JURY MISCONDUCT

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CONTENTS

I. Introduction. This chapter discusses the trial court's duties with respect to misconduct by and affecting jurors. The North Carolina Defender Manual, Vol. 2, Ch. 26, Jury Misconduct (2020 ed.), and the North Carolina Prosecutors' Resource Online, Jury Procedures, *available at* ncpro.sog.unc.edu, are excellent resources on this subject. Excerpts from these publications have been incorporated herein.

II. Ensuring the Right to a Fair Trial by an Impartial Jury--Generally. Under the Sixth and Fourteenth Amendments to the United States Constitution, every criminal defendant who has a right to a jury trial is entitled to a fair trial by a neutral and impartial jury. *See* Pena-Rodriguez v. Colorado, 580 U.S. 206, 228 (2017); Morgan v. Illinois, 504 U.S. 719, 726-27 (1992); Duncan v. Louisiana, 391 U.S. 145, 149-50 (1968). This right also is guaranteed by Article I, Section 24 of the North Carolina Constitution. State v. Garcell, 363 N.C. 10, 43-44 (2009). After the jury is impaneled, a defendant's constitutional right to fairness and impartiality is protected in North Carolina through statutory admonitions, pattern jury instructions, the trial court's obligation to inquire into misconduct, and the trial court's authority to remedy misconduct.

A. Statutory Admonitions. G.S. 15A-1236(a) requires the trial judge at appropriate times to admonish the jurors that it is their duty:

- not to talk among themselves about the case except in the jury room after their deliberations have begun;
- not to talk to anyone else or to allow anyone else to talk with them or in their presence about the case, and to report to the judge

immediately the attempt of anyone to communicate with them about the case;
- not to form an opinion about the guilt or innocence of the defendant or express any opinion about the case until they begin their deliberations;
- to avoid reading, watching, or listening to accounts of the trial; and
- not to talk during trial to parties, witnesses, or counsel.

The judge also may admonish the jurors about other matters that the judge considers appropriate. G.S. 15A-1236.

To establish reversible error on appeal, a defendant must either object to any failure by the trial court to properly admonish the jury and show prejudice resulting from that failure, State v. Harris, 315 N.C. 556, 566 (1986), or show that any unpreserved failure to admonish rises to the level of plain error. State v. Ward, 354 N.C. 231, 263 (2001) (defendant failed to assert plain error on appeal); State v. Smith, 222 N.C. App. 637, *3 (2012) (unpublished) (the court allowed plain error review of failure to instruct properly under G.S. 15A-1236, but did not find plain error). *See also* State v. Lawrence, 365 N.C. 506, 511-19 (2012) (explaining distinction between harmless error and plain error; noting that plain error will be found only in "exceptional circumstances").

B. Pattern Jury Instructions. The following pattern jury instructions contain admonitions to jurors about improper oral and electronic communications and contacts, impermissible research, and watching or listening to media:

- N.C.P.I. Crim.—100.25: Precautionary Instructions to Jurors (to be given after jury is impaneled)
- N.C.P.I. Crim.—100.31: Admonitions to Jurors at Recesses (to be given before first recess)
- N.C.P.I. Crim.—100.33: Recesses (to be given before second and subsequent recesses)

C. Trial Court's Duty to Inquire about Misconduct. "It is the duty and responsibility of the trial judge to insure that the jurors remain impartial . . . ." State v. Rutherford, 70 N.C. App. 674, 677 (1984). It is the trial judge's responsibility to conduct investigations into apparent juror misconduct, "including examination of jurors when warranted, to determine whether any misconduct has occurred and has prejudiced the defendant;" the scope of the inquiry is within the trial court's sound discretion. State v. Barnes, 345 N.C. 184, 226 (1997); *see also* State v. Burke, 343 N.C. 129, 149 (1996); State v. Galbreath, ___ N.C. App. ___, 2024 WL 4018666 (2024); State v. Gurkin, 234 N.C. App. 207, 212-13 (2014). Practice pointers about how to conduct the relevant inquiry are provided in Section II.E., below.

D. Remedies for Misconduct. If juror misconduct has occurred, the trial judge can take "any appropriate action." State v. Drake, 31 N.C. App. 187, 191 (1976). The most common remedies are:

- Using contempt powers. *See* G.S. 15A-1035 (a presiding judge may maintain courtroom order through the use of contempt powers as provided in G.S. Chapter 5A, Contempt); *see generally* Contempt in this Benchbook.
- Giving a curative Instruction. *Cf.* State v. Hines, 131 N.C. App. 457, 462-63 (1998) (so noting this as a possible remedy but finding it inadequate in a case where the prosecutor's notes erroneously were submitted to the jury). An instruction should include a statement to the jury to disregard the conduct that occurred or the statements that were made. The judge may also individually or collectively determine if each juror will follow the judge's instruction.
- Discharging the juror and substituting an alternate juror. G.S. 15A-1215(a) authorizes a trial judge in the guilt/innocence phase of a trial to replace a juror with an alternate if any juror becomes incapacitated or disqualified at any time before the verdict is rendered. *See also* G.S. 15A-1340.16(a1) (same as to jury determining existence of aggravating factor for structured sentencing offense); G.S. 20-179(a1)(3) (same as to jury determining existence of aggravating factor for impaired driving offense). *Compare* G.S. 15A-2000(a)(2) (authorizing the substitution of an alternate juror during a capital sentencing hearing if any juror dies, becomes incapacitated or disqualified, or is discharged for any reason before the start of deliberations).

  The traditional rule in North Carolina was that an alternate juror may not be substituted once the jury had begun deliberations. *See, e.g.*, State v. Bunning, 346 N.C. 253, 255 (1997). However, legislation enacted in 2021 amended G.S. 15A-1215 to provide that during the guilt/innocence phase of a trial an alternate juror may replace a juror after deliberations begin, in which case the trial court must order the jury to begin its deliberations anew. *See* S.L. 2021-94 (so amending G.S. 15A-1215(a) and making similar changes to statutes governing non-capital sentencing proceedings). A recent decision from the North Carolina Court of Appeals held that, notwithstanding these statutory changes, substitution of an alternate juror after deliberations have begun is impermissible under the state constitution as interpreted by the state supreme court in *Bunning*. *See* State v. Chambers, ___ N.C. App. ___, 898 S.E.2d 86, *review allowed*, ___ N.C. ___, 901 S.E.2d 774 (2024). Until the North Carolina Supreme Court provides greater clarity on this issue, trial judges may wish to take the cautious approach of discharging alternate jurors upon submitting the case to the jury, as required by the statute prior to the 2021 legislative changes. *See* Shea Denning, *Court of Appeals Holds that State Constitution Prohibits Substitution of Alternate Jurors After Deliberations Begin*, NC CRIM. LAW BLOG (March 14, 2024) (so suggesting; noting that under *Bunning* juror substitution after deliberations begin arguably is prohibited as a state constitutional matter in capital sentencing proceedings); N.C.P.I—Crim. 101.35: Concluding Instructions to Jury (contemplating that the trial court may choose to discharge alternate jurors upon submitting the case to the jury, notwithstanding S.L. 2021-94). *See also* State v. Thomas, ___ N.C. App. ___, 2024 WL 4019098 (2024) (granting the defendant a new trial under *Chambers* based on the substitution of an alternate juror after deliberations had begun; noting that North Carolina Supreme Court had granted review of *Chambers*); State v. Ingram, ___ N.C. App. ___, 901 S.E.2d 929 (unpublished) (Arrowood, J., concurring) (discussing the generally unsettled state of the law regarding juror substitution), *temp. stay allowed*, ___ N.C. ___, 901 S.E.2d 814 (2024).

The exercise of the power to discharge a juror and substitute an alternate rests in the trial judge's sound discretion and, at least with respect to substitutions prior to submitting the case to the jury for deliberations, is not reversible error absent a showing of an abuse of discretion. State v. Nelson, 298 N.C. 573, 593 (1979); State v. Knight, 262 N.C. App. 121, 129 (2018). Alternate jurors are discussed in more detail in Section IV.E.1., below.

- Granting a motion for a mistrial, if the misconduct is discovered before the verdict. *See* G.S. 15A-1061 ("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."). Misconduct by a juror may result in a mistrial if it would render a fair and impartial trial impossible. Whether a motion for mistrial should be granted is a matter that rests in the trial judge's sound discretion; this decision is not reversible error absent an abuse of discretion. State v. McCarver, 341 N.C. 364, 383 (1995). *See, e.g.,* State v. Galbreath, ___ N.C. App. ___, 2024 WL 4018666 (2024) (no abuse of discretion in refusing to declare a mistrial when the judge made a full inquiry into jury's exposure to a juror's pre-deliberation statements about witness testimony and possible outside research; juror who made statements and conducted research was excused, remaining jurors and alternates stated that they could remain fair and impartial, and judge instructed jury not to consider outside information); State v. Rutherford, 70 N.C. App. 674, 677 (1984) (no abuse of discretion in refusing to declare a mistrial when the judge made a full inquiry regarding a discussion between a juror and the State's witness during a lunch recess about whether they had mutual acquaintances). For information about mistrials, see Jury Deadlock, Absolute Impasse, and Double Jeopardy, in this Benchbook.
- Granting a motion for a new trial for misconduct discovered after the verdict, typically made in a motion for appropriate relief (MAR). The standards and procedures applicable to MARs are discussed in Motions for Appropriate Relief, in this Benchbook. In short, a trial court ruling on a MAR must find that juror misconduct was prejudicial to the defendant in order to grant a new trial. *See, e.g.*, State v. Lyles, 94 N.C. App. 240, 248-50 (1989) (jurors' exposure to writing that was not in evidence and tended to contradict defendant's alibi witness was prejudicial); State v. Heavner, 227 N.C. App. 139, 148-52 (2013) (juror's conversation with the defendant's mother prior to jury selection was not prejudicial). Other cases assessing prejudice, though decided prior to the enactment of the MAR statutes, include *State v. Sneeden*, 274 N.C. 498, 504 (1968) (it was improper that the bailiff answered the jury's legal question, but no prejudice was shown), and *State v. Johnson*, 295 N.C. 227, 234 (1978) (bailiff's prejudicial comment to the jury that he was proud that the prosecutor had "stood up" for law enforcement officers required a new trial because the quality of the officers' investigation and their credibility were contested issues at trial).

E. Practice Pointers.

1. How the Issue Arises. The trial court may learn about potential misconduct from a variety of sources including courtroom staff, such as the bailiff, defense counsel, the prosecutor, or from the jurors themselves, typically in the form of a note.

2. **Inform and Hear from Counsel.** When an issue about juror misconduct arises, the trial court should, as a general rule, inform the parties and counsel of the issue, inform those persons how the judge plans to address the alleged misconduct, if at all, and hear from counsel on the issue.
3. **Address Issue in Open Court.** When misconduct is alleged to have occurred, the trial court typically will make inquiry of the relevant people in the courtroom, on the record, with the parties and their lawyers present. *See, e.g.,* State v. Knight, 262 N.C. App. 121, 129 (2018) (describing trial judge's inquiry into whether an impaneled juror was competent to render a fair and impartial verdict which involved questioning the juror and a bailiff who witnessed conduct that called the juror's competence into question); State v. Drake, 31 N.C. App. 187, 191 (1976) (reversible error when the trial court denied a defense motion to examine a juror after hearing the uncontradicted testimony of a disinterested witness that she heard the juror during a recess tell other jurors his views of the defendant's defense). A trial court's ex parte conversation with a juror is disapproved, and it is prohibited in capital cases where a defendant has an unwaivable right to be present. State v. Harrington, 335 N.C. 105, 116-17 (1993) (ex parte conversation with a juror in a non-capital case about a juror's comments was disapproved, although it was not prejudicial to the defendant); JEFFREY B. WELTY, NORTH CAROLINA CAPITAL CASE LAW HANDBOOK 74-78 (3d. ed. 2013) (discussing a defendant's right to be present at trial, including a trial judge's communication with jurors).

   As a general rule, the relevant persons should be examined one at a time and without the others present. For example, if it is alleged that a juror was seen speaking to a State's witness at lunch, the person who reported the conduct, the juror, the State's witness, and any other relevant persons should be examined individually and without the others present.

   As a general rule, an inquiry should be made to determine whether other jurors were affected by the misconduct at issue. Thus, in the example above about a lunchtime conversation between a juror and a State's witness, the judge should ask the juror in question whether he or she spoke to any other jurors about the conversation or whether any other jurors may have overheard the conversation. Depending on the responses, it may be necessary to examine other potentially implicated jurors. Although an examination of other jurors is not *required* unless the trial court determines that some potentially prejudicial conduct occurred, *Harrington*, 335 N.C. at 115 (trial court did not abuse its discretion in not examining jurors other than the particular juror who was dismissed, because the dismissed juror's comments were not prejudicial to the defendant), the trial court has the discretion to engage in a broader inquiry to protect the record.

   When the misconduct may be cured by an instruction, the judge should inquire whether the juror can continue to be impartial and follow the court's instructions.
4. **Re-Opening Voir Dire.** When it is determined that a juror failed to mention a pertinent fact during voir dire or was not truthful during voir dire, the trial court may need to consider re-opening voir dire. For a

discussion of that issue and the parties' rights to exercise remaining challenges, see Section IV.C.2, below.

5. **Deciding on Appropriate Remedy.** When juror misconduct has been found to have occurred, the trial court must implement an appropriate remedy. Section II.D, above, discusses the options available to the trial court.
6. **Findings of Fact and Conclusions of Law.** The judge should make findings of fact and conclusions of law when a hearing is held on jury misconduct. *See, e.g.*, *Knight*, 262 N.C. App. at 130 (trial court did so).

III. Exposure to Extraneous Information and Impeaching the Verdict. Juror misconduct encompasses a wide range of improper activities. Exposure to extraneous information has been the subject of many cases and is discussed here. Other types of misconduct are discussed in Section IV, below.

A. What Constitutes Extraneous Information--Generally. A fundamental aspect of a criminal defendant's constitutional right to confront witnesses and evidence against the defendant is that a jury's verdict must be based on evidence produced at trial, not on extraneous information that has not been subject to the rules of evidence, supervision of the court, and other procedural safeguards of a fair trial. *See, e.g.,* Parker v. Gladden, 385 U.S. 363, 364 (1966); Turner v. Louisiana, 379 U.S. 466, 472-73 (1965). Jurors may be exposed to extraneous information in a variety of ways, including through news media reports; observation of events occurring outside the courtroom; communications by or with third parties; or independent research using the internet, dictionaries, or other sources. Issues of exposure to extraneous information are handled differently, depending on whether the issue is discovered before or after the verdict. Both scenarios are discussed below.

B. Discovered Before the Verdict. A trial court has a duty to inquire into the exposure of jury members to extraneous information "when there is a substantial reason to fear that the jury has become aware of improper and prejudicial matters." State v. Barts, 316 N.C. 666, 683 (1986); State v. Jacobs, 172 N.C. App. 220, 229-30 (2005) (trial court did not err by refusing to conduct inquiry when allegations of misconduct were speculative and involved an interaction in the courtroom while the trial judge was present). The trial court has discretion as to how to conduct this inquiry, though it generally must involve questioning affected jurors as to "whether such exposure has occurred and, if so, whether the exposure was prejudicial." *Barts,* 316 N.C. at 682-83 (rejecting defendant's argument that the trial court was required to specifically question each juror as to their potential exposure to extraneous information; approving of trial court's general questioning of jury as a whole on whether any of the court's instructions, including commands to avoid extraneous information, had been violated); State v. Campbell, 340 N.C. 612, 634 (1995) (approving of trial court's inquiry which involved individual voir dire of three jurors directly exposed to extraneous information and questioning of jury as a whole as to whether they could render a verdict based solely on the evidence). *See also* State v. Gainey, 355 N.C. 73, 96 (2002) (approving of trial court's inquiry that did not question affected jurors but instead questioned the third party with whom the jurors had a brief conversation; noting that defense counsel stated that he did not think the interaction, which did not involve discussion of the case, was inappropriate).

The North Carolina Supreme Court has held that while a "trial court's inquiry into the substance and possible prejudicial impact" of exposure to extraneous information is a "vital measure" for ensuring jury impartiality, the trial court has discretion not to conduct an inquiry if the defendant, with knowledge of the circumstances, asks that the trial court not do so. State v. Burke, 343 N.C. 129, 149 (1996) (after hearing details of alleged misconduct defendant declined trial judge's offer to conduct inquiry).

After appropriate inquiry, the trial judge must weigh all the circumstances and determine in his or her discretion whether a defendant's right to a fair trial has been violated. State v. Jones, 50 N.C. App. 263, 268 (1981) (trial judge found that jurors had not formed an opinion as a result of reading a newspaper article revealing the defendant's prior heroin conviction and that they could make a decision based solely on the evidence presented at trial; denial of mistrial was not error); State v. Hines, 131 N.C. App. 457, 462 (1998) (the defendants' right to confrontation was violated and their motion for a mistrial should have been granted when the prosecutor's notes and typewritten list of statements made by the defendants, including hearsay statements, were mistakenly published to the jury without being admitted into evidence).

The denial of a motion for a mistrial based on alleged misconduct affecting the jury is equivalent to a finding by the trial court that prejudicial misconduct has not been shown, and the decision will be reversed only on a clear showing that the trial court abused its discretion. State v. Bonney, 329 N.C. 61, 74 (1991) (no error in denying a mistrial motion when the juror had not begun to read a book found in the jury room); State v. Degree, 114 N.C. App. 385, 392 (1994) (no error in denying a mistrial motion when a juror inadvertently saw a newspaper article reporting that the defendant, charged with rape, had AIDS; the trial court examined the juror regarding the article, who stated, "I was reading and I saw the defendant's name and I quit," and it was reasonable to conclude that the juror did not read the article and had formed no opinion that would jeopardize the defendant's right to a fair trial); State v. Salentine, 237 N.C. App. 76, 82-84 (2014) (no error in denying the defendant's mistrial motion and in not conducting an inquiry of other jurors; the trial judge's extensive examination of a juror and his credibility concerning the alleged misconduct in contacting non-jurors was sufficient to show that prejudicial misconduct had not occurred).

C. Discovered After the Verdict. Misconduct by or affecting jurors that is discovered after the verdict is rendered typically is evaluated by a trial judge in the context of a defendant's motion for appropriate relief (MAR). A MAR alleging juror misconduct is subject to the same procedures as other MARs, including that it must contain specific factual allegations amounting to more than mere speculation to warrant an evidentiary hearing. State v. Rollins, 367 N.C. 114 (2013) (trial court did not err in denying MAR without evidentiary hearing where allegations of juror misconduct were speculative and nonspecific). *See generally* Motions for Appropriate Relief, in this Benchbook. However, there are certain limitations on what evidence concerning juror misconduct a judge may consider after a verdict is rendered. As a general rule, once a verdict is rendered, it may not be impeached—that is, a juror may not testify nor may evidence be received as to matters occurring during deliberations or calling into question the reasons on which the verdict was based. State v. Heatwole, 344 N.C. 1, 12 (1996). The scope of this general rule and the limited exceptions to it are provided by G.S. 15A-1240 and Evidence Rule 606.

1. **General Rule: No Impeachment of the Verdict.** G.S. 15A-1240(a) provides that when there is an inquiry into a verdict's validity, no evidence may be received to show the effect of any statement, conduct, event, or condition upon a juror's mind or concerning the mental processes by which the verdict was determined. *See* State v. Heavner, 227 N.C. App. 139, 150-51 (2013) (trial court erroneously admitted and considered in a hearing on a motion for appropriate relief a juror's testimony that his conversation with the defendant's mother did not in any way affect his deliberations in the defendant's case); State v. Lyles, 94 N.C. App. 240, 245 (1989) (the trial court did not err in a hearing on a motion for appropriate relief by excluding juror testimony about how extraneous information affected the jury's verdict); State v. Froneberger, 55 N.C. App. 148, 155-56 (1981) (testimony of defense counsel's secretary about a juror's conversation concerning "second thoughts" about the verdict was inadmissible under G.S. 15A-1240(a) in a motion to set aside the verdict).

   Like G.S. 15A-1240(a), Evidence Rule 606(b) provides that when there is an inquiry into a verdict's validity, a juror may not testify as to the effect of any statement, conduct, event, or condition upon a juror's mind or emotions influencing assent to or dissent from the verdict or concerning the mental processes by which the verdict was determined. Rule 606(b) also bars receiving any affidavit or evidence of a statement by the juror that would be inadmissible as testimony.

   Exceptions to the general rule against impeachment of the verdict are discussed in the sections that follow.

2. **G.S. 15A-1240(b) Exception: Verdict Reached by Lot.** G.S. 15A-1240(b) provides that G.S. 15A-1240(a) "do[es] not bar evidence concerning whether the verdict was reached by lot."

3. **G.S. 15A-1240(c)(1) Exception: Matters not in Evidence Violating Right to Confrontation.** G.S. 15A-1240(c)(1) allows impeachment of a verdict through a juror's testimony—subject to the limitations of G.S. 15A-1240(a)—when matters not in evidence came to the attention of one or more jurors under circumstances that would violate the defendant's constitutional right to confront the witnesses against the defendant.

   Because the G.S. 15A-1240(c)(1) exception remains subject to the limitations of G.S. 15A-1240(a), the exception allows a juror to testify "regarding the *objective events*" covered by the statute but prohibits testimony on the "*subjective effect* those matters had on [the] verdict." *Lyles*, 94 N.C. App. 240, 246 (1989). In *Lyles*, for example, the trial judge admitted jurors' testimony that they were exposed to writing that was not in evidence which tended to contradict the defendant's alibi witness, and the judge correctly excluded testimony concerning how that exposure affected the jurors' mental processes. *Id*. *See also* State v. Heavner, 227 N.C. App. 139, 150-51 (trial court erred by admitting evidence of the effect of a conversation with the defendant's mother upon a juror's mental processes in reaching verdict).

   If the challenged evidence does not implicate the defendant's right to confrontation, G.S. 15A-1240(c)(1) does not apply. For example, in *State v. Rosier*, 322 N.C. 826, 832 (1988), the court ruled that the defendant's right to confrontation was not violated when the jury foreman watched a program on child abuse contrary to the trial judge's instructions, and the foreman told other jurors about a young friend of his

who had been raped. The jurors' affidavits concerning these events should not have been considered by the trial court because the matters the foreman reported to the jury "did not deal with the defendant or with the evidence" in the case and "[p]arties do not have the right to cross examine jurors as to the arguments they make during deliberation as the foreman did in this case." *Id.* at 832.

4. **G.S. 15A-1240(c)(2) Exception: Bribery or Intimidation.** G.S. 15A-1240(c)(2) allows a juror's testimony concerning bribery, intimidation, or attempted bribery or intimidation of a juror. As with G.S. 15A-1240(c)(1), this exception remains subject to the limitations of G.S. 15A-1240(a) and therefore a juror may testify regarding the objective events covered by the exception but may not testify to the effect of those matters on the verdict.

5. **Evidence Rule 606(b) Exceptions: Extraneous Prejudicial Information or Improper Outside Influence.** Evidence Rule 606(b), which applies in both criminal and civil cases, provides that a juror is competent to testify when the validity of a verdict is challenged, but only on the question (1) whether extraneous prejudicial information was improperly brought to the jury's attention, or (2) whether any outside influence was improperly brought to bear upon any juror. The North Carolina appellate courts have noted that Rule 606(b) arguably permits somewhat broader testimony than G.S. 15A-1240, *Rosier*, 322 N.C. at 362, but that the two statutes do not conflict and are "designed to protect the same interests." *Lyles*, 94 N.C. App at 246.

Extraneous information under Rule 606(b) has been interpreted to mean information that reaches a juror without being introduced into evidence and that deals specifically "with the defendant or the case which is being tried." *Rosier*, 322 N.C. at 832 (judge's consideration of jurors' affidavits was improper when the affidavits revealed that the jury foreman watched a program on child abuse contrary to the trial judge's instructions and told jurors about a young friend of his who had been raped because that information was not "extraneous information" within the meaning of Rule 606 as it did not involve the defendant or the case being tried); State v. Quesinberry, 325 N.C. 125, 132 (1989) (jurors' affidavits in a motion for appropriate relief showing that they considered the defendant's parole eligibility in a capital sentencing hearing were inadmissible under Rule 606 because they were internal influences; there were no allegations that jurors received the parole eligibility information from an outside source), *vacated on other grounds*, 494 U.S. 1022 (1990).

General information that jurors learn in their day-to-day experiences does not constitute "extraneous information." *Compare* State v. Heatwole, 344 N.C. 1, 12 (1996) (juror's communication with his professor about violent tendencies of paranoid schizophrenics was not "extraneous information" because it did not involve the defendant or the case being tried), *and Rosier*, 322 N.C. at 832 (1988) (see summary above), *with Lyles*, 94 N.C. App. at 245 (1989) (testimony by jurors was proper under both Rule 606 and G.S. 15A-1240(c)(1) where it concerned the fact that a juror peeled paper from the bottom of an exhibit during deliberations and uncovered information that implied that the defendant had prior criminal involvement and directly contradicted the defendant's alibi witnesses; jurors' exposure to the information entitled the defendant to a new trial). *See also* 1 KENNETH S. BROUN, BRANDIS & BROUN ON

NORTH CAROLINA EVIDENCE § 148, at 550-54 (8th ed. 2018) (discussing Rule 606).

Improper outside influence may take various forms and is not limited to actions such as bribes, threats, or intimidation. *See* State v. Lewis, 188 N.C. App. 308, 312 (2008) (granting the defendant a new trial when the lead detective made comments during a break to a deputy sheriff serving as a juror, namely that the defendant had failed a polygraph test; the comments were "intended to influence the verdict").

By its terms, and consistent with G.S. 15A-1240, Rule 606(b) permits evidence on the factual issue of whether the jury was improperly exposed to extraneous prejudicial information or outside influence but prohibits evidence of the effect of those matters on the verdict. *Rosier*, 322 N.C. at 832; *Lyles*, 94 N.C. App. at 246.

6. G.S. 15A-1240(c) and Rule 606(b) Practice Pointers. When a defendant asserts that he or she is entitled to impeach the verdict using evidence admissible under G.S. 15A-1240(c) or Rule 606(b), the judge first must determine whether the type of alleged misconduct falls within the scope of the statute or the rule, as discussed above.

a. Evidence Outside Scope of Exceptions. If alleged misconduct does not fall within the scope of the G.S. 15A-1240(c) or Rule 606(b) exceptions, the judge may dismiss the matter summarily without a hearing. *See, e.g.,* State v. Barnes, 345 N.C. 184, 228 (1997) (the trial court did not abuse its discretion by failing to inquire of the jury concerning defense counsel's unsubstantiated assertions that: (1) the jury consulted a Bible before deliberations; and (2) a juror's alleged actions in calling a minister to ask a question about the death penalty; neither incident involved prejudicial "extraneous information" under Rule 606(b)); State v. Corbett, 260 N.C. App. 509, 521-23 (2020) (trial court did not err by summarily denying defendant's MAR alleging juror misconduct in the form of pre-deliberation conversations between jurors as any such conversations would constitute "internal" rather than "external" influence and evidence thereof would not be within the scope of the exceptions from the no-impeachment rule), *aff'd on other grounds*, 376 N.C. 799 (2021); State v. Patino, 207 N.C. App. 322, 330 (2010) (the trial court did not abuse its discretion by failing to inquire of the jury concerning alleged jury misconduct in looking up definitions of legal terms on the Internet because the definitions were not extraneous information under evidence Rule 606 and did not implicate the defendant's confrontation rights under G.S. 15A-1240). *See also* Motions for Appropriate Relief, in this Benchbook (discussing situations where it is proper to summarily deny a motion for appropriate relief).

b. Evidence Within Scope of Exceptions. If the alleged misconduct falls within the scope of G.S. 15A-1240(c) or Rule 606(b) exceptions and may be prejudicial, a hearing should be held, taking recorded testimony under oath, and with the defendant present unless the defendant waives the right to be present. In a capital trial, a defendant has an unwaivable right to be present. *Cf.* State v. Smith, 326 N.C. 792, 794 (1990) (error in capital case when judge spoke privately with prospective jurors); State v. Artis,

325 N.C. 278, 297 (1989) (error in a capital case when the judge spoke with a juror in chambers), *vacated on other grounds*, 494 U.S. 1023 (1990); JEFFREY B. WELTY, NORTH CAROLINA CAPITAL CASE LAW HANDBOOK 74-78 (3d. ed. 2013).

If the judge finds a violation of the defendant's constitutional confrontation rights, the error is presumed prejudicial and the burden is on the State to prove that the jury's exposure to the improper information was harmless beyond a reasonable doubt. *See Lyles*, 94 N.C. App. at 248 (citing G.S. 15A-1443(b)). The *Lyles* court provided the following guidance for judges assessing whether jury exposure to improper information is harmless:

> In the context of jury exposure to extraneous information, because inquiry into jurors' mental processes is prohibited, the test for determining harmlessness generally has been whether there was no reasonable possibility that *an average juror* could have been affected by it.
>
> In assessing the impact of the extraneous evidence on the mind of the hypothetical "average juror," the court should consider: (1) the nature of the extrinsic information and the circumstances under which it was brought to the jury's attention; (2) the nature of the State's case; (3) the defense presented at trial; and (4) the connection between the extraneous information and a material issue in the case.

Id. at 249 (internal quotation omitted).

The judge should make findings of fact and conclusions of law when a hearing is held on jury misconduct. *See generally* Motions for Appropriate Relief, in this Benchbook (discussing procedures for evidentiary hearings on motions for appropriate relief).

7. **Constitutional Exception: Clear Statement that Juror Relied on Racial Stereotypes or Animus.** In *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 225 (2017), the United States Supreme Court held that when a juror during jury deliberations makes a clear statement indicating that the juror relied on racial stereotypes or animus to convict a defendant, the Sixth Amendment requires that federal and state statutes and rules limiting impeachment of a verdict give way to permit the trial court to consider the evidence of a juror's statement and any resulting violation of the Sixth Amendment right to a trial by a fair and impartial jury. Elaborating on its ruling, the court stated:

> Not every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry. For the inquiry to proceed, there must be a showing that one or more jurors made statements exhibiting overt

> racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict. Whether that threshold showing has been satisfied is a matter committed to the substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence.

580 U.S. at 226-27.

Although the Court used the term "racial bias," it made clear, noting the defendant's Hispanic identity, that it recognizes "ethnic" bias within that term. *Id*. at 215. It would appear that the Court also would recognize bias based on national origin, as the *Pena-Rodriguez* juror's comments referred to Mexicans. It is also possible that the Court would recognize juror comments clearly indicating bias on the basis of sex or religion as admissible as constitutional exceptions to the general rule against impeaching a verdict. *See* Jury Selection, in this Benchbook (discussing federal and state constitutional prohibitions on exercising peremptory challenges on the basis of sex and religion).

Because the issue was not presented, the Court declined to address what procedures a trial court must follow when confronted with a motion for relief based on juror testimony of racial bias. It likewise declined to decide the appropriate standard for determining when evidence of racial bias is sufficient to require that the verdict be set aside and a new trial be granted.

In the absence of guidance from the Court or North Carolina appellate cases, a trial court that determines an allegation of juror bias affecting a defendant's right to a fair and impartial jury is sufficiently substantial to justify an evidentiary hearing may wish to follow the procedure discussed above in Section C.6.b. for evidence falling within the scope of the codified exceptions for verdict impeachment.

8. **Constitutional Exception: Trial Court's Discovery of Misconduct Constituting Structural Error.** In *State v. Blake*, 275 N.C. App. 699 (2020), the Court of Appeals addressed a circumstance in which immediately after the jury rendered its verdict the trial court discovered that the jury disregarded the court's instructions on reasonable doubt and convicted the defendant despite being unsure whether he was guilty and despite disbelieving the State's witnesses. In part because the misconduct at issue was structural error that "went to the very heart of the defendant's presumption of innocence" and the requirement of proof beyond a reasonable doubt, the Court of Appeals rejected the State's argument that Rule 606(b) prohibited inquiry into the verdict and granted the defendant a new trial. *Id*. at 711.

D. Selected Examples of Extraneous Information.

1. **Dictionaries & Other Reference Materials.** The North Carolina appellate courts have held in a few cases that dictionary definitions consulted by jurors were not extraneous information under evidence Rule 606(b), and the consultation, while improper, did not violate the

constitutional right to confrontation as required for admissibility under G.S. 15A-1240(c)(1). State v. Patino, 207 N.C. App. 322, 330 (2010) (definitions of legal terms that jurors consulted on the internet were not extraneous information under Rule 606 and did not implicate the defendant's constitutional right to confront witnesses against him); *see also* Lindsey v. Boddie-Noell Enterprises, Inc., 355 N.C. 487 (2002) (adopting reasoning of dissenting opinion below that dictionary definitions at issue were not "extraneous information" within the meaning of Rule of Evidence 606(b) because definitions of the words "willful" and "wanton" did not specifically concern the civil defendant or the evidence presented in the case). However, it is conceivable in certain situations that evidence of jurors' resort to extraneous reference materials, if discovered prior to the verdict or admissible under one of the post-verdict exceptions discussed above, could be found prejudicial to the defendant. *See, e.g.*, State v. Barnes, 345 N.C. 184, 226-28 (1997) (finding no abuse of discretion in the trial judge's failure to inquire of the jury concerning defense counsel's unsubstantiated assertion that the jury consulted a Bible before deliberations "[a]s there is no evidence that the alleged Bible reading was in any way directed to the facts or governing law at issue in the case"; collecting cases from other jurisdictions where jurors' resort to extraneous reference material was prejudicial to the defendant); State v. Armstrong, 203 N.C. App. 399, 444-45 (2010) (affirming trial court's MAR ruling that defendant's constitutional right to confrontation was violated by juror's internet research into a contested issue at trial but that this presumptively prejudicial misconduct was proved harmless by the State). *See also* State v. Galbreath, ___ N.C. App. ___, 2024 WL 4018666 (2024) (noting that trial court reponed voir dire and sustained State and defense challenges for cause of a juror who discussed the case prior to deliberations and possibly conducted unspecified "outside research").

2. News Media Reports. Several North Carolina cases deal with a jury's exposure or potential exposure to news media reports concerning the trial or the circumstances at issue in the trial. Generally speaking, a trial judge determining whether a defendant's right to a fair trial has been violated by exposure to news media reports must weigh the extent to which the jury has been exposed to a report, the content of the report, whether the report has influenced the jury, and whether any prejudicial exposure can be cured. Cases illustrating these issues include:

State v. Barts, 316 N.C. 666, 683 (1986) (no abuse of discretion in denying a mistrial motion when the defendant made no showing that the jury had been exposed to a highly prejudicial newspaper article about the defendant, and the trial court's inquiry of the jury as a whole revealed no violation of the judge's instruction to avoid exposure to the news media; specific questioning of each juror was not required in this case);

State v. McVay, 279 N.C. 428, 433 (1971) (holding that while an inquiry of the jury was not required because there was no evidence that the jury actually was exposed to a newspaper article published the afternoon of the first day of trial, which stated that the defendants had been recently convicted of another armed

robbery and were serving prison terms for that earlier offense, the better practice is to inquire of the jurors to see if they had been exposed or influenced by it)

State v. Woods, 293 N.C. 58, 65 (1977) (trial court did not err in denying defendant's motion for a mistrial where jurors read a newspaper article containing an objective and non-inflammatory account of testimony at the first day of trial; the trial court instructed the jury not to be influenced by any news articles or outside sources)

State v. Jones, 50 N.C. App. 263, 268 (1981) (although a newspaper article included the defendant's inadmissible prior heroin conviction, other circumstances found by the trial court justified its conclusion that the jurors who had read the article had not formed an opinion and they could make a decision solely on the evidence presented at trial)

State v. Reid, 53 N.C. App. 130, 131 (1981) (trial judge erred in denying defendant's motion for a mistrial based on four jurors' reading of a newspaper article; the article quoted the trial judge as saying, when he denied the defendant's motion to dismiss, "too many shots . . . motion denied;" excessive force was a crucial issue and the reading of the judge's statement, which had been made outside the jury's presence, irreparably prejudiced the defendant)

When there is evidence that jurors read a newspaper or other media account of a trial, but the trial judge decides not to declare a mistrial, a jury instruction could include: "Your verdict must be based entirely on the evidence introduced at trial and you are not to be influenced by anything you may have read in a newspaper or by any other outside influence." This instruction is a substantially similar to that given in *State v. Woods*, cited above.

3. **Third Party Communication.** It is misconduct for a juror during the trial to discuss the matter or to receive any information related to the case except in open court and in the manner provided by law. Thus, any communication concerning the case between jurors and third parties including victims, defendants, counsel, courtroom personnel, witnesses, relatives, and friends is prohibited. *See, e.g.*, N.C.P.I. Crim.—100.25: Precautionary Instructions to Jurors (admonishing jurors not to talk to anyone else or allow anyone else to talk to the jurors or say anything in the jurors' presence about the case); "'[B]rief, public, and nonprejudicial conversations between jurors and parties or their relatives will not vitiate the verdict or require that the jury be discharged . . . .'" O'Berry v. Perry, 266 N.C. 77, 81 (1965) (a juror walked with the plaintiff and his witness from the courthouse to restaurant for lunch, but no conversation of case occurred; no abuse of discretion in denying motion to set aside verdict; this ruling would be equally applicable to criminal cases); State v. Barnes, 345 N.C. 184, 224-25 (1997) (trial court properly inquired into juror's conversation with a relative who told the juror that the relative knew the

defendants while serving time in prison; trial court did not abuse its discretion by finding that conversation did not involve discussion of the case and the juror was not tainted by it).

IV. Other Common Types of Misconduct.

A. Impaired Jurors. "The law requires that jurors, while in the discharge of their duties, shall be temperate, and in such condition of mind as to enable them to discharge those duties honestly, intelligently, and free from the influence and dominion of" impairing substances. State v. Jenkins, 116 N.C. 972, 974 (1895). If a juror, while hearing the evidence, argument of counsel, or charge, or while deliberating as to verdict, is so incapacitated by reason of intoxicants or otherwise as to be physically or mentally incapable of functioning as a competent, qualified juror, the trial judge may order a mistrial (unless the impaired juror can be discharged and replaced with an alternate juror at any time before the jury has begun deliberations). State v. Tyson, 138 N.C. 627 (1905) (mistrial was proper when a juror was found to be intoxicated and unfit for duty during the trial). However, the use of impairing substances outside the courtroom does not justify granting a mistrial (or replacement of the impaired juror by an alternate juror) unless it is found that the juror is unfit to serve while present in court. *See* State v. Crocker, 239 N.C. 446, 451 (1954) (although several jurors became intoxicated during an overnight recess, a mistrial over the defendant's objection was not warranted when there was no evidence or finding that any of those jurors were impaired when the court reconvened the following morning).

Under G.S. 15A-1215, if a juror becomes incapacitated for any reason, an alternate may be substituted. Section II.D., above, discusses substitution of alternate jurors in more detail.

B. Sleeping or Otherwise Inattentive Juror. A defendant in superior court has the state constitutional right to be convicted by a jury of twelve unless the defendant waives the right to a jury trial in a non-capital case. N.C. CONST. art. I, § 24; G.S. 15A-1201; State v. Hudson, 280 N.C. 74, 79 (1971). If a juror is sleeping during the trial or otherwise inattentive, the defendant can move to substitute the juror or for a mistrial. The defendant must show by competent evidence that the juror was inattentive or sleeping and the defendant was prejudiced thereby. State v. Lovin, 339 N.C. 695, 715 (1995) (no abuse of discretion in the denial of the defendant's motion to substitute an occasionally sleeping juror because the evidence was sufficient to support the conclusion that the juror, although inattentive to parts of the case, could nevertheless perform his duties); State v. Williams, 33 N.C. App. 397, 398 (1977) (no error in the trial judge's failure to grant a mistrial on his own motion based on a juror falling asleep during cross-examination of a witness because the defendant did not show any prejudice).

C. Juror's Failure to Disclose Information During Voir Dire. Note that voir dire procedures are discussed in more detail in Jury Selection, in this Benchbook.

1. Discovery of Juror's Non-Disclosure Before Jury is Impaneled. If it is discovered that a juror made an incorrect statement during voir dire before the jury is impaneled:

- the judge may examine, or permit counsel to examine, the juror to determine whether there is a basis for a challenge for cause;

- if the judge determines there is a basis for a challenge for cause, the judge must excuse the juror or sustain any challenge for cause that has been made;
- if the judge determines there is no basis for a challenge for cause, any party who has not exhausted his or her peremptory challenges may challenge the juror.

G.S. 15A-1214(g).

2. Discovery of Juror's Non-Disclosure After Jury is Impaneled. If the juror's failure to disclose is discovered after the jury is impaneled but before the jury begins its deliberations, the trial court may exercise its discretion to reopen the examination. State v. Holden, 346 N.C. 404, 428 (1997); State v. Galbreath, ___ N.C. App. ___, 2024 WL 4018666 (2024) (trial court reponed voir dire and sustained State and defense challenges for cause of a juror who discussed the case prior to deliberations and possibly conducted unspecified "outside research"). Prior to formally reopening voir dire, the trial court may make an initial inquiry into whether grounds exist to do so; voir dire is formally reopened if the court allows the parties to question the juror. *See* Jury Selection, Section X.I., in this Benchbook. If the trial court reopens the examination of the juror, then both the prosecutor and defendant have the absolute right to exercise any remaining peremptory challenges to excuse the juror (assuming, of course, that the trial court does not excuse the juror for cause). *Holden*, 346 N.C. at 428 (trial court did not err in allowing prosecutor to exercise a remaining peremptory challenge after all the evidence had been presented, but before the jury had begun deliberations); State v. Thomas, 230 N.C. App. 127, 128 (2013) (trial court committed reversible error by reopening examination of a juror after impanelment but denying the defendant's motion to exercise remaining peremptory challenge); State v. Hammonds, 218 N.C. App. 158, 163 (2012) (similar ruling). If the juror is removed for cause or by a peremptory challenge, then the trial court must replace that juror with an alternate juror. If there is not an available alternate juror, then grounds for a mistrial may exist.

If the failure to disclose is discovered after the jury has begun deliberations but before it reaches a verdict, then grounds for a mistrial may exist. The party moving for a mistrial must show:

- the juror concealed material information during voir dire;
- the moving party exercised due diligence during voir dire to uncover the information; and
- the juror demonstrated actual bias or bias implied as a matter of law that prejudiced the moving party.

State v. Maske, 358 N.C. 40, 48 (2004) (a juror's inadvertent failure to disclose four-decades-old information that she had forgotten was not concealment and she did not demonstrate bias; trial court did not err in denying defendant's motion for mistrial). If the party meets this burden, the trial judge must grant the motion. For a discussion of the meaning of bias implied as a matter of law, see *State v. Buckom*, 126 N.C. App. 368

(1997) (finding no implied bias by a juror based on limited association in the same organization as the State's witness).

3. **Discovery of Juror's Non-Disclosure After Verdict.** A juror's misrepresentation of or failure to disclose potentially important information during voir dire that is discovered after the verdict typically is evaluated by a trial court in the context of a defendant's motion for appropriate relief. The North Carolina Court of Appeals has applied the same three-part test set out above for mistrial motions made at trial to a defendant's motion for appropriate relief made on the basis of an alleged non-disclosure discovered after the verdict. *Buckom*, 126 N.C. App. 368; *see also* Motions for Appropriate Relief, in this Benchbook.

D. **Unauthorized Jury View of Crime Scene.** A jury view is authorized by G.S. 15A-1229. An unauthorized view of a crime scene by jurors is misconduct. State v. Perry, 121 N.C. 533 (1897). However, the fact that a juror makes an unauthorized visit to the place of the crime is not grounds for a new trial unless it appears that the defendant was prejudiced. State v. Boggan, 133 N.C. 761 (1903) (no undue influence shown when the jurors passed through the crime scene during their stay at a hotel pending the trial); State v. Hawkins, 59 N.C. App. 190, 192 (1982) (although jurors used information about the lighting at the crime scene provided by a juror who visited the scene, there was no constitutional violation because there was testimony by an officer about the lighting conditions); State v. Smith, 13 N.C. App. 583, 585 (1972) (any possible prejudice from an unauthorized viewing by one juror was removed by the trial court's having the entire jury view the scene). Whether to grant relief for a juror's unauthorized view is in the trial judge's discretion. State v. Farris, 13 N.C. App. 143, 145 (1971).

For a discussion of all aspects of a jury view, see Jury View in this Benchbook.

E. **Presence of Unauthorized Person in Jury Room during Deliberations.**

1. **Alternate Jurors.** The North Carolina Supreme Court has held that the presence of an alternate juror in the jury room during deliberations violates the defendant's constitutional right to a jury trial as contemplated by article I, section 24 of the North Carolina Constitution. *See* State v. Bindyke, 288 N.C. 608, 627 (1975) (new trial granted based on constitutional violation when an alternate juror was present in the jury room for three to four minutes during deliberations).

The *Bindyke* Court held that the presence of an alternate juror in the jury room at any time after deliberations begin is reversible error per se. 288 N.C. at 627. The Court explained, however, that if the alternate's presence is inadvertent and momentary and occurs under circumstances from which it can clearly be determined that the jury has not begun deliberating, then the alternate's presence will not void the trial. *Id*. at 628. If the trial judge believes it is probable that deliberations had not yet begun when the alternate was in the jury room, the trial judge may recall the jury and the alternate and make a limited inquiry concerning whether there has been any discussion of the case or comment as to what the verdict should be. *Id*. If the answer is yes, the judge must declare a mistrial. If the answer is no, the alternate must be excused and the jury returns to deliberate. *Id*.; State v. Jernigan, 118 N.C. App. 240, 245

(1995) (no mistrial warranted when the alternate was present in the jury room during the selection of a foreman because this did not amount to deliberation; the judge had instructed the jury to select a foreperson and not to deliberate while the judge talked with the lawyers prior to finally submitting the case to the jury); State v. Locklear, 180 N.C. App. 115, 120 (2006) (no prejudicial error occurred when an alternate spoke with jurors after deliberations had begun because the conversations occurred during a lunch break, did not take place in the deliberation room, and the alternate did not express her feelings about the case to the other jurors).

Following the 2021 legislative changes to G.S. 15A-1215, discussed above in Section II.D., permitting substitution of an alternate juror after deliberations have begun, N.C.P.I—Crim. 101.35 (Concluding Instructions to Jury) was modified to include a note to the trial court to order any retained alternate jurors not to discuss the case among themselves or anyone else while sequestered. As noted above, the law permitting substitution of alternate jurors after deliberations have begun has been held unconstitutional; thus, a cautious trial judge may wish to discharge alternates upon submitting the case to the jury.

2. Non-jurors. The presence of a non-juror in the jury room is improper, but it does not automatically invalidate a verdict. If the trial judge finds that neither the deliberations nor the verdict were in any manner influenced by the entrance of a non-juror, and there was no communication between the non-juror and any juror, the judge may deny a motion to set aside the verdict. State v. Hill, 225 N.C. 74, 76 (1945) (affirming the denial of the defendant's motion to set aside the verdict based on the presence of two reporters in the jury room for several minutes, when an inquiry showed that neither the deliberations nor the verdict were in any way influenced by their unauthorized presence); State v. Battle, 271 N.C. 594, 595 (1967) (no error in the denial of the defendant's motion to set aside the verdict when a juror from a different case mistakenly went into the jury room for a brief time with the defendant's jury, and the jurors had not discussed the case in that juror's presence); State v. Riera, 6 N.C. App. 381, 385 (1969) (no error in the denial of the defendant's motion for mistrial when the jury became silent and said nothing when an unauthorized person mistakenly entered the jury room during deliberations), *rev'd on other grounds*, 276 N.C. 361 (1970).

Although older cases such as *State v. Hill* and *State v. Battle*, cited above, indicate that a trial judge's refusal to set aside the verdict or grant a mistrial is not reviewable on appeal, later cases utilize an abuse of discretion standard of review. State v. Billups, 301 N.C. 607, 616 (1981) (the trial court did not abuse its discretion by denying the defendant's motion for a mistrial when a prosecuting witness entered the jury room during a recess at the conclusion of trial but before the court's charge to the jury; the witness entered to use the bathroom and did not communicate with any of the jurors); State v. Washington, 141 N.C. App. 354, 375 (2000) (the trial court did not abuse its discretion by failing to declare a mistrial when the bailiff entered the jury room during deliberations to retrieve some magazines; the bailiff did not communicate with any of the jurors or hear any deliberations); State v. Phillips, 87 N.C. App. 246, 249 (1987) (the trial court did not abuse its discretion by failing to set aside the verdicts when the victim's wife was in the jury room

before the opening of court one day, and the sheriff took coffee cups to the jury in the jury room).