been announced, but holding that the instructions did "not rise to the level of being so fundamentally erroneous as to constitute plain error."); *State v. Pate*, 187 N.C. App. 442, 445 (2007) (because defendant did not object to the judge's coercive instructions to the deadlocked jury, the argument would be analyzed under the plain error standard of review; court found that the judge's error in the instructions did not have "a probable impact on the jury's finding of guilt" under the facts of the case) (citation omitted).

34.4 Improper Expression of Opinion by Trial Judge

Comments and actions by the trial judge in the jury's presence, although not amounting to coercion of the jury as discussed in the preceding section, may constitute an improper expression of opinion as to the defendant's guilt and warrant relief. Questioning of witnesses by the judge, although permissible, may also indicate the judge's opinion as to the defendant's guilt and constitute an improper expression of opinion. For a discussion of these issues, see *supra* § 22.1B, Expression of Opinion Prohibited, and § 22.1C, Questioning of Witnesses Allowed, within Limits.

34.5 Deadlock

"In times long gone by, when a jury was unable to reach a verdict the trial court simply deprived the jurors of food, water, and fire until it reached a verdict. Today a more subtle approach is used to break a deadlocked jury." *State v. Lamb*, 44 N.C. App. 251, 253 (1979) (citations omitted); *see also Renico v. Lett*, 559 U.S. 766, 780 (2010) (Stevens, J., dissenting) (noting that "[f]ourteenth-century English judges reportedly loaded hung juries into oxcarts and carried them from town to town until a judgment 'bounced out'" while "[l]ess enterprising colleagues kept jurors as de facto 'prisoners' until they achieved unanimity") (citations omitted).

A. Further Instructions

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). *See supra* § 34.1, Instructions to the Jury about Reaching a Verdict. The language of G.S. 15A-1235(c) is permissive rather than mandatory, and it is within the sound discretion of the trial judge whether to give those instructions. *State v. Williams*, 315 N.C. 310 (1986).

In lieu of the instructions set out in G.S. 15A-1235(b), the judge may give the pattern instruction entitled "Failure of Jury to Reach a Verdict," which is found in N.C. Pattern Jury Instruction—Crim.101.40 (June 2014). *See, e.g.*, *State v. Walters*, 209 N.C. App. 158 (2011). This instruction is similar to the one found in G.S. 15A-1235(b). The instructions in both G.S. 15A-1235(b) and N.C. Pattern Jury Instruction—Crim. 101.40 are modified, weaker versions of the charge approved by the U.S. Supreme Court in *Allen v. United States*, 164 U.S. 492 (1896). Both are still sometimes referred to as an "*Allen*" or "dynamite" charge. *See State v. Fowler*, 312 N.C. 304, 306 (1984); *State v. Lamb*, 44 N.C. App. 251, 253–54 (1979).

B. Mistrial

Grounds. If it appears that there is no reasonable possibility of the jury reaching a verdict, the judge may declare a mistrial and discharge the jury. G.S. 15A-1235(d). This statute allows a judge to declare a mistrial on the same grounds as in G.S. 15A-1063(2), which states that "[u]pon motion of a party or upon his own motion, a judge may declare

a mistrial if . . . [i]t appears there is no reasonable probability of the jury's agreement upon a verdict." *State v. O'Neal*, 67 N.C. App. 65 (1984) (noting judge's authority to grant a mistrial under G.S. 15A-1063(2), but order for mistrial not justified since the jury could and did reach a verdict in the case), *aff'd in pertinent part*, 321 N.C. 154 (1984). The jury's inability to reach a verdict due to deadlock constitutes "manifest necessity," justifying the declaration of a mistrial. *State v. Pakulski*, 319 N.C. 562, 570 (1987). Whether to grant a motion for a mistrial is a matter that lies within the sound discretion of the trial judge, and that ruling will not be disturbed on appeal unless it was so clearly erroneous that it amounted to an abuse of discretion. *State v. McCarver*, 341 N.C. 364, 383 (1995).

Findings of fact. Pursuant to G.S. 15A-1064, "[b]efore granting a mistrial, the judge must make finding of facts with respect to the grounds for the mistrial and insert the findings in the record of the case." In noncapital cases, a trial judge's failure to make findings in support of a mistrial is not subject to appellate review unless timely objected to by defense counsel. "However, in a *capital* case, the failure to object to a mistrial declaration will not prevent a defendant from assigning the declaration of mistrial as error on appeal." *State v. Pakulski*, 319 N.C. 562, 569 (1987) (emphasis in original).

For further discussion of mistrials after a jury has become deadlocked, see *supra* § 31.7, Juror Deadlock.

34.6 Use of Juror Notes During Deliberations

Jurors are permitted to use their trial notes during deliberations unless otherwise directed by the trial judge. G.S. 15A-1228; *see supra* § 27.1, Note Taking by the Jury.

34.7 Verdicts

"A verdict is the unanimous decision made by the jury and reported to the court." *State v. Hemphill*, 273 N.C. 388, 389 (1968). A verdict in a criminal action should be "clear and free from ambiguity or uncertainty." The "enforcement of the criminal law and the liberty of the citizen" demand "exactitude." *State v. Jones*, 227 N.C. 47, 49–50 (1946).

A. Basic Requirements

Pursuant to G.S. 15A-1237(a) and (b), a verdict must be:

- in writing;
- signed by the foreman;
- made a part of the record of the case;
- unanimous; and
- returned by the jury in open court.

According to the Official Commentary to G.S. 15A-1237, the purpose of enacting a statute that requires a verdict to be in writing was to "cure a great many defects that occur when the [foreperson] of the jury inadvertently omits some essential element of a verdict in stating it orally." *See also State v. Goodman*, 298 N.C. 1, 15–16 (1979).

This statute does not require that a written verdict contain each element of the offense to which it refers. It is sufficient if it provides the judge "a proper basis upon which to pass judgment and sentence the defendant appropriately." *State v. Sanderson*, 62 N.C. App. 520, 524 (1983) (after considering the indictments, jury charge, and verdict sheets together, court concluded that the verdict forms, although improperly omitting the element of "intent to sell and deliver," sufficiently identified the offenses found by the jury to enable the trial judge to pass judgment on the verdicts and appropriately sentence defendant); *see also State v. Floyd*, 148 N.C. App. 290 (2002) (finding no plain error where the verdict sheets erroneously omitted the two prior violent felony convictions that the jury must find to render a verdict that defendant had attained the status of violent habitual offender because there was extensive evidence of defendant's guilt and the trial judge had properly instructed the jury).

Additionally, even though G.S. 15A-1237(a) specifically states that the verdict must be "signed by the foreman," it is not a fatal error for the foreman to fail to do so if the written verdict form "properly set[s] forth, without any possibility of ambiguity or confusion, the essential elements of the verdicts that could be returned." *State v. Collins*, 50 N.C. App. 155, 160 (1980); *see also State v. Miller*, 61 N.C. App. 1 (1983) (finding verdict sheet conformed to statute even though it was signed by a different juror than the one who had earlier indicated in open court that he was the foreman).

Practice note: Always carefully review the verdict sheets before submission to the jury. Place any objections to the contents or omissions therefrom on the record in order to preserve the issue for appellate review. If applicable, state that you are objecting based on violations of G.S. 15A-1237 and article I, section 24 of the N.C. Constitution (the right to a unanimous verdict).

B. Types of Verdicts

General and special verdicts distinguished. Verdicts in criminal cases may be either general or special. A general verdict is rendered where jurors take the law as given by the trial judge, apply it to the facts as they find them to be, and reach a general conclusion, usually "guilty" or "not guilty." *State v. Ellis*, 262 N.C. 446, 449 (1964); *see also State v. McHone*, 174 N.C. App. 289, 299 (2005) (finding plain error where trial judge omitted the "not guilty" option when instructing the jury and on the verdict sheet; the "inadvertent omission 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"). "A special verdict is a common law procedural device by which the jury may answer specific questions posed by the trial judge that are separate and distinct from the general verdict." *State v. Blackwell*, 361 N.C. 41, 46–47 (2006). Another type of verdict is the partial verdict, discussed *infra* § 34.7F, Partial Verdicts.

The right to have the jury make the ultimate determination of guilt is guaranteed by the Due Process Clause of the Fifth Amendment and by the Sixth Amendment right to a jury trial. *See United States v. Gaudin*, 515 U.S. 506 (1995); *Blackwell*, 361 N.C. 41; *see also* N.C. Const. art. I, § 24 ("No person shall be convicted of any crime but by the unanimous verdict of a jury in open court."); *State v. Barbour*, 229 N.C. App. 635 (2013) (holding that jury failed to fulfill its constitutional duty under the Sixth Amendment to make an actual finding of guilt where the verdict sheet only required the jury to make factual findings on the essential elements of the crimes charged and did not include the words "guilty" or "not guilty"). Special verdicts in criminal cases do not replace general verdicts but instead are commonly used to supply information *in addition to* the general verdict. *See* Kate H. Nepveu, *Beyond "Guilty" or "Not Guilty": Giving Special Verdicts in Criminal Jury Trials*, 21 YALE L. & POLICY REV. 263 (2003). To avoid any possible constitutional violations, trial judges "using special verdicts in criminal cases must require juries to apply [the] law to the facts they find, in some cases 'straddl[ing] the line between facts and law' as a 'mini-verdict' of sorts." *Blackwell*, 361 N.C. 41, 47 (citing Nepveu, 21 YALE L. & POL'Y REV. 276).

Limitations of special verdicts. Special verdicts are subject to two limitations: (1) the jury must use the "beyond a reasonable doubt" standard in reaching the special verdict; and (2) the jury must apply the law to the facts—that is, the jury cannot simply make findings on the factual components of the essential elements alone and leave the final judgment to the court. *See State v. Barbour*, 229 N.C. App. 635 (2013); *State v. Wilson*, 181 N.C. App. 540 (2007).

Examples of special verdicts. Special verdicts in North Carolina are commonly submitted to juries in order to determine:

- The theory or theories of first-degree murder on which the defendant is found guilty. *See State v. Lewis*, 321 N.C. 42 (1987); *see also State v. Lail*, ___ N.C. App. ___, 795 S.E.2d 401, 411 (2016) (holding that "where a general verdict would be ambiguous for sentencing purposes, trial courts should frame a special verdict requiring the jury to specify under which malice theory it found the defendant guilty of second-degree murder"); *see also* N.C. Pattern Jury Instruction—Crim. 206.14 (June 2018) (includes sample verdict sheet).
- Whether a defendant was found not guilty by reason of insanity. *See infra* § 34.7H, Insanity; *see also* N.C. Pattern Jury Instruction—Crim. 304.10 (June 2009).
- Jurisdiction where the defendant has challenged the State's ability to prove beyond a reasonable doubt that the crime occurred within North Carolina. *See State v. Batdorf*, 293 N.C. 486 (1977); *see also* N.C. Pattern Jury Instruction—Crim. 311.10 (May 2003) (includes sample verdict sheet).
- The existence of aggravating factors. *See State v. Blackwell*, 361 N.C. 41, 49 (2006) *see also* N.C. Pattern Jury Instruction—Crim. 204.25 (June 2018) (includes sample verdict sheet).
- Whether the defendant fathered an illegitimate child and whether he then willfully neglected or refused to support the child in violation of G.S. 49-2. *See State v. Ellis*, 262 N.C. 446 (1964); *State v. Hobson*, 70 N.C. App. 619 (1984); *see also* N.C.

Pattern Jury Instruction—Crim. 240.40 (June 2014) (includes sample verdict sheet). https://nccriminallaw.sog.unc.edu/prying-open-jury-room-supreme-court-creates-exception-no-impeachment-rule-racial-bias/

- The constitutionality of an ordinance or statute in a criminal proceeding on grounds that do not appear on the face of the record. *See State v. Underwood*, 283 N.C. 154 (1973) (where defendants, convenience store employees, moved to quash the warrants charging them with violations of a Sunday closing ordinance on the ground that the ordinance was unconstitutional, the trial judge exceeded his jurisdiction in finding facts relating to whether items sold by defendants overlapped with those sold by newsstands, filling stations, and other businesses permitted to stay open all day because those facts were determinative and could only have been found by a jury in a special verdict).
- Whether or not a defendant has attained the status of habitual felon. *See State v. Sullivan*, 110 N.C. App. 779 (1993).
- The dates of a defendant's alleged violations of a continuing conduct offense where the statute proscribing the conduct has been modified during the pendency of the conduct. *See State v. Williams*, 226 N.C. App. 393 (2013) (holding that the trial judge should have submitted a special verdict form to the jury to resolve the issue of whether defendant's alleged conduct in stalking the victim extended beyond the effective date of the amended statute); *see also United States v. Julian*, 427 F.3d 471, 481–82 (7th Cir. 2005) ("[B]ecause the alleged conspiracy spanned two different versions of the statute with different maximum penalties, the question of whether the conspiracy extended beyond the effective date of the amended version was one that had to be resolved by the jury rather than the judge.").

C. Acceptance of Verdict by Judge

A verdict is a substantial right of the defendant. Although not complete until the trial judge accepts it, a trial judge does not have unrestrained discretion to accept or reject a verdict. *State v. Rhinehart*, 267 N.C. 470 (1966). "The trial judge should examine a verdict with respect to its form and substance to prevent a doubtful or insufficient verdict from becoming the record of the court . . . ." *Id.* at 481. However, "only when a verdict is not responsive to the indictment or . . . is incomplete, insensible or repugnant," may a judge decline to accept it and order "the jury to retire and bring in a proper verdict." *State v. Hampton*, 294 N.C. 242, 247–48 (1978); *see also State v. Abraham*, 338 N.C. 315 (1994) (trial judge properly declined verdict and ordered further deliberations where jury's original verdict incorrectly found defendant guilty of both first-degree murder and second-degree murder for the same homicide).

If the issues are substantially answered by the verdict so as to allow the trial judge to pass judgment in accordance with the manifest intention of the jury, the verdict should be received and recorded. *State v. Smith*, 299 N.C. 533 (1980). A verdict is considered sufficient if it "can be properly understood by reference to the indictment, evidence and jury instructions." *State v. Connard*, 81 N.C. App. 327, 336 (1986), *aff'd per curiam*, 319 N.C. 392 (1987).

D. Unanimity

G.S. 15A-1237(b) and article I, section 24 of the N.C. Constitution require that the verdict be unanimous. For a more detailed discussion on unanimity, see *supra* § 24.2D, Jury Unanimity.

E. Inconsistent Verdicts

Generally. Consistency between verdicts is generally not required in North Carolina. *See, e.g., State v. Reid*, 335 N.C. 647 (1994); *see also Dunn v. United States*, 284 U.S. 390, 393 (1932) ("Consistency in the verdict is not necessary."). However, North Carolina jurisprudence recognizes a difference between verdicts that are "merely inconsistent" and verdicts that are "legally inconsistent *and* contradictory." *State v. Mumford*, 364 N.C. 394, 398 (2010).

> According to our Supreme Court, inconsistent verdicts fall into one of two categories. First, some verdicts are inconsistent only. These verdicts "represent[] an apparent flaw in the jury's logic[,]" such as in the *Mumford* case when "presumably, a finding of guilt in the greater offense would establish guilt in the lesser offense." *Id.* at 400, 699 S.E.2d at 915. The second category consists of verdicts that are inconsistent because they are mutually exclusive in that "a verdict purports to establish that the [defendant] is guilty of two separate and distinct criminal offenses, the nature of which is such that guilt of one necessarily excludes guilt of the other." *Id.* (citation and internal quotation marks omitted) (alteration in original).

State v. Blackmon, 208 N.C. App. 397, 403–04 (2010).

"Merely inconsistent" verdicts. Verdicts rendered by the jury in the same trial against the same defendant or as between co-defendants that are "merely inconsistent" will ordinarily not be disturbed. *See, e.g., State v. Mumford*, 364 N.C. 394, 401 (2010) (upholding verdicts acquitting defendant of driving while impaired but convicting him of felony serious injury by vehicle, which includes as an element that the defendant was driving while under the influence of an impairing substance; verdicts were "certainly inconsistent" but not "mutually exclusive"); *State v. Reid*, 335 N.C. 647 (1994) (allowing conviction of defendant for acting in concert with a co-defendant even though jury acquitted co-defendant of committing the offense); *State v. Blackmon*, 208 N.C. App. 397 (2010) (jury deadlocked on the charge of felony breaking and entering but found the defendant guilty of felony larceny premised on the breaking and entering; result was merely inconsistent, not mutually exclusive); *State v. Cole*, 199 N.C. App. 151, 160 (2009) (no error by trial judge in accepting "the seemingly inconsistent verdicts" of guilty of assault with a deadly weapon and not guilty of possession of a firearm by a felon); *State v. Shaffer*, 193 N.C. App. 172 (2008) (although difficult to rationally reconcile the jury's verdicts, no error where defendant was convicted of first-degree sexual offense for anal intercourse and crime against nature for forced fellatio and the State's evidence also

would have supported guilty verdicts of first-degree rape and the greater offense of first-degree sexual offense for the forced fellatio); *State v. Bagnard*, 24 N.C. App. 54 (1974) (no error in defendant's conviction for possession with intent to distribute marijuana where co-defendant was convicted only of possession of the same marijuana).

Verdicts also will not be disturbed in cases where the jury returns a verdict of guilty to a lesser degree of a crime and all the evidence points to the more serious crime or in cases where the defendant is charged with separate offenses resulting from the same act and the jury returns a verdict of guilty on one count and not guilty on the other. *See, e.g., State v. Bullard*, 82 N.C. App. 718 (1986) (finding no merit in defendant's argument that the trial judge erred in allowing a verdict of guilty to second-degree rape when all the evidence indicated guilt of first-degree rape or not guilty); *State v. Rosser*, 54 N.C. App. 660 (1981) (finding that consistency between verdicts was not required where jury found defendant guilty of manufacturing marijuana but not guilty of possession of the same marijuana).

The rationale behind upholding "merely inconsistent" verdicts embodies the acknowledgment of several factors. *See State v. Reid*, 335 N.C. 647 (1994). "The acquittal may represent the mistake of the jury due to 'compromise[] or lenity.' If this is true, 'the Government has no recourse if it wishes to correct the jury's error; the Government is precluded from appealing or otherwise upsetting such an acquittal by the Constitution's Double Jeopardy Clause.'" *Id*. at 659 (citation omitted) (quoting *United States v. Powell*, 469 U.S. 57, 65 (1984)). The rule against permitting a criminal defendant to upset an inconsistent verdict also acknowledges that he or she has already been "'afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts.'" *Id.* (quoting *Powell*, 469 U.S. 57, 67 (citation omitted)). "The fact that the inconsistency may be the result of lenity, coupled with the Government's inability to invoke review, suggests that inconsistent verdicts should not be reviewable." *Id.* (quoting *Powell*, 469 U.S. 57, 66).

Mutual exclusivity. While a "mere inconsistency" will not invalidate the verdicts, verdicts that are inconsistent *and* contradictory— i.e., mutually exclusive—will entitle a defendant to relief. *State v. Mumford*, 364 N.C. 394 (2010); *State v. Surcey*, 139 N.C. App. 432 (2000); *see also State v. Meshaw*, 246 N.C. 205 (1957) (new trial granted where defendant was convicted of the mutually exclusive offenses of larceny and receiving stolen goods); *State v. Hames*, 170 N.C. App. 312 (2005) (offenses of assault with a deadly weapon inflicting serious injury and attempted voluntary manslaughter were mutually exclusive since defendant either did or did not have the intent to kill; new trial granted where trial judge permitted jury to convict defendant of both offenses and imposed the same sentence for each and ran them concurrently).

If the offenses are mutually exclusive and are properly joined for trial, the trial judge may submit both offenses to the jury, but the jury must be instructed that it may convict the defendant of only one of the offenses. *See, e.g., State v. Speckman*, 326 N.C. 576 (1990) (defendant could be tried but not convicted for both embezzlement and obtaining property by false pretenses; the charges are mutually exclusive because embezzlement

requires that property be obtained lawfully and then wrongfully converted while obtaining by false pretenses requires that property be obtained unlawfully at the outset); *see also* 1 NORTH CAROLINA DEFENDER MANUAL § 6.1B, Standard for Joinder of Offenses (discussing joinder of mutually exclusive offenses).

The rule against mutually exclusive verdicts does not apply if the convictions are not based on the same conduct by the defendant. *See State v. Mosher*, 235 N.C. App. 513 (2014) (upholding convictions for two counts of felony child abuse, one based on an intentional act and one based on a negligent act, where sufficient evidence was presented from which a reasonable juror could conclude that defendant committed two separate, successive acts of felonious child abuse); *State v. Johnson*, 208 N.C. App. 443, 449 (2010) (holding that based on the facts in that case "the two offenses in question were not mutually exclusive but instead occurred in succession.").

Practice note: If your client is being tried for mutually exclusive offenses, you must request at the charge conference that the trial judge give the *Speckman* instruction informing the jury that it may convict your client of only one of the offenses, if any. If you fail to make such a request, the appellate court will review the instructional error under the more stringent "plain error" standard of review. *See State v. Melvin*, 364 N.C. 589 (2010) (although defendant was convicted of the mutually exclusive offenses of first-degree murder and accessory after the fact to murder, no plain error was found in trial judge's failure to give a *Speckman* instruction where he arrested judgment on accessory after the fact and sentenced defendant to life without parole for first-degree murder and the evidence supported that conviction); *State v. Loftis*, 233 N.C. App. 239 (2014) (unpublished) (finding plain error and remanding for a new trial where trial judge failed to instruct the jury that it could find defendant guilty of either embezzlement by an employee or robbery with a dangerous weapon where the charges were mutually exclusive).

F. Partial Verdicts

Generally. The term "partial verdict" is susceptible to several interpretations. *Whiteaker v. State*, 808 P.2d 270 (Ct. App. Alaska 1991). It can refer to cases where

- several defendants are being tried together and the jury is able to return a final verdict against one or more of them but not against all;
- a single defendant is charged in a multi-count indictment or in multiple separate indictments and the jury is able to return a final verdict as to one or more of the counts or offenses but not all; or
- a single defendant is charged in a single-count indictment which supports lesser-included offenses and the jury returns a verdict on some, but not all of the greater degrees of the offense included in the charge.

See id. at 273–74; *see also* BLACK'S LAW DICTIONARY 1592 (Deluxe 8th ed. 2004) (defining partial verdict as "[a] verdict by which a jury finds a criminal defendant innocent of some charges and guilty of other charges"). For further discussion of partial

verdicts generally, see 6 LAFAVE, ET AL., CRIMINAL PROCEDURE § 24.10(d), at 732–34 (4th ed. 2015).

The term "partial verdict" as used here refers to decisions by a jury made after the jury has finished the deliberative process and has deadlocked on some charges, or on some degree of an offense, or has been unable to agree as to all defendants. The type of partial verdict rendered before the jury fully completes its deliberations as to all defendants or as to all counts or all degrees of an offense against a single defendant will be referred to in this manual as an "interim partial verdict." *See generally State v. Shomo*, 609 A.2d 394, 398–99 (N.J. 1992) (using that designation).

Statutory authority for partial verdicts. G.S. 15A-1237 specifically addresses the rendering of partial verdicts. G.S. 15A-1237(d) provides that in multiple defendant cases, "if the jury agrees upon a verdict for one defendant but not another, it must return that verdict upon which it agrees."

G.S. 15A-1237(e) addresses a single defendant situation and provides 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, to which it agrees." Pursuant to this subsection, a jury may return verdicts on fewer than all the charged offenses if it is unable to reach verdicts on all charged offenses. A jury can also return a verdict on a lesser included offense even if it has not reached a unanimous verdict on the greater offense. *See 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; plain language of G.S. 15A-1237(e) does not support an "acquittal first" instruction).

While partial verdicts are expressly permitted under G.S. 15A-1237, neither the statute nor the official commentary indicate whether the statute was intended to apply only to partial verdicts rendered after deadlock or if it also applies to interim partial verdicts which may be delivered before all jury deliberations are finally concluded. *Cf. State v. Shomo*, 609 A.2d 394, 399 (N.J. 1992) (extensively reviewing the validity of the acceptance of interim partial verdicts and noting that the comment accompanying the New Jersey rule that expressly permits a jury to deliver partial verdicts in multiple-defendant trials or as to specific counts of a multi-count indictment against one defendant contemplates partial verdicts rendered at the end of jury deliberations and did not indicate whether a partial verdict may be delivered before deliberations are concluded); FED. R. CRIM. P. 31(b) (expressly authorizing juries in multi-defendant trials to return a verdict "at any time in its deliberations" as to one or more defendants). No North Carolina case has definitively addressed this issue. *See State v. Sargeant*, 206 N.C. App. 1, 16 (2010) (addressing interim partial verdicts on theories of an offense but declining to decide whether the taking of the partial verdicts on other offenses while the jury was still deliberating was permissible in North Carolina because defendant "did not argue any prejudice with respect to" those offenses), *aff'd as modified on other grounds*, 365 N.C. 58 (2011).

Interim partial verdicts on theories of an offense disallowed. In *State v. Sargeant*, 206 N.C. App. 1 (2010), *aff'd as modified on other grounds*, 365 N.C. 58 (2011), our appellate courts addressed, in part, the propriety of taking partial verdicts. In *Sargeant*, the defendant was charged with first-degree murder based on premeditation and deliberation, felony murder, and lying in wait. He also was charged with armed robbery, kidnapping, and burning personal property. At the end of a full day of deliberations, the trial judge, on his own volition and over the defendant's objection, directed the jury to return verdicts on those charges on which it had agreed. The judge apparently did this to address his concern that if "something happens" during the overnight recess, a mistrial would have to be granted. The jury returned verdict sheets finding the defendant guilty of all charges except first-degree murder based on premeditation and deliberation. The following day, the jury was given a new verdict sheet solely asking it to decide the defendant's guilt of first-degree murder on the basis of premeditation and deliberation. The jury continued deliberating and found the defendant guilty of premeditated and deliberate murder later that day. The trial judge polled the jurors and accepted this verdict.

Focusing on the taking of "verdicts" on two of the theories of first-degree murder while the jury was still deliberating on the third theory, the defendant argued on appeal that the trial judge's action violated his constitutional right to a unanimous jury. The court of appeals, affirmed by the supreme court, agreed, holding that the trial judge's action erroneously locked the jury in on two theories of first-degree murder before it had unanimously agreed on a final verdict for the single charge. The court noted that defendants are convicted or acquitted of crimes, not theories, and these "verdicts" were not true partial verdicts as to a crime but were "factual findings regarding theories of the crime of first degree murder." *Id*. at 11.

After reviewing cases from other jurisdictions that evaluated the risks of taking partial verdicts in cases involving lesser included offenses or individual charges of a multiple count indictment, the court of appeals observed that the trial judge's procedure in this case "may have 'cut short [the jury's] opportunity to fully consider the evidence . . . [or] deprive[d] the defendant of the very real benefit of reconsideration and change of mind or heart.'" *Id*. at 14 (alterations in original) (citing *United States v. Benedict*, 95 F.3d 17, 19 (8th Cir. 1996)). The court also observed that the State's argument concerning the limited impact of a verdict on the premeditation theory once the jury rendered its decision on the two other theories "disregards the importance of the potential of juror compromises during the jury's deliberations." *Id.* at 12.

The court then held that the trial judge's "intrusion into the province of the jury cannot be deemed harmless beyond a reasonable doubt" under the facts of that case and granted the defendant a new trial as to the murder indictment. *Id*. The factors that the court cited that made the acceptance of the partial interim verdicts on two of the three theories of murder prejudicial error were:

- deliberations had not been underway for a substantial amount of time when the trial judge accepted the partial verdicts;

- neither the jury nor a party requested the judge to take the partial verdicts;
- the jury was still actively deliberating and had not indicated any deadlock; and
- the three murder theories were "'so closely related' that '[i]t is difficult to imagine that the jury could continue to deliberate on [one theory] without reweighing the evidence with respect to' the other theories."

Id. at 16 (citing *Benedict*, 95 F.3d at 20).

Partial verdicts on interrelated offenses. It is clear that a trial judge may accept partial verdicts where a jury, after completing its deliberations, deadlocks on one or more offenses and reaches a verdict on others. *See* G.S. 15A-1237(e). This appears to be true even where the facts of the offenses are interrelated and where the verdicts are not consistent. *See supra* § 34.7E, Inconsistent Verdicts. What is unclear is whether this statute authorizes a trial judge to accept verdicts on less than all interrelated offenses while a jury is still deliberating on one or more other offenses.

The appellate courts in *State v. Sargeant*, 206 N.C. App. 1 (2010), *aff'd as modified on other grounds*, 365 N.C. 58 (2011), did not directly address the propriety of the taking of verdicts on the non-homicide charges in the case (e.g., the kidnapping and armed robbery charges) while the jury was still deliberating on the homicide charge since the issue was not raised on appeal. The court of appeals stated, "Even assuming, without deciding, that partial verdicts as to multiple charges are permissible in North Carolina, we hold that a trial court may not take partial verdicts as to theories of a crime." *Sargeant*, 206 N.C. App. at 11. Since G.S. 15A-1237(e) expressly authorizes verdicts on less than all charged offenses, the court of appeals must have been referring to "interim" partial verdicts, i.e., verdicts rendered before the jury fully completes its deliberations on all counts against a single defendant.

No other cases in North Carolina appear to have considered the issue, but the reasoning of *Sargeant* may apply to bar the acceptance of interim partial verdicts in contexts other than multiple-theory cases. In addition to the bar on partial verdicts on theories of an offense, *Sargeant* may bar interim partial verdicts when the offenses are legally interrelated. For example, in a case involving felony breaking and entering and larceny where larceny is the crime that the defendant allegedly intended to commit, it may be inappropriate for the judge to take a verdict on one charge while the jury is still deliberating on the other. Likewise, it may be inappropriate in a felony murder case predicated on a particular felony to split up the jury's deliberations on the murder charge and the underlying felony. (In *Sargeant*, the jury did not return a partial verdict on felony murder and the underlying felonies, as it returned a verdict at the same time on felony murder, armed robbery, and kidnapping.) Whether or not legally interrelated, *Sargeant* may also weigh against the taking of an interim partial verdict in any case in which multiple offenses are joined for trial because a requirement for joinder is that the offenses be factually interrelated.

To accept verdicts on some offenses while the jury is still deliberating on others presents the inherent danger that the acceptance of the partial verdict will prematurely convert a

tentative jury vote into an irrevocable one and deprive the defendant of "'the very real benefit of reconsideration and change of mind or heart by the jury.'" *See United States v. Benedict*, 95 F.3d 17, 19 (8th Cir. 1996) (finding that "the taking of a partial verdict in a single-defendant case is not per se invalid" and recognizing that partial verdicts may be appropriate in certain circumstances but holding that trial judge abused his discretion in accepting verdicts on three of the charged offenses while requiring further deliberations on the fourth charge because nothing suggested that the jury was deadlocked on the final charge and the final charge was so interrelated with one of the other charges that it was difficult to imagine that the jury could continue to deliberate on that charge without reweighing the evidence with respect to the other charge since the evidence was virtually the same); *see also State v. Shomo*, 609 A.2d 394, 399 (N.J. 1992) (after collecting federal and state authorities that have upheld interim partial verdicts, weighing the pros and cons, and strongly discouraging their routine use, court held that interim partial verdicts will be allowed and considered final only "when a jury is properly instructed [that the verdicts will be final], recorded, and, if requested, confirmed by a polling of the jurors").

This discussion does *not* apply in cases in which the jury deadlocks on some offenses and reaches a verdict on others. In that instance, the jury has completed its deliberations on all offenses, and the judge may take a verdict on the offenses on which the jury has unanimously agreed and declare a mistrial on the offenses on which the jury has deadlocked. For a discussion of mistrials based on a jury deadlock, see *supra* § 31.7, Juror Deadlock.

No right to partial verdict on greater offense following deadlock on lesser offense. In *State v. Sargeant*, 206 N.C. App. 1 (2010), *aff'd as modified on other grounds*, 365 N.C. 58 (2011), the court of appeals analogized the taking of an interim partial verdict on less than all theories of a single offense with determining the jury's verdict on greater offenses when it has deadlocked on a lesser offense, a procedure discussed in *State v. Booker*, 306 N.C. 302 (1982). In *Booker*, at the defendant's first trial on first-degree murder, the trial judge declared a mistrial. The defendant asserted that during the first trial the jury sent a note to the judge stating that the jury was deadlocked on second-degree murder. At his second trial, the defendant argued that double jeopardy barred retrial on first-degree murder because the jury implicitly acquitted him of that offense when it deadlocked on second-degree murder. The *Booker* court rejected the defendant's argument, finding that the jury did not reach a final verdict and "therefore there was no implied acquittal." *Id.* at 307. *See also Blueford v. Arkansas*, 566 U.S. 599, 610 (2012) (foreperson's report in open court that jury was "unanimous against" convicting defendant of the two greater charges and was deadlocked on the third lesser charge was not a final resolution and the Double Jeopardy Clause "does not stand in the way of a second trial on the same offenses").

The *Booker* court also rejected the defendant's request to adopt the rule, announced by the Supreme Court of New Mexico in *State v. Castrillo*, 566 P.2d 1146 (N.M. 1977), that "'when a jury announces its inability to reach a verdict in a case involving included offenses, the trial court is required to submit verdict forms to the jury to determine if it

has unanimously voted for acquittal on any of the included offenses, and the jury may then be polled with regard to any verdict thus returned.'" *Booker*, 306 N.C. 302, 306 (citation omitted). Discussing this part of the *Booker* case, the court of appeals in *Sargeant* stated that such a procedure, if followed with respect to greater or lesser offenses, would amount to an attempt "to establish unanimity on aspects of a charged crime in advance of a final verdict on the charged crime," a form of partial verdict. *Sargeant*, 206 N.C. App. 1, 11. Determining the jury's position on greater offenses after it has deadlocked on a lesser offense does not appear to involve true partial verdicts, however. Such a procedure would not require the jury to return a verdict on one charge while it is still deliberating on other charges; rather, the procedure would only come into play when the judge determines that the jury is deadlocked and has completed its deliberations.

For a more detailed discussion of the double jeopardy implications of a deadlocked jury, see *supra* § 31.7, Juror Deadlock.

G. Co-defendants

Where a defendant is tried jointly with one or more co-defendants, the jury must return a separate verdict with respect to each defendant. "If the jury agrees upon a verdict for one defendant but not another, it must return that verdict upon which it agrees." G.S. 15A-1237(d). The trial judge's instructions to the jury must not imply that the guilt or innocence of each of the co-defendants depends on the guilt or innocence of the other, or lead the jury to believe that it cannot find one guilty and fail to agree as to the other jointly-tried defendants. *See State v. Norton*, 222 N.C. 418, 420 (1942) (granting new trial where the trial judge, in response to a question from the jury, erroneously instructed the jury that it could not render a verdict as to one co-defendant and "not decide on the other. . . ."); *State v. Lockamy*, 31 N.C. App. 713, 716 (1976) (granting a new trial where the jury charge did not contain a separate final mandate as to each defendant and it was "susceptible to the interpretation that the jury must find either both defendants guilty or both defendants not guilty.").

Inconsistent verdicts rendered by the jury in the same trial between co-defendants will ordinarily not be disturbed. *See, e.g.*, *State v. Reid*, 335 N.C. 647 (1994) (allowing conviction of defendant for acting in concert with a co-defendant even though jury acquitted co-defendant of committing the offense); *State v. Bullard*, 82 N.C. App. 718, 723 (1986) (finding no error where trial judge refused to set aside an inconsistent jury verdict convicting defendant of second-degree rape while acquitting his co-defendant of kidnapping and first-degree rape; court held that "criminal verdicts as between two or more defendants tried together need not demonstrate rational consistency").

H. Insanity

G.S. 15A-1237(c) provides that "[i]f the jurors find the defendant not guilty on the ground that he was insane at the time of the commission of the offense charged, their verdict must so state."

The N.C. Supreme Court has suggested different procedures for the judge to follow for instructing the jury and preparing verdict sheets where insanity is at issue. In *State v. Linville*, 300 N.C. 135 (1980), the court suggested that the trial judge should first submit the issues of guilt or innocence in the normal fashion. After those issues have been submitted, a special issue should be submitted, which states:

> *Special Issue*: Did you find defendant not guilty because you were satisfied that he was insane?

The court also stated that the jury should be instructed that it is not to consider the special issue *unless* it has returned a general verdict of not guilty. If a general verdict of not guilty is returned, to comply with G.S. 15A-1237(c) "the jury must clarify for the record whether its general verdict of not guilty was or was not based upon its satisfaction that defendant was insane." *Id.* at 142. If the reason for a not guilty verdict is not based on a finding of insanity, then the reason need not be specified. *Id.*

In other opinions, the N.C. Supreme Court has suggested that the jury may first determine the issue of insanity and then address the issue of guilt or innocence. *See State v. Cooper*, 286 N.C. 549 (1975) (holding that the "better procedure" would be to instruct the jury to consider the insanity issue first, and if answered negatively, then to proceed to determine defendant's guilt or innocence of the offense charged). Whether to order the instructions in this way is in the trial judge's discretion. *See State v. Hudson*, 331 N.C. 122 (1992) (although *Cooper* stated the "better procedure," it is "merely advisory"); *State v. Mancuso*, 321 N.C. 464 (1988) (order in which the insanity issue is submitted should be left to the discretion of the trial judge).

N.C. Pattern Jury Instruction—Crim. 304.10 (June 2009) also addresses the insanity defense and advises the judge to give the insanity instruction just before the mandate of the instruction on the offense charged. This pattern instruction states that a jury should consider evidence of insanity "only if . . . the State has proved beyond a reasonable doubt" each of the elements of the offense charged. *See also State v. Mize*, 315 N.C. 285 (1985) (jury should first decide whether State has met its burden of proof on offense charged and then reach insanity question only if it finds defendant guilty). The instruction also directs the judge to add the *Linville* Special Issue at the end of the verdict form.

Practice note: Although it is permissible for the trial judge to instruct the jury to decide first whether or not the State has met its burden of proof on the elements of the offense before considering the insanity issue, this order of the issues may reduce the jury's willingness to consider insanity because it will already have found the defendant guilty before considering the issue. Pursuant to *Cooper* and *Hudson*, counsel can argue that the jury should first determine the issue of insanity before deciding guilt or innocence.

I. Judicial Comment on the Verdict

A trial judge is prohibited from commenting on the verdict in criminal cases in open court in the presence or hearing of any member of the jury panel. If he or she comments

on the verdict, or praises or criticizes the jury on account of its verdict, any defendant whose case is calendared for that session of court is entitled to a continuance of his or her case to a time when all members of the jury panel are no longer serving. *See* G.S. 15A-1239; G.S. 1-180.1. The right to a continuance is waived by failing to move to continue before trial. *State v. Neal*, 60 N.C. App. 350 (1983). Under the provisions of G.S. 15A-1239 and G.S. 1-180.1, a continuance is the only remedy for a judicial comment on the verdict. *Id.*

J. Polling of the Jury

For a discussion on the right to poll the jury in criminal cases, see *supra* § 27.6, Polling of the Jury.

K. Impeachment of the Verdict

Generally. As a general rule, once a verdict is rendered, it may not be impeached—that is, a juror may not testify nor may evidence be received as to matters occurring during deliberations or calling into question the reasons on which the verdict was based. *See State v. Cherry*, 298 N.C. 86 (1979); *see also Pena-Rodriguez v. Colorado,* ___ U.S. ___, 137 S. Ct. 855 (2017) (discussing the origin and history of the anti-impeachment rule and noting that forty-two jurisdictions follow Rule 606 of the Federal Rules of Evidence). The substantial policy considerations and values that support this anti-impeachment rule "include freedom of deliberation, stability and finality of verdicts, and protection of jurors from harassment and embarrassment." *See State v. Lyles*, 94 N.C. App. 240, 244 (1989) (citing N.C. R. Ev. 606 Official Commentary); *see also McDonald v. Pless*, 238 U.S. 264, 268 (1915) *(*addressing the negative consequences of allowing verdict to be impeached including "the destruction of all frankness and freedom of discussion and conference").

"However, harsh injustice has sometimes resulted from the view that jury verdicts are beyond challenge. Thus, as an 'accommodation between policies designed to safeguard the institution of trial by jury and policies designed to insure a just result in [an] individual case,' certain exceptions to the rule have been carved out." *Lyles*, 94 N.C. App. 240, 244 (citation omitted). G.S. 15A-1240 and N.C. Rule of Evidence 606(b) provide limited exceptions to the anti-impeachment rule. Additionally, in *Pena-Rodriguez,* ___ U.S. ___, 137 S. Ct. 855, the U.S. Supreme Court carved out a judicial exception to the anti-impeachment rule where clear racial bias is shown to have played a part in jury deliberations, discussed further below.

Application of statute. G.S. 15A-1240(c)(1) allows impeachment of a verdict only in a criminal case and only when matters not in evidence came to the attention of one or more jurors under circumstances that would violate the defendant's constitutional right to confront the witnesses against him or her. If the challenged evidence does not implicate the defendant's right to confront under the Sixth Amendment to the U.S. Constitution or article I, section 23 of the N.C. Constitution, G.S. 15A-1240(c)(1) does not apply. *Compare State v. Rosier*, 322 N.C. 826, 832 (1988) (defendant's right to confront not

violated where jury foreman watched a program on child abuse contrary to the trial judge's instructions and foreman told other jurors about a young friend of his who had been raped; jurors' affidavits concerning these events should not have been considered by the court because "[p]arties do not have the right to cross examine jurors as to the arguments they make during deliberation as the foreman did in this case"), *with State v. Heavner*, 227 N.C. App. 139, 149 (2013) (conversation between defendant's mother and juror in courthouse hallway before trial violated defendant's confrontation right because "matters not in evidence" dealing with defendant and the case were discussed).

Under subsection (c)(2) of G.S. 15A-1240, a verdict may also be impeached after the jury has been dispersed when there is evidence of bribery, intimidation, or attempted bribery or intimidation of a juror.

Application of rule. N.C. Rule of Evidence 606(b), which applies in both criminal and civil cases, provides that a juror is competent to testify when the validity of a verdict is challenged, but only on the questions of (1) whether extraneous prejudicial information was improperly brought to the jury's attention or (2) whether any outside influence was improperly brought to bear upon any juror. Jurors can testify as to objective events set out in the above rule but cannot testify as to the subjective effect that the matters had on their verdict. *State v. Lyles*, 94 N.C. App. 240, 244 (1989).

Extraneous information under Rule 606(b) has been interpreted to mean information that reaches a juror without being introduced into evidence and that deals specifically "with the defendant or the case which is being tried." *Compare State v. Rosier*, 322 N.C. 826, 832 (1988) (judge's consideration of jurors' affidavits found improper where the affidavits related that jury foreman watched a program on child abuse contrary to the trial judge's instructions and told jurors about a young friend of his who had been raped because that information was not "extraneous information" within the meaning of Rule 606 since it did not deal with defendant or the case being tried), *with State v. Heavner*, 227 N.C. App. 139, 149 (2013) (conversation between defendant's mother and juror in courthouse hallway about defendant and the case contained "extraneous information" within the meaning of Rule 606(b)).

General information that a juror has gained in his or her day-to-day experiences does not constitute "extraneous information." *Compare State v. Heatwole*, 344 N.C. 1 (1996) (juror's exchange with his professor about violent tendencies of paranoid schizophrenics was not "extraneous information" because it did not deal with defendant or with the case being tried), *with State v. Lyles*, 94 N.C. App. 240 (1989) (testimony by jurors was proper under both Rule 606(b) and G.S. 15A-1240(c)(1) where a juror peeled paper from the bottom of an exhibit during deliberations and uncovered information that implied that defendant had prior criminal involvement and that directly contradicted the defendant's alibi witnesses; jurors' exposure to the information was found to entitle the defendant to a new trial). *See also* 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 148, at 550–54 (8th ed. 2018) (discussing the anti-impeachment rule).

Racial bias exception to the anti-impeachment rule. In *Pena-Rodriguez v. Colorado*, ___ U.S. ___, 137 S. Ct. 855 (2017), the U.S. Supreme Court for the first time recognized a constitutional exception to Fed. R. Evid. 606(b), the federal anti-impeachment rule. The defendant in *Pena-Rodriguez* was convicted of charges stemming from sexual assaults against two teenagers. After the jury was discharged, two jurors revealed that another juror had made anti-Hispanic comments concerning the defendant and his alibi witness. The defendant made a motion for a new trial based on the comments and the trial judge, relying on Colorado's anti-impeachment statute, denied it. The judge's decision was affirmed by the Colorado appellate courts.

The U.S. Supreme granted certiorari and noted that "[l]ike its federal counterpart, Colorado's Rule 606(b) generally prohibits a juror from testifying as to any statement made during deliberations in a proceeding inquiring into the validity of the verdict." *Id*., 137 S. Ct. at 862. However, after distinguishing prior cases upholding the anti-impeachment rule, the Court concluded that if left unaddressed, the "familiar and recurring evil" of racial bias "would work systemic injury to the administration of justice." *Id.* at 868. The Court then held that "where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee." *Id.* at 869. While not every offhand comment indicating racial bias will justify setting aside the no-impeachment bar, judicial inquiry must proceed if there is "a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict." *Id*.

For further discussion of the decision in *Pena-Rodriguez*, see Alyson Grine, *Prying Open the Jury Room: Supreme Court Creates an Exception to the No-Impeachment Rule for Racial Bias*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Mar. 13, 2017).