C.4

Topic:
JUROR CONDUCT

This issue distributed to:

Superior and district court judges, district attorneys, and public defenders

ADMINISTRATION OF JUSTICE MEMORANDA

PUBLISHED BY THE INSTITUTE OF GOVERNMENT
University of North Carolina at Chapel Hill

January 1978 01/78

JUROR CONDUCT/MISCONDUCT AND THE ROLE OF THE TRIAL JUDGE

by C.E. HINSDALE

This paper examines a selective collection of modern North Carolina cases involving irregular or unusual conduct by or affecting a trial jury. The search period covers roughly the last fifty years, although a few earlier cases have been included. Emphasis is placed on what action, if any, the judge should take when an irregular situation arises. Frequently the cases are self-explanatory, so that no commentary is necessary. Occasionally commentary has been offered to develop a point on which the case law is sketchy or obscure. Citations to appropriate sections of G.S. Ch.15A, Arts. 59 et seq. (the new trial and appellate procedure act), effective July 1, 1978, are included.

I. CONDUCT OF INDIVIDUAL JURORS

A. Drunkenness

In State v. Tyson, 138 N.C. 627 (1905), a capital case, the defendant entered a plea of former jeopardy, since the judge in an earlier trial of the same case had declared a mistrial because of a drunken juror. In the earlier trial the juror in question, after the evidence had been presented but before arguments of counsel, went home and got some liquor. Thereafter, he was in a "... very nervous and besotted condition and unfit for duty, and unavailing efforts were made to render him fit." The judge at the second trial overruled the plea, and his action was upheld on appeal on the grounds that the mistrial was manifestly necessary.

A different result was reached in State v. Crocker, 239 N.C. 446 (1954), also a capital case. In this case, the jurors were sequestered;

The author wishes to thank Mr. Joseph Johnson, now an attorney of Chapel Hill and Raleigh, N.C., for his help in locating many of the cases discussed here.

This publication is issued occasionally by the Institute of Government. An issue is distributed to those of the following groups to whom its subject is of interest: sheriffs, general law enforcement officers, special-purpose law enforcement officers, police attorneys, judges, clerks, district attorneys, public defenders, adult correction officers, juvenile correction personnel, jailers, and criminal justice trainers. The upper left-hand corner lists those to whom this issue was distributed and indicates a topic heading for this issue, to be used in filing. Comments, suggestions for future issues, and additions or changes to the mailing lists should be sent to: Editor, Administration of Justice Memoranda, Institute of Government, P.O. Box 990, Chapel Hill, N.C. 27514.

three of them got drunk one night at their motel and were "...moving about in their underwear along the halls...." Over the defendant's objection, the court granted a mistrial. At the second trial, a plea of double jeopardy was entered and, after conviction, sustained on appeal. The appellate court pointed out that the trial judge failed to take any evidence or make any findings that the jurors were unfit or incompetent at the trial the next morning; therefore, there was no proof of manifest necessity to justify the mistrial order.

B. Sleeping

The defense counsel in State v. Engle, 5 N.C. App. 101 (1969), moved for a mistrial on the suggestion that a juror had been sleeping. He offered to get affidavits to support his motion. The judge denied the motion, stating, "It's hard to tell when a man is asleep. People close their eyes--I do that myself--a lot of times, concentrating. Sometimes my eyes get tired, and I close my eyes, and anyone would say that I was asleep, but I listen." He also asked the jurors whether any of them had been asleep; none responded. On appeal, five months later, the trial judge was upheld, since there was no competent evidence before the court that any juror had been sleeping. Defense counsel had attached affidavits to support his overruled motion, but they were held to be of no effect, having been made five months after the trial. (Apparently a different result would have been required if counsel had presented his affidavits at trial; the judge at the least would have had to conduct an inquiry and make findings of fact.)

In State v. Williams, 33 N.C. App. 397 (1977), because a juror had fallen asleep, the judge made all jurors stand. Defense counsel made no objection or motion but contended on appeal that his client was convicted by a jury of eleven. The appeals court noted that twelve jurors were empaneled, twelve returned a verdict, there was no objection at the time, and there was no specific showing of prejudice. It rejected the contention.

C. Conducting Experiments

Brown v. Boren Clay Products Co., 5 N.C. App. 418 (1969), was a civil suit for damages resulting from an automobile collision that occurred forty minutes after sunset. During a night recess a juror "conducted some experiments with regard to viewing vehicles on the highway some thirty minutes after sunset." The judge found no prejudice, after inquiring into the incident (no additional facts are given), and his discretion was upheld.

A similar result was reached in State v. Pridgen, 20 N.C. App. 116 (1973). In that case during recess a juror got into a large box--a defense exhibit--that arresting officers had hidden in while riding in the back of a pickup truck used to transport nontaxpaid whiskey. The sheriff asked the juror what he could see. The juror responded that he could see the back of the court room through a hole in the box. The defendant contended that the juror was getting evidence improperly but failed to demonstrate actual prejudice. The judge's denial of a new trial was affirmed on appeal; the court merely stated that the judge's decision on such a matter is final when supported by the evidence.

D. Visiting the Scene

An aggravated case of visiting the scene of the crime occurred in State v. Perry, 121 N.C. 533 (1897), a capital (rape) case. The jury was sequestered for the weekend but was allowed on Sunday to take a walk for exercise. They proceeded to the scene of the crime, a railway cut, and while there asked a passerby where a particular house was located and noted distances, vegetation, ground texture, and the like. This incident came to light after the verdict. The judge investigated but refused to grant a new trial. His decision was overturned on appeal; the Supreme Court firmly pointed out that the jury had been exposed to evidence other than that offered at the trial.

In Lewis v. Fountain, 168 N.C. 277 (1915), a suit for damages for an assault with a firearm, after the evidence was in a juror dined in the house where the shooting took place. The judge found that during the visit the juror did not discuss the case or inspect the bullet holes in the house walls and concluded that, while there had been an opportunity for improper conduct, none had actually taken place, and actual misconduct resulting in prejudice must be shown before a new trial is required.

In a recent case, State v. Smith, 13 N.C. App. 583 (1972), a juror visited the spot where the defendant had been arrested for possessing marijuana but told the court that the visit had had no effect on him. The court found no prejudice and denied the motion for a new trial. In a further effort to eliminate any possible residual prejudice, the trial judge, on his own motion, ordered all jurors taken to the scene. In upholding the judge's action, the appeals court stressed an absence of prejudice.

E. Attending a Movie

While sitting as a juror in a murder trial, is it error to attend a movie depicting a murder mystery? In State v. Hawkins, 214 N.C. 326 (1938), the jurors were permitted to do just that. The appeals court held, without discussion, that this was no grounds to set the verdict aside.

F. Expressing an Opinion

During a recess in State v. Drake, 31 N.C. App. 187 (1976), a disinterested witness overheard a juror telling another juror that he had formed an opinion on the issue of self-defense, contrary to the judge's earlier instruction to remain open-minded to the end of the trial. The judge questioned the witness but not the juror and denied a motion for a new trial. On appeal, a new trial was granted. The trial judge should have questioned the talkative juror to determine the truth of the allegation, and should also have questioned the other jurors to determine its impact, if any, on them.

G. Miscellaneous

In State v. Brown, 13 N.C. App. 261 (1971), a prospective juror was asked whether he had heard the case discussed in the community. He said

in the other jurors' presence that he had heard about the defendant's escape from jail and was peremptorily excused. A motion for a mistrial was overruled. The appeals court held that "[i]n the factual setting of this case, it was not prejudicial error" to deny the motion.

II. CONDUCT BETWEEN JURORS AND NONJURORS

A. Contact Between Jurors and a Party

When a juror met with the defendant on a "logging trail" during a weekend recess in the trial, a mistrial was properly declared and a second trial was allowed [State v. Cutshall, 278 N.C. 334 (1971)]. The opposite result was reached in State v. Scott, 242 N.C. 595 (1955), when a juror, during a trial recess, asked the defendant to buy for him a bottle of paregoric. The two discussed (exact nature of discussion unknown) the case before the defendant realized that he was talking to a juror. The defendant moved for a new trial. The Supreme Court found it hard to believe that the defendant would have said anything in the conversation to hurt his case. While the contact between the two was error, no prejudice was shown, so a new trial was not required. From these two cases, it is reasonable to conclude that a secret and deliberate contact between defendant and jury will be presumed prejudicial, while an open and accidental contact will not be.

In an automobile negligence case, a juror disclosed after a verdict for the defendant had been entered that she overheard defendant during trial (in the rest room) state that the windshield of plaintiff's car was not broken. The court investigated (its findings are not reported) and found no prejudice. The appeals court found no abuse of discretion and affirmed [Wright v. Holt, 18 N.C. App. 661 (1973)].

In State v. Suddreth, 230 N.C. 239 (1949), before judgment was imposed, the defendant moved to set the verdict aside because a juror had permitted the sister of the deceased victim to ride in his car while the case was pending. The court found that the juror did not know that his passenger was a sister of the deceased and that they did not discuss the case. The Supreme Court held that the trial court's decision was not reviewable unless there was an error of law, and it found no such error in this case.

Suppose a juror walks to lunch with the plaintiff and one of plaintiff's witnesses. This happened in O'Berry v. Perry, 266 N.C. 77 (1965). The trial court found that the case was not discussed and that the outcome of the trial was not affected. The Supreme Court found no error.

In State v. Norman, 8 N.C. App. 239 (1970), a forgery case, three jurors returned to court after adjournment for the day and saw the defendant in handcuffs. The conviction was affirmed, the appeals court finding no showing of prejudice. The court intimated, however, that had the defendant taken the stand, this incident would have a bearing on his credibility.

During a recess in State v. Selph, 33 N.C. App. 157 (1977), a juror talked to the mother of the defendant's accomplice, who, although not on

trial, was mentioned often in the testimony. This conversation was reported to the district attorney and defense counsel while the jury was deliberating. The defense counsel moved to question the juror on voir dire. Instead, the judge asked the entire panel whether any juror had talked about the case with any third party. All jurors remained silent. Held, no error; the judge's procedure was within his discretion and amounted to a specific finding of no misconduct. (This case is very useful for its review of the recent case law in this field.)

B. Contact Between Juror and a Witness

In State v. Spencer, 239 N.C. 604 (1954), three jurors in the box overheard a witness say to defense counsel, "...I don't know anything about this case. If you put me on the stand, you will be sorry." When the judge questioned the jury, only one juror said the incident might have some bearing on his verdict; on further questioning, he said he would not be influenced by the remark. The judge denied a motion for a new trial. The appeals court affirmed, merely saying the trial judge has authority to rule on the competency of the jurors.

In State v. Shedd, 274 N.C. 95 (1968), several jurors overheard a witness discussing his testimony in the hall during a recess. The trial court did not investigate, but the Supreme Court found that the facts related by the witness in his testimony were not in dispute. The jurors' overhearing his remarks was therefore held to be not prejudicial, though the Supreme Court hinted that the trial judge should have investigated and made findings of fact.

In State v. Gaines, 283 N.C. 33 (1973), a juror talked with one of the State's witnesses. They did not discuss the case and the juror told the court he did not know that he was talking to a witness. Held, no error.

In State v. Chavis, 24 N.C. App. 148 (1974), in the presence of the jury, a witness left the stand and tried to reach the defense table during defense counsel's unusually loud and long cross-examination. The court overruled a motion for a mistrial, apparently feeling that the defense should not be allowed to profit from a disturbance it was responsible for provoking. The judge's ruling was upheld.

C. Contact Between a Juror and a Court Officer

In Keener v. Beal, 246 N.C. 247 (1957), before court was convened, two jurors overheard an officer say, "This is just a fight between two insurance companies." The jurors testified that they remembered kidding with the officer but not discussing anything to do with the case. The court found no prejudice and denied a mistrial. This ruling was upheld on appeal.

In State v. Sneeden, 274 N.C. 498 (1968), the bailiff and the jury foreman (who came to the jury room door during deliberation) had a conversation about how soon a parole was possible. The bailiff told the foreman "It had nothing to do with the evidence." On appeal the Court found no prejudice and upheld the conviction. The case is noteworthy for its citations and discussion of the law.

In State v. Wood, 9 N.C. App. 707 (1970), a juror overheard a judge say, at the end of the day, "I guess he [the defendant] ought to be kept in jail overnight." After the verdict, the judge questioned the jurors, found out that one juror had overheard his remark, and queried the juror, who said that it did not affect his vote. No prejudice was found, and the conviction was affirmed.

In State v. Harrell, 20 N.C. App. 352 (1974), after the jury had been deliberating for about an hour, the foreman knocked on the door, which was about 15 feet from the bench. The bailiff opened the door, and the foreman told him that the jury was in disagreement. The bailiff told the judge, who was conducting another trial; the judge told the bailiff to find out what the foreman wanted; the bailiff asked the foreman and again reported the disagreement to the judge, the same as before; the judge told the bailiff to tell the jury to continue to seek agreement. The jury reached agreement in another twenty minutes. Motion for a mistrial was denied, but the court allowed defense counsel to fully develop the facts as related here. The appeals court disapproved the judge's action in not bringing the jury into the courtroom but found no prejudice because the bailiff did not exceed the instructions given to him to relay to the jury.

A mistrial was granted in State v. Shuler, 293 N.C. 34 (1977), a homicide case, when a juror overheard a law enforcement officer say, "Unless there is more evidence produced than there has been, that man will never be found guilty by this jury." The juror, in chambers, told the judge that he was not influenced, but the judge nevertheless declared a mistrial because "...[the] verdict would inevitably be suspect." On retrial, conviction, and appeal, the judge was upheld (the former-jeopardy motion was not sustained) as having acted within the proper exercise of his discretion.

D. Contact Between Juror and Jury Custodian-Witness

In two 1946 criminal cases, the Supreme Court found no prejudice when a deputy sheriff acting as jury custodian was also a witness (State v. Hart, 226 N.C. 200; State v. Taylor, 226 N.C.286). In Hart, the extent of the jury's exposure to the witness-custodian was not set out, but the Court found that the officer's testimony was cumulative and further stated that actual prejudice must be found, not just the opportunity for prejudice. In Taylor, the Court held that using the deputy-witness as jury custodian when the jury viewed an automobile on the courthouse lawn that was introduced as an exhibit was improper but not reversible. In a 1970 case, State v. Macon, 276 N.C. 466, courtroom bailiffs whose sole contact with the jury was to open doors for them were also witnesses. The Supreme Court found no opportunity for prejudice thereby but said that if the witnesses had been custodians in charge of the jury, prejudice would have been "conclusively presumed." This dictum in Macon seems to be contrary to the 1946 cases, which were cited and apparently distinguished on their facts. The safest rule is to maintain a rigid separation between the roles of jury officer and witness.

E. Juror/Third-Party Expressions of Opinion

After conviction in a capital case, the defendant presented affidavits that a juror had expressed an opinion, before being sworn, that the defendant

was guilty. The trial judge examined the juror's answers on voir dire and concluded that there was no evidence of prejudice. The Court held that his ruling was within his discretion and confirmed the conviction [State v. Sheffield, 206 N.C. 374 (1934)].

In Stone v. Griffin Baking Co., 257 N.C. 103 (1962), a juror had a conversation during trial (at lunch) with a stranger who told him that one could get out of future jury duty by hanging the jury. The judge denied a retrial, noting that there was no showing that the stranger tried to influence the juror or that he knew the juror had any connection with the case.

In a 1971 case, State v. Waddell, 279 N.C. 442, three strangers approached a prospective juror, who was later accepted, and asked whether he was on the jury panel. Then one of them told the juror, "Don't find any Black Panthers guilty." On voir dire, the juror stated that he could give a fair trial. There was also a post-verdict inquiry, revealing nothing prejudicial. The Court found that the jurors did not know the strangers, knew no Black Panthers, and did not even know whether the defendant was a Black Panther. It affirmed the conviction.

III. EXPOSURE TO PUBLICITY

In the following cases, all decided in the last decade, allegations were made of prejudicial publicity by newspapers or radio. In none of these cases was prejudice found.

During a trial a newspaper referred to another charge pending against the defendant. Since the jury had been sequestered, the judge examined the jury custodian, who felt that there was no chance that the jury had read the article. The judge had also instructed the jury not to read the papers [State v. Tippett, 270 N.C. 588 (1967)].

During the trial of another case, State v. Garrett, 5 N.C. App. 367 (1969), a local headline read: "Witness Held As Poker-Theft Trial Kicks Off." The article quoted the assistant solicitor as saying that the witness's testimony had differed substantially from an unsigned statement he had given the police. On questioning by the judge, only one juror stated that he had seen the article, but only the headline, and it would not affect him in any way.

Despite an earlier warning by the judge not to do so, eight jurors listened to a news report that called the defendant a "dope peddler." On interrogation, they said that they could still give the defendant a fair trial. The case is valuable for its collection of authorities on the law involved [State v. Moye, 12 N.C. App. 178 (1971)].

Two jurors read in the newspaper that the defendant was appealing a conviction for attempted armed robbery. The judge queried them as to exposure and prejudice and found some exposure but no prejudice [State v. Powell, 11 N.C. App. 465 (1971)].

On the day the trial began, the local paper carried an article about the two defendants under the caption "2 Convicts Land Back in Court." The article said that the defendants were serving a sentence after an earlier con-

viction for another armed robbery. The defendants contended that the jurors (who were not sequestered) had been exposed to the paper, but no evidence to this effect was adduced and no actual prejudice was shown. The judge did not ask the jurors about their exposure, although the Supreme Court said that it would have been "better practice" to do so [State v. McVay, 279 N.C. 428 (1971)].

During the trial [State v. Feimster, 21 N.C. App. 602 (1974)], a newpaper story said that a warrant had been issued for the defendant for assaulting a police officer with a deadly weapon. The judge did not examine the jurors for possible exposure or prejudice. Again the appellate court said that the better practice would have been to examine the jurors, but found no evidence of prejudice in the record. Thus it becomes clear that the burden is on the party that seeks a mistrial not only to make the mistrial motion but also to insist on presenting supporting testimony; furthermore, the testimony must show prejudice of a serious and incurable (or curable but not cured) nature.

During the trial [State v. Walker, 22 N.C. App. 291 (1974)], a local radio news broadcast said that the defendant had entered a guilty plea in an insurance fraud case. The judge asked the jury whether any of them had heard the newscast. None responded.

A juror read a newspaper article during the trial that listed other felonies committed by the defendant. The judge and cousel asked the juror whether he could nevertheless reach a fair and impartial verdict, and the juror said that he could. On investigation, the judge found no prejudice [State v. Trivette, 25 N.C. App. 266 (1975)].

Several jurors read a newspaper account of the trial [State v. Woods, 293 N.C. 58 (1977)]. The judge thereafter gave them a cautionary instruction and made a finding that the newpaper article contained only a factual summary of testimony already heard by the jurors.

While none of these cases resulted in a mistrial or a new trial, it is clear that when allegations of exposure to extrajudicial "evidence" are made, the judge should investigate thoroughly, on the record, and make such findings of fact and conclusions of law as the evidence supports. Failure to do so, especially when defense counsel is alert and makes the proper motions, could result in reversal on appeal.

IV. UNAUTHORIZED PERSONS IN JURY ROOM

Three recent North Carolina cases involve an alternate juror in the jury room. In State v. Alston, 21 N.C. App. 544 (1974), the alternate juror was permitted to participate in the deliberations. He acquiesced in the verdict, when polled, as the thirteenth juror. Citing G.S. 9-18 (discharging alternate jurors) and an 1800 case, Whitehurst v. Davis, 3 N.C. 113, the Court held this action to be reversible error. In State v. Bindyke, 288 N.C. 608 (1975), the alternate juror remained in the jury room only three to four minutes after the jury retired to deliberate, at which point the judge recalled the jury and dismissed the alternate without asking whether deliberations had begun. The defense did not object to the incident at the time, but on appeal a split court (4-3) awarded a new trial. Justice Sharp, for the majority, concluded that

the presence of an alternate juror during deliberations is error per se, and she wrote that in such a case a hearing to determine the extent of participation is futile. A hearing is permissible only to determine whether there was any deliberation while the alternate was present; if so, a new trial is mandatory. The decision overturned the Court of Appeals' assumption that in the three or four minutes the alternate was in the jury room he could not have participated in the deliberations. Justice Huskins, in a strong dissent, pointed out that the record contained nothing whatever to suggest the alternate was present in the jury room during deliberations. In the third case, State v. Rowe, 30 N.C. App. 115 (1976), the alternate juror had been in the jury room (sitting at a separate table) approximately ten minutes and deliberations had begun when he was removed. The defense declined a specific invitation to move for a mistrial. Nevertheless, relying on Bindyke, the Court of Appeals granted a new trial, making it clear that the defendant cannot consent to a "thirteen man jury." It is likely that the dissenters in Bindyke would find more form than substance in this decision.

In State v. Battle, 271 N.C. 594 (1967), a prospective juror who had not been impaneled for this case took a seat in the jury box and by mistake went to the jury room with the eleven other jurors, the twelfth legitimate juror being absent. A few "moments" later the twelfth juror appeared, and the mistaken juror was removed. The judge examined the jury and found that the case had not been discussed in his presence. The verdict was upheld.

In State v. Hill, 225 N.C. 74 (1945), two newspaper reporters entered the jury room during deliberations and talked together briefly near the door. The jury was "over near the window." The judge examined the reporters and each member of the jury, finding that the reporters entered by mistake, did not know the jurors were deliberating, and heard nothing the jurors said. The Supreme Court refused to set aside the verdict. While this result is sound, the strong language in Bindyke may undermine its reliability.

In State v. Riera, 6 N.C. App. 381 (1969), a "female" entered the jury room during deliberations. On investigation, the trial court found that when she entered, the jury fell silent and said nothing (apparently the intruder then left). The appeals court found no prejudice.

V. MATTERS AFFECTING DELIBERATIONS

A. Quotient Verdicts

It has long been the rule that a jury may not impeach its own verdict. In Cambell v. High Point Railroad, 201 N.C. 102 (1931), pursuant to this principle, a juror was not allowed to testify that a verdict was a quotient verdict. This was carried a little farther in an eminent domain case, Collins v. N.C. State Highway Comm., 240 N.C. 627 (1954). The verdict was for $1,666.67. Although the appellate court surmised that this was a quotient verdict, it noted that the State had failed to request that the jury be polled and found that the surmise did not compel a conclusion that the verdict was in fact a quotient verdict. Finally, in N.C. State Highway Comm. v. Matthis, 2 N.C. App. 233 (1968), the defendant's attorney found a piece of paper in the jury room that had twelve figures on it. The figures had been totaled and

the result divided by 12. The resulting figure matched the verdict. In this case the appeals court did not presume that the jurors had acted improperly. The scrap of paper did not create a presumption; it may have been used in only the deliberative process, and nothing indicated that the jurors had earlier agreed to be bound by the quotient.

In any event, evidence of a quotient verdict must now come from some source other than the jurors themselves, although effective July 1, 1978, G.S. 15A-1240(b) may permit evidence from jurors themselves concerning whether a verdict was reached "by lot."

B. Taking Notes

In State v. Ward, 286 N.C. 304 (1974), three jurors took notes for later use in the jury room. The court carefully inquired into the matter, found no possibility of prejudice, and upheld the verdict. The appeals court affirmed this decision, pointing out that there had been no distraction occasioned by the note-taking and the trial was short and simple, so that it is unlikely that the jurors with notes had any undue influence over the other jurors. In State v. Pearson, 24 N.C. App. 410 (1975), a long and serious trial, the judge refused to prohibit jurors from using notes they had taken during the trial in their deliberations. This refusal was upheld and is consistent with earlier North Carolina cases. G.S. 15A-1228 (to become effective July 1, 1978) permits note-taking by jurors if no party objects.

C. Evidence and Miscellaneous Documents in Jury Room

The defendant, in State v. Stephenson, 218 N.C. 258 (1940), was charged with burning a tobacco packhouse to collect insurance. The jury, without the knowledge or consent of the court or the defendant, took into the jury room a copy of a civil complaint and a sheet of paper containing a synopsis of the solicitor's argument. The complaint was a part of the State's evidence; the synopsis commented unfavorably on the defendant's failure to testify. On inquiry the court found that the jury did not use the documents in reaching a verdict--at most, they read one paragraph of the complaint. The Supreme Court held that use of either document by the jury was error (a statute prohibited use of the complaint) but set the verdict aside for other errors.

In re Hall's Will, 252 N.C. 70 (1960), is a case in which a juror took into the jury room a volume of the Encyclopedia Americana, from which he read to the jury a definition of "undue influence." While this conduct was improper, the Supreme Court held that the only evidence of it came from the jurors themselves, and they invoked the rule that a jury may not impeach its own verdict. The court added that the encyclopedia definition was more favorable to the appellant than the correct definition, so prejudice was not possible. Two justices dissented in this case on the grounds that the trial judge should have exercised his discretion and not considered himself bound as a matter of law by the rule against a jury's impeaching its own verdict. Query, would the rule have stood up if the definition had been less favorable to the moving party?

In a forgery prosecution, one of the jurors took a dictionary definition of "uttering" to the jury room. This came to light when the jury asked the judge to clarify the definition. The judge told the jury to "disregard in every way" the dictionary definition and then repeated his instruction. The jury's conduct was, of course, improper, but the appellate court held that the trial judge's corrective action cured the error. [State v. McLain, 10 N.C. App. 146 (1970)].

In State v. Haltom, 19 N.C. App. 646 (1973), the trial court permitted the jury to take the State's evidence (packages of marijuana) into the jury room. Assuming that this was error, the court nevertheless sustained the conviction because the defense failed to show prejudice and "...that a different result would likely have ensued" without the error. Under G.S. 15A-1233(b) (effective July 1, 1978), the judge in his discretion, with the consent of all parties, may permit the jury to take with them exhibits and writings in evidence. When he does so, he must, on request, instruct the jury not to conduct experiments with the exhibits. He may take steps to see that the jury does not give undue prominence to the evidence taken with them.

In State v. Quick, 20 N.C. App. 589 (1974), the court prepared a writing that contained the elements of the offense and permitted the jury to take it to the jury room for use in deliberation. The appeals court held this action to be no error, citing State v. Frank, 284 N.C. 137 (1973), in which the Supreme Court approved of the practice in a case with several lesser-included offenses as possible verdicts.

Allowing a jury to return home for the night after deliberations have begun but before a verdict has been reached was approved in State v. Bynum, 282 N.C. 552 (1973). Of course, the judge should give the jury appropriate admonitions.

VI. IRREGULARITIES AFFECTING THE VERDICT

Since as early as 1805, in Suttrell v. Day, 5 N.C. 94, the Supreme Court has supported the common law doctrine that a jury will not be allowed to impeach its own verdict. An examination of the cases, however, indicates that it is not always easy to tell when the doctrine will be invoked.

In McCabe Lumber Co. v. Beaufort County Lumber Co., 187 N.C. 417 (1924), the jury returned a verdict at noon and was excused for the midday meal. After the recess, just before reconvening, several jury members told the judge that they had made a mathematical error in their verdict ($10, 800 should have been $1,080). The judge reassembled the jury, confirmed this error by inquiry, and over objection allowed the jury to change its verdict. The judge found no evidence of jury-tampering or other improper influence. On appeal, the Supreme Court acknowledged the rule that a jury may not attack its verdict, but it would not apply the rule to these facts and upheld the changed verdict. Correcting a verdict is different from impeaching it, said the Court.

In In re Will of Sugg, 194 N.C. 638 (1927), with the agreement of the parties, the judge left for the weekend, with the clerk authorized to take the verdict.

When the jury was polled, one juror said that he had something to say about his decision, but he withheld it because the judge was absent; he nevertheless said that he agreed with the other jurors. After being discharged, the juror told a news reporter that he did not agree with the verdict. In a hearing to set aside the verdict at which these facts came out, the judge found that the juror did not in fact assent to the verdict when it was rendered and therefore ordered a new trial. On appeal the Supreme Court held that the juror did not impeach the verdict, but indicated dissent from it before it was accepted, thus approving the trial judge's action.

In Lambert v. Caronna, 206 N.C. 616 (1934), an affidavit was presented as to what a juror said in the jury room during deliberations. The affidavit was held to be incompetent under the basic no-impeachment rule.

In Livingston v. Livingston, 213 N.C. 697 (1938), the jury answered "yes" to an issue and was discharged. Fifteen minutes later, a question that arose in the clerk's office revealed that at least one juror thought the answer decided the case for the defendant rather than the plaintiff, when the contrary was in fact true. The judge recalled the jury, satisfied himself by inquiry that the jury had neither been tampered with nor discussed the case with anyone other than the questioner in the clerk's office; over the plaintiff's objection he allowed the jury to reconvene. The jury thereupon returned a verdict of "No," which was accepted. On appeal, the Supreme Court found no sanction for this procedure and ordered a new trial. Language in the case apparently approves of allowing a jury to correct an error before it is discharged, citing Lumber Co. v. Lumber Co., 187 N.C. 417 (1924), but not to change a verdict after discharge. Other language in the opinion about the jury's having made a mistake of law rather than a mistake of fact may not have been necessary to the decision.

A somewhat similar factual situation arose in Selph v. Selph, 267 N.C. 635 (1966), a divorce and alimony case. After accepting the jury's answers to the issues, the judge recorded the verdict and dismissed the jury. Thereupon, one of the jurors informed plaintiff's attorney that he was confused as to the legal effect of his answers to the abandonment issue. The judge examined the juror in chambers and found that his was indeed true. On motion, he set aside the verdict and ordered a new trial. The Supreme Court conceded the trial court's discretionary right to set aside a verdict in the interests of justice but invoked the rule that jurors cannot impeach their verdict and returned the case to the trial court for entry of judgment on the verdict. The Court repeated--unnecessarily, it seems--the confusing discussion about mistakes of fact and mistakes of law recited in the Livingston case. The rule that jurors may not impeach their verdict could have been used to decide both Livingston and Selph without elaboration.

In State v. Hollingsworth, 263 N.C. 158 (1964), two days after the trial was over, defense counsel moved to cross-examine the jury on whether it had heard and understood the charge. The Supreme Court upheld the trial judge's refusal to comply and took the opportunity to review the origin of the doctrine and to reassert its soundness. Other North Carolina cases are cited in Hollingsworth.

G.S. 15A-1240, effective July 1, 1978, codifies the no-impeachment rule, with some apparent liberalization. The new rule follows the ABA Standards

Relating to Trial by Jury, Sec. 5.7, very closely. The language is general and will require judicial interpretation. The discussion in the Standards manual, at pages 164-75, is a prerequisite to understanding the new rule.

The decisions in negligence cases, in which the jury answers "Yes" to the contributory negligence issue and then mistakenly awards damages to the plaintiff, hold that the court should not return the issues to the jury for reconsideration but accept the verdict and render judgment thereon for the defendant [Swann v. Bigelow, 243 N.C. 285 (1955); Butler v. Gantt, 220 N.C. 711 (1942)]. In other civil cases, when the answers to the issues are indefinite or inconsistent, it may be the judge's duty to give the jury further instructions and direct them to retire, reconsider, and bring in a proper verdict. Development of this topic is beyond the scope of this paper. See Bank v. Pocock, 29 N.C. App. 52 (1977), and cases cited therein.

Norburn v. Mackie, 264 N.C. 479 (1965), presents the simple fact situation in which a jury, when polled, could not agree on one of the issues. The trial judge directed the jury to return to the jury room and try to reach agreement and they did. The Supreme Court held the judge's action to be within his discretion; it is also sanctioned by G.S. 15A-1238 (effective July 1, 1978). In a somewhat similar case, a juror, when polled, expressed some confusion and hesitation on one issue but finally said that he assented to the verdict. The judge thereupon accepted the verdict, a course that the appeals court held to be proper [Nolan v. Boulware, 21 N.C. App. 347 (1974)]. A substantially similar case is Trantham v. Elk Furniture Co., 194 N.C. 615 (1927).

In State v. Jacobs, 25 N.C. App. 500 (1975), the foreman of the jury reported that one juror did not hear all of the testimony. The judge sent the jury back for further deliberation. It finally returned a guilty verdict; when polled, it was unanimous. The trial judge denied a motion for mistrial on grounds of an eleven-man verdict, and his denial was upheld.

Annotations

Effect, in criminal case, of placing jury in charge of officer who is a witness, 38 ALR 3d 1012 (1971).

Interrogation of jurors, during criminal trial, as to whether they have read newspaper articles pertaining to alleged crime or the trial, 15 ALR 2d 1152 (1951).

Juror's reading of newspaper account of trial in criminal case during its progress, 31 ALR 2d 417 (1953).

Permitting jurors to attend theater or the like during course of criminal trial, 33 ALR 2d 847 (1954).

Competency of jurors' statements or affidavits to show that they never agreed to purported verdict, 40 ALR 2d 1119 (1955).

Effect, in criminal case, of communication between court officials and jurors, 41 ALR 2d 227 (1955).

Prejudicial effect, in civil case, of communications between court officials and jurors, 41 ALR 2d 288 (1955).

Admissibility, in civil case, of juror's affidavit or testimony to show bias, prejudice, or disqualification of a juror not disclosed on voir dire examination, 48 ALR 2d 971 (1956).

Admissibility in civil case of affidavit or testimony of juror in support of verdict attacked on ground of bias or disqualification of juror, 30 ALR 2d 914 (1953).

Prejudicial effect, in civil case, of communications between witnesses and jurors, 52 ALR 2d 182 (1957).

Effect of jury's procurement or use of lawbook during deliberations, 54 ALR 2d 710 (1957).

Effect of jury's procurement or use of book other than lawbook during deliberations, 54 ALR 2d 738 (1957).

Unauthorized view of premises by juror or jury in criminal case, 58 ALR 2d 1147 (1958).

Contact or communication between juror and party or counsel during trial of civil case, 62 ALR 2d 298 (1958).

Contact or communication between juror and outsider during trial of civil case, 64 ALR 2d 158 (1959).

Inattention of juror from sleepiness or other cause, 88 ALR 2d 1275 (1963).

Experiments in jury room, 95 ALR 2d 351 (1964).

Use of intoxicating liquor by jurors; civil cases, 6 ALR 3d 934 (1966).

Use of intoxicating liquor by jurors; criminal cases, 7 ALR 3d 1040 (1966).

Effect, in criminal case, of communications between witnesses and jurors, 9 ALR 3d 1275 (1966).

Taking and use of trial notes by jury, 14 ALR 3d 831 (1967).

Admissibility, in civil case, of juror's affidavit or testimony relating to juror's misconduct outside jury room, 32 ALR 3d 1356 (1970).

Discussion during jury deliberations of possible insurance coverage as prejudicial misconduct, 47 ALR 3d 1299 (1973).

General References

58 Am. Jur. 2d, New Trial, §§ 76-114, 129-133 (1971).
75 Am. Jur. 2d, Trial, §§ 978-1040 (1974).
76 Am. Jur. 2d, Trial, §§ 1075-1110, 1126, 1127, 1134, 1135-1139, 1155-1162, 1214-1215, 1219-1237 (1975).

2 N.C. Index 2d, Criminal Law, § 101 (1967).
3 N.C. Index 2d, Criminal Law, §§ 128, 130 (1967).
4 N.C. Index 3d, Criminal Law, §§ 98.1, 101-101.4, 128.1, 130 (1976).