VI. Trial-Specific Motions

A. Motion for Full Recordation
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H. Request for Jury Instructions
I. Motion to Poll Jury
J. Motion for Mistrial

A. Motion for Full Recordation

Authority

G.S. 15A-1241(b).

Key Principles

By the terms of the statute, this motion must be granted on request.

Without complete recordation, jury selection, opening statements, closing arguments, and bench conferences are not recorded by the court reporter. To preserve potential error for appellate review during these parts of the trial, they must be recorded.

Practice Tips

- Judges may discourage counsel from insisting on complete recordation. North Carolina Court of Appeals and Supreme Court opinions make clear that unrecorded errors are not preserved, and thus counsel must insist on complete recordation as a matter of effective assistance of counsel.
- If a motion for full recordation is not made and some error or improper argument is presented during an unrecorded portion of the trial, counsel must attempt to reconstruct the error for the record.
- This motion may be made orally in open court, but the better practice is to file a written request pretrial.
- Some attorneys prefer to not include bench conferences in this request, in an effort to allow the parties and the bench some ability to quickly go off the record and have private conversations with the court (as well as to avoid inconvenience to the court reporter in having to transcribe conferences at the bench). If this is done, it is vital to re-state the substance of any arguments and rulings from the bench on the record during or following an unrecorded bench conference.

B. Motion for Sequestration of Witnesses

Authority

N.C. R. EVID. 615; G.S. 15A-1225; Fifth and Fourteenth Amendments to the U.S. Constitution; Article I, Sections 19 and 23 of the N.C. Constitution.

Key Principles

The purposes of sequestration are to avoid conscious or unconscious tailoring of testimony by one witness based on the testimony of another witness and to assist the fact finder in detecting false or less than candid testimony.

Sequestration may be granted on motion of either party or on the court's motion. The decision to order sequestration is in the discretion of the court.

Practice Tips

- This motion should be made as a matter of course when going to trial.
- A specific showing of the need for sequestration based on the facts of the case should be included in the motion, such as the existence of close family ties among witnesses, possible financial or employment-based interest or incentives by the witnesses, prior inconsistent witness statements, or a desire to please the State, among other potential reasons.
- In addition to requesting physical sequestration, the motion should ask the court to instruct the witnesses not to discuss their testimony or the case with other witnesses during the trial.
- In addition to the statute, argue that sequestration is required as a matter of due process and best practices. The Official Commentary to Evidence Rule 615 notes that sequestration should ordinarily be granted on request.
- This motion may be made orally in court, but the better practice is to prepare a detailed written motion.
- Violation of an order of sequestration can result in sanctions, including contempt, declaration of a mistrial, exclusion of the witness's testimony, cross-examination of the witness on the violation, a jury instruction on the credibility of the witness who violated the order, or other relief. Counsel should be vigilant in ensuring that all witnesses are following any sequestration order.

References

N.C. DEFENDER MANUAL Vol. 2, § 29.3 (Sequestration of Witnesses).

C. Witness Lists

Authority

G.S. 15A-905(c)(3).

Key Principles

At or before the beginning of jury selection, counsel must provide a written list of witnesses who are reasonably expected to testify. This requirement arguably only applies if the defendant requests discovery.

Practice Tips

- There is no requirement that a witness listed on the witness list be called to testify. However, failure to list a witness on the witness list may result in the judge prohibiting the witness from testifying, absent good cause for the omission. Under G.S. 15A-905(c)(3), if the defendant makes a good faith showing that he or she did not reasonably expect to call a witness (and therefore failed to list the witness), the court must allow the witness to testify. Further, the court can always allow an undisclosed witness to testify in the interest of justice.
- Rebuttal witnesses should also be disclosed as a part of this obligation. Rebuttal evidence generally is addressed in G.S. 15A-1226, which provides that both parties have the right to present rebuttal evidence and which gives the trial court discretion to allow additional evidence any time before verdict. If the need to call a rebuttal witness who was not listed arises, argue under G.S. 15A-905(c)(3) that the rebuttal witness was not reasonably expected to be called or that it is otherwise in the interest of justice to allow the testimony.

D. Motion for Individual *Voir Dire* of Jurors

Authority

G.S. 15A-1214(j); Fifth and Fourteenth Amendments to the U.S. Constitution; Article I, Sections 19 and 23 of the N.C. Constitution.

Key Principles

For good cause in capital cases, the court may order that jurors be selected one at a time and be sequestered before and after selection, by the terms of the statute. Where the facts of the case warrant such a procedure, counsel may consider requesting individual *voir dire* of jurors even in non-capital cases as a constitutional matter and as within the judge's discretion.

This procedure substantially lengthens the amount of time required to complete jury selection and is likely to be granted in non-capital cases only in limited circumstances.

Practice Tips

- Many courts typically allow some individual *voir dire* of individual jurors without such a motion, particularly in serious cases or where sensitive issues are raised during *voir dire*. Counsel should therefore consider the impact of filing such a motion on the *voir dire* process, as the motion may draw more attention to the defense *voir dire* than would otherwise be paid to it.
- As an alternative to full *voir dire* of each juror individually, consider requesting other accommodations when necessary, such as permission to individually *voir dire* a juror on any particularly sensitive topics of *voir dire*, use of a juror questionnaire, the ability to have a juror answer a question at the bench or otherwise privately, or any other reasonable method designed to provide the jurors an opportunity to answer *voir dire* questions openly and honestly.

References

N.C. DEFENDER MANUAL Vol. 2, § 25.3 (Voir Dire).

See also Jeff Welty, *Individual Voir Dire*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Nov. 28, 2011).

E. Motion to Record Race of Potential Jurors

Authority

Fifth and Fourteenth Amendments to the U.S. Constitution; Article I, Sections 19 and 23 of the N.C. Constitution; *Batson v. Kentucky*, 476 U.S. 79 (1986).

Key Principles

To preserve appellate review of *Batson* issues, the trial transcript must reflect the race of the jurors who were peremptorily struck by the State, as well as the race of the jurors who were seated. *State v. Brogden*, 329 N.C. 534 (1991). Thus, whether or not a motion on the subject was filed pretrial, when the concern arises during trial defense counsel should move to have the race of each juror peremptorily struck by the State entered into the record.

Practice Tips

- If *Batson* issues are a concern, counsel should consider filing a pretrial motion to record the race of the jurors. Counsel may move to have each prospective juror state his or her race at the beginning of examination by the court. *Batson* challenges are beyond the scope of this guide, but the materials below are excellent resources for this area of law.

References

N.C. DEFENDER MANUAL Vol. 2, § 25.5 (Peremptory Challenges).

See also ALYSON A. GRINE & EMILY COWARD, RAISING ISSUES OF RACE IN NORTH CAROLINA CRIMINAL CASES ch. 7 (UNC School of Government 2014).

F. Motion to Allow (or Prohibit) Notetaking by Jurors

Authority

G.S. 15A-1228.

Key Principles

Consider making the request to allow notetaking by jurors where there are voluminous amounts of evidence or where the trial will take considerable time to complete.

The decision to grant this motion is in the court's discretion. Any party or the court itself may make this motion.

Practice Tips

- Consider making this request in a long or unusually complex trial.
- Reasons to oppose notetaking by the jurors may include the potential for distraction among jurors, overreliance on the notes by jurors in deliberations, and the possibility of inconsistent notes between jurors.

- When making the request to allow notetaking, it may be helpful to have the court provide paper and pens to be used by the jurors as a practical matter.

G. Motion to Dismiss for Insufficiency of the Evidence

Authority

G.S. 15-173; G.S. 15A-1227; N.C. R. APP. P. 10(a)(3); Fifth and Fourteenth Amendments to the U.S. Constitution; Article I, Sections 18 and 19 of the N.C. Constitution; *Jackson v. Virginia*, 443 U.S. 307 (1979).

Key Principles

This is a specific type of motion to dismiss based on the State's failure to present substantial evidence of each element of the offense charged (or of a lesser-included charge) and of the identity of the defendant as the perpetrator.

The standard for deciding the motion is whether a reasonable fact finder could find that the case has been proven beyond a reasonable doubt, viewing the evidence in the light most favorable to the State. Evidence that raises a mere suspicion or conjecture of guilt is not sufficient.

Where the proof at trial varies in a material way from the allegations in the pleading, the defense should also move to dismiss for a fatal variance. This is effectively a more specific type of motion to dismiss for insufficiency of the evidence, and any variance argument should be explicitly made alongside any sufficiency motion.

This motion must be made at the close of the State's evidence and, if the defense presents evidence, renewed at the close of all evidence to preserve appellate review of the issue. Sufficiency of the evidence and variance as to each and every element should be raised at the time of this motion in every case, in order to best protect the defendant and to preserve all potential sufficiency issues for appeal.

Note that G.S. 15A-1227(d) and 15A-1446(d)(5) both purport to allow a sufficiency of evidence issue to be preserved for appellate review without any objection or motion at trial. These statutes conflict with N.C. Rule of Appellate Procedure 10(a)(3), which requires an objection or motion to preserve the issue. The state appellate courts have consistently ruled that the rules of appellate procedure control on this issue. Thus, a timely motion must be made to preserve appellate review of any sufficiency argument.

When granted, a motion to dismiss for insufficiency of the evidence generally has the effect of an acquittal for purposes of double jeopardy, although if the motion is granted on grounds of a fatal variance, the State likely can re-charge any offenses not properly charged by the defective pleading.

Practice Tips

- Whether or not defense counsel has a specific argument as to a failure of proof, this motion should be made as a matter of course at the conclusion of the State's evidence (and at the close of all evidence if the defense presents evidence).

- Whenever making a motion to dismiss for insufficiency of the evidence, defense counsel should make a "global" motion to dismiss. In addition to arguing for any specific failures of evidence and any specific variance, defense counsel must move to dismiss for insufficiency as to each and every element of the offense in order to preserve review of each element. If a specific element of an offense is argued and no more general motion made as to other elements, only the element argued will be preserved for review. *State v. Walker*, ___ N.C. App. ___, 798 S.E.2d 529 (2017).
- This motion should be made outside of the presence of the jury and is not typically written.

References

N.C. DEFENDER MANUAL Vol. 2, ch. 30 (Motions to Dismiss Based on Insufficient Evidence).

H. Request for Jury Instructions

Authority

G.S. 15A-1231 through G.S. 15A-1234; Fifth and Fourteenth Amendments to the U.S. Constitution; Article I, Sections 19 and 23 of the N.C. Constitution.

Key Principles

At the close of all evidence, the court will hold a charge conference to determine how to instruct the jury. A written request for jury instructions should be filed early in the course of the trial in preparation for the charge conference. It must be requested before the jury is actually instructed. Any request for instructions should be written, signed, filed with the court, and served on the State.

Consider requesting instructions (and which instructions may be sought by the State) from the N.C. Pattern Jury Instructions, such as lesser-included offenses, defenses, and reasonable doubt, among others.

Consider requesting special jury instructions that are not covered by the pattern instructions to define legal terms or otherwise explain the applicable law to the jury. Legally correct statements of law, supported by the evidence, must be given by the court on request. *State v. Lamb*, 321 N.C. 633 (1988).

Practice Tips

- Despite the language of G.S. 15A-1231(d) (purporting to allow appellate review of erroneous jury instructions without an objection), counsel must object at the charge conference to the denial of any requested instructions or requested modification of instructions to preserve the issue for appeal, at least where no written request for instruction was filed and ruled on by the court. *State v. Bennett*, 308 N.C. 530 (1983).
- Objections to proposed instructions should specifically state what part of the instruction is objectionable or why the instruction or failure to give a proposed instruction is prejudicial.
- Objections to jury instructions should be made on constitutional grounds as a matter of state and federal due process.

References
N.C. DEFENDER MANUAL Vol. 2, ch. 32 (Instructions to the Jury).

I. Motion to Poll Jury

Authority
G.S. 15A-1238.

Key Principles
This motion must be granted on the request of either party. It requires the court to question each juror individually to ensure that the verdict is unanimous.

If the poll reveals that the jury is not in fact unanimous, the court must order the jury to return to deliberations.

This motion is made orally in open court after the verdict has been announced but before the jury has been released.

J. Motion for Mistrial

Authority
G.S. 15A-1061 through G.S. 15A-1065; Fifth and Fourteenth Amendments to the U.S. Constitution; Article I, Sections 18 and 19 of the N.C. Constitution.

Key Principles
Where conclusion of the trial is a physical impossibility, the jury is unable to perform their function, or where a fair trial is no longer possible for either party due to substantial and irreparable prejudice, a mistrial may be declared. In many instances, a defendant may be tried again following a mistrial. However, depending on the reasons for the mistrial and whether the defendant objected, double jeopardy may preclude further prosecution in some circumstances.

The court has wide discretion to declare a mistrial, but a mistrial must be supported by a manifest necessity to overcome double jeopardy concerns. *State v. Sanders*, 347 N.C. 587 (1998). Firmly established grounds supporting a manifest necessity to declare a mistrial include the death or disability of the judge or a juror, a hung jury, or a fatally flawed pleading that fails to confer jurisdiction.

Where the defendant requests the mistrial, joins in the request, or consents to it, there is usually no double jeopardy problem. *State v. White*, 322 N.C. 506 (1988) (but recognizing an exception for prosecutorial misconduct designed or intended to cause a mistrial). While the law of mistrials and double jeopardy is beyond the scope of this guide, counsel should be aware of what may constitute a manifest necessity and what will not.

Practice Tips
- Depending on the issue resulting in the motion for a mistrial, consider whether some lesser sanction would be appropriate, such as a limiting instruction, recess, or other relief.

- Depending on which party is seeking the mistrial and the reasons for the motion, counsel may consider opposing the request.
- Failure to object to the declaration of a mistrial is likely considered consent to the mistrial and will constitute a waiver of any double jeopardy claim. *State v. Cummings*, 169 N.C. App. 249 (2005).
- Because the grounds for a mistrial will not be known before trial, this motion is made orally in open court.

References

N.C. DEFENDER MANUAL Vol. 2, ch. 31 (Mistrials).