

## JURY SELECTION

### ***Duren v. Missouri*, 439 U.S. 357 (1979), and Was Not Unreasonable Application of Clearly Established Federal Law**

*Berghuis v. Smith*, 130 S. Ct. 1382, \_\_\_ L. Ed. 2d \_\_\_ (30 March 2010).

The defendant (and later federal habeas petitioner) was convicted in state court of second-degree murder and his conviction was affirmed by a state appellate court. He alleged on appeal in state court and in federal court a violation of his Sixth Amendment right to be tried by an impartial jury drawn from sources reflecting a fair cross section of the community. The Court ruled that the appellate court's ruling that rejected the petitioner's fair-cross-section claim was consistent with *Duren v. Missouri*, 439 U.S. 357 (1979), and was not an unreasonable application of clearly established federal law under the standard set out in 28 U.S.C. § 2254(d)(1).

**(1) When Defendant and Defense Counsel Reached Absolute Impasse Whether to Exercise Peremptory Challenge of Prospective Juror, Trial Court Erred in Not Permitting Defendant to Make Decision Instead of Defense Counsel**

**(2) Trial Court Did Not Err in Allowing Offense of Attempted Sale of Cocaine That Had Been Committed With a Firearm to Be Used as Underlying Felony Under Felony Murder Rule**

*State v. Freeman*, \_\_\_ N.C. App. \_\_\_, 690 S.E.2d 17 (2 March 2010).

(1) The court ruled, relying on *State v. Ali*, 329 N.C. 394 (1991), that when the defendant and defense counsel reached an absolute impasse whether to exercise a peremptory challenge of a prospective juror, the trial court erred in not permitting the defendant to make the decision instead of defense counsel. (2) The court ruled that the trial court did not err in allowing the offense of attempted sale of cocaine that had been committed with a firearm to be used as the underlying felony under the felony murder rule. On April 8 and April 10, 2006, the defendant delivered cocaine to the victim, but payment was not made then. When the defendant sought payment on April 17 after phoning the victim in advance to tell her he was coming to collect the money, he shot and killed her. The court noted that the sales were not complete on April 8 and 10 because payment had not been made. The defendant's actions on April 17 constituted an attempt to complete the transactions of the sale of cocaine.

**Court Rules That Its Prior Rulings Were Not "Clearly Established" (Federal Habeas Review Standard) That Judge Must Reject Demeanor-Based Explanation for Peremptory**

### **Challenge Unless Judge Personally Observed and Recalled Aspect of Juror's Demeanor on Which Explanation Was Based**

*Thaler v. Haynes*, 130 S. Ct. 1171, \_\_\_ L. Ed. 2d \_\_\_ (22 February 2010).

The defendant was tried in a Texas court and convicted of murder. Two judges presided at different stages of the defendant's trial. One judge presided when the attorneys questioned the prospective jurors individually, but another judge took over when peremptory challenges were exercised. The defendant filed a federal habeas petition challenging the second judge's ruling that the prosecutor did not violate *Batson v. Kentucky*, 476 U.S. 79 (1986), when making a demeanor-based explanation for a peremptory challenge of an African-American juror. The Court ruled that its prior rulings were not "clearly established" (federal habeas standard of review) that a judge must reject a demeanor-based explanation for a peremptory challenge unless the judge personally observed and recalled the aspect of the juror's demeanor on which the explanation was based.

### **Trial Judge Erred by Failing to Grant Defendant's Request to Remove Juror With Remaining Peremptory Challenge After Judge Had Reopened Jury Voir Dire**

*State v. Thomas*, \_\_\_ N.C. App. \_\_\_, 673 S.E.2d 372 (3 March 2009).

After the jury was impaneled and the trial had begun, the trial judge learned that one of the seated jurors had attempted to contact an employee in the district attorney's office before impanelment. Voir dire was reopened, the trial judge questioned the juror, and allowed the parties to do so as well. The judge did not allow the defendant to remove the juror with a remaining peremptory challenge. The court ruled that the judge erred under *State v. Holden*, 364 N.C. 404 (1997) (once trial judge reopens examination of a juror, each party has absolute right to exercise any remaining peremptory challenges to excuse juror).

## **No Prejudicial Error Resulted When Trial Judge Failed to Impanel Jury Until After State's Opening Statement**

*State v. Pointer, 181 N.C. App. 93, 638 S.E.2d 909 (2 January 2007).*

The court ruled, distinguishing *State v. Stephens*, 51 N.C. App. 244, 275 S.E.2d 564 (1981), that no prejudicial error resulted when the trial judge failed to impanel the jury until after the state's opening statement.

### **3. Jury-Selection-Deviation from mandatory statutory guidelines-Failure to show bias**

*State v. Love 177 NCA 614 (2006)*

The trial court did not commit prejudicial error in a robbery with a firearm, felonious breaking or entering, and multiple first-degree kidnapping case by imposing a jury selection procedure which deviated from mandatory statutory guidelines under N.C.G.S. § 15A-1214, because: (1) although defendants assert a claim of prejudice, they fail to show jury bias, the inability to question prospective jurors, inability to assert peremptory challenges, or any other defect which had the likelihood to affect the outcome of the trial; and (2) not a single defendant used each and every one of his peremptory challenges, and defendants failed to do anything more than make a blanket assertion that statutory violation of mandated jury selection procedures prejudiced them.

### **1. Jury\_selection\_prospective jurors over 65**

*State v Elliott, 360 NC 400 (2006)*

The premise that the court may excuse a juror merely for being over sixty-five is unfounded in North Carolina law; a prospective juror's age may be a compelling personal hardship, but this is not always so. Although the issue was not properly preserved for appellate review, the trial court's exercise of discretion is apparent from its discussion with prospective jurors over sixty-five and the trial court did not abuse its discretion by refusing to excuse the juror in question. N.C.G.S. §§ 9-3, 9-6(a), and 9-6.1.

## **2. Jury–selection–additional peremptory challenge**

*State v. Smith 359 NC 199 (2005)*

The failure to grant an additional peremptory challenge after a seated juror was removed before the end of jury selection was not error. There is no general authority to grant additional peremptory challenges (although the trial court may grant an additional peremptory challenge if it reconsiders and grants a denied challenge for cause).

## **7. Criminal Law--recording of trial--jury selection--arguments of counsel--bench conferences**

*State v. Price 170 NCA 57 (2005)*

Jury selection in noncapital cases and the opening and closing arguments of counsel must be recorded upon the motion of either party or on the judge's own motion. However, routine private bench conferences between the trial judge and attorneys are not required to be recorded. N.C.G.S. § 15A-1241(b).

#### **4. Jury--selection--questioning replacement jurors before approval of panel of twelve**

*State v. Garcia 358 NC 382 (2004)*

Although the trial court violated North Carolina's jury selection statute under N.C.G.S. § 15A-1214(f) by requiring defendant to question replacement jurors in a first-degree murder case before the State approved a full panel of twelve individuals, this error was not prejudicial to defendant and was not structural constitutional error because: (1) defendants claiming error in jury selection procedures must show prejudice in addition to a statutory violation before they can receive a new trial; (2) defendant has not complained that the aberrant procedure resulted in a biased jury, an inability to question the prospective jurors, an interference with his right to challenge, or any other defect without which a different result might have been reached; (3) our Supreme Court has previously held, under similar circumstances of juror shortage, that a defendant is not prejudiced by questioning fewer than a full panel of replacement jurors when that defendant has not exhausted his peremptory challenges, and defendant in this case possessed adequate remaining peremptory challenges during both court sessions for which he assigns error; and (4) defendant has failed to show that he was denied a trial by a fair and impartial jury or to show that any other

constitutional error resulted from the jury selection procedure employed at his trial, and defendant did not raise this constitutional issue at trial.

#### **1. Jury--peremptory challenges--voir dire reopened**

*State v. Boggess 358 NC 676 (2004)*

The trial court erred in a first-degree murder and robbery with a dangerous weapon case by failing to allow defendant to exercise one of his remaining peremptory challenges to excuse a juror after the trial court permitted counsel to

question the juror upon finding out that after completing her individual voir dire the juror learned that defendant's mother would be staying at the home of one of the juror's friends during the trial, because: (1) if the judge at any point allows the attorneys to question the juror directly, voir dire has necessarily been reopened and the procedures set out in N.C.G.S. § 15A-1214(g)(1)-(3) are triggered; and (2) once the examination of a juror has been reopened, the parties have an absolute right to exercise any remaining peremptory challenges to excuse such a juror.

## **12. Jury--voir dire--automatic disregard of testimony in light of plea bargain**

*State v. Johnson 164 NCA 1 (2004)*

The trial court did not abuse its discretion in a robbery with a dangerous weapon, attempted robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon case by permitting the State to ask potential jurors during voir dire if there was anyone who would automatically disregard any and all testimony of a coparticipant even in light of other believable evidence if the jury found out that the coparticipant actually received a plea bargain, because: (1) the question was not directed at discerning whether the potential jurors would believe the coparticipant in spite of his having agreed to a plea bargain, but whether jurors would be able to consider his testimony notwithstanding his having agreed to a plea bargain; and (2) the question properly was directed at the potential juror's ability to be fair and impartial.

## **2. Jury--selection--examination after peremptory challenge--no structural error**

*State v. Thompson 359 NC 77 (2004)*

A violation of the random selection provision of N.C.G.S. § 15A-1214(a) during

jury selection (examination of the remaining jurors after a peremptory challenge without seating a replacement) was not structural error. A technical violation of a statute is not sufficient to support a claim of a defect in the trial mechanism so serious that the trial cannot reliably determine guilt or innocence.

#### **4. Jury--panels--calling jurors in order assigned rather than randomly**

*State v. Johnson 161 NCA 68 (2003)*

Although defendant contends the trial court erred in a double first-degree murder, second-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, robbery with a dangerous weapon, and larceny case by dividing prospective jurors into panels and then calling prospective jurors from each panel in the order in which they were assigned rather than randomly from the jury venire as a whole, this assignment of error is dismissed because: (1) defendant waived his right to appeal under N.C.G.S. § 15A-1214(a) based on his failure to follow the procedures mandated in N.C.G.S. § 15A-1211(c) for challenging the entire jury panel; and (2) although defendant asserted plain error, he failed to show that absent the violation of N.C.G.S. § 15A-1214(a) a different result probably would have been reached or that the process of selecting a jury led to a miscarriage of justice or denied defendant a fair trial. See Farb p. 19

#### **5. Jury--impanelment of wrong alternate juror--motion for mistrial**

*State v. Johnson 161 NCA 68 (2003)*

The trial court did not err in a double first-degree murder, second-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, robbery with a dangerous weapon, and larceny case by failing to declare a mistrial after it was discovered that the jury had been impaneled with the wrong individual sitting as an alternate juror even though the error was not discovered until after opening

statements had been presented.

### **1. Jury--voir dire--failure to disclose a crime victim**

*State v. Maske 358 NC 40 (2003)*

The trial court did not err in a capital first-degree murder case by denying defendant's motion for a mistrial based on alleged juror misconduct regarding a failure to disclose during voir dire that the juror was a victim of a robbery forty years earlier but thereafter sharing this experience with the other jurors, because: (1) the juror's inadvertent failure to disclose the four-decade-old information that she had forgotten did not amount to concealment; and (2) the juror demonstrated no bias. See Farb p. 5

### **3. Jury--selection--peremptory challenges--black jurors--racial discrimination**

*State v. Wiggins 159 NCA 252 (2003)*

The trial court did not err in a conspiracy to commit murder, firing a gun into occupied property, and using an instrument with intent to destroy an unborn child case by allowing the peremptory strikes of black jurors, because: (1) the prosecutor offered race-neutral explanations for striking each of the eight black jurors; and (2) where the only factor supporting an inference of discrimination is the disproportionate number of prospective black jurors peremptorily challenged by the State and other elements relevant to finding an inference of discrimination are not present, the trial court's determination that the State did not purposefully discriminate on the basis of race is not clearly erroneous.

### **4. Jury--selection--peremptory challenges--gender discrimination**

*State v. Wiggins 159 NCA 252 (2003)*

The trial court in a conspiracy to commit murder, firing a gun into occupied property, and using an instrument with intent to destroy an unborn child case did not improperly fail to assess gender discrimination against black males in the juror selection, because: (1) after reviewing the totality of circumstances the trial court concluded as a matter of law that the reasons proffered by the State for its

excusal of each juror are acceptable, non-pretextual, race-neutral, and gender neutral; and (2) the trial court's order indicated that in light of the State's rebuttal testimony, it accepted those justifications and concluded the State had acted in a gender neutral fashion. correct alternate seated and allowed the parties to present the opening statements to the empanelled jury; and (2) it is within the trial court's discretion to re-impanel a jury in order to make sure defendant's right to a jury trial is protected.

## **2. Jury - selection - requirement of medical finding - not improper stakeout question**

*State v. Henderson, 155 N.C. App. 719 (2003)*

The prosecutor's question to prospective jurors in a first-degree sexual offense and taking indecent liberties with children case regarding whether the jurors would require a medical finding in order to convict was not an improper stakeout question because the purpose was to secure an impartial jury rather than to commit the jurors to a future course of action.

## **6. Jury - peremptory challenges - racially neutral reasons**

*State v. Rogers, 355 N.C. 420 (2002)*

The trial court did not abuse its discretion in a first-degree murder, first-degree

burglary, and first degree sexual offense prosecution by overruling defendant's objections to the prosecutor's peremptory challenges of several African-American jurors based on alleged racial discrimination, because the prosecutor gave racially neutral reasons including that: (1) one prospective juror was dismissed because the juror knew defendant's mother and was ambivalent about sitting in judgment; (2) another prospective juror's spouse had worked for one of defendant's counsel; (3) another prospective juror had a history of problems with the law and may have been mentally challenged; (4) another prospective juror seemed uncomfortable with the law and unwilling to participate in the trial; (5) another prospective juror had a prior DWI and seemed to the prosecutor to be weak on the death penalty; and (6) another prospective juror also appeared to be mentally challenged and had a family history of encounters with the law.

#### **7. Jury - excusal - age**

*State v. Rogers, 355 N.C. 420 (2002)*

The trial court did not abuse its discretion in a first-degree murder, first-degree burglary, and first degree sexual offense prosecution by excusing two prospective jurors over the age of sixty-five based on their age, because: (1) both prospective jurors asked to be excused, and N.C.G.S. § 9-6.1 allows a person over sixty-five years of age to be excused if they ask to be excused; (2) citizens over the age of sixty-five do not make up a distinctive group for the purposes of determining whether defendant was denied his right to have a jury selected from a cross-section of the community as guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 26 of the North Carolina Constitution; and (3) the rational basis of the General Assembly's decision to allow trial judges to excuse jurors on the basis of advanced age is readily apparent when the adverse affects of growing old do not strike all equally or at the same time.

#### **Jury - selection - challenge for cause - financial concerns about potential impact of jury**

## service

*State v. Reed, 355 N.C. 150 (2002)*

The trial court did not err in a first-degree murder case by failing to allow defendant's challenge for cause under N.C.G.S. § 15A-1212(9) of a prospective juror who expressed financial concerns about the potential impact of jury service even though defense counsel alleges it showed the prospective juror could not render a fair and impartial decision, because: (1) although the juror stated the length of the trial might interfere with his ability to decide or possibly be a fair juror, an examination of his answers throughout the entire voir dire reveals there is no indication that he would not or might not be able to follow the law as given to him by the trial court; (2) the prospective juror repeatedly stated during both the State's and defendant's voir dire that he could follow the law; and (3) the prospective juror stated during both the State's and defendant's voir dire that he had no outside distractions, that he could be fair to both sides, and that he could listen to all the evidence fairly.

## **2. Jury--selection--reopening examination--number of peremptory challenges**

*State v. Locklear, 145 NC App 447 (2001)*

The trial court erred in a first-degree murder case by denying defendant the full number of peremptory challenges during jury selection as required by N.C.G.S. § 15A-1217 when it reopened examination of a juror previously accepted by the parties and ruled that defendant had no peremptory challenges remaining with which to excuse this juror because: (1) N.C.G.S. § 15A-1217(a)(1) allows defendants tried capitally to have fourteen peremptory challenges, and N.C.G.S. § 15A-1217(c) allows each party one peremptory challenge for each alternate juror in addition to any unused challenges; (2) defendant exercised eleven peremptory challenges in seating the regular jury and then exercised three peremptory

challenges in seating the two alternate jurors for a total of fourteen challenges, meaning defendant had two peremptory challenges remaining; and (3) defendant was not required to exhaust his supply of peremptory challenges left over from regular jury selection until he had used both of the challenges allotted for alternate jurors.

### **1. Jury--selection--questions restricted**

*State v. Godley, 140 N.C. App. 15 (2000)*

The trial court did not abuse its discretion during jury selection in a prosecution for first-degree murder and assault by restricting certain lines of questioning while allowing defendant the opportunity to gain information about the prospective jurors' interests and prejudices or by not allowing defendant to ask individual jurors questions about relationships with other prospective jurors but permitting a question sufficient to determine whether the prospective jurors would be affected by the relationships.

### **1. Jury - voir dire - plea agreement by witnesses - truthful testimony**

*State v. Gell, 351 N.C. 192 (2000)*

The trial court did not abuse its discretion in allowing the prosecutor to ask prospective jurors in a capital case a question about their ability to believe witnesses who testified pursuant to a plea agreement in which they promised to give "truthful" testimony in this case.

### **2. Jury--special venire--another county**

*State v. Golphin, 352 N.C. 364 (2000)*

Although one defendant argues there was no filed court order changing venue for purposes of jury selection, the trial court did not abuse its discretion in a capital trial by ordering a special venire from another county for the limited purpose of jury selection because: (1) both defendants agreed through their counsel to the proposed change; (2) N.C.G.S. § 15A-957 does not apply since defendants never moved for a change of venue; and (3) N.C.G.S. § 15A-133 was not violated since the trial court had the inherent authority to order the change based on the nature and circumstances of the alleged crimes against two law enforcement officers, and defendants' acquiescence to the stipulation and proposal at the hearing.

#### **8. Jury--selection--excusal of juror with limited English**

*State v. Smith, 352 N.C. 531 (2000)*

The dismissal of a prospective juror was not impermissibly based upon national origin where it was clear from the transcript that the court's determination was based on the juror's limited ability to communicate in English rather than on his origin. The legislature's purpose in prescribing the mandatory qualifications for citizens who might serve as jurors was to assure that defendants be judged fairly and impartially; in order to do this a juror must have sufficient proficiency in English to enable full comprehension of the testimony and instructions and to fully and effectively participate in the jury's deliberations. Defendant could have challenged the excusal through the Batson procedure to determine whether the prosecutor acted with discriminatory intent.

#### **6. Jury 203 (NCI4th) - prospective jurors - knowledge about case - denial of challenges for cause**

*State v. Yelverton, 334 N.C. 532 (1993)*

The trial court did not err in the denial of defendant's challenges for cause of a prospective juror who knew the victims and had heard and read about the case and another prospective juror who owned a store near the crime scene, knew defendant's family, and had heard much discussion about the crimes, where these two potential jurors were thoroughly questioned with regard to whether their familiarity with the case might taint their ability to be fair and impartial in rendering a verdict, and their testimony demonstrated a conscientious and deliberate resolve to put familiarity and possible prejudice aside and to abide by the law and the trial court's instructions.

**1. Jury 257 (NCI4th) - peremptory challenge - racial basis - prima facie case not shown**

*State v. Glenn, 333 N.C. 296 (1993)*

**2. Jury 248 (NCI4th) - black defendant's exclusion of white jurors - showing of race-neutral grounds required by court - no error**

*State v. Austin, 111 N.C. App. 590 (1993)*

**Jury 203 (NCI4th) - prospective juror - member of district attorney's staff - challenge for cause denied**

*State v. Scales, 114 N.C. App. 735 (1994)*

**3. Jury 203 (NCI4th) murder and rape - jury selection - questions concerning publicity - restricted - no abuse of discretion**

*State v. Moseley, 338 N.C. 1 (1994)*

The trial court did not err in a prosecution in which defendant was convicted of first-degree murder, first-degree rape, and first-degree sexual offense by limiting the scope of defendant's voir dire questions concerning the extent of jury exposure to pretrial publicity and the content of the information heard by the jurors. Morgan v. Illinois, 119 L.Ed.2d 492, does not create a constitutional right to ask voir dire questions about the specifics of juror exposure to pretrial publicity and the content of that publicity

**5. Jury 137 (NCI4th) first-degree murder - jury selection - references to race**

*State v. Williams, 339 N.C. 1 (1994)*

The trial court did not deny a first-degree murder defendant due process during jury selection by allowing the prosecutor to ask prospective jurors whether they could put the issue of race completely out of their minds.

**7. Jury 127 (NCI4th) first-degree murder - jury selection - questions concerning secretly taped conversation**

*State v. Williams, 339 N.C. 1 (1994)*

The trial court did not deny a first-degree murder defendant due process during jury selection by allowing the prosecutor to ask prospective jurors whether they would have trouble hearing a recording and whether they would refuse to consider such a recording as evidence "just for the fact that it was secretly recorded without the knowledge of one of the parties."

**3. Criminal Law 836 (NCI4th) conspiracy and first-degree murder - interested witness instruction -no plain error**

*State v. Larrimore, 340 N.C. 119 (1995)*

There was no plain error in a prosecution for conspiracy and first-degree murder from an instruction given during jury selection on interested witnesses in explanation of a line of questions posed by the prosecution. The instruction correctly informed the jury that, should it determine that the evidence is believable, the evidence then takes on the same tenor as all other credible evidence before the jury and did not require the jury to assign a certain weight to the evidence.

**3. Jury 203 (NCI4th) first-degree murder - recent murder of juror's friend - denial of challenge for cause**

*State v. House, 340 N.C. 187 (1995)*

The trial court did not err

**13. Criminal Law 454 (NCI4th) first-degree murder sentencing defendant's argument restricted statutory aggravating circumstances not presented not allowed to argue**

*State v. Buckner, 342 N.C. 198 (1995)*

There was no abuse of discretion in a first-degree murder sentencing hearing in the trial court not allowing defendant to tell the jury in his argument about the statutory aggravating factors that the State did not present. The trial court's

decision was based upon its a belief that absence of an aggravating circumstance is not evidence of a mitigating circumstance, a reasonable interpretation of State v. Brown, 306 N.C. 151.

**6. Criminal Law 107 (NCI4th) jury selection - potential jurors criminal records - not subject to disclosure by state**

*State v. Kandies, 342 N.C. 419 (1996)*

**2. Jury § 259 (NCI4th) peremptory challenges disparate treatment of jurors racial discrimination not shown**

*State v. Floyd, 343 N.C. 101 (1996)*

Disparate treatment of potential jurors does not necessarily show racial discrimination in the exercise of peremptory challenges.

**1. Jury § 137 (NCI4th) first-degree sexual offense against child jury selection questions regarding interracial marriage not allowed**

*State v. Woody, 124 N.C. App. 296 (1996)*

**8. Criminal Law § 485 (NCI4th Rev.). - juror's limited association with witness - failure to disclose -no implied bias - new trial not required**

*State v. Buckom, 126 N.C. App. 368 (1997)*

Failure of a juror in an armed robbery trial to disclose his association with a State's chain of custody witness (a police officer) through his participation in Crimestoppers when asked on voir dire if he had worked with the witness on any law enforcement related matter was not so egregious as to establish prejudicial bias implied as a matter of law and thus did not entitle defendant to a new trial since the juror's limited association with the witness would not have merited a challenge for cause; the trial court found that the juror's conduct was not intentional; and the withheld information does not indicate a substantial likelihood of prejudice against defendant.

**6. Jury § 35 (NCI4th) - first-degree murder - supplemental list of jurors three days before trial - no error**

*State v. Dickens, 346 N.C. 26 (1997)*

The trial court did not err during jury selection in a first-degree murder prosecution where a supplemental list of jurors was prepared three days before trial and defendant's motion that these jurors be discharged because N.C.G.S. § 9-5 requires that prospective jurors be selected for service at least thirty days prior to the session was denied. It is true that N.C.G.S. § 9-5 mandates that jurors be selected at least thirty days in advance of the scheduled session, but N.C.G.S. § 9-11 specifically allows a trial court to summon a special venire of jurors at any time and the thirty-day notice provision in N.C.G.S. § 9-5 therefore did not apply to the trial court's selection of a supplemental jury panel.

**7. Jury § 99 (NCI4th) - first-degree murder - jury selection - excusal of accepted juror - no additional peremptory challenge**

*State v. Dickens, 346 N.C. 26 (1997)*

The trial court did not err in a first-degree murder prosecution by failing to award

defendant an additional peremptory challenge following the reexamination and excusal for cause of one of the supplemental jurors where the juror was initially passed by both sides before further examination revealed reasons supporting removal for cause N.C.G.S. § 15A-1214 (g) allows the trial court for good cause to examine and excuse a juror already accepted and provides that any replacement juror is subject to examination and challenge, but does not afford additional peremptory challenges. Indeed, the trial court is precluded from authorizing any party to exercise more peremptory challenges than specified by statute.

**2. Jury § 26 (NCI4th) - first-degree murder - jury selection - jurors not summoned or not responding- contact by sheriff - no error**

*State v. Barnard, 346 N.C. 95 (1997)*

The trial court did not err in a first-degree murder prosecution by denying defendant's challenge to the jury panel where defense counsel learned prior to trial that the sheriff possessed a list of some of the jurors drawn for the session who had not been served with a summons or who had not made a proper return of summons, defendant filed a motion to continue on the basis that there might be insufficient prospective jurors for purposes of selecting an entire panel and alternates, and the clerk's office and the Sheriff's Department attempted to contact some of the prospective jurors who had not returned their notification of service to find out if they had received service. The record supports the trial judge's finding that no evidence exists to support a conclusion of impropriety or that any juror was included or excluded systematically.

**13. Jury § 99 (NCI4th) - capital resentencing - reopening voir dire - peremptory challenge - no error**

*State v. Holden, 346 N.C. 404 (1997)*

The trial court did not abuse its discretion in a capital resentencing hearing by reopening voir dire after the jury was impaneled and permitting the State to exercise a peremptory challenge where the prosecutor informed the court after the close of all the evidence that he had learned from "an officer of the court" that a juror had in the last few years presented an argument against the death penalty; the juror was brought into the courtroom for questioning and stated that she currently believed that some people should receive the death penalty, that she had never stated that the death penalty was not being fairly administered or that the death penalty should not be imposed, and that her responses on voir dire were correct; and the trial court declined to excuse the juror for cause but the prosecutor exercised one of his remaining peremptory challenges. The information provided by the prosecutor established good reason to reopen voir dire to inquire into whether the juror made the statements attributed to her, whether she continued to hold these beliefs and whether her beliefs would prevent or substantially impair the performance of her duties as a juror. While not addressed by statute, this Court has held that the trial court may reopen the examination of a juror after the jury is impaneled and that this decision is within the sound discretion of the trial court. *State v. McLamb, 313 N.C. 572, 575-76, 330 S.E.2d 476, 479 (1985)*; *State v. Kirkman, 293 N.C. 447, 452-54, 238 S.E.2d 456, 459-60 (1977)*. "[O]nce the trial court reopens the examination of a juror, each party has the absolute right to exercise any remaining peremptory challenges to excuse such a juror." *Womble, 343 N.C. at 678, 473 S.E.2d at 297.*

#### **4. Criminal Law § 491 (NCI4th Rev.) - first-degree murder - bailiff as witness - incidental contact -jurors not dismissed**

*State v. Flowers, 347 N.C. 1 (1997)*

The trial court did not err in a capital first-degree murder prosecution by failing to

dismiss jurors after discovering that the courtroom bailiff was a State's witness where the bailiff's only contact with jurors occurred while letting them into and out of the courtroom and directing them to their seats; his contact with the jurors took place in the courtroom and occurred at various times over a period of less than a day and a half; he did not have specific contact or communication with any individual juror; and the trial court took steps to remedy the potential conflict by ordering the bailiff not to have any direct contact with the jurors as soon as the potential conflict was brought to its attention. There is no evidence to suggest that this bailiff at any time acted as a custodian or officer in charge of the jury, and his contact with the jury was brief, incidental, entirely within the courtroom, and was thus without legal significance.

**2. Jury § 120 (NCI4th) - capital murder - jury selection - leading questions - no error**

*State v. Gray, 347 N.C. 143 (1997)*

The trial court did not err in a capital first-degree murder prosecution in allowing the State to use leading questions during the jury voir dire. Although leading questions should not in most cases be used when testimony is being offered to a jury, it is not error to allow such questions at voir dire.

**1. Jury § 123 (NCI4th) - voir dire - prosecutor's interested witness question - propriety**

*State v. Jones, 347 N.C. 193 (1997)*

The prosecutor's questions to prospective jurors in a first-degree murder and armed robbery trial inquiring into the ability of the jurors to consider the testimony of an interested witness who testified pursuant to a plea bargain, to follow the court's instructions as to how to view that testimony, and to give it the

same weight as the testimony of any other witness if they found the testimony credible did not misinform the jurors about applicable law or constitute an attempt to "stake out" the jurors on the verdict they would render. Therefore, the trial court did not abuse its discretion in failing to intervene ex mero motu.

**4. Jury § 260 (NCI4th) - peremptory challenges - lack of attention and maturity - no Batson violation**

*State v. Caporasso, 128 N.C. App. 236 (1998)*

The trial court did not err by allowing the State to peremptorily challenge two African-American prospective jurors where the prosecutor stated that one juror was excused because she seemed bored with the proceedings and exhibited a general lack of attention and that the second juror was excused due to his young age and lack of maturity.

**1. Jury § 120 (NCI4th) - sexual offenses against child - jury selection - whether jurors thought child abuse victims credible - not allowed - no prejudicial error**

*State v. Hatfield, 128 N.C. App. 294 (1998)*

There was no prejudicial error in a prosecution for first-degree sexual offenses and taking indecent liberties where defendant was not allowed to ask prospective jurors if they thought that children were more likely to tell the truth when they made allegations of abuse. The question did not fish for an answer to a legal question before the judge had instructed on applicable legal principles, the question was not an attempt to establish a rapport with prospective jurors, it did not ask prospective jurors what kind of a verdict they would render under certain circumstances, and it did not incorporate assumed facts and was not a

hypothetical. It simply informed jurors that the State would offer a child's testimony and sought to ensure that their impartiality would not be swayed. The question was allowable as a proper inquiry into the jurors' sympathies toward a molested child and the court erred by not allowing it; however, defendant's argument that he was prejudiced amounts to little more than speculation and conjecture.

**1. Jury § 50 (NCI4th) - jury array - racial composition - statistical disparity not sufficient**

*State v. Corpening, 129 N.C. App. 60 (1998)*

The trial court did not err in a first-degree murder prosecution by denying defendant's motion to challenge the jury array based on alleged racial discrimination in the selection of the pool. Defendant's argument relies solely on a statistical disparity between the jury and the community; such a disparity, standing alone, is insufficient to prove that the underrepresentation is a product of systematic exclusion from the minority group.

**2. Jury § 260 (NCI4th) - lone black juror excused - Batson challenge - State's explanation**

*State v. Corpening, 129 N.C. App. 60 (1998)*

The trial court did not abuse its discretion in a first-degree murder prosecution by denying defendant's Batson challenge to the striking of the lone black juror where the State had offered as an explanation that the juror indicated previous contact with defendant and defendant's family, two of which were listed as potential witnesses for defendant and one of whom attended church with the juror's mother; the prospective juror seemed to lack an understanding of the questions; and a relative of the prospective juror had been a defendant in a murder case.

**1. Jury § 248 (NCI4th) - peremptory challenges -Batson decision - applicability to defendants**

*State v. Cofield, 129 N.C. App. 268 (1998)*

The decision of *Batson v. Kentucky*, 476 U.S. 79, has been expanded to prohibit not only the State, but also criminal defendants, from engaging in purposeful racial discrimination in the exercise of peremptory challenges.

**2. Jury § 257 (NCI4th) - peremptory challenges - racial discrimination - prima facie showing**

*State v. Cofield, 129 N.C. App. 268 (1998)*

The State made a prima facie showing of racial discrimination in a black defendant's peremptory challenges in a capital trial where the jury consisted of six black and six white jurors just prior to defense counsel's exercise of defendant's peremptory challenges; defense counsel peremptorily challenged no black jurors at this point but did peremptorily challenge four white jurors, two-thirds of the white jurors then available; and the State noted other relevant circumstances, including the facts that black jurors remaining on the panel "paralleled" the challenged white jurors, that the challenged jurors had indicated that they could consider both life imprisonment and the death penalty, and that none had demonstrated any partiality.

**9. Jury § 203 (NCI4th) - challenge for cause - preconceived opinion - knowledge of victim - ability to set aside opinion**

*State v. Bonnett, 348 N.C. 417 (1998)*

The trial court did not err in denying defendant's challenge for cause of a

prospective juror on the basis that the juror had formed an opinion and knew the victim where the juror stated unequivocally that he could set aside his opinion and base his decision on the evidence, and the juror's responses did not suggest that he would not be a fair and impartial juror or that he could not return a verdict according to N.C.G.S. § 15A-1212 (6) and (9).

### **1. Jury - individual voir dire and sequestration - denied**

*State v. White, 31 N.C. App. 734 (1998)*

The trial court did not abuse its discretion in a first-degree murder prosecution by denying defendant's motion for individual voir dire and sequestration of prospective jurors where defendant contended that individual voir dire was necessary to prevent prospective jurors from giving dishonest answers to sensitive and potentially embarrassing questions concerning racial prejudices. Lack of candor is a danger that is present in every case and the trial court here stated that it would reconsider the matter if defendant believed that collective voir dire was inhibiting jurors' candor as jury selection proceeded.

### **Jury - selection - prejudicial statements - entire panel not dismissed - peremptory challenges not fully restored**

*State v. Howard, 133 N.C. App. 614 (1999)*

There was prejudicial error in a prosecution for multiple offenses arising from a home invasion where 5 jurors were seated; a prospective juror stated that she knew one defendant from having been a Durham County detention officer and that another defendant looked familiar; that prospective juror was dismissed; nine jurors were selected by the end of the day; and a defense counsel brought to the

attention of the court his concern over the statements. After an extended discussion, the court concluded that the jury was tainted, excused eight of the jurors but retained the ninth, who became the foreman, and restored only some of the peremptory challenges. When inappropriate answers are given or comments made by a prospective juror during the jury selection process, the trial court should make an inquiry of all jurors, both accepted and prospective, to determine whether they heard the statements, the effect of the statements on them, and whether they could disabuse their minds of the harmful effects of the comments. Moreover, the trial court here ordered that counsel for the three defendants not consult with one another in the courtroom during the jury selection process; although not assigned as error, such an order should be used only if necessary to maintain courtroom order during the proceedings and a record should be made of the reasons for the implementation of such a procedure.

#### **5. Jury - selection - question about eyewitness identification - not improper stake-out**

*State v. Roberts, 135 N.C. App. 690 (1999)*

The prosecution did not impermissibly stake out jurors during jury selection in a felony breaking or entering case by asking if they had a per se problem with eyewitness identification because questions designed to measure prospective jurors' ability to follow the law are proper within the context of jury selection voir dire since they tend to only secure impartial jurors and do not cause the jurors to commit to a future course of action.