

Chapter 27:

Deliberations and Verdict

27.1 Instructions to the Jury about Reaching a Verdict	1
27.2 Requests to Review Testimony and Exhibits During Deliberations	2
A. Review of Testimony and Exhibits in Open Court	
B. Review of Exhibits in the Jury Room	
27.3 Coercion of the Verdict by the Trial Judge	4
A. In General	
B. Inquiry into Numerical Split	
C. Length of Deliberations	
D. Comment on the Inconvenience or Expense of Retrial	
27.4 Improper Expression of Opinion by Trial Judge	6
27.5 Deadlock	6
A. Further Instructions	
B. Mistrial	
27.6 Use of Juror Notes During Deliberations	7
27.7 Verdicts	7
A. Basic Requirements	
B. Special Verdicts	
C. Acceptance of Verdict by Judge	
D. Unanimity	
E. Inconsistent Verdicts	
F. Co-defendants	
G. Insanity	
H. Judicial Comment on the Verdict	
I. Polling of the Jury	
J. Impeachment of the Verdict	

This chapter addresses two related topics. Sections 27.1 through 27.6 deal with issues surrounding jury deliberations leading up to the verdict, including instructions about reaching a verdict, juror requests, coercion, and deadlock. Section 27.7 addresses the return of the verdict, including the procedures and issues surrounding its return.

27.1 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 court gives some, but not all, of the instructions found in G.S. 15A-1235(b), counsel must specifically object in order 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 26.

27.2 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); *see also State v. Ashe*, 314 N.C. 28 (1985) (holding that under Art. I, § 24 of the North Carolina Constitution, 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 will not preclude the defendant from assigning the trial judge’s violation of G.S. 15A-1233(a) as error on appeal. However, if you *consent* to a procedure that does not comply with the statutory mandate, the defendant’s right to appeal the issue will be waived. *See State v. Pointer*, 181 N.C. App. 93 (2007); *State v. Helms*, 93 N.C. App. 394 (1989),

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. *Helms*, 93 N.C. App. 394. 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 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).

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).

B. Review of Exhibits in the Jury Room

The trial judge may permit the jury to take requested exhibits into the jury room if all of the parties have consented. Whether jurors are allowed to take exhibits to 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 requested 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. G.S. 15A-1233(b).

Unlike jury review of exhibits or testimony in open court, consent of all parties is required before the jury may take evidence 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 on 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)). 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).

If the judge allows an exhibit to be taken to the jury room, he or she must, on request, instruct the jury not to conduct any experiments with the exhibit. G.S. 15A-1233(b).

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, you should object on the record in order to ensure preservation of the issue on appeal.

27.3 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, § 24 of the North Carolina 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 in § 27.1 *supra*. 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 follow those instructions is not, in itself, reversible error. *State v. Sanders*, 81 N.C. App. 438 (1986). 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); *State v. Peek*, 313 N.C. 266 (1985). 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 judging the totality of circumstances are whether the court

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

Beaver, 322 N.C. at 464. 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, *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, § 24 of the North Carolina 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 United States Constitution. *Id.*; *see also Brasfield v. United States*, 272 U.S. 448 (1926) (based on its supervisory power over the *federal* courts and not on the defendant’s constitutional rights, U.S. Supreme Court held that it is reversible error for a trial court to inquire into the numerical division of a jury deadlock). The making of an inquiry into the numerical division of the jury lies within the sound discretion of the trial judge. *State v. Easterling*, 300 N.C. 594 (1980).

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 abuse of discretion 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 six and a half 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 (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 ignored 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 final 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: Counsel should 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 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). An isolated mention of the expense and inconvenience of retrying the case will not result in a new trial unless the charge as a whole is coercive. *State v. Alston*, 294 N.C. 577 (1978); *State v. Darden*, 48 N.C. App. 128 (1980).

27.4 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 infra* § 28.1B (improper expression of opinion), § 28.1D (improper questioning of witnesses).

27.5 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).

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* § 27.1. 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 to Reach a Verdict,” which is found in N.C.P.I.—Crim.101.40 (June 2008). 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.P.I.—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); *Lamb*, 44 N.C. App. at 253–54.

B. Mistrial

Grounds. If it appears 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 (1995).

Findings. 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 non-capital cases, a trial court’s failure to make findings in support of a mistrial is not subject to appellate review unless timely objected to by defense counsel. “[H]owever, 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.” *Pakulski*, 319 N.C. at 569.

27.6 Use of Juror Notes During Deliberations

Jurors may be permitted to use their trial notes during deliberations unless otherwise directed by the trial judge. G.S. 15A-1228; *see supra* § 25.1.

27.7 Verdicts

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 the 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); *see also State v. Collins*, 50 N.C. App. 155, 160 (1980) (although G.S. 15A-1237(a) specifically states that the verdict must be signed by the foreman, court found no error by the trial court in receiving and recording unsigned verdict because the written verdict form “properly set forth, without any possibility of ambiguity or confusion, the essential elements of the verdicts that could be returned”).

Practice note: Always place objections to the contents of the verdict sheet on the record in order to preserve the issue for appellate review. If you fail to object to the error at trial, the error will be reviewed under the harsher plain error standard of review. *State v. Gilbert*, 139 N.C. App. 657 (2000) (applying plain error analysis where jury returned a verdict on a verdict sheet captioned in the name of a different defendant and there was no timely objection by trial counsel).

B. Special Verdicts

Purpose of special verdicts. 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). “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 (2006).

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 (“[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court.”). Therefore, 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 N. 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. at 47 (citing Nepveu, *supra*, at 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. 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).
- Whether a defendant was found not guilty by reason of insanity. *See infra* § 27.7G.
- 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).
- The existence of aggravating factors. *See Blackwell*, 361 N.C. at 49.
- 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. *Ellis*, 262 N.C. 446; *State v. Hobson*, 70 N.C. App. 619 (1984).
- 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 defendant has attained the status of habitual felon. *See State v. Sullivan*, 110 N.C. App. 779 (1993).

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 (1978); *see also State v. Abraham*, 338 N.C. 315 (1994) (trial court 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, § 24 of the North Carolina Constitution require that the verdict be unanimous. For a more detailed discussion on unanimity, *see supra* § 22.2D.

E. Inconsistent Verdicts

Generally. Consistency between verdicts is not required in North Carolina. Inconsistent verdicts rendered by the jury in the same trial against the same defendant or as 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. Shaffer*, ___ N.C. App. ___, 666 S.E.2d 856 (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 would have also supported guilty verdicts of first-degree rape and the greater offense of first-degree sexual offense for the forced fellatio), *pet. for disc. review filed* (Nov. 11, 2008); *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 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 court 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 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.” *United States v. Powell*, 469 U.S. 57, 66 (1984).

Mutual exclusivity. However, if the defendant can show that the verdicts are “logically inconsistent” because the offenses are mutually exclusive, he or she is entitled to a new trial. *See, e.g., State v. Perry*, 305 N.C. 225, 229 (1982) (“where a defendant is tried for breaking or entering and for felonious larceny [based on breaking or entering] and the jury returns a verdict of not guilty of felonious breaking or entering and guilty of

felonious larceny, it is improper for the trial judge to accept the verdict of guilty of felonious larceny”); *State v. Tanner*, ___ N.C. App. ___, 666 S.E.2d 845 (2008) (reaching same result where jury found defendant guilty of possession of stolen goods based on breaking or entering but not guilty of breaking or entering), *temporary stay allowed*, ___ N.C. ___ (Oct. 20, 2008); *State v. Hames*, 170 N.C. App. 312, 323 (2005) (holding that guilty verdicts for both the lesser included offense of assault with a deadly weapon inflicting serious injury and attempted voluntary manslaughter were “logically inconsistent” because the offenses were mutually exclusive since defendant either did or did not have the intent to kill).

If the offenses are mutually exclusive and they are properly joined for trial, the court may submit both offenses to the jury but must instruct the jury that it may convict the defendant of only one. *See, e.g., State v. Speckman*, 326 N.C. 576 (1990) (if evidence at trial conflicts and supports mutually exclusive charges, trial court should submit both but must instruct jury it may convict defendant of only one; in this case, 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 false pretenses requires that property be obtained unlawfully at the outset); *see also supra* 1 NORTH CAROLINA DEFENDER MANUAL § 6.1B (discussing joinder of mutually exclusive offenses).

F. 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).

G. 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 North Carolina 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, in order 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 North Carolina 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 court’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.P.I.—Crim. 304.10 (May 2003) 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 the offense charged, and then reach the 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.

H. 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 prior to 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 exclusive remedy for a judicial comment on the verdict. *Id.*

I. Polling of the Jury

For a discussion on the right to poll the jury in criminal cases, *see supra* § 25.6.

J. Impeachment of the Verdict

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). There are some narrow exceptions to this rule. For a detailed discussion of the anti-impeachment rule and its exceptions, *see supra* § 24.2B.