

Chapter 33:

Mistrials

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33.1 Purposes of Mistrial

A mistrial is a procedural device used by a judge to terminate a trial before the jury returns a verdict on the merits. *See State v. Diehl*, 137 N.C. App. 541 (2000), *rev’d on other grounds*, 353 N.C. 433 (2001). The courts have observed that the “purposes of mistrial are to prevent prejudice arising from conduct before the jury and to provide a remedy where the jury is unable to perform its function.” *State v. O’Neal*, 67 N.C. App. 65, 69, *aff’d as modified*, 311 N.C. 747 (1984). They have also stated that although it is a “drastic remedy,” a mistrial is appropriately granted when a party shows the occurrence of serious improprieties that render a fair and impartial verdict impossible. *See State v. Stocks*, 319 N.C. 437, 441 (1987); *see also State v. Taylor*, 362 N.C. 514 (2008).

The basic reasons for a mistrial can be categorized as follows. A mistrial may be granted if an event occurs during trial that:

- prejudices the defendant,
- prejudices the State, or
- prevents the trial from proceeding in conformity with the law.

A mistrial may also be granted if

- the jury becomes hopelessly deadlocked,
- a juror dies or becomes disabled during deliberations, or
- the trial judge dies or becomes disabled during the trial.

Each of these types of mistrials is discussed in this chapter as well as the practical effects of a mistrial, including the effect of a mistrial on a defendant’s constitutional right to be free from double jeopardy.

33.2 Timing of Mistrial Order

An order granting a mistrial must be made before the jury renders a verdict. *See State v. O'Neal*, 67 N.C. App. 65, *aff'd as modified*, 311 N.C. 747 (1984). Once the jury has been discharged, there is no purpose in ordering a mistrial because the proceedings may be determined by rulings of the court on matters of law, including motions for a new trial. *See State v. O'Neal*, 67 N.C. App. 65, 69, *aff'd as modified*, 311 N.C. 747 (1984). The prohibition on declaring a mistrial after verdict also may be viewed as protecting defendants. A retroactive declaration of a mistrial, if allowed, “would impermissibly place a defendant who made *any* mistrial motion at *any* time in peril, subject to the unlimited discretion of the trial court, of losing his constitutional right to not be twice put in jeopardy for the same offense.” *Id.* (trial judge had no authority to belatedly grant a motion for mistrial where five days had passed since the acceptance of the verdict and the discharge of the jury).

33.3 Standard of Review on Appeal

The decision to order a mistrial lies within the sound discretion of the trial judge and the decision will not be disturbed on appeal absent a showing of an abuse of that discretion. *See State v. Upchurch*, 332 N.C. 439 (1992); *State v. Scott*, 150 N.C. App. 442 (2002); *see also Arizona v. Washington*, 434 U.S. 497 (1978). “An abuse of discretion occurs when a ruling is manifestly unsupported by reason, which is to say it is so arbitrary that it could not have been the result of a reasoned decision.” *State v. Taylor*, 362 N.C. 514, 538 (2008) (upholding denial of motion for mistrial). A trial judge’s decision to grant a mistrial is given “great deference since he [or she] is in a far better position than an appellate court to determine the effect” of any error or impropriety on the jury. *State v. Thomas*, 350 N.C. 315, 341 (1999).

33.4 Mistrial Based on Prejudice to the Defendant

Sometimes misconduct, disruptive events, or improprieties occur during trial that prejudice the defendant in the eyes of the jury. A motion for mistrial may be the appropriate remedy if the prejudice cannot be cured in some less drastic manner, such as instructions to the jury, replacement of a juror with an alternate, etc.

A. Statutory Authority for Mistrial

G.S. 15A-1061 provides that “[u]pon motion of the defendant or with his concurrence the judge may declare a mistrial at any time during the trial.” Pursuant to this statute, a defendant’s motion for mistrial must be granted if, during the trial, an error or legal defect in the proceeding occurs, or conduct inside or outside the courtroom, that results in “substantial and irreparable prejudice to the defendant’s case.”

Not every disruptive event or impropriety occurring during the trial will automatically require the judge to declare a mistrial. *State v. Newton*, 82 N.C. App. 555 (1986). “A mistrial should be granted only when there are improprieties in the trial so serious that they substantially and irreparably prejudice the defendant’s case and make it impossible for the defendant to receive a fair and impartial verdict.” *State v. Warren*, 327 N.C. 364, 376 (1990) (citation omitted).

B. Timing of Motion

The motion for mistrial must be made prior to verdict. If made after the verdict, the motion would be for a new trial. *State v. Miller*, 271 N.C. 646 (1967). Additionally, if the motion for mistrial is not made in a timely manner, *i.e.*, “at some time sufficiently close to the occurrence of the error to permit its correction,” then denial of the motion may not be preserved for appellate review. See G.S. 15A-1446 official commentary; see also *State v. Summers*, 177 N.C. App. 691, 695 (2006) (Court of Appeals refused to review the denial of defendant’s motion for mistrial based on improper photo identification testimony where defense counsel did not object to the testimony when it was offered but “waited until the testimony of an additional witness” before moving for mistrial); *State v. Smith*, 96 N.C. App. 352 (1989) (defendant waived appellate review where his motion for mistrial based on the prosecutor’s improper opening statement was not made until after the jury began deliberation); see also N.C. R. APP. P. 10 (requiring a timely objection or motion in order to preserve the error for appellate review).

C. Concurrence of the Defendant in Declaration of Mistrial

Even if the defendant does not move for mistrial under G.S. 15A-1061, the trial judge may nevertheless declare one pursuant to this statute if he or she believes that an error occurred resulting in substantial and irreparable prejudice to the defendant *and* the defendant concurs in the declaration of mistrial. The appellate courts might consider a defendant’s failure to object to be a “concurrence.” See, *e.g.*, *State v. Cummings*, 169 N.C. App. 249 (2005) (finding that an order of mistrial was appropriate under G.S. 15A-1061 and double jeopardy did not bar retrial where the trial judge, after hearing the State’s evidence and realizing that he had a personal familiarity with the case, rescheduled the case and the defendant made no objection).

In instances where a defendant does not move for mistrial or concur in the declaration of mistrial under G.S. 15A-1061, a trial judge may grant a mistrial pursuant to G.S. 15A-1063(1) if the error or defect made it impossible for the trial “to proceed in conformity with the law.” See *infra* § 33.6.

Practice note: If you do not want a mistrial to be declared, you should expressly object to the order of mistrial on the record so that it will be clear on review that the defendant did not concur under G.S. 15A-1061. An objection is also necessary to preserve a double jeopardy issue for appellate review in non-capital cases. See *infra* § 33.9E.

D. Co-Defendants

If two or more defendants are joined for trial, G.S. 15A-1061 provides that a mistrial may not be granted under that statute as to a defendant who did not make or join in a motion for mistrial.

E. Misconduct by the Defendant

When a defendant moves for a mistrial based on his or her own misconduct, the argument in support of mistrial will not be given great weight. *State v. Perkins*, 181 N.C. App. 209 (2007) (no abuse of discretion by trial judge in denying defendant’s motion for mistrial based on the ground that she was prejudiced when a juror overheard defense counsel in a stairwell trying to convince defendant not to leave her own trial); *State v. Marino*, 96 N.C. App. 506, 507 (1989) (no error in the denial of defendant’s motion for mistrial where any prejudice was a result of his own open-court “intemperate and profane outburst,” the evidence of defendant’s guilt was overwhelming, and it was unlikely that the outburst prevented defendant from receiving a fair and impartial verdict).

F. Misconduct by a Juror

A mistrial may be the appropriate remedy to seek when a juror has engaged in inappropriate conduct. For a detailed discussion of issues related to misconduct by a juror and the exposure of jurors to extraneous information, see 2 NORTH CAROLINA DEFENDER MANUAL Ch. 24.

G. Selected Examples

The following cases contain examples of disruptive events or improprieties resulting in motions for mistrial by a defendant. In many of these cases, the appellate court upheld the trial judge’s denial of the motion for mistrial on the facts presented. Nevertheless, these cases represent various situations in which a mistrial motion may be appropriate.

- Emotional outbursts by a witness, a spectator, a co-defendant, a prosecutor, or the alleged victim. *See, e.g., State v. Moore*, 335 N.C. 567 (1994) (prosecutor); *State v. Turner*, 330 N.C. 249 (1991) (victim’s family); *State v. Blackstock*, 314 N.C. 232 (1985) (prosecuting witness); *State v. McGuire*, 297 N.C. 69 (1979) (co-defendant).
- Exposure of jurors to news reports or extraneous information about the case. *See, e.g., State v. Woods*, 293 N.C. 58 (1977); *State v. Hines*, 131 N.C. App. 457 (1998).
- Improper contact with the jury by a third person. *See, e.g., State v. Wilson*, 314 N.C. 653 (1985) (error to deny defendant’s motion for mistrial); *State v. Lewis*, 188 N.C. App. 308 (2008).
- Expressions of opinion or improper remarks by the trial judge in the jury’s presence. *See, e.g., State v. Harris*, 308 N.C. 159 (1983).
- References to inadmissible evidence by a witness or prosecutor. *See, e.g., State v. Harris*, 323 N.C. 112 (1988); *State v. Britt*, 288 N.C. 699 (1975) (error to deny defendant’s motion for mistrial); *State v. Moose*, 115 N.C. App. 707 (1994) (same).

- Misconduct by the prosecutor. *See, e.g., State v. Elliott*, 64 N.C. App. 525 (1983) (error to deny defendant’s motion for mistrial).
- Appearance of defendant in front of jurors while wearing some type of visible restraint. *See, e.g., State v. Montgomery*, 291 N.C. 235 (1976).
- Failure of the State to comply with discovery requirements. *See, e.g., State v. Walker*, 332 N.C. 520 (1992); *see also* G.S. 15A-910(a)(3a) (providing for mistrial as a possible remedy for discovery violations); Guideline 7.5(g)(4), *Confronting the Prosecution’s Case, Performance Guidelines for Indigent Representation in Non-Capital Criminal Cases at the Trial Level* (North Carolina Office of Indigent Defense Services, Nov. 2004) (recommending that counsel request appropriate relief, including mistrial, if the prosecutor failed to properly disclose copies of all prior statements of prosecution witnesses as required by G.S. 15A-903(a))
- Inappropriate remarks by a prosecutor during opening statement or closing argument. *See, e.g., State v. Dorton*, 172 N.C. App. 759 (2005); *State v. Jordan*, 149 N.C. App. 838 (2002).

Practice note: When moving for a mistrial, assert not only the statutory basis for the motion but a constitutional basis as well. Argue that the legal defect or misconduct that occurred during trial violated your client’s rights to a fair and impartial trial as guaranteed by the Fourteenth Amendment to the U.S. Constitution and Article I, §§ 19 and 24 of the N.C. Constitution, and to a fair and impartial jury pursuant to the Sixth Amendment to the U.S. Constitution and Article I, § 24 of the N.C. Constitution. *See State v. Williams*, 330 N.C. 579 (1992); *State v. Tolley*, 290 N.C. 349 (1976).

33.5 Mistrial Based on Prejudice to the State

Sometimes misconduct, disruptive events, or improprieties occur during trial that prejudice the State in the eyes of the jury. A motion for mistrial may be the appropriate remedy if the prejudice cannot be cured in some less drastic manner, such as instructions to the jury, replacement of a juror with an alternate, etc.

A. Statutory Authority

Generally. G.S. 15A-1062 provides that a judge may grant a motion for mistrial made by the State if there occurs during the trial, either inside or outside the courtroom, misconduct resulting in substantial and irreparable prejudice to the State’s case and the misconduct was by

- a juror,
- the defendant,
- the defendant’s lawyer, or
- someone acting at the behest of the defendant or his lawyer.

Interpretation of “someone acting at the behest” of defendant or lawyer. This part of the statute has been interpreted restrictively to mean that the trial judge can only grant the State’s motion for mistrial if the defendant or his attorney engaged in “some sort of action or conduct” that induced or prompted the alleged misconduct. *See State v. Cooley*, 47 N.C. App. 376, 381 (1980). It is not sufficient that the defendant will benefit from the misconduct. The acts must have been done “at the behest of the defendant or his lawyer.” *Id.* (finding that order for mistrial would not have been proper under G.S. 15A-1062 where there was no evidence that defendant or his attorney induced or prompted the alleged jury tampering activities; court found mistrial proper under G.S. 15A-1063, however, discussed *infra* § 33.6).

Juror misconduct. Under G.S. 15A-1062, the State may move for mistrial when conduct by a juror results in substantial prejudice to the State’s case. This misconduct need not have occurred “at the behest of the defendant or his lawyer.” *See, e.g., State v. Sanders*, 347 N.C. 587 (1998) (trial judge properly granted State’s motion for mistrial pursuant to G.S. 15A-1062 where record revealed a “manifest necessity” caused by juror misconduct not attributable to defendant). For a discussion of issues relating to juror misconduct, *see* 2 NORTH CAROLINA DEFENDER MANUAL Ch. 24.

B. Co-Defendants

If two or more defendants are joined for trial, G.S. 15A-1062 provides that a mistrial may not be declared under that statute as to a defendant who does not join in the State’s motion for mistrial if

- neither the defendant, defense counsel, nor a person acting at the defendant’s or defense counsel’s behest participated in the misconduct; or
- the State’s case was not substantially and irreparably prejudiced as to him or her.

Practice note: Do not join in the State’s motion for mistrial if your client was not prejudiced by a co-defendant’s misconduct. If you join in the State’s motion (or appear to consent), you will waive any future claim to dismissal based on double jeopardy. *See infra* § 33.9D.

33.6 Impossibility of Proceeding in Conformity With the Law

Sometimes misconduct, disruptive events, or improprieties occur during trial that prohibit the trial from being fair and impartial and make it necessary for the judge to declare a mistrial. In that event, the mistrial may be granted at either party’s request or on the judge’s own motion.

A. Statutory Authority

G.S. 15A-1063(1) provides that “[u]pon motion of a party or upon his own motion, a judge may declare a mistrial if . . . [i]t is impossible for the trial to proceed in conformity

with law.” This statute “was intended to continue the North Carolina practice of allowing a mistrial when it becomes physically necessary to do so.” *State v. Cooley*, 47 N.C. App. 376, 382 (1980).

The statute also allows a judge, even over a defendant’s objection, to declare a mistrial for the necessity of doing justice and where he or she could reasonably conclude that the trial will not be fair and impartial. *Id.* (State’s motion for mistrial pursuant to G.S. 15A-1063 was properly granted where the judge had reasonable grounds to believe that jury tampering had occurred); *see also State v. Malone*, 65 N.C. App. 782 (1984) (trial judge properly granted a mistrial on his own motion where one of the defendant’s attorneys testified for the State).

B. Physical Impossibility

According to the Official Commentary, one of the reasons that G.S. 15A-1063(1) was enacted was to cover situations where it becomes physically impossible for the trial to proceed, “such as may be caused by fire, flood, or other catastrophe.” *Compare State v. Shoff*, 128 N.C. App. 432 (1998) (no abuse of discretion by trial judge in granting mistrial due to adverse weather conditions—three to six inches of snow—and the effect that these conditions had on both the jurors’ and the defendant attorney’s ability to physically get to court for the second day of trial) *with Whaley v. White Consolidated Industries, Inc.*, 144 N.C. App. 88 (2001) (trial judge did not abuse his discretion by refusing to declare a mistrial after the trial was interrupted by Hurricane Floyd flooding where record showed that the judge made inquiry as to the effect of the delay and reached a reasoned decision that the trial could continue based on the jurors’ responses).

C. Physical Necessity

Death or disability of a juror. The Official Commentary to G.S. 15A-1063(1) states that one of the reasons the statute was enacted was to “cover[] the case in which a juror dies or becomes disabled to continue, and there is no alternate or else deliberations have already begun.” *See also State v. Crocker*, 239 N.C. 446, 452 (1954) (a trial judge may order a mistrial if, during trial, a juror “is so incapacitated by reason of intoxicants or otherwise as to be incapable, physically or mentally, of functioning as a competent, qualified juror”); *State v. Beal*, 199 N.C. 278 (1930) (mistrial properly granted where juror became insane during trial); *State v. Ledbetter*, 4 N.C. App. 303 (1969) (no abuse of discretion by trial judge in granting a mistrial where a juror suddenly became ill and was taken to the hospital in serious condition).

If there is an alternate juror and deliberations have not yet begun when the original juror dies or becomes disabled, incapacitated, or disqualified, the trial judge is free to substitute the alternate and a mistrial would not be necessary. *See* G.S. 15A-1215(a) (substitution of alternate juror during trial); G.S. 15A-2000(a)(2) (substitution of alternate juror during a capital sentencing hearing).

Death or disability of the trial judge. If a trial judge becomes sick or disabled during a trial and is unable to continue presiding “without the necessity of a continuance,” he or

she may exercise discretion and order a mistrial. G.S. 15A-1224(a); *see also State v. Boykin*, 255 N.C. 432 (1961) (trial judge’s declaration of mistrial from hospital bed was justified where the judge suffered a heart attack at the courthouse, kept the jury on call for three days hoping to return, and upon medical examination, it was determined he could not return).

A subsequent judge assigned to the case may also declare a mistrial because of the absence of the initial trial judge. *See* G.S. 15A-1224(b) (“If by reason of absence, death, sickness, or other disability, the judge before whom the defendant is being or has been tried is unable to perform the duties required of him before entry of judgment, and has not ordered a mistrial, any other judge assigned to the court may perform those duties, but if the other judge is satisfied that he cannot perform those duties because he did not preside at an earlier stage of the proceedings or for any other reason, he must order a mistrial”).

Death or disability of defense counsel. If the defense attorney suddenly dies or becomes ill during trial, a judge may grant a mistrial if it is “for ‘necessity of doing justice. . . .’” *See State v. Battle*, 267 N.C. 513, 518 (1966) (trial judge properly granted a mistrial on his own motion in a non-capital case, over the four defendants’ objections, where an attorney for one of the defendants suddenly became ill at the noon recess of the first day of trial) (citation omitted).

33.7 Juror Deadlock

A. Statutory Authority

A jury’s inability to reach a verdict due to deadlock is a “manifest necessity,” justifying the declaration of a mistrial. *State v. Pakulski*, 319 N.C. 562, 570 (1987). Two statutes authorize a trial judge to declare a mistrial in the event that the jury becomes hopelessly deadlocked during deliberations. G.S. 15A-1063(2) 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.” *See also State v. O’Neal*, 67 N.C. App. 65 (1984) (noting judge’s statutory authority to grant a mistrial, but finding that order for mistrial was not justified since the jury could and did reach a verdict in the case), *aff’d as modified*, 311 N.C. 747 (1984).

G.S. 15A-1235(d) also allows a judge to declare a mistrial on the same grounds as in G.S. 15A-1063(2), stating that “[i]f it appears that there is no reasonable possibility of agreement, the judge may declare a mistrial and discharge the jury.” *See O’Neal*, 67 N.C. App. 65. The purpose behind the enactment of G.S. 15A-1235, which precludes the trial judge from requiring or threatening to require the jury to continue deliberating for an unreasonable length of time, was “to avoid coerced verdicts from jurors having a difficult time reaching a unanimous decision.” *State v. Evans*, 346 N.C. 221, 227 (1997) (citation omitted).

B. Capital Sentencing Hearings

If a jury becomes deadlocked during deliberations in a capital sentencing hearing, a mistrial and new sentencing hearing is not the appropriate remedy. Instead, G.S. 15A-2000(b) provides that “[i]f the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment; provided, however, that the judge shall in no instance impose the death penalty when the jury cannot agree unanimously to its sentence recommendation.”

If misconduct occurs during jury deliberations at the sentencing phase, mistrial remains an appropriate remedy if there is a manifest necessity for its declaration. *See, e.g., State v. Sanders*, 347 N.C. 587 (1998) (record revealed “manifest necessity” based on misconduct by the jurors in failing to follow the judge’s instructions concerning their duties and the law).

C. Retrial Permitted after Mistrial Based on Hung Jury

Generally. It has long been held that the prohibition against double jeopardy will not bar a retrial of a defendant whose previous trial ended in a deadlocked jury. *See State v. Odom*, 316 N.C. 306 (1986); *see also United States v. Perez*, 22 U.S. 579 (1824). “A ‘hung’ jury is a classic example of manifest necessity.” *Odom*, 316 N.C. at 310 (citing *Arizona v. Washington*, 434 U.S. 497 (1978)); *see also State v. Simpson*, 303 N.C. 439 (1981).

No implied acquittal of offenses. In *Green v. United States*, 355 U.S. 184 (1957), the U.S. Supreme Court explained the doctrine of implied acquittal as follows: when a jury convicts a defendant on a lesser alternate charge and fails to reach a verdict on the greater charge—without announcing any splits or divisions and having had a full and fair opportunity to do so—the jury’s silence on the second charge is an implied acquittal. *Brazzel v. Washington*, 484 F.3d 1087 (9th Cir. 2007). “A verdict of implied acquittal is final and bars a subsequent prosecution for the same offense.” *Id.* at 1090. For example, when a defendant is tried for first degree murder on the theory of premeditation and deliberation and is found guilty of murder in the second degree, the jury has decided that there is not sufficient evidence to conclude beyond a reasonable doubt that defendant premeditated and deliberated the killing. The conviction of the lesser included offense of second-degree murder is an implied acquittal of the greater offense of first degree murder. *See State v. Marley*, 321 N.C. 415, 244 (1988).

If a mistrial is declared because the jury is deadlocked and unable to reach *any* verdict, the implied acquittal doctrine does not apply and the defendant is not entitled to the dismissal of the charge of the greater offense even if the jury indicated that it was deadlocked on a lesser-included offense. There must actually be a final verdict before there can be an implied acquittal in North Carolina. Since a deadlocked jury has been unable to reach any verdict, double jeopardy principles do not preclude a defendant from being tried again for the greater offense. *See State v. Booker*, 306 N.C. 302 (1982) (no double jeopardy bar to retrying defendant on a first-degree murder charge after a mistrial

had been declared even though the jury at the first trial had sent a note to the trial judge stating that it was deadlocked seven to five in favor of a verdict of guilty of second-degree murder); *see also State v. Edwards*, 150 N.C. App. 544 (2002) (no implied acquittal of felony assault charge where mistrial was declared after jury indicated its deadlock on lesser included misdemeanor assault charge).

In *Booker*, the N.C. Supreme Court refused to adopt the rule announced by the Supreme Court of New Mexico in *State v. Castrillo*, 566 P.2d 1146 (N.M. 1977), that “when a jury announces its inability to reach a verdict in a case involving included offenses, the trial court is required to submit verdict forms to the jury to determine if it has unanimously voted for acquittal on any of the included offenses, and the jury may then be polled with regard to any verdict thus returned.” *Booker*, 306 N.C. at 306 (citation omitted). The North Carolina Supreme Court concluded that a polling of the jury on the various possible verdicts that were submitted would amount to an “unwarranted and unwise intrusion into the province of the jury.” *Id.*

When a trial judge elects not to submit lesser-included offenses of a greater charged offense, a defendant is not deemed to have been “acquitted” of those lesser charges if the trial later results in a mistrial because of a hung jury. Thus, the defendant can be retried not only on the greater offense, but also on any lesser included offenses supported by the evidence at the second trial. *See State v. Hatcher*, 117 N.C. App. 78 (1994) (after mistrial was declared based on a hung jury, defendant could be retried on second-degree rape charge *and* any applicable lesser included offenses even though trial judge in first trial only charged on second-degree rape).

For additional information regarding double jeopardy in the context of mistrials, *see infra* § 33.9.

D. Additional Resources

For further discussion of topics relevant to deadlock and jury deliberations, including lengthy deliberations, *see* 2 NORTH CAROLINA DEFENDER MANUAL Ch. 27.

33.8 Findings of Fact

A. Statutory Requirement

Before granting a mistrial, G.S. 15A-1064 requires the trial judge to make findings of fact “with respect to the grounds for the mistrial and insert the findings in the record of the case.” *See also State v. Jones*, 67 N.C. App. 377 (1984) (stating that a trial judge should exercise his or her power to grant a mistrial cautiously after a careful consideration of all available evidence and only after making the requisite findings of fact on the basis of evidence before the judge at the time the judicial inquiry is made). Prior to the enactment of this statute, the common law only required that judges in *capital cases* find facts and

set them out in the record whenever he or she declared a mistrial due to a manifest necessity. *State v. Lachat*, 317 N.C. 73 (1986).

If the findings of fact are not supported by the evidence in the record, the order of mistrial cannot stand. *Id.* (defendant entitled to dismissal of charge based on former jeopardy where first trial judge failed to make both an inquiry and factual findings as to why he felt the jury was hopelessly deadlocked, the record did not indicate that there was a deadlock, and defendant objected to the entry of the mistrial order); *see also State v. Chriscoe*, 87 N.C. App. 404 (1987) (trial judge erred in granting State’s motion for mistrial where the evidence did not support his finding that there was a manifest necessity for a mistrial).

B. Purpose of Requirement

The purpose of G.S. 15A-1064 is to protect the constitutional right of a criminal defendant to have his or her trial completed before a particular tribunal by “ensur[ing] that mistrial is declared only where there exists a real necessity for such an order.” *State v. Jones*, 67 N.C. App. 377, 382 (1984); *see also* G.S. 15A-1064 official commentary (making of findings of fact is “important when the rule against prior jeopardy prohibits retrial unless the mistrial is upon certain recognized grounds or unless the defendant requests or acquiesces in the mistrial”; effect of request or acquiescence is discussed under F., below). A secondary purpose is to “ensure that a full record is made.” *State v. Jones*, 67 N.C. App. at 385; *see also State v. Lachat*, 317 N.C. 73 (1986) (findings of fact are required so that the judge’s conclusion as to the matter of law arising from the facts may be reviewed by the appellate courts).

C. Timing of Findings of Fact

To ensure full deliberation by the trial judge, the findings must be made *before* the mistrial is declared. To allow a judge to make retroactive findings in support of mistrial after it has already been granted would weaken the protections provided by G.S. 15A-1064. *See State v. Jones*, 67 N.C. App. 377 (1984); *but see State v. Johnson*, 60 N.C. App. 369, 373 (1983) (noting that G.S. 15A-1064 was “valued highly by this Court” but finding that the declaration of mistrial before making findings of fact was harmless under the peculiar facts of the case where the trial judge had ordered the mistrial after experiencing chest pains during a heated trial of a drug case).

D. Failure to Make Findings

The requirements of G.S. 15A-1064 are mandatory and “[e]ven the most exigent of circumstances do not justify circumvention of this rule.” *State v. Jones*, 67 N.C. App. 377, 382 (1984) (citation omitted); *compare Arizona v. Washington*, 434 U.S. 497 (1978) (while the U.S. Constitution does not require explicit findings supporting a manifest necessity before granting a mistrial, it does require that the record adequately disclose the necessity on which the order rests). The failure of the trial judge to make findings of fact is error. *See State v. Odom*, 316 N.C. 306 (1986); *see also State v. Lachat*, 317 N.C. 73

(1986). However, the failure to make findings, or the making of findings that do not comply with the statute, may be held harmless if the record shows ample factual support for the mistrial order. *See State v. Felton*, 330 N.C. 619 (1992); *State v. Pakulski*, 319 N.C. 562 (1987).

E. Necessity for Objection

In *non-capital* cases, the defendant must object to the trial judge's failure to make findings in support of a mistrial or the error is not subject to appellate review. *See State v. Pakulski*, 319 N.C. 562 (1987). The mandatory nature of G.S. 15A-1064 does not relieve a defendant of the duty to prevent avoidable errors and the resulting unnecessary appellate review by lodging an appropriate objection. *State v. Odom*, 316 N.C. 306 (1986). In a *capital* case, the issue of the judge's failure to make findings of fact after declaring a mistrial will not be waived by the defendant's failure to object. *See id.*; *State v. Lachat*, 317 N.C. 73 (1986); *see also infra* § 33.9E (defendant's failure to object to declaration of mistrial waives later double jeopardy argument in noncapital case but not in capital case).

F. Motion Granted at Defendant's Request or with Defendant's Acquiescence

Generally, if a mistrial is granted based on a defendant's request, there can be no prejudice to the defendant resulting from a trial judge's failure to make findings of fact. *State v. White*, 85 N.C. App. 81 (1987), *aff'd*, 322 N.C. 506 (1988); *State v. Moses*, 52 N.C. App. 412 (1981). However, where the defendant's motion for mistrial was based on prosecutorial misconduct, findings of fact "may be as essential to adequate review of his double jeopardy claim as in a case in which mistrial is ordered over the defendant's objection." *White*, 85 N.C. App. at 85 (finding harmless error where trial judge made no findings of fact after granting defendant's motion for mistrial because grounds for the mistrial based on prosecutorial misconduct were clear from the record; however, prosecutorial misconduct in this case did not to bar retrial on double jeopardy grounds); *see also infra* § 33.9D (discussing double jeopardy implications of mistrial granted on defendant's request).

Likewise, if the defendant acquiesces to a mistrial, a finding to that effect may cure the absence of other findings (subject to the above caveat about prosecutorial misconduct). *See* G.S. 15A-1064 official commentary ("[i]f the defendant requests or acquiesces in the mistrial, that finding alone should suffice").

Practice note: It is not clear what constitutes an acquiescence by the defendant to an order of mistrial. Obviously, if a defendant explicitly consents to the mistrial, he or she has acquiesced. *See, e.g., State v. Boykin*, 255 N.C. 432 (1961) (defendant and his attorney consented to the mistrial and signed the order). To properly preserve the defendant's rights in cases where you do not want a mistrial, always unequivocally object to the order of mistrial on the record. *See State v. Johnson*, 60 N.C. App. 369 (1983) (no discussion of particulars but finding that defendant did not acquiesce in declaration of mistrial).

33.9 Double Jeopardy and Mistrials

A. In General

The Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution precludes retrial of defendants in some instances where the proceedings are terminated prior to judgment. *State v. Cooley*, 47 N.C. App. 376 (1980); *see also United States v. Dinitz*, 424 U.S. 600 (1976). This clause is applicable to the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 N.C. 784 (1969). The Law of the Land Clause, in Article I, § 19 of the N.C. Constitution, may also prohibit a defendant from being tried again after an order of mistrial is declared. *See State v. Cameron*, 283 N.C. 191 (1973).

A defendant's right to have his or her trial completed before a particular tribunal has long been considered a "valued right" guaranteed by the constitutional prohibition of double jeopardy. *See, e.g., Wade v. Hunter*, 336 U.S. 684 (1949); *see also Cooley*, 47 N.C. App. at 384 ("[t]he interest of the accused which is protected in such cases is his right to retain a given tribunal") (citation omitted).

The reasons why this "valued right" merits constitutional protection are worthy of repetition. Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed. Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial.

Arizona v. Washington, 434 U.S. 497, 503-05 (1978) (footnotes omitted).

Whether a defendant's motion to dismiss based on double jeopardy should be granted depends on the validity of the order for mistrial. If the order for mistrial was valid, then a defendant's motion to dismiss will be denied. If the order for mistrial was improperly granted, then the defendant is entitled to dismissal based on former jeopardy. *See State v. Battle*, 267 N.C. 513 (1966).

B. When Jeopardy Attaches

In order for a defendant to move to dismiss a charge on double jeopardy grounds based on the declaration of a mistrial, jeopardy must have attached at the time the mistrial was ordered.

Superior court. Jeopardy attaches in superior court "when a defendant in a criminal prosecution is placed on trial: (1) on a valid indictment or information, (2) before a court of competent jurisdiction, (3) after arraignment, (4) after plea, and (5) when a competent jury has been empaneled and sworn." *See State v. Cutshall*, 278 N.C. 334, 344 (1971).

Thus, the critical time for jeopardy purposes in a jury trial is the empanelment and swearing of the jury.

District court. In non-jury trials in district court, jeopardy attaches when the trial judge begins to hear evidence or testimony. *See State v. Brunson*, 327 N.C. 244 (1990); *see also State v. Fowler*, ___ N.C. App. ___, 676 S.E.2d 523, 538 (2009) (“until a defendant is ‘put to trial *before the trier of the facts*, whether the trier be a jury or a judge, jeopardy does not attach’”) (citations omitted). The rationale behind this rule is that the potential for conviction exists only when evidence or testimony against a defendant is presented to and accepted by the court. *See State v. Ward*, 127 N.C. App. 115 (1997).

C. Mistrial Declared for a Manifest Necessity

Under the common law, a defendant’s constitutional right to be free from double jeopardy will not be violated where a defendant’s trial or sentencing hearing “ends with a mistrial declared for a manifest necessity or to serve the ends of public justice.” *State v. Sanders*, 347 N.C. 587, 599 (1998). A manifest necessity only exists when some event occurs at trial that creates “a situation where the defendant’s right to have the trial continue to termination in a judgment is outweighed ‘by the public’s interest in fair trials designed to end in just judgments.’” *Id.* at 595 (quoting *Wade v. Hunter*, 336 U.S. 684, 689 (1949)); *see also State v. Lachat*, 317 N.C. 73 (1986) (stating that the failure of a jury to reach a verdict due to deadlock is a manifest necessity justifying the declaration of a mistrial).

What constitutes a “manifest necessity” depends on the circumstances of each case. In discussing what constitutes a “manifest necessity,” the North Carolina Supreme Court has stated:

We think, that in all cases of this nature, the law has invested Courts of Justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office. . . .

State v. Shuler, 293 N.C. 34, 43 (1977) (quoting *United States v. Perez*, 22 U.S. 579, 580 (1824)).

D. Mistrial Granted on Defendant's Motion or with Consent

Generally. If a motion for mistrial is granted on a defendant's request or with his or her consent, the prohibition against double jeopardy will generally not bar reprosecution. *See State v. White*, 322 N.C. 506 (1988); *see also United States v. Jorn*, 400 U.S. 470 (1971). "If a defendant moves for a mistrial, he or she normally should be held to have waived the right not to be tried a second time for the same offense." *White*, 322 N.C. at 511.

Motion based on prosecutorial misconduct. A narrow exception exists to the above general rule allowing retrial following the granting of a defendant's mistrial request. If the defendant's motion for mistrial is prompted by serious misconduct by the prosecutor *and* he or she can show "that the prosecutor was motivated by the intent to provoke a mistrial instead of merely the intent to prejudice the defendant," then double jeopardy will bar reprosecution. *White*, 322 N.C. at 511. The test is the same under the federal and state constitutions. *Id.* (adopting the test under the Fifth Amendment set out by the U.S. Supreme Court in *Oregon v. Kennedy*, 456 U.S. 667 (1982), as the appropriate standard under Article I, § 19 of the N.C. Constitution). The U.S. Supreme Court has held that "the strictest scrutiny is appropriate when the basis for the mistrial is the unavailability of critical prosecution evidence, or when there is reason to believe that the prosecutor is using the superior resources of the State to harass or to achieve a tactical advantage over the accused." *Arizona v. Washington*, 434 U.S. 497, 508 (1978).

Motion based on judicial misconduct. Like prosecutors, judges are also prohibited from taking action intended to provoke requests for mistrial. If the defendant can show that his or her motion for mistrial was prompted by bad-faith conduct by the judge that "threatens the '(h)arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict' the defendant[.]" double jeopardy will bar a retrial. *See United States v. Dinitz*, 424 U.S. 600, 611 (1976) (citations omitted); *see also Divans v. California*, 434 U.S. 1303 (1977) (to be entitled to relief under the Double Jeopardy Clause, the defendant must show error by the prosecution or by the court for the purpose of forcing the defendant to move for a mistrial).

E. Preservation of Double Jeopardy Issue for Appellate Review When Mistrial is Granted on State's Motion or by Trial Judge *Ex Mero Motu*

Capital cases. The failure of the defendant in a capital case to object to the trial judge's declaration of mistrial will not bar the defendant from pleading former jeopardy and moving for a dismissal of the charge against him or her. *See State v. Lachat*, 317 N.C. 73 (1986). "To strictly require such objections to mistrials in capital cases would require payment of a price too high even for the commendable result of improved judicial efficiency." *Id.* at 85; *see also supra* § 33.8E (defendant's failure to object to lack of findings of fact by trial court in declaring mistrial in capital case does not waive appellate review of issue).

Non-capital cases. Generally, to preserve a double jeopardy issue for review in non-capital cases, the defendant must lodge an objection to the declaration of mistrial at the time it is declared. If he or she fails to do so, the appellate court will find that the defendant waived the objection on appeal. *State v. Odom*, 316 N.C. 306 (1986). This rule is “a court made rule designed to prevent avoidable errors and the resulting unnecessary appeals.” *Lachat*, 317 N.C. at 85; *but see* § 33.9C (mistrial based on prosecutorial or judicial misconduct may not constitute manifest necessity in some circumstances, and retrial may not be permissible notwithstanding defendant’s motion for or consent to mistrial).

F. No Set Limit on Number of Retrials

As a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial. *See Arizona v. Washington*, 434 U.S. 497 (1978). This principle notwithstanding, there is no specific state or federal constitutional limit on how many times a defendant can be retried after a mistrial is granted. Instead, each double jeopardy claim must be examined individually and considered in light of the particular facts of the case. *See State v. Simpson*, 303 N.C. 439 (1981) (no double jeopardy violation found in defendant’s third trial for the same charges since there was no indication of harassment by the State or bad faith conduct by the trial judges in the prior trials, and it appeared that the previous juries were genuinely deadlocked and given every reasonable opportunity to reach a verdict); *State v. Williams*, 51 N.C. App. 613, 619 (1981) (finding that double jeopardy did not preclude a fourth retrial where the previous mistrials were properly ordered based on juror misconduct and juror deadlock with no objection by defendant, the State acted “expeditiously and fairly to achieve a final resolution, and all four trials took place in less than a year”).

G. Other Double Jeopardy Issues

The above discussion has focused on the application of double jeopardy to mistrials. For a discussion of other double jeopardy issues, *see* 1 NORTH CAROLINA DEFENDER MANUAL § 13.4B; *see also* Robert L. Farb, *Double Jeopardy, Ex Post Facto, and Related Issues*, online at www.sog.unc.edu/programs/crimlaw/djoverview.pdf (Jan. 2007).

33.10 Practical Effect of Mistrials

When a mistrial is properly granted, “in legal contemplation there has been no trial.” *State v. Tyson*, 138 N.C. 627, 629 (1905). “Stated otherwise, a ‘mistrial results in nullification of a pending jury trial.’” *Burchette v. Lynch*, 139 N.C. App. 756, 760 (2000) (citation omitted). The parties are returned to their original positions and, at a retrial, can introduce new evidence and assert new defenses that were not raised at the first trial. *See United States v. Mischlich*, 310 F. Supp. 669, 672 (D. N.J. 1970), *aff’d sub nom United States v. Pappas*, 445 F.2d 1194 (3d Cir. 1971). This principle applies to trials and sentencing hearings. *State v. Sanders*, 347 N.C. 587 (1998).

A. Procedure Following Mistrial

When a trial judge orders a mistrial, he or she must then “direct that the case be retained for trial or such other proceedings as may be proper.” G.S. 15A-1065. According to the Official Commentary, the drafters did not address in this statute whether a defendant awaiting retrial should be held in custody or released on bail because it “thought the matter was already covered by Article 26, Bail.” For a detailed discussion of pretrial release, *see* 1 NORTH CAROLINA DEFENDER MANUAL Ch. 1.

B. Rulings from Previous Trials

Evidentiary rulings. Rulings on the admissibility of evidence made by the trial judge in a previous trial are not binding on the judge when the defendant is subsequently tried again following a mistrial. “[N]either the doctrine of collateral estoppel nor the one judge overruling another rule can apply” to an evidentiary ruling made by the judge at a retrial since it was made after a mistrial was declared in the first trial. *See State v. Harris*, ___ N.C. App. ___, 679 S.E.2d 464, 468 (2009) (holding that previous judge’s ruling excluding evidence under Rule 404(b) did not bind judge in later retrial because in legal contemplation, there had been no trial); *State v. Lawrence*, 179 N.C. App. 654 (2006) (unpublished) (trial judge on retrial could reconsider granting of motion *in limine* before first trial that excluded evidence against the defendant); *see also Burchette v. Lynch*, 139 N.C. App. 756, 760 (2000) (if a defendant’s trial results in a hung jury, the new trial is a trial *de novo* and is unaffected by rulings made during the original trial).

Pretrial non-evidentiary rulings. Pretrial non-evidentiary rulings are also not binding on the judge who presides over a retrial. *See Harris*, ___ N.C. App. ___, 679 S.E.2d 464 (holding that previous judge’s ruling on defendant’s motion for complete recordation did not bind judge in later retrial).

Suppression rulings. Pretrial rulings on motions to suppress evidence made pursuant to Article 53 of Chapter 15A of the N.C. General Statutes are also unlikely to be binding on a subsequent judge at retrial. Motions made pursuant to this Article are a specific type of motion *in limine* and rulings on motions *in limine* are preliminary or interlocutory decisions that are subject to change if circumstances during trial make it necessary. *Cf. State v. McNeill*, 170 N.C. App. 574 (2005) (finding that even though the trial judge had granted defendant’s pretrial motion to suppress based on Fourth Amendment grounds, the trial judge acted within his authority in reversing this ruling and subsequently admitting this evidence later during the same trial).

Practice note: Always renew *all* of your motions at the retrial after a mistrial has been granted regardless of whether the motions were previously granted or denied. If your motions were originally denied, this is an opportunity to reargue them and obtain a different ruling. You should also renew a motion to suppress even if it was originally granted at the first trial. However, you can assert to the judge at retrial that he or she is not required to rehear the motion but can instead adopt the previous ruling without hearing testimony or arguments. *See State v. Grogan*, 40 N.C. App. 371, 374 (1979)

(after the first trial ended in a mistrial, defendant moved for a rehearing of his motion to suppress that had been previously denied but second trial judge refused to hear it—Court of Appeals noted that “nothing alleged by the defendant in his motion for rehearing and supporting affidavits required [the judge at retrial] to rehear the motion which had previously been finally denied”).

Special verdicts. A party is precluded by the principles of *res judicata* and collateral estoppel from relitigating during a retrial an issue that was actually litigated and finally decided by special verdict during a previous trial that ended in mistrial. *See State v. Dial*, 122 N.C. App. 298 (1996) (defendant, at retrial, was precluded from relitigating jurisdiction issue where trial judge in first trial accepted jury’s special verdict finding that North Carolina had jurisdiction but granted a mistrial due to the jury’s deadlock on the issue of guilt or innocence).

C. Transcripts of Previous Trials

Determination of defendant’s entitlement. The State must, as a matter of equal protection, provide an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective defense or appeal. *Britt v. North Carolina*, 404 U.S. 226, 227 (1971); *see also* G.S. 7A-450(b) (State must provide indigent defendant “with counsel and the other necessary expenses of representation”). However, under *Britt*, a free transcript need not always be provided. Upon a defendant’s motion for transcript, the trial judge must determine

- whether a transcript is necessary for preparing an effective defense; and
- whether there are alternative devices available to the defendant that are substantially equivalent to a transcript.

State v. Rankin, 306 N.C. 712 (1982) (finding constitutional violation where the trial judge denied defendant’s motion for transcript as untimely because the retrial had not yet been scheduled and the judge’s offer to make the court reporter available to the defendant during retrial was clearly an insufficient alternative to the verbatim transcript). It is difficult to imagine a situation in which a defendant would not be entitled to the transcript of the prior trial under this standard.

Reimbursement may be required. A trial judge may order the defendant to reimburse the State for the cost of the transcript in the event that the defendant is convicted. *See State v. Harris*, ___ N.C. App. ___, 679 S.E.2d 464 (2009) (upholding trial judge’s order requiring defendant, as a condition of post-release supervision, to reimburse the State for the cost of the transcript of defendant’s previous trial); *see also* G.S. 7A-304(a) and (c), 7A-455(b) (describing convicted defendant’s obligation to repay costs).