JURY DEADLOCK

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Contents

I. Generally. A criminal defendant has a right to be tried by a jury of twelve, whose verdict must be unanimous. G.S. 15A-1201(a); *see also* G.S. 15A-1237(b); N.C. CONST. art. I, § 24. A jury deadlock occurs when all twelve jurors cannot agree on a verdict. "In times long gone by, when a jury was unable to reach a verdict the trial court simply deprived the jurors of food, water, and fire until it reached a verdict. Today a more subtle approach is used to break a deadlocked jury." State v. Lamb, 44 N.C. App. 251, 253 (1979) (citation omitted). This section discusses the latter approach and procedures for dealing with a jury deadlock generally.

II. Instructions prior to Deliberations.

A. Mandatory Instruction. Before the jury retires for deliberations, the judge *must* give an instruction which informs the jury that in order to return a verdict, all twelve jurors must agree to a verdict of guilty or not guilty. G.S. 15A-1235(a). This required instruction has been incorporated into N.C.P.I.—Crim. 101.35.

B. Optional Instruction. Before the jury retires for deliberations, the judge *may* give an instruction informing the jury that:

- Jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
- Each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;
- In the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and
- No juror should surrender his 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.

G.S. 15A-1235(b).

III. When Jury Indicates It Cannot Agree.

A. How the Issue Arises. The trial judge typically learns about a potential jury deadlock when the jury sends a message to the judge, *see, e.g., State v. Blackwell*, 228 N.C. App. 439, 441 (2013) (jury sent a note), or when the judge checks in with the jury at the end of the day or at a natural break in the proceedings. State v. Phillpott, 213 N.C. App. 468, 475 (2011) (trial court inquired of jury at 5:15 pm).

B. The Judge's Response.

1. May Require Continued Deliberations. If the jury has been unable to agree, the judge simply may require the jury to continue its deliberations. G.S. 15A-1235(c). It is not error for the trial court to require continued deliberations without giving an *Allen* instruction (discussed immediately below). State v. Porter, 340 N.C. 320, 336 (1995) (no abuse of discretion to require the jury to continue deliberations without giving the instruction); State v. Summey, 228 N.C. App. 730, 739-42 (2013) (same as to judge's response to jury's first indication that it was having trouble reaching a verdict); State v. Ross, 207 N.C. App. 379, 389 (2010) (no abuse of discretion where the trial court did not give an *Allen* instruction the first and third time that the jury indicated it was deadlocked).

2. May Give Allen Instruction. If the jury has been unable to agree, the judge may give or repeat the mandatory and optional instructions specified in G.S. 15A-1235(a) and (b) (reproduced in Section II above). G.S. 15A-1235(c). The instruction in G.S. 15A-1235(b) commonly is referred to as an *Allen* instruction. *See, e.g., Ross*, 207 N.C. App. at 388; *see generally* Allen v. United States, 164 U.S. 492, 501–02 (1896) (approving of the use of jury instructions that encourage the jury to reach a verdict, if possible). North Carolina Criminal Pattern Jury Instruction 101.40 provides an alternative *Allen* instruction. North Carolina cases repeatedly have approved of this pattern instruction. State v. Gettys, 219 N.C. App. 93, 104-05 (2012) ("[T]he pattern jury instructions provide the substance of each of the guidelines contained in the statute."); State v. Walters, 209 N.C. App. 158, 165 (2011) (noting that the instructions in G.S. 15A-1235 and N.C.P.I.—Crim. 101.40 are "virtually identical"); State v. Price, 201 N.C. App. 153, 157 (2009) (approving of the pattern jury instruction even though, unlike G.S. 15A-1235, it instructs that the jury has a "duty to do whatever [it] can to reach a verdict").

When the trial judge opts to instruct the jury pursuant to G.S. 15A-1235(b), the trial judge must give the entire instruction. State v. Aikens, 342 N.C. 567, 579 (1996); State v. Williams, 315 N.C. 310, 327 (1986). However, a variance from the statutory advisements will not require a new trial if the judge's instruction contained the substance of the statute. *Aikens*, 342 N.C. at 579-80; *see also* State v. May, 368 N.C. 112 (2015) (citing *Aikens* and finding no error in trial judge's instructions that "substantially tracked the language of [G.S. 15A-1235(b)]"); *Williams*, 315 N.C. at 327-28 ("We have recognized that every variance from the procedures set forth in the statute does not require the granting of a new trial." (quotation omitted)). As the court of appeals has put it: "[T]he instructions contained in the statute are 'guidelines' and need not be

given verbatim." State v. Gettys, 219 N.C. App. 93, 103 (2012); *see also* State v. Garrett, 277 N.C. App. 493, 502 (2021) (trial judge's instructions properly communicated "all of the core ideas" of G.S. 15A-1235(b));State v. Harris, 235 N.C. App. 322, 336 (2017) (noting that statutory instructions are "guidelines" but that trial judge erred by not giving entire G.S. 15A-1235(b) instruction). While the statutory instructions need not be given verbatim, appellate court opinions emphasize the importance of avoiding any instruction that might "reasonably be construed by a juror as requiring him to surrender his well-founded convictions or judgments to the views of the majority." *See, e.g.*, *Garrett*, 277 N.C. App. at 502 (quoting State v. Alston, 294 N.C. 577, 593 (1978)); State v. Blackwell, 228 N.C. App. 439, 444 (2013) (same); State v. Lamb, 44 N.C. App. 251, 254 (1979) (stating that "such an instruction violates the basic tenants of American justice"); *see also* State v. Jackson, 277 N.C. App. 106, 112 (2021) (trial judge's instruction to resume deliberations "with a goal of reaching a unanimous decision" did not improperly compel any juror to surrender his or her well-founded convictions or judgment).

The decision whether to give the instruction in G.S. 15A-1235(b) is within the judge's discretion. *See, e.g., Porter*, 340 N.C. at 336 (no abuse of discretion to require the jury to continue deliberations without giving the instruction). However, at least one case found that a verdict was coerced where, among other things, the instruction was not given after the jury indicated it was having difficulty reaching a verdict and added: "the best practice would have been simply to repeat in toto the instructions of G.S. 15A-1235(b)." State v. McEntire, 71 N.C. App. 720, 724-25 (1984).

It is not error to give the G.S. 15A-1235(b) instruction over objections by the parties. State v. Smith, 194 N.C. App. 120, 129-31 (2008). Additionally, the instruction may be given in the absence of any indication that the jury is having difficulty reaching a verdict and before deliberations have become lengthy. *Id.*

3. **May Require Continued Deliberations Even after Report of Deadlock.** Appellate courts have repeatedly upheld action by the trial court requiring continued deliberations despite indications, even repeated ones, from the jury that it is at a standstill or hopelessly deadlocked. *See, e.g., Blackwell*, 228 N.C. App. at 441-45 (no abuse of discretion to require jury to resume deliberations after it indicated that it was deadlocked 11-1); State v. Summey, 228 N.C. App. 730, 739 (2013) (no abuse of discretion to require jury to continue deliberations after it indicated three times that it was deadlocked); State v. Ross, 207 N.C. App. 379, 385 (2010) (no abuse of discretion to require continued deliberations after three notes from the jury indicating it was deadlocked, including a third note that read: "HUNG JURY. 11–1. (Deadlock)"); State v. Baldwin, 141 N.C. App. 596, 608-09 (2000) (noting that the North Carolina Supreme Court has upheld trial court decisions to continue deliberations despite jury indications that it was at a standstill or hopelessly deadlocked; holding that the trial court did not err by refusing to declare a mistrial after the jury gave such an indication).

4. **May Not Coerce a Verdict.** Article I, section 24 of the North Carolina Constitution has been interpreted to prohibit a trial court from coercing a jury to return a verdict. State v. Patterson, 332 N.C. 409, 415 (1992); *Summey*, 228 N.C. App. at 740 (same). Additionally, G.S. 15A-1235(c)

provides that the trial court "may not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals."

a. **Totality of Circumstances Analysis.** In determining whether the trial court's instructions forced a verdict or merely served as a catalyst for further deliberation, the courts consider the totality of the circumstances. *May*, 368 N.C. 112; *Porter*, 340 N.C. at 335; *Patterson*, 332 N.C. at 416; State v. Beaver, 322 N.C. 462, 464 (1988).

b. **Relevant Factors.** Factors suggesting coercion include:

- that the trial court conveyed an impression to the jurors that it was irritated with them for not reaching a verdict; State v. Nobles, 350 N.C. 483, 510 (1999); *Porte*r, 340 N.C. at 335 (rejecting the defendant's argument that the trial court's comments intimated that it was unhappy with the report of a deadlocked verdict); *Beaver*, 322 N.C. at 464; State v. Cox, 256 N.C. App. 511, 526-27 (2017) (considering totality of the circumstances the trial court's statement that "after five days of testimony and less than 5 hours of deliberations, these folks deserve better" did not convey the impression to jurors that trial court was irritated);
- that the trial court suggested to the jurors that it would hold them until they reached a verdict; *Nobles*, 350 N.C. at 510; *Porter*, 340 N.C. at 335 (rejecting the defendant's argument that the trial court's comments intimated that it would hold the jury until it reached a verdict); *Beaver,* 322 N.C. at 464; *see also* State v. Gillikin, 217 N.C. App. 256, 265 (2011) (reversible error to instruct jurors to "go back into that jury room [and] deliberate until you reach a unanimous verdict on all charges"); State v. Dexter, 151 N.C. App. 430, 433-34 (2002) ("Having notified the trial court on three separate occasions that it was unable to reach a unanimous verdict and not having been given an *Allen* instruction after its final note to the trial court, the jury could reasonably have concluded that it was required to deliberate until it did in fact reach a verdict."), *aff'd*, 356 N.C. 604 (2002) (per curiam); and
- that the trial court told the jury a retrial would burden the court system. *Nobles*, 350 N.C. at 510; *Beaver,* 322 N.C. at 464.

This is not an exclusive list, and other factors may be relevant, depending on the circumstances. *See, e.g., Dexter*, 151 N.C. App. at 434 (verdict was coerced, in part, where the trial judge failed to address one juror's concerns about receiving permission to attend his wife's surgery the next day and as a result juror may have felt pressured to reach a verdict by the end of the day); State v. McEntire, 71 N.C. App. 720, 724-25 (1984) (verdict was coerced where, among other things, the trial court failed to clearly stress to jurors that each of them must decide for him- or herself and not surrender his or her convictions for the mere purpose of returning a verdict); State v. Sutton, 31 N.C. App. 697, 702 (1976) (verdict

was coerced where the trial court told the jury "take no more than five minutes" to report to the court on its verdict).

Regarding the second factor, cases have held that the following instructions do not constitute a suggestion that the trial court would hold the jurors until they reached a verdict:

- a statement that the jurors would stay longer for further deliberations that evening "with a view towards reaching a unanimous verdict," State v. Lee, 218 N.C. App. 42, 56 (2012);
- a statement that "we've got all the time in the world" or "we've got all week, *Porter*, 340 N.C. at 335;
- a statement at 4 pm on a Tuesday after the jury had been deliberating for seventy-five minutes that the jury would continue to deliberate for the remainder of the afternoon and if they needed more time they would come back the following day, *Blackwell*, 228 N.C. App. at 445.

Although older case law had authorized the trial court to inform the jurors that if they do not reach a verdict, another jury may be called upon to try the case, that approach was rejected when G.S. 15A-1235 was adopted. Official Commentary to G.S. 15A-1235; State v. Easterling, 300 N.C. 594, 608 (1980) (error to so instruct a jury after adoption of G.S. 15A-1235); State v. Lamb, 44 N.C. App. 251, 260 (1979) (same). And as noted above, a statement by the trial court that a retrial would burden the court system is a factor suggesting a coerced verdict.

c. "Acquit First" Instruction Can Coerce Verdict. The fact that the jury cannot reach a verdict on the principal charge does not preclude it from considering and returning a verdict on a lesser charge and an instruction suggesting otherwise may coerce the verdict. State v. Mays, 158 N.C. App. 563, 573-78 (2003) (in response to jury's indication that it was deadlocked on first-degree murder, it was error for the trial court to give the jurors an "acquit first" instruction, telling them that they could not consider second-degree murder unless they had first unanimously decided to acquit the defendant of first-degree murder; noting that acquit first instructions can coerce a verdict and concluding that the legislature rejected such an approach when it enacted G.S. 15A-1237(e) ("If there are two or more offenses for which the jury could return a verdict, it may return a verdict with respect to any offense, including a lesser included offense on which the judge charged, as to which it agrees.")). If the jury expresses confusion about whether it must acquit first on the primary charge, the court of appeals has recommended that the trial court inform the jury

> (1) that the jury should first consider the primary offense, but it is not required to determine unanimously that the defendant is not guilty of that offense before it may consider a lesser included offense; and (2) that if the jury's verdict as to the primary offense is not guilty, or if, after all reasonable efforts, the jury is unable to

> reach a verdict as to that offense, then it may consider whether the defendant is guilty of the lesser included offense.

Id. at 575.

d. **Inquiry About Numerical Division Not Inherently Coercive.** A trial court's "inquiry as to a division, without asking which votes were for conviction or acquittal, is not inherently coercive." State v. Beaver, 322 N.C. 462, 464 (1988); *see also* State v. Fowler, 312 N.C. 304, 308 (1984) (finding that court's question concerning the division of the jury was not coercive; trial judge was polite and did not hint that the court was displeased with the jury; after ascertaining the jury's division late Friday afternoon, the court dismissed the jurors until Monday morning with thanks for their patience); State v. Nobles, 350 N.C. 483, 510 (1999) (citing *Beaver*). The courts have noted that inquiries into the division of the jury are "useful in timing recesses, in determining whether there has been progress toward a verdict, and in deciding whether to declare a mistrial because of a deadlocked jury." *Fowler*, 312 N.C. at 309 (quotation omitted) (inquiry was necessary because term of court was ending that day).

e. **No Bright Line Rule as to Time.** As noted above, G.S. 15A-1235(c) provides that the judge may not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals. The courts have declined to adopt a bright-line rule setting an outside time-limit on jury deliberations, or a rule that deliberations for a certain length of time, in relation to the length of time spent by the State presenting its evidence, is too long. *Porter*, 340 N.C. at 337 ("we decline to adopt any rule as to how long the jury should be allowed to deliberate which is based on the time required for the State to present evidence"; no abuse of discretion by the trial judge where the jury deliberated for four days before reaching a verdict in a case where only two days were used to present evidence); *Beaver,* 322 N.C. at 465 ("The fact that the jury deliberated for a considerable length of time and into the weekend does not show the court coerced a verdict."); State v. Phillpott, 213 N.C. App. 468, 476-78 (2011) (so noting the law and holding that it was not error to require jury to continue deliberations after having already deliberated nearly seven hours over two days); State v. Baldwin, 141 N.C. App. 596, 608 (2000) (noting that no bright line rules apply and holding that no coercion occurred where the jury began deliberations at 2:10 pm on a Friday and returned a verdict at 11:04 pm, after having indicated earlier in the evening that it was at an impasse); State v. Jones, 47 N.C. App. 554, 562 (1980) (stating a two-day period is not an "unreasonable" length of time for deliberations).

5. **May Declare Mistrial.** . G.S. 15A-1235(d) and -1063(2) provide that if there is no reasonable possibility of agreement, the judge may declare a mistrial and discharge the jury. Both statutes are written in the permissive ("may"), *Phillpott*, 213 N.C. App. at 476 (G.S. 15A-1235(d) "does not mandate the declaration of a mistrial; it merely permits it" (quotation

omitted)), and as noted above, the judge may require the jury to continue deliberations even in the face of deadlock. *See* Section III.B.3 above.

a. **Decision Is Discretionary.** "It is well-settled that the decision to grant or deny a motion for mistrial lies within the sound discretion of the trial judge." State v. Baldwin, 141 N.C. App. 596, 607 (2000).

b. **Mistrial Order.** If the trial court does declare a mistrial based on juror deadlock, the order should:

- Include findings of fact with respect to the grounds for the mistrial. G.S. 15A-1064 ("Before granting a mistrial, the judge must make finding of facts with respect to the grounds for the mistrial and insert the findings in the record of the case."). The trial court may wish to include in its order information about the length of the jury's deliberations, the numerical division of the jury, how long that division has persisted, the jury's responses to the court's inquiry about whether further deliberations would enable it to make progress towards a unanimous verdict and whether there was a reasonable possibility of agreement, and any other relevant facts supporting the finding of deadlock.
- Grant the mistrial motion. The following language may be used: "It appearing to the court that there is no reasonable probability of the jury's agreement upon a verdict, the Court [on its own motion] [on the motion of _____] declares a mistrial."
- Order that the case be retained for trial or for such further proceedings as may be proper. G.S. 15A-1065.

Additionally, the trial court should remember to discharge the jury.

IV. **Further Proceedings after Mistrial Because of Deadlock.** A genuine jury deadlock constitutes "manifest necessity" justifying a declaration of a mistrial. *See, e.g., Baldwin*, 141 N.C. App. at 608 (quoting State v. Pakulski, 319 N.C. 562, 570 (1987)). Given that, double jeopardy presents no bar to a retrial. *See* Robert Farb, *Double Jeopardy and Related Issues*, in this Benchbook.