SEQUESTRATION OF WITNESSES

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Contents

I. Generally.

A. Authority. G.S. 15A-1225 and N.C. R. EVID. 615 authorize the sequestration of witnesses.

B. Effect. When a witness is sequestered, the witness is excluded from the courtroom so that he or she cannot hear the testimony of other witnesses.

C. Goal. The goal of sequestration is discourage and expose fabrication, inaccuracy, and collusion. N.C. R. EVID. 615, official commentary ; *see also* State v. Harrell, 67 N.C. App. 57, 64 (1984) (sequestration has to purposes: "First, it acts as a restraint on witnesses tailoring their testimony to that of earlier witnesses, and second, it aids in detecting testimony that is less than candid."); State v. Patino, __ N.C. App. __, 699 S.E.2d 678, 681 (2010) (quoting *Harrell*); State v. Johnson, 128 N.C. App. 361, 370 (1998) (same).

D. Scope. A sequestration order can apply to all or some of the witnesses, State v. Stanley, 310 N.C. 353, 357 (1984); *see also* State v. Garcell, 363 N.C. 10, 41 (2009) (trial court sequestered only some of the witnesses), and to all or some of the evidence, *Stanley,* 310 N.C. 353 (witnesses were sequestered only during the victim's testimony).

II. On Motion or Sua Sponte. G.S. 15A-1225 provides that a judge may order sequestration on motion of a party. Rule 615 also allows for sequestration at the request of a party but also provides that a judge may order sequestration on its own motion. Even before Rule 615 was enacted, however, it was understood that the trial court had authority to sequester witnesses sua sponte. *Stanley*, 310 N.C. at 357 ("The judge's power to control the progress and, within the limits of the adversary system, the shape of the trial has long included the broad power to sequester witnesses before, during, and after their testimony."). Neither the statute nor Rule 615 specifies a time for making a sequestration motion.

III. Discretionary Decision. The trial judge's decision about sequestration is a discretionary one. G.S. 15A-1225 ("judge may order"); Rule 615 ("court may order"); *see also* State v. Anthony, 354 N.C. 372, 396 (2001) (no abuse of discretion by denying motion to sequester); State v. Jones, 337 N.C. 198, 208 (1994) (no abuse of discretion by granting motion to sequester).

Notwithstanding the fact that the decision is discretionary, the Official Commentary to Rule 615 states that "the practice should be to sequester witnesses on request of either party unless some reason exists not to." Citing this language, the North Carolina Supreme Court has noted that "[p]articularly in cases as consequential as a capital murder trial, judges should give [sequestration] motions thoughtful consideration." *Anthony*, 354 N.C. at 396. However, no party has a right to have witnesses sequestered. *Stanley*, 310 N.C. at 357.

IV. Constitutional Issues. The North Carolina courts have repeatedly stated that due process does not automatically require separation of witnesses who will testify to the same set of facts. *See, e.g.,* State v. Holmes, 109 N.C. App. 615, 623 (1993).

V. Exceptions

A. Parties. G.S. 15A-1225 provides that a defendant may not be sequestered. Also, Rule 615 provides that it does not authorize the exclusion of a "party who is a natural person" or "an officer or employee of a party that is not a natural person designated as its representative by its attorney."

B. Victims. Victims may be sequestered. However, pursuant to G.S. 15A-825(6a), victims should be informed of the right to be present throughout the trial, subject to a sequestration order.

C. Essential Persons. Rule 615 provides that it does not authorize sequestration of "a person whose presence is shown by a party to be essential to the presentation of his cause." For example in *State v. Jones*, 337 N.C. 198, 208 (1994), the court held that the trial court did not abuse its discretion by permitting the lead investigating officer to remain in the courtroom although other witnesses were sequestered when the State had asserted that the officer was essential to the State's presentation if its case.

D. Presence Is in the Interest of Justice. Rule 615 provides that it does not authorize the exclusion of "a person whose presence is determined by the court to be in the interest of justice."

E. Parent of Minor Child. G.S. 15A-1225 provides that when a minor child is called as a witness, the parent or guardian may be present while the child testifies even though the child's parent or guardian is to be called subsequently. *See also* N.C. R. EVID. 615, official commentary (explaining that the exception for persons whose presence is in the interest of justice would include, for example, a parent or guardian of a minor witness). Several cases have found no abuse of discretion when the trial court granted the defendant's motion to sequester the State's witnesses, but allowed a child victim's parent to remain in court while the child testified. *See, e.g.,* State v. Cook, 280 N.C. 642, 648 (1972) ("It was clearly not an abuse of discretion to permit the mother of an eight-year-old witness to remain in the courtroom while the child testified so as to give the child the comfort of her mother's presence in strange and, at best, frightening circumstances to a little girl testifying in a case of this nature."). However the parent does not have a right to be present and may be excluded. State v. Weaver, 117 N.C. App. 434, 436 (1994) (no abuse of discretion by excluding victims' mother). At least one case found no abuse of discretion when the trial court sequestered witnesses but allowed the victim's mother to remain in the courtroom even though the victim was no longer a minor. State v. Dorton, 172 N.C. App. 759, 766 (2005) (victim was 16 when she was sexually and physically assaulted by her father; she was 18 at the time of trial). When a trial judge exercises his or her discretion and allows the parent to remain in the courtroom, it is best to make a record of the reason for that exercise of discretion. N.C. R. EVID. 615, official commentary.

VI. Practical Matters

A. The Sequestration Order. When ordering sequestration, the trial judge should indicate which witnesses are to be sequestered and whether they are to be excluded from presentation of all evidence or only during certain testimony. If the judge intends to limit other contacts among the witnesses, the judge should explicitly state his or her intentions. State v. Abraham, 338 N.C. 315, 360-61 (1994) (no abuse of discretion by denying the defendant's motion to exclude testimony when the prosecutor interviewed several sequestered witnesses together; the sequestration order only sequestered the witnesses during their testimony). The order should provide clear instructions to the witnesses so that there is no confusion.

B. Communicating with Sequestered Witnesses. If the trial judge decides to sequester a witness, he or she must make arrangements so that the court can

communicate logistical matters to the witness, such as when he or she will be called to testify.

C. Violations of the Sequestration Order. There are no hard and fast rules for dealing with a witness's violation of a sequestration order, and the trial court has discretion as to the appropriate remedy. State v. Johnson, 128 N.C. App. 361, 369-71 (1998) (no abuse of discretion by denying a defense motion to bar testimony of a witness who may have violated a sequestration order).

1. **Excluding Witness's Testimony.** One response to a violation is to exclude the witness's testimony. *Johnson*, 128 N.C. App. at 370 (noting the availability of this remedy). However, judges should be cautious about excluding testimony that might violate a defendant's constitutional right to present a defense.
2. **Contempt**. Contempt is another option when a witness violates a court order. See "Contempt" in this Guide.