Jury Instructions
Advanced Criminal Procedure
North Carolina Judicial College
Justice Paul M. Newby
May 8, 2014[1]

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[1] Special thanks to my law clerk Will Robinson and my intern Emily Seawell from Elon University School of Law for providing valuable assistance in developing this manuscript and accompanying presentation.

An Opening Thought on the Role of the Jury

Printed in the *New York Times*, January 1, 2012

Jury Nullification

To the Editor:

Re "Jurors Need to Know That They Can Say No," by Paul Butler (Op-Ed, Dec. 21):
It is deeply ironic that federal prosecutors have obtained an indictment of an American citizen, Julian P. Heicklen, for distributing brochures outside the United States Courthouse in Manhattan saying that jurors may disregard the law if they disagree with it and for encouraging them to render their verdicts according to conscience.

For the generation that made the American Revolution, trial by jury was prized precisely because the jury could protect a defendant from an overreaching government. At the trial of John Peter Zenger in colonial New York in 1735, the defense counsel reminded the jury that they had "the right beyond all dispute to determine both the law and the fact." And they did just that, acquitting Zenger of seditious libel for printing the truth about the government, for which they got three huzzahs from the crowded courtroom.

It never occurred to me that teaching my students about this landmark case in the struggle for a free press could possibly be considered criminal.

JOHN V. ORTH
Chapel Hill, N.C., Dec. 29, 2011
The writer is a professor of law at the University of North Carolina.

Indictment and Jury Instructions

N.C.P.I.--Crim. 207.45 Sexual Offense with a Child

N.C.P.I.--Crim. 207.45.1 First Degree Sexual Offense—Child Under the Age of Thirteen Years

***State v. Pizano-Trejo*, 723 S.E.2d 583 (N.C. Ct. App. 2012) (unpublished), *aff'd per curiam by an equally divided court*, __ N.C. __, 748 S.E.2d 144 (2013)**

Defendant was indicted, *inter alia*, for first-degree statutory sexual offense, N.C.G.S. § 14-27.4(a)(1). The trial court, however, erroneously instructed the jury on the charge of sexual offense with a child, N.C.G.S. § 14-27.4A. The jury found the defendant guilty. N.C.G.S. § 14-27(a)(1) is a lesser included offense of N.C.G.S. § 14-27.4A. *See* N.C.G.S. § 14-27.4A(d).

The Court of Appeals vacated the conviction, holding that "the trial court's failure to charge the jury on the elements of first degree sex offense, the offense listed in the indictment, amounts to a dismissal of the charge." *See State v. Williams*, 318 N.C. 624, 350 S.E.2d 353 (1986). The Court of Appeals opinion was affirmed by an equally divided Supreme Court and thus holds no precedential value. *State v. Pizano-Trejo*, __ N.C. __, 748 S.E.2d 144 (2013).

***State v. McDaris*, No. COA12-476, 2012 WL 6590460 (Dec. 18, 2012) (unpublished), *aff'd per curiam*, 748 S.E.2d 144 (N.C. 2013)**

The statutory rape indictments in defendant's case stated the victim was fifteen years at the time of the alleged incidents. In its charge, the trial court instructed the jury that it could convict defendant if the jury found the victim was either fourteen or fifteen years old. The Court of Appeals found no error in the variance between the indictment and instructions. In cases involving allegations of child sex abuse, temporal specificity requirements are diminished, and even more so in cases where the alleged incidents of child sex abuse occurred years earlier. Additionally, the variance did not deprive defendant of the opportunity to adequately defend himself against the charges.

Manufacturing Methamphetamine: *State v. Hinson*, 203 N.C. App. 172 (Steelman, J. dissenting), *rev'd per curiam for the reasons stated in the dissent*, 364 N.C. 414 (2010)

There was no error in the trial court's jury charge when the court's instructions contained slightly different words than those found in the indictment which alleged defendant manufactured methamphetamine by "chemically combining and synthesizing precursor chemicals."

Weapons: *State v. Bollinger*, 192 N.C. App. 241 (2008), *aff'd per curiam*, 363 N.C. 251 (2009)

In a concealed weapon case, the trial court did not commit plain error when its instructions to the jury referred to "one or more knives" and the indictment referred to "a Metallic set of Knuckles." The Court of Appeals held that the discrepancy in the instructions "was inadvertent and did not affect the burden of proof required of the State or constitute a substantial change or variance from the indictment," and there was "no reasonable possibility that a different result would have been reached had the trial court's error not been committed."

Specificity of Instructions

Protective Order: *State v. Byrd*, 185 N.C. App. 597 (2007), *rev'd on other grounds*, 363 N.C. 214 (2009)

In a case involving violation of a valid domestic violence protective order, the trial judge did not err in instructing the jury that the State was required to prove the elements of the crime but omitted from the instruction that the defendant must have violated an order entered pursuant to Chapter 50B of the North Carolina General Statutes. Where defendant conceded that he was aware of the temporary restraining order but not its legal impact, his mistake of law was no defense to criminal prosecution, and thus the Court of Appeals found no error in the trial court's instruction.

Indecent Liberties with a Child: *State v. Smith*, 362 N.C. 583 (2008)

Where defendant faced charges of sexual offense and indecent liberties with a child, the trial court did not commit plain error by failing to specifically identify the acts underlying the indecent liberties charge. The trial court instructed the jury according to the pattern instruction for indecent liberties, and all evidence offered at trial was sufficient to support a conviction.

Willfulness: *State v. Ramos*, 363 N.C. 352 (2009)

In a case involving a terminated employee who damaged a computer system at her former office, the trial judge committed prejudicial error by failing to instruct the jury on the willfulness element of the offense. The statutory language requires that a defendant act "willfully and without authorization." The trial court denied defendant's explicit request to include the word "willfully" in the jury instruction, and instead instructed the jury that defendant must have acted simply "without authorization."

Felony murder: *State v. Bunch*, 363 N.C. 841 (2010)

Where defendant was charged with felony murder, the trial court committed harmless error when it failed to give an explicit instruction requiring the jury to find beyond a reasonable doubt that defendant was the killer or that defendant's acts proximately caused the victim's death. In the context of the entire charge, encompassing both felony murder and premeditated murder, the trial court informed the jury of the elements of felony murder, and it additionally instructed the jury on the underlying felonies of burglary and robbery with a dangerous weapon. The evidence was overwhelming that defendant caused the victim's death. Thus, there was no reasonable possibility of a different outcome had the instructions been complete.

Lesser Included Offenses

> [D]ue process requires an instruction on a lesser-included offense only 'if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.'
>
> *State v. Conaway*, 339 N.C. 487, 514, *cert. denied,* 516 U.S. 884 (1995) (quoting *Beck v. Alabama*, 447 U.S. 625, 634 (1980))

> In determining whether the evidence is sufficient to support the submission of the issue of a defendant's guilt of a lesser included offense to the jury, courts must consider the evidence in the light most favorable to the defendant.
>
> *State v. Debiase*, 211 N.C. App. 497, 504, *disc. review denied*, 365 N.C. 335 (2011)

The well-established rule for submission of second-degree murder as

> a lesser-included offense of first-degree murder is: 'If the evidence is sufficient to fully satisfy the State's burden of proving each and every element of the offense of murder in the first degree, including premeditation and deliberation, and there is no evidence to negate these elements other than defendant's denial that he committed the offense, the trial judge should properly exclude from jury consideration the possibility of a conviction of second degree murder.'
>
> *State v. Locklear*, 363 N.C. 438, 454–55(2009) (quoting *State v. Strickland*, 307 N.C. 274, 293 (1983), *overruled in part on other grounds* by *State v. Johnson*, 317 N.C. 193, (1986))

***State v. Broom*, 736 S.E.2d 802 (N.C. Ct. App.), *disc. rev. denied*, 739 S.E.2d 853 (N.C. 2013)**

Defendant was convicted, *inter alia*, of first-degree murder of his daughter who was born prematurely and died as a result of defendant's shooting the girl's then-pregnant mother. On appeal, defendant contended the trial court erred in denying his request for an instruction on second-degree murder.

The Court of Appeals noted the substantial evidence offered by the State to support the finding of premeditation. This included defendant's strong desire not to have a second child; defendant's deliberate efforts to put the mother's cell phone out of reach prior to the shooting; defendant's exit from and subsequent return to the room after which he approached the mother with a pistol and shot her in the abdomen; defendant's refusal to call for medical assistance for twelve hours afterward. In contrast to the State's evidence, defendant provided no evidence to support his claim that the mother shot herself. Accordingly, defendant was not entitled to an instruction on the lesser offense of second-degree murder.

***State v. Stokes*, No. 94PA13–2, 2014 WL 1477990 (N.C. Apr. 11, 2014)**

Defendant was convicted of, *inter alia*, second-degree kidnapping. The jury did not consider a charge of attempted second-degree kidnapping. The Court of Appeals reversed defendant's conviction, concluding that the State failed to introduce sufficient evidence of removal, an essential element of second-degree kidnapping. The Court of Appeals saw no basis for considering whether defendant's actions satisfied the elements of attempted second-degree kidnapping because the State did not attempt to prove it at trial nor argue it on appeal. The Supreme Court of North Carolina reversed the Court of Appeals, acknowledging the long-standing practice of appellate courts to determine whether the evidence presented was sufficient to support a lesser included offense of the convicted crime. Having

identified sufficient evidence to satisfy the elements of attempted second-degree kidnapping, the Court remanded for entry of judgment on the lesser offense.

Attempted First-Degree Sexual Offense: *State v. Carter*, 366 N.C. 496 (2013)

The victim testified to numerous encounters of anal penetration, but used various prepositions to describe the acts (e.g. "on," "in," and "between"). The trial court did not commit plain error in failing to provide a jury instruction on the lesser offense of attempted first-degree sexual offense when there was sufficient evidence to support the jury's guilty verdict on the completed offense.

***State v. Gwynn*, 362 N.C. 334 (2008)**

In a case involving robbery with a dangerous weapon and first-degree felony murder, the trial court did not err by failing to instruct the jury on second-degree murder as a lesser included offense: "[W]hen the State proceeds on a theory of felony murder only, the trial court should not instruct on lesser-included offenses if the evidence as to the underlying felony supporting felony murder is not in conflict and all the evidence supports felony murder[.] . . . [I]n the instant case, the State proceeded on a theory of felony murder only, relying on robbery with a dangerous weapon as the underlying felony."

Special Verdict Considerations

> "A special verdict is a common law procedural device by which the jury may answer specific questions posed by the trial judge that are separate and distinct from the general verdict. Despite the fact that the General Statutes do not specifically authorize the use of special verdicts in criminal trials, it is well-settled under our common law that special verdicts are permissible in criminal cases.
>
> Special verdicts, however, are subject to certain limitations. After the United States Supreme Court decision in *United States v. Gaudin*, a special verdict in a criminal case must not be a 'true' special verdict-one by which the jury only makes findings on the factual components of the essential elements alone-as this practice violates a criminal defendant's Sixth Amendment right to a jury trial. 515 U.S. 506, 511–15, 115 S. Ct. 2310, 132 L.Ed.2d 444 (1995). . . . Furthermore, requests for criminal special verdicts must require the jury to arrive at its decision using a 'beyond a reasonable doubt' standard, since a lesser standard such as 'preponderance of the evidence' would violate a defendant's right to a jury trial. Aside from these limitations,

> however, we are aware of no limits on our trial courts' broad discretion to utilize special verdicts in criminal cases when appropriate."
>
> *State v. Blackwell,* 361 N.C. 41, 46–47, 638 S.E.2d 452, 456–57 (2006) (citations, quotation marks, and brackets omitted), *cert. denied,* 550 U.S. 948, 127 S. Ct. 2281, 167 L. Ed. 2d 1114 (2007)

***State v. Williams*, 741 S.E.2d 9 (N.C. Ct. App. 2013)**

Defendant was charged with stalking. The alleged conduct constituting the offense spanned several months during which time the stalking statute, N.C.G.S. § 14-277.3 (2007), was repealed and replaced by N.C.G.S. § 14-277.3A (2009). The trial court instructed the jury on the crime of stalking under the new statute but it was unclear what, if any, criminal acts occurred after the enactment date of the new statute. Citing due process concerns related to the jury instruction, the Court of Appeals ordered a new trial. The Court commented that a special verdict would have been particularly apt for resolving issues relating to the timing of the alleged criminal conduct in this case. The Court also observed that trial courts had been instructed previously to use special verdicts to have the jury explicitly determine a special issue of fact necessary for conviction, such as the location of the offense when jurisdiction is contested.

Self-Defense

> Furthermore, self-defense is justified only if the defendant was not the aggressor. Justification for defensive force is not present if the person who used defensive force voluntarily entered into the fight or, in other words, initially provoked the use of force against [himself] [herself].
>
> N.C.P.I.--Crim. 308.45

The Aggressor Doctrine: *State v. Vaughn*, 742 S.E.2d 276 (N.C. Ct. App.), *disc. rev. denied*, 747 S.E.2d 526 (N.C. 2013)

Defendant and her friend went out to a club with the friend's boyfriend. In the club's parking lot, the boyfriend argued with defendant and started beating her. Defendant retreated to her car. The boyfriend began shoving the friend away from the area. Angry at the boyfriend and concerned for her friend, defendant grabbed a knife and got back out of the car but could not see where the boyfriend had gone. The boyfriend charged at her, she stabbed him, and he punched her. The boyfriend suffered permanent physical injuries.

Defendant was charged and convicted of assault with a deadly weapon with intent to kill, inflicting serious injury. The jury was instructed on self-defense, including the rule that self-defense is justified only if the defendant is not the aggressor. Defendant appealed, arguing there was no evidence to suggest she was the aggressor. The Court of Appeals agreed, holding that defendant's decision to arm herself and leave the vehicle was not, in and of itself, evidence that she brought on the difficulty, aggressively or willingly entered the fight, or intended to continue the altercation. There was no evidence that defendant believed the boyfriend was still near her car or that she was preparing to continue the confrontation. According to the evidence, the boyfriend was fighting with the friend when defendant got out of her car. The Court also noted other instances in case law where defendants had armed themselves in anticipation of potential confrontation but were not aggressors.

Imperfect Self-Defense: *State v. Cruz*, 203 N.C. App. 230, *aff'd per curiam*, 364 N.C. 417 (2010)

The trial court did not err in refusing to instruct the jury on imperfect self-defense because there was no evidence that Defendant believed it necessary to kill the victim in order to save himself from death or great bodily harm.

"An instruction on imperfect self-defense should be given where a defendant 'reasonably believes it necessary to kill the deceased to save himself from death or great bodily harm even if defendant (1) might have brought on the difficulty, provided he did so without murderous intent, and (2) might have used excessive force.' " *State v. Cruz*, 203 N.C. App. 230, 236 (2010) (quoting *State v. Mize,* 316 N.C. 48, 52 (1986).

Defense of Others: *State v. Moore*, 363 N.C. 793 (2010)

In a voluntary manslaughter case, the trial court committed reversible error by denying defendant's request to instruct the jury on self-defense and defense of a family member, instead explicitly instructing the jury not to consider those defenses in its deliberations. The evidence, when viewed in the light most favorable to defendant, showed that as the victim attempted to rob defendant's wife at their family produce stand, defendant's wife called out for defendant, who told the victim to back off. The victim then re-approached defendant's wife while slowly pulling his hand out of his pocket, and defendant shot him one time, believing the victim to be reaching for a weapon. Defendant testified that he feared for himself, his wife, and his grandson, and "wasn't going to wait to see no gun." The Supreme Court held that

the evidence was sufficient to show that defendant believed it was necessary to use force to prevent death or great bodily injury to himself or a family member.

Flight

> The State contends (and the defendant denies) that the defendant fled. Evidence of flight may be considered by you together with all other facts and circumstances in this case in determining whether the combined circumstances amount to an admission or show a consciousness of guilt. However, proof of this circumstance is not sufficient, in itself, to establish defendant's guilt.
>
> N.C.P.I.--Crim. 104.35

***State v. Davis*, 738 S.E.2d 417 (N.C. Ct. App. 2013)**

Defendant was from Florida but was visiting his aunt in North Carolina. He got involved in an altercation in which he shot and killed the victim. Defendant was found three months later in Florida. At defendant's trial, the State presented evidence showing that defendant left the state within hours of the shooting. Accordingly, the trial court instructed the jury on flight. On appeal following his conviction, defendant alleged the trial court erred in instructing the jury on flight because his presence in his home state of Florida did not indicate he was avoiding apprehension.

The Court of Appeals disagreed. "Mere evidence that defendant left the scene of the crime is not enough to support an instruction on flight. There must also be some evidence that defendant took steps to avoid apprehension." *State v. Blakeney*, 352 N.C. 287 (2000). "An action not part of defendant's normal pattern of behavior . . . could be viewed as a step to avoid apprehension." *State v. Hope*, 189 N.C. App. 309, 319 (2008) (quotations and citation omitted). The COA noted defendant had been residing with his aunt but did not return to her house after the shooting. Given that the shooting occurred at 2:30 am, defendant's decision to return immediately to Florida at such "an early and unusual hour [was] an action outside his likely normal pattern of behavior." Thus, the trial court did not err in instructing the jury on flight.

Joint Defendants

> This Court has often found reversible error where two or more defendants are tried together for the same offense upon jury instructions susceptible to the construction that the jury should convict all of the defendants if they find beyond a reasonable doubt that any of the defendants committed the offense charged.
>
> *State v. McCollum,* 321 N.C. 557, 559-60 (1988)

***State v. Adams*, 212 N.C. App. 413 (2011)**

In an attempted murder and assault case, the trial court instructed the jury, in relevant part, as follows.

> On attempted first-degree murder:
> The defendants have been charged with attempted first-degree murder. *For you to find the defendants guilty of this offense*, the State must prove two things beyond a reasonable doubt: First, that each of the defendants intended to commit first-degree murder . . . . And, second, that at the time each of the defendants had this intent they performed an act which was calculated and designed to accomplish the crime but which fell short of the completed crime.
>
> On self-defense:
> *The defendants would not be guilty of attempted first degree* murder on the grounds of self-defense if: First, it appeared to each of the defendants that they believed it to be necessary to use potentially deadly force against the victims in order to save themselves from death or great bodily harm. Second, the circumstances as they appeared to each of the defendants at the time were sufficient to create such a belief.
>
> . . .
>
> On assault with a deadly weapon with intent to kill inflicting serious injury:
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date *the defendants intentionally shot* the victims repeatedly with a handgun or attempted to shoot the victims repeatedly with a handgun and that the gun or guns was or were deadly weapons and that each of the defendants intended to kill the victims and did seriously injure them or attempt to seriously injure

them, nothing else appearing, it would be your duty to return verdicts of guilty.

The jury found both defendants guilty of all charges. The Court of Appeals ordered a new trial, holding that "the jury instructions . . . impermissibly grouped defendants together in presenting the charges, the issues, and defendants to the jury," which "likely had an effect on the jury's verdict." *State v. Adams*, 212 N.C. App. 413, 418 (2011). The court found that "the same type of lumping together of defendants and charges" occurred in this case as in *State v. Lockamy*, which held that "the trial judge must either give a separate final mandate as to each defendant or otherwise clearly instruct the jury that the guilt or innocence of one defendant is not dependent upon the guilt or innocence of a codefendant." *Adams*, 212 N.C. App. at 417; *State v. Lockamy*, 31 N.C. App. 713, 715 (1976).

Jury Unanimity

Child Sex Abuse Cases*: State v. Lawrence*, 360 N.C. 368, 374 (2006)

Defendant was convicted, *inter alia*, of five counts of statutory rape and three counts of indecent liberties with a minor. The short-form indictments for each alleged crime were identically worded and lack specific details distinguishing one particular incident of a crime from another. The jury heard testimony regarding three encounters that constituted indecent liberties and five specific instances of statutory rape. Despite the lack of specificity in the indictments, the Supreme Court of North Carolina held that defendant was unanimously convicted of all counts. "[W]hile one juror might have found some incidents of misconduct and another juror might have found different incidents of misconduct, the jury as a whole found that improper sexual conduct occurred."

Partial Verdict on Theory of First-Degree Murder: *State v. Sargeant*, 206 N.C. App. 1 (2010), *modified and aff'd*, 365 N.C. 58 (2011)

The Court of Appeals held that it was error for the trial court to receive the jury's verdict sheets for first-degree murder on the bases of both felony murder and lying in wait at the end of the first day of deliberation and then receive the jury verdict on first-degree murder on the basis of premeditation and deliberation the following day. "We hold that a trial court may not take partial verdicts as to theories of a crime." The Supreme Court of North Carolina affirmed the grant of a new trial on other grounds but noted, "[W]e agree with the Court of Appeals majority that the [jury verdict] procedure was erroneous." *State v. Sargeant*, 365 N.C. 58, 62 (2011).

"Removal" As an Element of Kidnapping: *State v. Boyd*, 214 N.C. App. 294 (2011)

The Court of Appeals held where the victim was moved a short distance of several feet and was not transported from one room to another within her apartment, the victim was not "removed" within the meaning of our kidnapping statute. Because the jury was instructed it could convict defendant of kidnapping if it found he "confined or restrained or removed a person," and there was no evidence for removal, defendant's right to a unanimous jury verdict was violated.

Conversation with Jury Foreperson: *State v. Wilson*, 363 N.C. 478 (2009)

In an armed robbery and conspiracy case, the trial judge committed plain error by instructing the jury foreperson separately from the other members of the jury. After the jury began deliberations, the jurors sent a note saying that there was "an issue" with the foreperson, apparently that he "already ha[d] [his] mind made up." The trial judge obtained approval from counsel for both parties to call the foreperson into the courtroom, where the trial judge then conducted two unrecorded bench conferences with the foreperson and counsel for both parties. Following those conferences, the trial judge called the other eleven jurors back into the courtroom and reinstructed the jury on its duty to "deliberate with a view toward reaching an agreement." The trial judge then sent the other eleven jurors back to the jury room, with instructions not to begin deliberations, and conducted a third unrecorded bench conference with the jury foreperson and counsel for both parties. Following the third unrecorded conference, the trial judge called the full jury back into the courtroom and instructed all twelve jurors to return to the jury room and begin deliberations. Defendant did not object to the separate instruction at trial but appealed based on his constitutional right to a unanimous verdict. The Supreme Court held that because the record did "not disclose the substance of the trial court's unrecorded bench conferences with the foreperson," nor were the conversations adequately reconstructed, the State failed to meet its burden of showing that the error was harmless beyond a reasonable doubt.

Territorial Jurisdiction

***State v. Tucker*, 743 S.E.2d 55 (N.C. Ct. App. 2013), *disc. rev. denied*, 753 S.E.2d 782 (N.C. 2014)**

Defendant was hired by a moving company headquartered in Greensboro to work as a long-distance truck driver. He delivered a load to Nevada, received a cash payment from the customer, then drove to Arizona. Three months later, defendant stopped working for the long-haul company but never remitted the cash payment. The State subsequently charged defendant with embezzlement. Defendant unsuccessfully moved to dismiss the embezzlement charge on the ground that North Carolina lacked territorial jurisdiction. The jury found defendant guilty of embezzlement, and he appealed.

At the Court of Appeals, defendant argued that the trial court lacked jurisdiction because the embezzlement acts occurred outside of the state. Defendant further claimed that the trial court erred in failing to instruct the jury on the territorial jurisdiction issue. In support he cited *State v. Rick*, 342 N.C. 91 (1995) which held where facts forming the basis for jurisdiction are contested, the trial court must instruct the jury regarding the State's burden and must require the jury to return a special verdict on jurisdiction if the jury is not satisfied that jurisdiction is established.

The Court of Appeals disagreed with defendant, observing where a defendant's challenge is to the theory of jurisdiction, not the factual basis for jurisdiction, the trial court is not required to give jurisdiction instructions. Here, the facts regarding defendant's embezzlement were not in dispute. Rather, defendant challenged the elements necessary to prove embezzlement. Accordingly, the Court of Appeals affirmed the trial court.

Instructions on Viewing Transcripts

> If the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence. In his discretion the judge may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.
>
> N.C.G.S. § 15A-1233(a)

> The usual method of reviewing testimony before a transcript has been prepared is to let the court reporter read to the jury his or her notes

> under the supervision of the trial court and in the presence of all parties.
>
> *State v. Ashe*, 314 N.C. 28, 35 n.6 (1985)

***State v. Haqq*, No. COA13-813, 2014 WL 859562 (N.C. Ct. App. Mar 4, 2014)**

Defendant was convicted of several drug related offenses. At trial after the jury was impaneled, the trial court instructed the jurors to rely upon their own memories of the evidence because they would be unable to view video or transcripts of any witness during the trial. Defendant's sole argument on appeal was that the trial court erred in making this statement under N.C.G.S. § 15A-1233(a).

The Court of Appeals agreed with defendant that the trial court erred under the statute, based on *State v. Ashe*. Nevertheless, in this instance, defendant did not demonstrate that the trial court's error was prejudicial.

***State v. Starr*, 365 N.C. 314 (2011)**

Defendant appealed his conviction on the basis that the trial court violated N.C.G.S. § 15A-1233(a). During its deliberations the jury requested the testimony of one of the witnesses. The trial court instructed the jury, "In North Carolina we don't have the capability of real-time transcripts so we cannot provide you with that. You are to rely on your recollection of the evidence that you have heard in your deliberations. That's my instruction to you. Okay. Thank you."

The Supreme Court of North Carolina held that the trial court's statement violated the statute because in this instance the record clearly indicated that the trial court failed to exercise its discretion. "A trial court's statement that it is unable to provide the transcript to the jury demonstrates the court's apparent belief that it lacks the discretion to comply with the request."

The Court went on to provide guidance to trial court judges with regards to section 15A-1233, noting, "[T]he trial court is not required to state a reason for denying access to the transcript. The trial judge may simply say, 'In the exercise of my discretion, I deny the request,' and instruct the jury to rely on its recollection of the trial testimony."

Acting in Concert and the Aggravating Factor of "more than one other person"

> Aggravating Factors. – The following are aggravating factors: . . . (2)The defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy.
>
> N.C.G.S. § 15A-1340.16 d(2)

> Evidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation, and the same item of evidence shall not be used to prove more than one factor in aggravation.
>
> N.C.G.S. § 15A-1340.16(d)

> For a person to be guilty of a crime, it is not necessary that he personally do all of the acts necessary to constitute the crime. If two or more persons join in a common purpose to commit (*name crime*), each of them, if actually or constructively present, is (not only) guilty of that crime if the other person commits the crime . . .
>
> N.C.P.I.--Crim. 202.10

***State v. Facyson*, 743 S.E.2d 252 (N.C. Ct. App.), *disc. rev. allowed*, 748 S.E.2d 317 (N.C. 2013)**

The State's evidence tended to show that defendant was with at least two others in a car that was implicated in a drive-by shooting. The jury found defendant guilty of second-degree murder and further found the aggravating factor that defendant had joined with "more than one other person" in committing the offense. Defendant appealed his sentence in the aggravated range, arguing that the evidence necessary to support the underlying offense of second-degree murder, acting in concert, was the same evidence necessary to support the aggravating factor.

The COA agreed with defendant, noting that the trial court had instructed the jury as follows:

> [I]f you find from the evidence beyond a reasonable doubt that on or about the alleged date the [d]efendant, acting either by himself *or acting together with other persons*, intentionally and with malice wounded Jermaine Anthony Jackson with a deadly weapon, thereby proximately causing his death, it would be your duty to return a verdict of guilty of second-degree murder.

The jury verdict sheet did not indicate whether it found defendant guilty on the basis of his own actions or on a theory of acting on concert. Resolving this ambiguity in defendant's favor, the Court of Appeals concluded that the same evidence was used both to convict defendant of second-degree murder and to find the existence of the aggravating factor. **This case is currently on review with the Supreme Court of North Carolina.**

***State v. Person*, 187 N.C. App. 512 (2007) (Jackson, J., dissenting), *rev'd per curiam for the reasons stated in the dissent*, 362 N.C. 340 (2008)**

In a first-degree rape case in which the defendant acted in concert with someone else, the trial judge did not commit plain error where the pattern instruction on acting in concert exposed defendant to the possibility of being twice convicted for the same conduct. A harmless error analysis was appropriate on appeal, and there was overwhelming evidence that defendant was guilty of both charges.

Use of the Term "Victim" In Jury Instructions

> The judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury.
>
> N.C.G.S. § 15A-1222

> In instructing the jury, the judge shall not express an opinion as to whether or not a fact has been proved and shall not be required to state, summarize or recapitulate the evidence, or to explain the application of the law to the evidence.
>
> N.C.G.S. § 15A-1232

***State v. Walston*, 747 S.E.2d 720 (N.C. Ct. App.), *disc. rev. allowed*, 753 S.E.2d 666 (N.C. 2013)**

Defendant was indicted in 2009 for offenses involving two sisters, allegedly occurring between June 1988 to October 1989. The evidence at trial consisted almost entirely of the testimony of the girls and defendant's testimony of events which happened twenty years prior. Defendant requested the trial court modify the pattern jury instructions by asserting "alleged victim" in the place of "victim." Defendant was convicted and appealed. On appeal, defendant argued the trial court erred in using the word "victim" in the pattern instructions given to the jury. The Court of Appeals agreed and order a new trial. The Court of Appeals held that "[t]he

issue of whether sexual offenses occurred and whether E.C. and J.C. were 'victims' were issues of fact for the jury to decide." **This case is currently on review with the Supreme Court of North Carolina.**

Reasonable Doubt

> A reasonable doubt is a doubt based on reason and common sense arising out of some or all of the evidence that has been presented, or lack or insufficiency of the evidence as the case may be. Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of the defendant's guilt.
>
> N.C.P.I.--Crim. 101.10

***State v. Eddings*, 754 S.E.2d 257 (N.C. Ct. App.) (unpublished), *rev. denied*, __ N.C. __ (2014)**

In a cocaine trafficking and possession case, the trial court delivered the pattern jury instruction on reasonable doubt. After eighty or ninety minutes of deliberation, the jury sent a note asking what would happen if it failed to reach a verdict. The jury was called back into the courtroom. One of the jurors asked the trial judge to "explain reasonable doubt again," to which the judge responded:

> It's a doubt based on reason and common sense arising out of some or all of the evidence or the lack or insufficiency of the evidence, whichever the case may be, and you are to use your common sense and your reason to come to a decision. It's not absolute.

The same juror asked, "No hundred percent?" The judge responded, "No hundred percent." The court then offered to send back the definition of reasonable doubt to the jury room, and stated, "If you're thinking that reasonable doubt is that you absolutely know that something happened, that is not reasonable doubt. It's not a certain thing, but you should have enough evidence to say that or that you can infer from that this happened or that happened."

Defense objected to the instruction. The trial judge brought the jury back in and stated, "There was some concerns that I didn't read the whole definition of reasonable doubt to you, so I'm going to read it to you as it states in the jury instruction." The judge then reinstructed the jury using the pattern instruction. After fifteen more minutes of deliberation, the jury returned a guilty verdict.

On appeal, the Court of Appeals held that the trial court's instruction did not constitute reversible error under a harmless error analysis because the charge as a whole presented the law fairly and clearly to the jury and did not prejudice the defendant. *See State v. Hooks*, 353 N.C. 629, 635 (2001) ("If the charge presents the law fairly and clearly to the jury, the fact that some expressions, standing alone, might be considered erroneous will afford no ground for reversal." (internal quotation omitted)), *cert. denied*, *Hooks v. North Carolina*, 534 U.S. 1155 (2002).

Deadlocked Jury

> Before the jury retires for deliberation, the judge may give an instruction which informs the jury that:
>
> > (1) Jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
> >
> > (2) Each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;
> >
> > (3) In the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and
> >
> > (4) No juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.
>
> . . .
>
> If it appears to the judge that the jury has been unable to agree, the judge may require the jury to continue its deliberations and may give or repeat the instructions provided in subsections (a) or (b). The judge may not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.
>
> N.C.G.S. § 15A-1235(b)-(c)

State v. May, 749 S.E.2d 483 (N.C. Ct. App. 2013), _disc. rev. allowed_, 753 S.E.2d 663 (N.C. 2014)

In a statutory rape case, the trial judge instructed the jury three times: (1) before the jury began deliberations; (2) after the jury had deliberated for about two hours and sent a note saying that it was "deadlocked;" and (3) again after the jury had deliberated for an additional thirty minutes and sent a note saying that it

was "hopelessly deadlocked." After the "hopelessly deadlocked" note, the trial judge called the jury back into the courtroom and instructed it as follows:

> I'm going, in my discretion, I'm going to ask you to resume your deliberations for another half an hour. I'm not going to stretch it any farther than that, but I'm going to ask you to give it your best shot. And it's your choice, not mine, but I'm not going to hot bond you, and we're not going to make you to stay until 5 o'clock, but I'm going to ask you to go back and try again, remembering the instructions I gave you. And at 3:30 I'm going to ask you to come out, unless you've hit, hit the button and reached the decision prior to that. And that's your choice. I mean, I can't tell you what to do. I appreciate your note letting me know, but I'm going to ask you, since the people have so much invested in this, and we don't want to have to redo it again, but anyway, if we have to we will. That's not my call either. That doesn't belong to me.
>
> I'll just ask you to give us another half hour an hour [sic] and continue to deliberate with a view towards reaching an agreement if it can be done without violence to your individual judgment. As I said earlier, none of you should change your opinion if you, you know, if you feel like that's what your conscience dictates, you stick by it. So with that, I'm going to ask you to go back and continue.

Exactly thirty minutes later, the jury returned a guilty verdict on one count and failed to reach a verdict on the two remaining counts.

On appeal, the Court of Appeals held that the trial court's instruction constituted reversible error under a harmless error analysis for three reasons. First, the trial court "failed to include all the elements" of section 15A-1235(b) in its third charge. *See State v. Aikens*, 342 N.C. 567, 579 (1996) ("When[ ] a trial judge gives a deadlocked jury any of the instructions authorized by N.C.G.S. § 15A-1235(b), he must give them all."). Second, the trial court "included a statement regarding the expense and inconvenience associated with the trial and possible retrial." *See State v. Easterling*, 300 N.C. 594, 608 (1980) (holding that after the passage of section 15A-1235, "a North Carolina jury may no longer be advised of the potential expense and inconvenience of retrying the case should the jury fail to agree"). Third, the trial court "imposed a 30-minute time limit, which the jury was able to meet just in time to reach one guilty verdict." *See State v. Sutton*, 31 N.C. App. 697, 702 (1976) (stating that "the mere fact that a judge prescribes a time limit for the jury's decision does not amount to coercion where the jury does not actually

come to a decision within the general limits imposed by the judge"). **This case is currently on review with the Supreme Court of North Carolina.**

Jury Polling

> Upon the motion of any party made after a verdict has been returned and before the jury has dispersed, the jury must be polled. The judge may also upon his own motion require the polling of the jury. The poll may be conducted by the judge or by the clerk by asking each juror individually whether the verdict announced is his verdict. If upon the poll there is not unanimous concurrence, the jury must be directed to retire for further deliberations.
>
> N.C.G.S. § 15A-1238

***State v. Long*, 753 S.E. 2d 398 (N.C. Ct. App. 2013), *disc. rev. allowed,* 753 S.E.2d 669 (N.C. 2014)**

After the jury returned a guilty verdict, defendant requested the jury be polled as to the general guilty verdict pursuant to N.C.G.S. § 15A-1238. The clerk responded by polling each juror, individually, as to their guilty verdicts. Thereafter, the trial court polled the jurors, collectively, concerning the aggravating factors without objection from defendant. Before releasing the jury, the trial court asked counsel, "[a]nything further for the jury?" Defendant replied, "[n]o, Your Honor."

On appeal, defendant argued the trial court violated the statute by allowing the jury to raises its hands collectively in expressing its assent to the aggravating factors. The Court of Appeals concluded defendant had waived this issue on appeal because he failed to object to the trial court's method of polling during the trial. **This case is currently on review with the Supreme Court of North Carolina.**

Inconsistent Verdicts

***State v. Melvin*, 364 N.C. 589 (2010)**

In a case involving charges of first-degree murder and accessory to murder after the fact, the trial court did not commit plain error by failing to instruct the jury that it could convict defendant of either charge, but not both charges. The jury convicted defendant of both charges, and the trial court arrested judgment on the accessory after the fact conviction. Although the verdicts were mutually exclusive, the jury's verdict on first-degree murder "indicat[ed] its intent to hold defendant accountable to the fullest extent of the law," and thus the Supreme Court was "satisfied that the jury would have convicted defendant of the more serious offense

had it been required to choose between the two charges." The Court further stated that, "[i]n light of the overwhelming evidence of first-degree murder, we cannot conclude that a different result would have been probable if the trial court had given a proper instruction."

***State v. Mumford*, 364 N.C. 394 (2010)**

In a DWI case, the trial judge did not err by failing to specifically instruct the jury that to find defendant guilty of felony serious injury by vehicle, it must also find him guilty of DWI. The jury found defendant guilty of felony serious injury by vehicle but not guilty of DWI. The Supreme Court held that "[w]hile these verdicts are certainly inconsistent, they are not mutually exclusive," noting that the statute for felony serious injury by vehicle "does not require a *conviction* of driving while impaired . . . but only requires a finding that the defendant was engaged in the conduct described under either of these offenses." The trial court and Court of Appeals had both concluded that "there was sufficient evidence presented at trial the support defendant's convictions for serious injury by vehicle."