

Chapter 25:

Miscellaneous Jury Procedures

25.1 Note Taking by the Jury	1
25.2 Authorized Jury View	1
A. View of the Crime Scene	
B. View of the Defendant	
25.3 Substitution of Alternates	3
25.4 Questioning of Witnesses by the Jury	3
25.5 Sequestration of Jurors During Trial	4
25.6 Polling of the Jury	4
A. Generally	
B. Noncapital Cases	
C. Capital Cases	

This chapter deals with miscellaneous procedural issues related to jurors. Issues dealing with jury misconduct are covered in Chapter 24, jury instructions are covered in Chapter 26, and issues related to deliberations and verdict are covered in Chapter 27.

25.1 Note Taking by the Jury

Jurors may make notes and take them into the jury room unless the trial judge, on his or her own motion or the motion of any party, directs otherwise. G.S. 15A-1228. Whether jurors are allowed to take notes is within the trial judge's discretion and that decision will not be reversed absent an abuse of that discretion. *State v. Crawford*, 163 N.C. App. 122 (2004).

Practice Note: If the trial judge allows the jury to take notes during the trial, counsel may request an instruction in accordance with N.C.P.I.—Crim. 100.30 (June 2008), which directs the jurors to use their notes to help refresh their recollection but not to give them undue significance.

25.2 Authorized Jury View

A. View of the Crime Scene

Under G.S. 15A-1229, a trial judge may permit a jury view. This decision is a discretionary one and will not be disturbed absent an abuse of that discretion. *State v.*

Fleming, 350 N.C. 109 (1999). If a view is ordered pursuant to G.S. 15A-1229(a):

- an officer must accompany the jury to the location;
- no person is permitted to communicate with the jury on any subject connected to the trial;
- the judge, prosecutor, and defense counsel must be present; and
- the defendant is entitled to be present.

A witness may testify at the site of the view and point out objects and physical characteristics material to his or her testimony if permitted by the court. This testimony must be recorded. G.S. 15A-1229(b).

The press is allowed to be present at a jury view because criminal trials in North Carolina are open to the press and to the public. N.C. Const. Art. I, § 24; *State v. Davis*, 86 N.C. App. 25 (1987) (no prejudice shown from allowing press to attend the jury view where judge kept press quiet and gave adequate instructions to the jury concerning the publicity surrounding the trial).

Unless authorized by the trial judge, a view of the crime scene by a juror is considered misconduct. *See supra* § 24.3E.

B. View of the Defendant

Generally. The State may require a defendant to stand or otherwise exhibit himself or herself before the jury as long as the act is not of a testimonial or communicative nature. Such an exhibition does not offend the Due Process Clause of the Fourteenth Amendment, nor does it violate the Fifth Amendment’s protection against self-incrimination. Both federal and state courts have usually held that the privilege against self-incrimination “offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture.” *Schmerber v. California*, 384 U.S. 757, 764 (1966); *see also* 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 126 (Michie Co., 6th ed. 2004).

Selected examples. Courts have found no constitutional violation where the defendant was required to:

- Stand before the jury and place a stocking mask over his head and face in the manner described by the robbery victim. *State v. Perry*, 291 N.C. 284 (1976).
- Remove his shirt and show scars on cross-examination to impeach or corroborate his testimony that the victim cut him with a razor. *State v. Sanders*, 280 N.C. 67 (1971).
- Speak a word or phrase for purposes of voice identification in court. *State v. Locklear*, 117 N.C. App. 255 (1994).
- Display his teeth to the jury. *State v. Summers*, 105 N.C. App. 420 (1992).

- Exhibit himself to the jury for purpose of allowing a witness to identify certain physical characteristics on his person. *State v. McNeil*, 47 N.C. App. 30 (1980).
- Give a signature sample in court to compare with a signature on a motel registration card. *State v. Valentine*, 20 N.C. App. 727 (1974).

25.3 Substitution of Alternates

G.S. 15A-1215(a) authorizes a trial judge to replace a juror with an alternate juror if any juror dies, becomes incapacitated or disqualified, or is discharged for any reason at any time before final submission of the case to the jury. The exercise of this power rests in the sound discretion of the trial judge and is not reversible error absent a showing of an abuse of discretion. *State v. Nelson*, 298 N.C. 573 (1979).

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

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

25.4 Questioning of Witnesses by the Jury

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

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

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

Practice note: Although cases indicate that it is not necessary for counsel to object to the jurors' questions when actually asked at trial in order to preserve the issue for appeal, *see, e.g., Howard*, 320 N.C. at 726, counsel should always object at the bench conference if one is held before the questions are asked or at the next available opportunity when the jury is not present.

25.5 Sequestration of Jurors During Trial

Jurors may be sequestered during trial if so directed by the trial judge in his or her discretion. G.S. 15A-1236(b). This statute authorizes either complete sequestration, which includes separate lodging facilities at night, or partial sequestration during lunch or while in the vicinity of the courthouse. *See* G.S. 15A-1236 commentary. When sequestration is ordered in a criminal case, the State must pay for all accommodations of jurors. G.S. 9-17.

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

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

25.6 Polling of the Jury

A. Generally

The right to poll the jury in criminal cases is firmly established by Article I, § 24 of the North Carolina Constitution and by statute. “The purpose of polling the jury is to ensure that the jurors unanimously agree with and consent to the verdict at the time it is rendered.” *State v. Black*, 328 N.C. 191, 198 (1991); *see also State v. Young*, 77 N.C. 498, 499 (1877) (the right to poll the jury “is surely one of the best safeguards for the protection of the accused” since it is the mode of “ascertaining the *fact* that it is the verdict of the whole jury”).

In both capital and non-capital cases, the poll must be conducted individually. *See* G.S. 15A-1238; G.S. 15A-2000(b). It is error for the trial judge to ask the jury collectively if they assented to and still assent to the verdict. *See State v. Boger*, 202 N.C. 702 (1932) (trial judge erred by requesting the jury to “stand up” if they assented to the verdict of manslaughter); *State v. Holadia*, 149 N.C. App. 248 (2002) (error to question the jury collectively and have them respond collectively by raising their hands).

B. Noncapital Cases

Need for motion. The jury must be polled on the motion of any party or on the trial

judge's own motion. G.S. 15A-1238. Pursuant to this statute:

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

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

Practice note: Counsel should *always* request that the jury be polled after a defendant is convicted in a noncapital case. A juror who was struggling with the verdict or feeling pressured by the other jurors may welcome the opportunity to say so in open court. It is especially important to timely request polling because, as a general rule, once a verdict has been rendered and received in open court, it may not later be impeached—that is, a juror may not testify nor may evidence be received as to matters occurring during deliberations or calling into question the reasons on which the verdict was based. *See, e.g., State v. Martin*, 315 N.C. 667 (1986). For a detailed discussion of the anti-impeachment rule and its limited exceptions, *see supra* § 24.2B.

C. Capital Cases

After delivery of the sentence recommendation by the foreman of the jury in a capital case, the jury must be individually polled to establish whether each juror concurs and agrees to the sentence recommendation returned. G.S. 15A-2000(b). Since the right to a jury poll in a capital case is statutorily mandated, it is not dependent upon a defendant's request for polling. *State v. Buchanan*, 330 N.C. 202 (1991). The trial judge's error in failing to properly poll a capital jury is not waived by the defendant's failure to object. *Id.*