

Chapter 28:

Duties and Conduct of Presiding Judge

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This chapter addresses the duties of the judge presiding at trial and the restrictions on his or her conduct in the presence of the jury. Specifically, this chapter covers the trial judge’s duty of impartiality, disqualification of the trial judge when his or her impartiality might reasonably be questioned, control of the proceedings, and maintaining order and security in the courtroom (including restraint and removal of the defendant and witnesses).

28.1 Impartiality

A. In General

Every person charged with a crime in North Carolina has a right to a fair trial before an impartial judge and an unprejudiced jury. *State v. Harris*, 308 N.C. 159 (1983); *State v. Carter*, 233 N.C. 581 (1951). The due process clause imposes on the trial judge the duty

of absolute impartiality, and he or she must supervise and control a defendant's trial to ensure fair and impartial justice for both parties. *See Tumey v. Ohio*, 273 U.S. 510 (1927); *State v. Fleming*, 350 N.C. 109 (1999); *Ponder v. Davis*, 233 N.C. 699 (1951).

B. Expression of Opinion Prohibited

A judge may not express an opinion, either explicitly or implicitly, on any question of fact to be determined by the jury. G.S. 15A-1222 [formerly G.S. 1-180]; *State v. Crummy*, 107 N.C. App. 305 (1992). G.S. 15A-1222 does not apply to comments made outside the presence of the jury. *Fleming*, 350 N.C. 109. G.S. 15A-1232 expressly prohibits a judge from expressing an opinion during the jury charge as to whether or not a fact has been proved.

The trial judge must abstain from conduct or language that tends to discredit or prejudice the defendant's case because the judge holds an exalted station and his or her opinion is greatly respected by the jury. *State v. Allen*, 353 N.C. 504 (2001). "The slightest intimation from a judge as to the strength of the evidence or as to the credibility of a witness will always have great weight with the jury. . . ." *Id.* at 510 (citation omitted).

Practice note: Although G.S. 15A-1222 and G.S. 15A-1232 do not apply when the conduct or remarks are made outside the presence of the jury, counsel should nevertheless object and make sure that the record reflects the improper conduct or remarks. On appeal, those statements or actions may be used to buttress a claim that the defendant did not receive a fair trial in front of an impartial judge in violation of due process.

What constitutes prejudicial error. Once the trial judge has expressed an opinion before the jury, the resulting prejudice to the defendant is "virtually impossible to cure." *State v. Clanton*, 20 N.C. App. 275, 277 (1973). However, not every indiscreet or improper remark by a trial judge will warrant relief. Whether the defendant was deprived of a fair trial by the trial judge's comments, questions, or actions "must be determined by what was said and its probable effect upon the jury in light of all attendant circumstances, the burden of showing prejudice being upon the appellant." *State v. Faircloth*, 297 N.C. 388, 392 (1979). A new trial will only be awarded if the remarks by the trial judge go to the "heart of the case." *State v. Sidbury*, 64 N.C. App. 177, 179 (1983); *State v. Whitted*, 38 N.C. App. 603, 606 (1978).

Selected examples. Types of improper judicial remarks or actions that have been found to require relief include:

- Statements intimating the defendant's guilt. *See State v. Guffey*, 39 N.C. App. 359, 361 (1979) (new trial required where trial judge stated that defendant was "pretty busy that day" since the indictment reflected two different victims); *State v. Teasley*, 31 N.C. App. 729 (1976) (even with a curative instruction, defendant was prejudiced

by trial judge's question when the case was called for trial, "What is this, another case of somebody ripping off an insurance company?").

- Remarks tending to suggest facts to be found by the jury. *See State v. Blue*, 356 N.C. 79 (2002) (trial judge's remark that the front porch, where the offense allegedly took place, was not in defendant's home denied defendant the coverage of defense of habitation and necessitated a new trial); *State v. Grogan*, 40 N.C. App. 371 (1979) (new trial granted where trial judge's explanation of his ruling denying the jury access to photographs never admitted into evidence may have led the jury reasonably to conclude that the photographs were important evidence that they should see and that the judge would allow them to see but for defendant withholding consent).
- Comments tending to belittle or humiliate the defendant's cause or his or her counsel before the jury. *See State v. Lynch*, 279 N.C. 1 (1971) (trial judge's blanket instruction to the court reporter to overrule any objection made by defendant's counsel necessarily belittled both defendant's cause and his attorney in the eyes of the jury); *State v. Frazier*, 278 N.C. 458, 464 (1971) (awarding a new trial because a series of comments by the trial judge, when viewed cumulatively, portrayed such an antagonistic attitude toward the defense that they breached "the cold neutrality of the law . . . to the prejudice of this defendant"); *State v. Brinkley*, 159 N.C. App. 446, 450 (2003) (new trial ordered because the trial judge's harsh criticisms of defense counsel "may have (1) prejudiced the jury against defendant, and (2) given the jury the impression that defense counsel was not trustworthy or ethical").
- Expressions concerning the credibility of witnesses. *See State v. Hensley*, 120 N.C. App. 313, 323 (1995) (trial judge's refusal to recall a child witness because doing so would be "very traumatic" and "injurious" to the witness, amounted to an expression that the judge believed the witness).
- Conduct concerning the credibility of the defendant. *See State v. Jenkins*, 115 N.C. App. 520 (1994) (improper expression of opinion about defendant's credibility where trial judge turned his back to the jury for 45 minutes while defendant testified on direct examination).
- Warnings or admonitions to witnesses concerning the consequences of committing perjury. *See State v. Locklear*, 309 N.C. 428 (1983) (while carefully given warnings to a witness with reference to perjury are permitted outside the presence of the jury, trial judge's actions in admonishing the witness and threatening her with imprisonment and a fine invaded the province of the jury, probably caused the witness to change her testimony, and may have deprived defendant of a fair trial before an impartial judge).
- Statements concerning sentencing. *See State v. Griffin*, 44 N.C. App. 601 (1980) (trial judge improperly expressed an opinion on defendant's guilt where, prior to the return of a verdict, the foreman asked if the jury could explain its decision and the judge made remarks about sentencing that assumed that the jury had reached a guilty verdict and left little doubt that he expected a guilty verdict).

It is not an impermissible expression of opinion for the trial judge:

- To refuse to grant a defendant's request that he or she be referred to by name and not as "the defendant." *State v. Brown*, 306 N.C. 151 (1982).

- To use the word “victim” when referring to the alleged victim of the crime. *State v. Gaines*, 345 N.C. 647 (1997); *State v. Hill*, 331 N.C. 387 (1992).
- To make ordinary rulings during the course of the trial. *State v. Weeks*, 322 N.C. 152 (1988); *State v. Welch*, 65 N.C. App. 390 (1983).
- To explain the role of the prosecutor and defense attorney to the jury. *State v. Hudson*, 54 N.C. App. 437 (1981).

Practice note: The provisions of G.S. 15A-1222 and G.S. 15A-1232 are mandatory; therefore, a defendant’s failure to object to an alleged expression of opinion by the trial court in violation of those statutes does not result in waiver of the issue on appeal. *State v. Young*, 324 N.C. 489 (1989). However, counsel must still object to an expression of opinion by the trial judge on *constitutional* grounds in order to preserve that issue on appeal.

C. Questioning of Witnesses Allowed, within Limits

A trial judge may direct questions to a witness in order to clarify the witness’s testimony and to promote a better understanding of it. *See State v. Whittington*, 318 N.C. 114 (1986); *State v. Alston*, 38 N.C. App. 219 (1978); *see also State v. Efird*, 309 N.C. 802, 808–09 (1979) (“trial judge has a duty to question a witness in order to clarify the testimony being given or ‘to elicit overlooked, pertinent facts’”) (citations omitted). Evidence Rule 614(b) specifically allows the trial judge to “interrogate witnesses, whether called by itself or by a party.”

However, a trial judge may not, by his or her questions, intimate an opinion regarding the guilt of the defendant, the witness’s credibility, or as to whether any fact essential to the State’s case has been proved. *See State v. Yellorday*, 297 N.C. 574 (1979); *State v. Lowe*, 60 N.C. App. 549 (1983). A judge must conduct his or her questioning carefully and in a manner that avoids prejudice to the parties. If the judge expresses an opinion by the tenor, frequency, or persistence of his or her questions, error has occurred in violation of G.S. 15A-1222. *State v. Rinck*, 303 N.C. 551 (1981); *State v. Currie*, 293 N.C. 523 (1977). If the expression of opinion might reasonably have had a prejudicial effect on the defendant’s trial, the error will not be considered harmless and a new trial will be awarded. *State v. Gregory*, 340 N.C. 365 (1995); *see also supra* § 28.1B.

As with other remarks and conduct prohibited by G.S. 15A-1222, the prohibition against the trial judge expressing an opinion when questioning a witness applies only when the jury is present. *State v. Rogers*, 316 N.C. 203 (1986).

Practice note: Evidence Rule 614(c) provides that no objection is necessary to questions propounded to a witness by the court “but it shall be deemed that proper objection has been made and overruled.” Counsel must still specifically object to prejudicial questioning by the trial judge on *constitutional* grounds in order to preserve the issue on those grounds.

D. Judicial Comment on the Verdict Prohibited

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.*

28.2 Recusal of Trial Judge

A. Applicable Law

Due process requires the trial judge to be absolutely impartial. *See also supra* § 28.1A. G.S. 15A-1223 and Canon 3 of the Code of Judicial Conduct both address the disqualification of a judge presiding over a criminal trial when a claim of partiality is raised.

Canon 3(C)(1)(a) of the Code of Judicial Conduct provides that upon the motion of any party, a judge should disqualify him or herself in a proceeding in which his or her impartiality may reasonably be questioned, including but not limited to instances where he or she has a personal bias or prejudice concerning a party. For other instances requiring disqualification, such as kinship or financial interest in the matter in controversy, *see* Canon 3(C)(1)(b)–(d).

Under G.S. 15A-1223(a), a judge may disqualify him or herself on his or her own motion. Upon motion of the State, or upon the motion of the defendant, recusal is mandatory in a criminal case if the judge is:

- prejudiced against the moving party or in favor of the adverse party;
- closely related to the defendant by blood or marriage;
- for any other reason unable to perform the duties required of him or her in an impartial manner; or
- a witness for or against one of the parties in the case.

G.S. 15A-1223(b), (e).

B. Procedural Requirements

The motion to disqualify “must be in writing and must be accompanied by one or more affidavits setting forth facts relied upon to show grounds for disqualification.” G.S. 15A-1223(c). The motion must be filed no less than five days before the time the case is called

for trial unless good cause is shown for failure to file within that time period. G.S. 15A-1223(d).

C. Burden on Moving Party

When a party moves for recusal, that party has the burden to demonstrate objectively that grounds for disqualification actually exist. *State v. Scott*, 343 N.C. 313 (1996). A mere allegation of bias or prejudice is not enough to compel recusal. The party must show that substantial evidence exists that the judge has such a personal bias, prejudice, or interest that he or she would be unable to rule impartially. *State v. Fie*, 320 N.C. 626 (1987). “The bias, prejudice, or interest which requires a trial judge to be recused from a trial has reference to the personal disposition or mental attitude of the trial judge, either favorable or unfavorable, toward a party to the action before him.” *Scott*, 343 N.C. at 325. If a reasonable person knowing all of the circumstances would have doubts about the judge’s ability to rule on the motion to recuse in an impartial manner, then the judge should either recuse him or herself or refer the matter to another judge to consider the motion. *Fie*, 320 N.C. 626.

For case summaries addressing recusal motions, *see supra* 1 NORTH CAROLINA DEFENDER MANUAL § 13.4C.

28.3 Control of Proceedings

A. In General

It is the duty of the trial judge to regulate the conduct and the course of business during trial. *State v. Spaulding*, 288 N.C. 397 (1975), *vacated in part on other grounds*, 428 U.S. 904 (1976). “Generally, in the absence of controlling statutory provisions or established rules, all matters relating to the orderly conduct of the trial or which involve the proper administration of justice in the court, are within his [or her] discretion.” *State v. Rhodes*, 290 N.C. 16, 23 (1976). Judges may take whatever legitimate steps are necessary to maintain proper decorum and an appropriate atmosphere in the courtroom during a trial. *State v. Dickerson*, 9 N.C. App. 387 (1970).

For a collection of cases addressing the measures taken by trial judges to preserve proper decorum in the courtroom, *see* 1 KENNETH S. BROUN, BRANDIS AND BROUN ON NORTH CAROLINA EVIDENCE § 168, at 545–46 n.551 (Michie Co., 6th ed. 2004).

B. Control of Examination of Witnesses

The trial judge has the power and the duty to control the examination and cross-examination of the witnesses both for the purpose of conserving the time of the court, and for the purpose of protecting the witness from prolonged, needless, or abusive examination. *See State v. Fleming*, 350 N.C. 109 (1999); *State v. Arnold*, 284 N.C. 41 (1973). He or she may ban unduly repetitious and argumentative questions as well as

inquiry into matters of tenuous relevance. *State v. Satterfield*, 300 N.C. 621 (1980); *see also* 1 KENNETH S. BROUN, BRANDIS AND BROUN ON NORTH CAROLINA EVIDENCE § 168, at 543–46 (Michie Co., 6th ed. 2004) (discussing method of examination and order in the courtroom).

C. Control of Examination of Potential Jurors

The trial judge has the power to closely regulate and supervise jury selection so that the defendant and the State receive the benefit of a trial by a fair and impartial jury. *See State v. Brady*, 299 N.C. 547 (1980). Regulation of the manner and extent of the questions of a potential juror regarding his or her fitness rests within the trial judge’s discretion and that decision will not be disturbed on appeal in the absence of a showing of an abuse of discretion and prejudice to the defendant. *State v. Johnston*, 344 N.C. 596 (1996); *State v. Hunt*, 37 N.C. App. 315 (1978). For a further discussion of jury selection, *see supra* Chapter 23.

D. Control of Witnesses and Spectators

A trial judge has the power and the duty to control the conduct of the witnesses and the spectators in the courtroom. *See State v. Braxton*, 344 N.C. 702 (1996) (trial judge properly denied motion for mistrial based on the spectators wearing buttons allegedly depicting a victim where defendant failed to show sufficient facts, including whether the jury even noticed the buttons); *State v. Higginbottom*, 312 N.C. 760 (1985) (judge did not improperly express opinion when, outside the presence of the jury, he admonished defendant’s witnesses and warned them that their actions could result in their being jailed).

For a discussion of the trial judge’s authority to remove witnesses or spectators from the courtroom, *see infra* § 28.4D.

28.4 Maintaining Order and Security in the Courtroom

A. Controlling Access to the Courtroom

In general. Article I, § 18 of the North Carolina Constitution requires that “[a]ll courts shall be open,” and § 24 provides that “[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court.” Additionally, the Sixth Amendment to the United States Constitution mandates that “[i]n all criminal prosecutions the accused shall enjoy the right to a speedy and public trial.” “The trial and disposition of criminal cases is the public’s business and ought to be conducted in public in open court.” *In re Edens*, 290 N.C. 299, 306 (1976).

“Although the right of access to criminal trials is of constitutional stature, it is not absolute.” *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 606 (1982). A trial judge may, “in the interest of the fair administration of justice, impose

reasonable limitations on access to a trial.” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 n.18 (1980). Under certain circumstances, a “reasonable limitation” may include closure of the courtroom to the public. *See Waller v. Georgia*, 467 U.S. 39 (1984). Reasons justifying closure include threats to participants and observers, and attempts by the defendant to escape. *See State v. Murray*, 154 N.C. App. 631 (2002).

Procedural requirements for closing a courtroom. Prior to closing a courtroom to the public in a criminal case, the trial judge must:

- determine whether the party seeking closure has advanced an overriding interest that is likely to be prejudiced;
- order closure no broader than necessary to protect that interest;
- consider reasonable alternatives to closing the proceeding; and
- make findings adequate to support the closure.

State v. Jenkins, 115 N.C. App. 520, 525 (1994) (citing *Waller*, 467 U.S. at 48).

The trial judge should take care not to unduly restrict access to the courtroom. *State v. Moctezuma*, 141 N.C. App. 90 (2000) (new trial awarded where trial judge made no findings of fact before closing the courtroom not only to the general public, but to defendant and defense counsel as well). The trial judge may order the courtroom closed for the entire trial or for only a portion of the proceedings. *See, e.g., State v. Clark*, 324 N.C. 146 (1989) (no impropriety found where trial judge limited public egress from the courtroom during closing arguments so as not to distract the jury).

Statutory authority for limiting access. Under G.S. 15A-1034(a), a judge may impose reasonable limitations on access to the courtroom when necessary to ensure the orderliness of courtroom proceedings or the safety of the persons present. G.S. 15-166 specifically provides that the trial judge may exclude bystanders in rape or sex offense trials during the taking of the testimony of the prosecutrix.

Statutory authority for ordering search of persons in courtroom. G.S. 15A-1034(b) authorizes a trial judge to “order that all persons entering or any person present and choosing to remain in the courtroom be searched for weapons or devices that could be used to disrupt or impede the proceedings. . . .” The judge may also “require that belongings carried by persons entering the courtroom be inspected.” If the judge orders a search pursuant to this subsection, he or she must enter it on the record.

Practice note: Although the denial of the right to a public trial is considered structural error necessitating a new trial, counsel must make a timely objection on state and federal constitutional grounds in order to preserve the issue on appeal. *See State v. Garcia*, 358 N.C. 382 (2004).

B. Controlling Access to Other Areas

In especially unusual circumstances, the trial judge may restrict activities not only in the

courtroom itself, but also in areas around the courthouse. *See, e.g., State v. Grant*, 19 N.C. App. 401, 414 (1973) (trial judge’s prohibition of picketing, parading, and congregating in and around courthouse and requirement that spectators submit to a search for weapons before entering courtroom were proper where the case was “of a nature which would attract public attention” and it was necessary for the court to “maintain discipline and decorum in the courtroom and its environs”).

C. Removal of Disruptive Defendant

Defendant’s right to personal presence. The Confrontation Clause of the Sixth Amendment to the United States Constitution guarantees a defendant the fundamental right to personal presence at all *critical* stages of trial. *See, e.g., Rushen v. Spain*, 464 U.S. 114 (1983); *State v. Buchanan*, 330 N.C. 202 (1991). The defendant also has a due process right to be present at a proceeding “whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.” *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934); *see also* 1 NORTH CAROLINA DEFENDER MANUAL § 13.2F (discussing right of defendant to be present at pretrial hearings).

The North Carolina Constitution is broader in scope than the federal constitution in the sense that it guarantees the defendant’s right to be present at *every* stage of his or her trial. *See* N.C. Const. Art. I, § 23; *State v. Badgett*, 361 N.C. 234 (2007).

Waiver. Capital defendants enjoy even greater protection under the North Carolina Constitution because their right to presence cannot be waived and the trial judge has the duty to insure their presence at trial. *Badgett*, 361 N.C. 234. Non-capital defendants can waive the right to be present at trial and related proceedings either “expressly or by [the] failure to assert it.” *State v. Braswell*, 312 N.C. 553, 559 (1985).

For further discussion of the defendant’s right to be present, *see infra* Chapter ____, Personal Rights of Defendant (forthcoming).

Removal of disruptive non-capital defendant not constitutionally prohibited. A defendant’s right to personal presence notwithstanding, a trial judge can constitutionally remove a disruptive, contumacious, or stubbornly defiant non-capital defendant from the courtroom when his or her conduct is so disruptive that the trial cannot proceed in an orderly fashion. *State v. Brown*, 19 N.C. App. 480 (1973); *see also Illinois v. Allen*, 397 U.S. 337, 344 (1970) (in order to maintain a proper courtroom atmosphere when the defendant is acting disruptively, the trial judge may constitutionally “(1) bind and gag him, thereby keeping him present; (2) cite him for contempt; [or] (3) take him out of the courtroom until he promises to conduct himself properly”).

Statutory authorization and procedure for removal of non-capital defendant. After warning a disruptive defendant, the trial judge may order the defendant removed from the trial if he or she continues to interrupt the proceedings. Unless impracticable, this warning and any subsequent order of removal must be made outside the presence of the

jury. G.S. 15A-1032(a); *see also State v. Rowe*, 33 N.C. App. 611 (1977) (trial judge had no opportunity to warn defendant prior to removal where defendant violently threw counsel's table, shouted obscenities at the judge, and continued shouting after he was physically restrained by officers and dragged to a corner of courtroom).

The judge must set forth on the record the reasons for the defendant's removal and must instruct the jury not to consider the defendant's removal or absence from the proceedings. G.S. 15A-1032(b); *see also State v. Callahan*, 93 N.C. App. 579 (1989).

After removal, the defendant must be given the opportunity to learn of the proceedings through counsel and to confer with counsel at reasonable intervals as directed by the court. He or she must be given the opportunity to return to the courtroom "upon assurance of his [or her] good behavior." G.S. 15A-1032(b).

Practice note: If a non-capital defendant is removed from trial for being disruptive, counsel should specifically object to the removal on statutory and constitutional grounds or the issue will be waived on appeal. *See State v. Watson*, 338 N.C. 168 (1994) (defendant's failure to object to the denial of his constitutional right to presence constituted a waiver of the right to argue the issue on appeal); *State v. Miller*, 146 N.C. App. 494 (2001) (same).

Removal of disruptive capital defendant constitutionally prohibited. It is a constitutional violation to remove a disruptive defendant from the courtroom during a capital trial if the trial is continued in his or her absence. *State v. Cunningham*, 344 N.C. 341 (1996). However, a new trial need not be granted for such a violation if the State can show that the error was harmless beyond a reasonable doubt. *State v. Huff*, 325 N.C. 1 (1989), *vacated on other grounds*, 497 U.S. 1021 (1990).

D. Removal of Disruptive Witnesses or Spectators

G.S. 15A-1033 authorizes a trial judge, in his or her discretion, to order any person other than a defendant removed from a courtroom when his or her actions disrupt the conduct of the trial. *See also State v. Dawson*, 281 N.C. 645, 656 (1972) (no prejudicial error by trial judge in ejecting two disruptive spectators from the courtroom "until they decided to behave themselves" because the action was necessary in order for the trial to continue "under circumstances of judicial decorum and fairness to all concerned").

E. Restraint of Defendant and Witnesses During Trial

Restraint of defendant allowed only under extraordinary circumstances. The Fifth and Fourteenth Amendments to the United States Constitution prohibit the use of physical restraints visible to the jury unless the trial court has determined, in its discretion, that the restraints are justified by an essential state interest specific to a particular trial. *Deck v. Missouri*, 544 U.S. 622 (2005). Examples of essential state interests include physical security, escape prevention, and courtroom decorum. Courts can take into account factors traditionally relied upon by courts in determining potential

security problems and the risk of escape at trial.

The United States Supreme Court noted that the routine use of shackling would:

- undermine the presumption of innocence and the related fairness of the factfinding process;
- interfere with the defendant's ability to communicate with his lawyer and to participate in his own defense; and
- affront the dignity and decorum of judicial proceedings.

Id. at 630–32.

Where a trial judge, without adequate justification, orders a defendant to be visibly shackled during trial, the defendant need not demonstrate actual prejudice to make out a due process violation. Instead, the burden is on the State to prove beyond a reasonable doubt that the shackling error did not contribute to the verdict obtained against the defendant. *Id.*

Prior to the United States Supreme Court's decision in *Deck*, the North Carolina Supreme Court had also held that a criminal defendant is entitled under the Due Process Clause of the state and federal Constitutions to appear at trial free from all bonds or shackles except in extraordinary instances. *State v. Tolley*, 290 N.C. 349 (1976). Unless there is a showing of necessity, compelling a defendant to stand trial while physically restrained is inherently prejudicial. *Id.*

Relevant circumstances. The Court in *Tolley* set out circumstances appropriate for the trial judge to consider in determining whether restraints are necessary. These include but are not limited to:

- the seriousness of the charges,
- the defendant's temperament and character,
- the defendant's age and physical attributes,
- the defendant's past record,
- any past escapes or attempted escapes, and evidence of a present plan to escape,
- any threats to harm others or cause a disturbance,
- any self-destructive tendencies,
- the risk of mob violence or of attempted revenge by others,
- the possibility of rescue by other offenders still at large,
- the size and mood of the audience,
- the nature and physical security of the courtroom, and
- the adequacy and availability of alternative remedies.

“The propriety of physical restraints depends upon the particular facts of each case, and the test on appeal is whether, under all of the circumstances, the trial court abused its discretion.” *Id.* at 369.

Statutory authorization and procedure for restraint of adult defendants. G.S. 15A-1031 incorporates the holding in *Tolley* and states that a defendant may be physically restrained during his or her trial “when the judge finds the restraint is reasonably necessary to maintain order, prevent the defendant’s escape, or provide for the safety of persons.” If the trial judge determines that a defendant should be restrained, he or she must:

- enter in the record out of the presence of the jury and in the presence of the person to be restrained and his or her counsel, if any, the reasons for the restraint;
- give the restrained person an opportunity to object; and
- unless the defendant or his or her attorney objects, instruct the jurors that the restraint is not to be considered in weighing evidence or determining the issue of guilt.

If the defendant objects to the stated reasons for the restraint, the judge must conduct a hearing and make findings of fact. *Id.* The judge may base his or her findings supporting the decision to use restraints upon information, if reliable, that would not be admissible at trial. *See, e.g., State v. Paige*, 316 N.C. 630 (1986) (permissible to consider hearsay testimony from deputy that defendants had attempted to escape the week before trial). The judge must make a “meaningful record” evidencing the basis of his or her discretion and “provide the rationale for that discretion, via some finding substantiated in the record.” *State v. Jackson*, 162 N.C. App. 695, 701 (2004).

Statutory authorization and procedure for restraint of juveniles. G.S. 7B-2402.1, enacted in 2007, provides that in a delinquency hearing, the judge may subject a juvenile to physical restraint in the courtroom only when the judge finds the restraint to be reasonably necessary to maintain order, prevent escape, or provide for courtroom security. In light of this statute, juveniles may not be routinely shackled in delinquency proceedings even though no jury is present in those proceedings. Before ordering the use of restraints, the judge, whenever practical, shall provide the juvenile and his or her attorney an opportunity to be heard to contest the use of restraints.

Restraint of witnesses during trial. G.S. 15A-1031 also grants the trial judge the authority to restrain witnesses. The procedures applicable to the restraint of the defendant as described above are also applicable to the restraint of witnesses. Whether to restrain a witness is a discretionary decision and will not be disturbed absent an abuse of discretion. *See State v. Abraham*, 338 N.C. 315 (1994) (no abuse of discretion or expression of opinion on credibility shown where trial judge permitted incarcerated prosecuting witness to appear without shackles but required three incarcerated defense witnesses to be restrained while testifying).

Necessity for objection. Appellate review is waived if counsel fails to object to the trial judge’s order of restraint. *See State v. Paige*, 316 N.C. 630 (1986); *Tolley*, 290 N.C. 349; *State v. Thomas*, 134 N.C. App. 560 (1999). Counsel must specifically assert a constitutional and statutory basis for the objection in order to preserve the issue on both grounds on appeal. *See State v. Holmes*, 355 N.C. 719 (2002) (where defendant failed to

object on constitutional grounds, review of the trial judge's decision to restrain was limited to statutory error pursuant to the abuse of discretion standard).

Practice note: If the trial judge, over objection, orders the defendant or a defense witness to be physically restrained during trial, counsel should request that the jury's view of the restraints be obstructed and that the defendant or witness walk to and from the witness chair outside the presence of the jury. *See, e.g., State v. Wilson*, 354 N.C. 493 (2001) (defendant's leg braces were hidden underneath his clothing); *State v. Atkins*, 349 N.C. 62 (1998) (cloth was draped over defense table to conceal defendant's leg restraints from jury); *State v. Wright*, 82 N.C. App. 450 (1986) (oversized briefcase placed by defendant's chair to obstruct jurors' view of his shackles). If the restraints are not visible to the jury, the risk is reduced that the restraints will create prejudice in the minds of the jurors. *See Holmes*, 355 N.C. 719. However, the restraints may still impede the defendant's thought processes and ease of communication with counsel.

F. Contempt Powers

In addition to the use of the powers set out above, a presiding judge is authorized by G.S. 15A-1035 to maintain courtroom order through the use of his or her contempt powers as provided in G.S. Ch. 5A, Contempt, and through the use of other inherent powers of the court.