JURY ISSUES
FALL 2005 SUPERIOR COURT JUDGES' CONFERENCE
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1. The jury sent a note through the bailiff asking to view a fingerprint card containing fingerprints taken at the scene of the alleged crime. Both the Assistant District Attorney and the defense attorney object to allowing the jury to view the fingerprint card. Is it error to allow the jury to view the fingerprint card in the courtroom?

   NO. If a jury after retiring requests to review evidence, the judge, in his or her discretion, after notice to the prosecutor and defendant, may permit the jury to examine in open court any requested materials, which have been admitted into evidence. In order for the trial judge to allow the jury to take the requested evidence into the deliberation room, the judge must have consent from both the State and the defendant. See N.C. General Statute §15A-1233(b). However, if the judge simply lets the jury examine the requested evidence in open court, but does not allow the jury to take it into the jury room, there is no necessity for obtaining consent of the parties. State v. Lee, 128 N.C. App. 506, 495 S.E.2d 373 (1998) (trial court did not abuse its discretion).

2. The defendant was tried and convicted of robbery. At trial, the State's case rested on eyewitnesses' identification of the defendant and the defendant relied on a defense of alibi contending that he lived in another state at the time of the robbery. During deliberations, the jury asked to view Exhibit #1, the photographic lineup, and with the consent of the parties the exhibit was delivered to the jury room. While viewing the photographs, a juror peeled back tape placed over a handwritten notation revealing the words "Police Department, Wilson, North Carolina—12291, 12-07-81". The jurors discussed the notation as evidence contradicting the defendant's alibi defense. The defendant was convicted. Is the defendant entitled to a new trial?

   YES. A fundamental aspect of the criminal defendant's right to confront the witnesses and evidence against him is that a jury's verdict must be based on evidence produced at trial, not on extrinsic evidence which has escaped the rules of evidence, the supervision of the court and other procedural safeguards of a fair trial. In this situation, the Court of Appeals observed that it was undisputed that information about the defendant, which has not been admitted in evidence, came to the attention of the jury and that this evidence directly contradicted the defendant's alibi witnesses. The Court of Appeals held that because this exposure occurred during the jury's deliberations, the defendant had no opportunity to challenge the evidence by cross-examination or to minimize its impact through closing argument or through a curative instruction by the trial judge. Under these circumstances, the jury's exposure to extraneous information clearly abridged the defendant's constitutional right of confrontation. State v. Lyles, 94 N.C. App. 240, 380 S.E.2d 390 (1989).

3. The jury sent a note requesting that the testimony of two witnesses be re-read. Both the State and the defense agreed that the testimony should not be re-read. The trial court determined, in the exercise of its discretion, that the testimony should not be re-read to the jury. The trial court sent a written message to the jury, through the bailiff, denying the jury's request. Is this procedure permissible?

NO. N.C. General Statute §15A-1233(a) provides that jurors must be conducted to the courtroom if after retiring for deliberation, they request a review of testimony or other evidence. The trial judge erred by not adhering to the requirements of the statute. State v. McLaughlin, 320 N.C. App. 564, 359 S.E.2d 768 (1987); State v. Colvin, 92 N.C. App. 152, 374 S.E.2d 126 (1988). It is unlikely that such an error is prejudicial.

4. During jury deliberations, the foreperson of the jury returned to the courtroom and in open court and on the record asked the trial judge for a clarification of the law. The trial court judge answered the question in open court on the record and the foreperson returned to the jury room. Is this procedure error?

YES. The danger in this instance is that the question presented and the trial court's response may be inaccurately relayed by the foreperson to the remaining jurors. It is error for the trial court to fail to bring the entire jury to the courtroom to respond to the jury's question. State v. Tucker, 91 N.C. App. 511, 372 S.E.2d 328 (1988). It is also error to allow only the foreperson to transmit requests for a transcript. State v. Ashe, 314 N.C. App. 28, 331 S.E.2d 652 (1985). The entire trial should be viewed and heard simultaneously by all twelve jurors. To allow a jury foreperson, another individual juror, or anyone else to communicate privately with the trial court regarding matters material to the case and then to relay the court's response to the full jury is inconsistent with this policy. The danger presented is that the person, even the jury foreperson, having alone made the request of the Court and heard the Court's response first hand may through misunderstanding, inadvertent editorialization, or an intentional misrepresentation, inaccurately relay the jury's request or the Court's response or both to the defendant's detriment. State v. Ashe, 314 N.C. App. at 36.

5. During jury deliberations, the jury sent a note to the trial judge requesting certain exhibits and transcripts of the testimony of four witnesses. The entire jury was returned to the courtroom. The trial court, with the consent of the parties, allowed the jury to take the exhibits into the jury room. The trial court denied the request for a transcript and indicated that the court reporter had not yet transcribed the testimony and the Court did not have the ability to present the transcript to the jury. The Court advised the jury that it was their responsibility and obligation to rely on their own recollection of the evidence. Is this procedure erroneous?

YES. It is within the Court's discretion to determine whether, under the facts of a particular case, the transcript should be made available for re-examination and rehearing by the jury. State v. Barrow, 350 N.C. App. 640, 517 S.E.2d 374 (1999). In the case described in this question, the trial court stated that it did not have the ability to present the transcript to the jury, indicating a failure to exercise discretion. Id. When no reason is assigned by the Court for a ruling, which

may be made as a matter of discretion, the presumption on appeal is that the Court made the ruling in the exercise of its discretion. However, where the statements of the trial court show that the trial court did not exercise discretion, the presumption is overcome and the denial is deemed erroneous. State v. Johnson, 346 N.C. App. 119, 484 S.E.2d 372 (1997). In this instance, the trial court should expressly rule, "in the exercise of my discretion," the request is either allowed or denied. When the trial court states for the record that, in its discretion, it is allowing or denying a jury's request to review testimony, it is presumed that the trial court did so in accordance with N.C. General Statute §15A-1233. State v. Perez, 135 N.C. App. 543, 522 S.E.2d 102 (1999).

6. During the trial of a cocaine and methamphetamine trafficking case, the jury, during deliberations, sent the trial court a written question asking, "What was the amount of cocaine in the cooler?" Is the trial court permitted to answer the jury's question concerning the facts of the case?

YES. In State v. Cardenas, ____N.C. App. ____, 610 S.E.2d 240 (2005), the Court conferred with counsel for the parties and replied that there was no evidence presented that there was any cocaine in the cooler. The Court of Appeals observed that "defendant does not show and we fail to see how the trial court abused its discretion in answering the jury's question." The defendant was acquitted on the cocaine charges and, as a result, the trial court's answer to the question did not prejudice the defendant. In State v. Wampler, 145 N.C. App. 127, 549 S.E.2d 563 (2001), the jury asked the court a question regarding the time frame from when the defendant was at a particular location until the time of the crime. The trial court instructed the members of the jury "to rely on your own recollection" of the evidence. In Wampler, the Court of Appeals found that the trial court acted properly in the use of its discretion in refusing to answer the jury's question. As the Court of Appeals opined, [i]n the absence of the transcript, the trial court would have had to give evidence, which in effect would be giving its own recollection of the testimony. 145 N.C. App. at 132. In this type of situation, the safer approach is the one followed by the trial court in Wampler.

7. The jury advised the trial court that it was divided 9 to 3 in the case. The trial court gave additional instructions consistent with the pattern instruction customarily given when a jury reports a deadlock. The Court added at the conclusion of the pattern charge that "the main purpose of that is that it will be expensive again to have to get another jury to try this case over." Are the additional jury instructions permissible?

NO. The additional instructions constituted prejudicial error. State v. Buckom, 111 N.C. App. 240, 431 S.E.2d 776 (1993). The North Carolina Supreme Court has observed that the General Assembly, by enacting NC General Statute §15A-1235, intended to provide that a jury may no longer be advised of the potential expense and inconvenience of retrying a case should the jury fail to agree. State v. Easterling, 300 N.C. App. 594, 268 S.E.2d 800 (1980). A trial court judge should avoid any reference to the potential expense and inconvenience of retrying the case should the jury fail to agree. State v. Hunter, 48 N.C. App. 689, 269 S.E.2d 736 (1980).

8. The courtroom clerk reported that when the jurors left the courtroom one juror commented to other jurors that he believed "when you take that Bible in your hand you are supposed to be telling the truth and I don't think that young boy was telling the truth." The Court excused the juror who reportedly made the comment without any further inquiry. Did the Court err by excusing this juror?

NO. The trial court may remove a sitting juror and seat an alternate juror before final submission of the case to the jury if a juror becomes incapacitated or disqualified, or is discharged for any other reason. See N.C. General Statute §15A-1215(a). The trial judge removed the juror in keeping with its desire that no one should be suspicious of his capacity to render a fair verdict. The trial court acted well within its discretion under N.C. General Statute §15A-1215(a) in doing so. State v. Harrington, 335 N.C. App. 105, 436 S.E.2d 235 (1993).

9. During deliberations in the sentencing phase of a capital trial, a juror reported to the trial judge that she was manic-depressive and could not mentally handle further participation in jury deliberations. The alternate jurors had been retained pursuant to N.C. General Statute 15A-1215(b) and were available for service. Did the trial court judge err by removing the distressed juror, substituting an alternate juror and instructing the jurors to begin deliberations anew?

YES. In this case, the jury verdict was reached by more than twelve persons. The juror who was excused participated in deliberations for half a day. It cannot be determined what influence this juror had on the other jurors, but the Court must assume she made some contribution to the verdict. The alternate juror did not have the benefit of the discussion of the other jurors, which occurred before he was placed on the jury. The Court cannot say he fully participated in reaching a verdict. In this case, eleven jurors fully participated in reaching a verdict and two jurors partially participated in reaching a verdict. This is not the twelve jurors required to reach a verdict in a criminal case. State v. Bunning, 346 N.C. App. 253, 485 S.E.2d 290 (1997). In non-capital criminal cases, alternate jurors, must be discharged upon final submission of the case to the jury. N.C. General Statute §15A-1215(a). N.C. General Statute 15A-1340.16(a1) permits the substitution of an alternate juror prior to the beginning of deliberations in a trial to determine the existence of an aggravating factor for felony sentencing. N.C. General Statute §15A-2000(a)(2) permits the substitution of an alternate juror in a capital case prior to the time the trial jury begins its deliberations on the issue of penalty.

10. The defendant was escorted by police officers through the courtroom several minutes before court began. At the time, the defendant was handcuffed and wearing visible leg restraints. All of the jurors were present in the courtroom when the defendant was escorted through and each juror indicated, when questioned by the Court, that he or she had seen the defendant in handcuffs and leg restraints. Could the trial court properly deny a motion for a mistrial and rely on curative instructions to the jury?

YES. N.C. General Statute §15A-1061 provides that the judge must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the

defendant's case. The decision whether to grant a motion for mistrial rests within the sound discretion of the trial judge and will not ordinarily be disturbed on appeal absent a showing of abuse of discretion. State v. Johnson, 341 N.C. App. 104, 459 S.E. 2d 246 (1995). In Johnson, the Supreme Court concluded that the trial court did not abuse its discretion in denying defendant's motion for a mistrial. The trial court gave corrective instructions about the incident described in this question and questioned jurors in order to determine if they were still able to give defendant a fair trial. Id. at 114. Upon questioning by the Court, none of the jurors indicated that they had any problem being fair or following the Court's instructions. Id. at 115.

11. During the trial of a murder case, the jury was sequestered at a local hotel. There was a police complaint originating from the hotel of disorderly conduct involving at least three jurors. Police officers observed three jurors in an intoxicated condition moving about in their underwear along the hallways. At least one juror was so intoxicated that he had to be threatened with arrest before he would agree to return to his hotel room. The trial court, after hearing evidence from law enforcement officers involved in the incident, declared a mistrial over the defendant's objection. Did the trial court err by ordering a mistrial?

YES. The Supreme Court observed in State v. Crocker, 239 N.C. App. 446, 80 S.E. 2d 243 (1954) that "there is no suggestion that any juror at any time when the court was in session was under any disability on account of intoxicants or otherwise. Nor is there any evidence that any of the jurors, when court convened Friday morning, were not 'clothed and in their right minds' and able to proceed with jury service." It appeared that the order of mistrial in Crocker was provoked by and based on the unfortunate incident in the nighttime causing some disturbance when certain of the jurors drank some intoxicants in their hotel rooms. The record in Crocker also indicated that the bailiff in charge of the jury furnished the intoxicants they drank and was held in contempt of court. In Crocker, there was no evidence concerning the crucial question namely the condition and fitness of the jurors to continue their service when court convened and, consequently there was no factual basis for the trial judge, in the exercise of his discretion, to order a mistrial.

In other cases, trial court judges' decisions to order a mistrial based on an intoxicated juror have been upheld. State v. Tyson, 138 N.C. App. 627, 50 S.E. 456 (1905) (Court found that after all the evidence had been presented a juror had, without permission, gone home and procured a quantity of liquor and was in a grossly intoxicated condition on Friday night and that on Saturday morning the juror was in a very nervous and besotted condition and unfit for duty and that unavailing efforts were made to render him fit for service.) State v. Jenkins, 116 N.C. App. 972, 20 S.E. 1021 (1895) (Jurors drank whiskey during deliberations and some were intoxicated during deliberations.) In Jenkins, the Supreme Court opined that "[t]he law requires that jurors, while in the discharge of their duties, shall be temperate and in such a condition of mind as to enable them to discharge those duties honestly, intelligently and free from the influence and dominion of strong drink." 116 N.C. at 974.

12. During the course of the trial, a juror fell asleep. This occurred during defense counsel's cross-examination of one of the State's witnesses. Did the trial court err by not declaring a mistrial when it observed the juror sleeping during the trial?

NO. In State v. Williams, 33 N.C. App. 397, 235 S.E.2d 86 (1972), a juror fell asleep during the defense attorney's cross-examination of one of the State's witnesses. The trial court judge asked the jurors to stand up and told the jury "you can't go to sleep." There was nothing in the record to indicate that the defendant was prejudiced in any way. American Jurisprudence and American Law Reports indicate that both the juror's inattention and the prejudicial effect on the complaining party must be shown. 75B Am Jur 2d Trial, §618; Inattention of Juror from Sleepiness or Other Cause as Grounds for Reversal or New Trial, 59 ALR 5th 1.

13. During the course of a trial, a voir dire hearing was conducted concerning a statement that the defendant allegedly made to a relative. After the hearing, but prior to the introduction of any of the evidence presented at the voir dire hearing, a local newspaper published details of the evidence in a front-page news story. The defendant moved to inquire whether any jurors had read or heard about the article. Did the trial judge err by denying the defendant's request?

NO. When there is a substantial reason to fear that the jury has become aware of improper and prejudicial matters, the trial court must question the jury as to whether such exposure has occurred and, if so, whether the exposure was prejudicial. However, in the situation outlined in the question, other than the fact that the statement was in the paper, there was no basis to think that the jury had become aware of it. Absent a clearer suspicion that the jury was aware of the publication, the trial court did not err in refusing to question the jury about it. State v. Smith, 135 N.C. App. 649, 522 S.E.2d 321 (1999). In fact, as the Court of Appeals observed in Smith, questioning the jury about whether they read the article may have done nothing more than alert them to a statement of which they were previously unaware. Id. at 658. For similar cases see State v. Harden, 344 N.C. App. 542, 476 S.E.2d 658 (1996); State v. Langford, 319 N.C. App. 337, 354 S.E.2d 518 (1987). If the evidence indicates that jurors actually were exposed to the publicity, then an inquiry would be required.

14. The defense lawyer advised the trial court that his secretary had informed him that someone called his office and left a message that one of the jurors had been talking about the case being tried with her mother-in-law. The juror reportedly said that she thought the defendant was guilty because of the look on his face. The defendant requested an inquiry by the court concerning this information. Did the trial court err by failing to question the juror who had reportedly made these comments?

NO. The report was an anonymous telephone call made to the attorney's office. Misconduct must be determined by the facts and circumstances of each case. The circumstances must be such as not merely to put suspicion on the verdict, because there was opportunity and a chance for misconduct. When there is merely a matter of suspicion, it is purely a matter in the discretion of the presiding judge. State v. Aldridge, 139 N.C. App. 706, 534 S.E.2d 629 (2000). An examination of the juror involved in the alleged misconduct is not always required, especially

where the allegation is nebulous or when the witness did not overhear the juror or third party talk about the case. Id. 139 N.C. App. 715.

15. In a murder case, an individual reported to the court that she went to the coffee bar in the basement of the courthouse and observed some of the jurors. This individual heard one of the jurors say to the others that "the boy probably took a knife and cut himself and threw the knife away and is going to plead self-defense". The defense attorney asked the Court to inquire by calling the juror who allegedly spoke these words to be questioned about the incident. The trial court denied the request. Did the trial court err by denying this request?

YES. The record in the case on which this question is based did not indicate that the individual who observed the incident had any interest in the case. The individual's testimony about the incident was uncontradicted and there was nothing to impeach this individual's credibility. In State v. Drake, 31 N.C. App. 187, 229 S.E.2d 51 (1976), the Court of Appeals observed "it is well-settled law in this State that the determination of the trial court on the question of juror misconduct will be reversed only where an abuse of discretion has occurred." The trial judge is in a better position to investigate any allegations of misconduct, question witnesses and observe their demeanor, and make appropriate findings. 31 N.C. App. at 190. In Drake, the Court of Appeals ordered a new trial and observed that the trial court denied the defendant's timely motion based on the uncontradicted testimony of a disinterested witness to call the juror who allegedly formed and expressed an opinion on the crucial issue of self-defense and the Court denied the motion for mistrial without determining the truth about the alleged misconduct. 31 N.C. App. at 192.

16. During a first degree murder trial, the Assistant District Attorneys prosecuting the case advised the Court that a juror had contact with one of the assistants that morning when the juror brought an insurance letter to the District Attorney's office relating to a traffic citation the juror received prior to the beginning of the trial. The juror spoke to one of the ADAs, who referred the juror to an office employee, who later read the insurance letter to the ADA in order to determine whether the letter was sufficient. The employee took the juror's ticket and the juror returned to the courtroom. The citation was dismissed in accordance with the standard policies of the District Attorney's office. The defendant challenged the juror's ability to continue serving as a juror. The trial court denied this challenge. Did the trial court err by not replacing this juror with an alternate?

NO. The trial court may replace a juror with an alternate juror should the original one become disqualified or be discharged for some reason. N.C. General Statute §15A-1215(a); 341 N.C. App. 658, 462 S.E.2d 492 (1995). When a juror has contact with someone who may have an interest in the case, the judge has the duty to determine whether such contact resulted in substantial and irreparable prejudice to the defendant. State v. Richardson, 341 N.C. App. 673. In Richardson, the trial court conducted an inquiry of the juror and the employee in the District Attorney's office. The juror indicated that the contact with the ADA would not influence her verdict and that she could be a fair and impartial juror. The Court of Appeals commented that the trial court had the opportunity to see and hear the juror on voir dire and, having observed the juror's demeanor and made findings as to her credibility, to determine whether the juror can be

fair and impartial. For this reason, among others, it is within the trial court's discretion based on its observation and sound judgment to determine whether a juror can be fair and impartial. 341 N.C. App. at 673. In this instance, there was no abuse of discretion in deciding not to replace the juror.

17. The jury began deliberations in a drug case on Wednesday and the Court recessed until Friday because of Veteran's Day. On Friday morning a juror returned to court with a two page typewritten document titled "Circumstantial Evidence" that listed fourteen circumstantial factors pointing toward the defendant's guilt. The juror gave the document to the bailiff and asked him to make copies to distribute to the other jurors. The bailiff gave the document to the trial judge. Defense counsel moved for an inquiry and a mistrial. The trial court denied both motions and returned the document to the juror without making copies. Did the trial court err?

NO. The trial court did not find that the juror had violated any order of the court. There was no implication that he continued deliberating with other jurors during the Court's recess or that he made any inquiry or investigation of his own concerning the case. On these facts, the Court of Appeals concluded in State v. Harris, 145 N.C. App. 570, 551 S.E.2d 499 (2001) that it was in the trial court's discretion whether to conduct an inquiry with the juror who prepared the notes. The Court of Appeals did "concede that a better course of action might have been for the trial court to have conducted a voir dire of the juror. 145 N.C. App. at 578. Since the document was a collection of the juror's own thoughts and his recollection of the evidence presented in the case, there was no substantial or irreparable harm to the defendant's case and the denial of the motion for a mistrial was not an abuse of discretion.

18. In a will caveat proceeding, the jurors consulted a dictionary concerning the definition of "undue influence" and the jury returned as its verdict that the will was not procured by the exercise of undue influence over the testator. The caveators procured eight affidavits from jurors that confirmed that the dictionary was brought into the jury room, read to the jury and studied individually by certain jurors. Are jurors permitted to consult dictionaries or other reference materials of common usage during their deliberations?

NO. It is generally ground for reversal that the jury obtained and took into the jury room a dictionary, which they consulted to determine the meaning of legal or other terms, which they do not understand. In re Will of Hall, 252 N.C. 70, at 87, 113 S.E.2d 1 (1960). In Hall the error was deemed not to be prejudicial since the dictionary definition was more favorable to the caveators than the Court's jury instructions.

19. During the sentencing phase of a capital murder trial, a juror took a Bible into the jury room and read passages from the Old Testament concerning the death penalty to the other jurors and the jurors discussed those passages in their deliberations. The jury then returned a death sentence. On a Motion for Appropriate Relief, the defendant establishes that this occurred by testimony from jurors. Is the defendant entitled to a new trial?

There is no North Carolina case directly on point. In State v. Barnes, 345 N.C. App. 184, 481 S.E.2d 44 (1997), the Supreme Court concluded that the trial court did not abuse its discretion in failing to conduct an inquiry or to declare a mistrial based on an attorney's mere assertion that a juror read a Bible in the jury room prior to the commencement of deliberations and when there was no indication that the Bible reading was in any way directed to the facts or governing law at issue in the case. In this hypothetical, the Bible reading occurred during deliberations and the passages read pertained to the issue of what sentence was appropriate. Courts in other jurisdictions have reached differing conclusions in this situation. See Birch v. Corcoran, 273 F. 3d 577 (4th Cir. 2001) (no improper jury communication); Jones v. Kemp, 706 F. Supp. 1534 (N.D. Ga.) (error); McNair v. State, 706 So.2d 828 (Ala. Crim. App. 1997) (no prejudice); People v. Mincey, 2 Cal. Rptr. 4th 408 (1992) (no error); People v. Harlan, 109 P.3d 616 (Colo. 2005) (death sentence vacated); Jones v. Francis, 252 Ga. 60, 312 S.E.2d 300 (Ga. 1984) (harmless error); Grooms v. Commonwealth, 756 S.W.2d 131 (Kent. 1988) (concurring opinion, error); State v. Harrington, 627 S.W.2d 345 (Tenn. 1981) (error); .

20. A juror informed the court that she had received telephone calls the previous evening from an alternate juror. When the alternate juror was questioned, he informed the court that one of the bailiffs made comments after a defense expert testified to the effect that, "They can pay somebody enough money to say something was wrong with it" and "some of the people who testified for the defense were paid to say what—were here to say because they were paid." The alternate juror indicated that about half the jurors were present when a bailiff made these remarks. Three jurors verified hearing these remarks. When the jurors who heard this bailiff's remarks were questioned, each juror indicated he or she was not influenced by the comments and could make a fair and impartial decision after the presentation of all the evidence. Could the trial court properly rely on the affected jurors' assurances that they could be fair and impartial and deny the defendant's motion for a mistrial?

YES. When the contention is made by the defendant that the jury has been improperly influenced, it must be shown that the jury was actually prejudiced against the defendant, before the defendant is entitled to relief from the verdict and the findings of the trial judge, upon evidence and facts, are conclusive and not reviewable. State v. Lippard 152 N.C. App. 564, 574, 568 S.E.2d 657 (2002) (citing State v. Bonney, 329 N.C. App. 61, 83, 405 S.E.2d 145, 58 (1991)). In Lippard, the Court of Appeals concluded that the trial court examined the jurors about the alleged misconduct and found as a fact that there was no evidence to support the defendant's allegation of prejudice to his case. 152 N.C. App. at 575. The trial court's findings of fact in Lippard were deemed to be supported by substantial evidence and, in turn, supported the conclusions of law and the subsequent denial of a motion for mistrial. Id.

21. A juror indicated in voir dire that he knew one of the State's witnesses and informed defense counsel that he had not worked with the witness in question on any law enforcement related matters. Later, the defendant learned that the juror was an active member of the Board of Directors of the local Crimestoppers organization and may have known the State's witness in that capacity. Does this evidence justify granting a new trial?

NO. A party moving for a new trial grounded upon misrepresentation by a juror during voir dire must show (1) the juror concealed material information during voir dire; (2) the moving party exercised due diligence during voir dire to uncover the information; and, (3) the juror demonstrated actual bias or bias implied as a matter of law that prejudiced the moving party. State v. Buckom, 126 N.C. App. 368, 380-381, 485 S.E.2d 319 (1997). The presence of bias implied as a matter of law may be determined from examination of the totality of the circumstances and includes (1) the nature of the juror's misrepresentation, including whether a reasonable juror in the same or similar circumstances could or might reasonably have responded as did the juror in question, (2) the conduct of the juror, including whether the misrepresentation was intentional or inadvertent, and (3) whether the defendant would have been entitled to a challenge for cause had the misrepresentation not been made. Id.126 N.C. App. at 382. In this case, the juror's conduct was not so egregious as to establish either actual bias or bias implied as a matter of law.

The case law seems to indicate a series of principles or best practices.

1) There is a duty to investigate or inquire into substantial allegations of juror misconduct.

2) The better practice is to inquire of the witnesses to the misconduct, including jurors.

3) The trial court should find facts on the record based on the results of the inquiry.

4) The trial court should give appropriate curative instructions tailored to the misconduct, if any is established.

5) The trial court should remove tainted jurors to eliminate prejudice, provided jury deliberations have not begun.

6) If the impact of the misconduct cannot be cured by curative instructions and the removal of tainted jurors, then a mistrial is in order.