



Picking the Jury

LAW, SELECTION PROCEDURE, THEORIES, FUNDAMENTALS, AND
TECHNIQUES

Remember
what you are
working with ...

- ▶ Almost every citizen dreads jury duty and wants to avoid being selected
- ▶ At all times appear balanced, reasonable, and trustworthy
- ▶ Tell the jury you are not here because you support DWI; that the allegations are very much disputed; and they are here because your client's liberty is at stake
- ▶ They aren't sitting in the defendant's chair, but help jurors envision you fighting for them



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Voir Dire: State of the Law

- ▶ *Voir dire* means to speak the truth.
- ▶ The North Carolina Supreme Court held jury selection has a dual purpose: (1) to help counsel determine whether a basis for challenge for cause exists; and (2) to assist counsel in intelligently exercising peremptory challenges. *State v. Wiley*, 355 N.C. 592 (2002); *State v. Simpson*, 341 N.C. 316 (1995).
- ▶ Criminal defendants have a constitutional right under the Sixth and Fourteenth Amendments to voir dire jurors adequately. *Morgan v. Illinois*, 504 U.S. 719 (1992) (Part of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors . . . Voir dire plays a critical function in assuring the criminal defendant that his constitutional right to an impartial jury will be honored).

Voir Dire: State of the Law

- ▶ Defense counsel may personally question prospective jurors individually concerning their fitness and competency to serve and determine whether there is a basis for a challenge for cause or to exercise a peremptory challenge. N.C. Gen. Stat. 15A-1214(c).
- ▶ How many peremptory challenges does defense counsel receive? N.C. Gen. Stat. 15A-1217.
 - ▶ Capital case: Each defendant receives 14 challenges.
 - ▶ Non-capital case: Each defendant receives 6 challenges.
 - ▶ When you move on to the alternate juror: Each defendant is entitled to one peremptory challenge for each alternate juror in addition to any unused challenges.

Not sure what to say to jurors?



- For ideas, start with the jury instructions!

Selection Procedure

- ▶ Read and recite to jurors the pattern jury instructions.
 - ▶ N.C.P.I. – Crim. 100.21: Remarks to Prospective Jurors After Excuses Heard (parties are entitled to jurors who approach cases with open minds until a verdict is reached; free from bias, prejudice or sympathy; must not be influenced by preconceived ideas as to facts or law; lawyers will ask if you have any experience that might cause you to identify yourself with either party, and these questions are necessary to assure an impartial jury; being fair-minded, none of you want to be tried based on what was reported outside the courtroom; the test for qualification for jury service is not the private feelings of a juror, but whether the juror can honestly set aside such feelings, fairly consider the law and evidence, and impartially determine the issues; we ask no more than you use the same good judgment that common sense you used in handling your own affairs last week and will use in the weeks to come; these remarks are to impress upon you the importance of jury service, acquaint you with what will be expected, and strengthen your desire to discharge your duties honorably).

Selection Procedure

- ▶ Read and recite to jurors the pattern jury instructions.
 - ▶ N.C.P.I. – Crim. 100.22: Introductory Remarks (this call upon your time may never be repeated in your lifetime; it is one of the obligations of citizenship, represents your contribution to our democratic way of life, and is an assurance of your guarantee that, if chance or design brings you to any civil or criminal entanglement, your rights and liberties will be regarded by the same standards of justice that you discharge here in your duties as jurors; you are asked to perform one of the highest duties imposed on any citizen, that is to sit in judgment of the facts which will determine and settle disputes among fellow citizens; trial by jury is a right guaranteed to every citizen; you are the sole judges of the weight of the evidence and credibility of each witness; any decision agreed to by all twelve jurors, free of partiality, unbiased and unprejudiced, reached in sound and conscientious judgment and based on credible evidence in accord with the court's instructions, becomes a final result; you become officers of the court, and your service will impose upon you important duties and grave responsibilities; you are to be tolerant of fellow jurors, sound and deliberate in your evaluations, and firm but not stubborn in your convictions; jury service is a duty of citizenship).

Selection Procedure

- ▶ Read and recite to jurors the pattern jury instructions.
 - ▶ N.C.P.I. – Crim. 100.25: Precautionary Instructions to Jurors (Given After Impaneled) (all the competent evidence will be presented while you are present in the courtroom; your duty is to decide the facts from the evidence, and you alone are the judges of the facts; you will then apply the law that will be given to you to those facts; you are to be fair and attentive during trial and must not be influenced to any degree by personal feelings, sympathy for, or prejudice against any of the parties involved; the fact a criminal charge has been filed is not evidence; the defendant is innocent of any crime unless and until the State proves the defendant's guilt beyond a reasonable doubt . . .

Selection Procedure

- ▶ Common Issues:

- ▶ Counsel should not engage in efforts to indoctrinate jurors, argue the case, visit with, or establish rapport with jurors. *State v. Phillips*, 300 N.C. 678 (1980).
- ▶ Counsel may not ask questions which contain inadmissible evidence or incorrect statements of law. *State v. Washington*, 283 N.C. 175 (1973); *State v. Vinson*, 287 N.C. 326 (1975).
- ▶ Stake-out questions are impermissible. Counsel may not pose hypothetical questions designed to elicit what a juror's decision will be under a certain state of the evidence or a given state of facts. *State v. Vinson*, 287 N.C. 326 (1975). Counsel should not question prospective jurors as to the kind of verdict they would render, how they would be inclined to vote, or what their decision would be under a certain state of evidence or given state of facts. *State v. Richmond*, 347 N.C. 412 (1998).

Selection Procedure

- ▶ Common Issues continued:
 - ▶ Be aware of *Batson* challenges.
 - ▶ Race, gender, and religious discrimination in juror selection is unconstitutional.
 - ▶ Three-step test for such challenges:
 - ▶ Defendant must make a *prima facie* showing the prosecutor's strike was discriminatory;
 - ▶ Burden shifts to the State to offer a race, gender, or religious neutral explanation for the strike; and
 - ▶ Be prepared if you are striking members of the same classification to provide independent neutral explanations for the same.
 - ▶ Trial court decides whether the defendant has proven purposeful discrimination.

Selection Procedure

- ▶ N.C. Gen. Stat. 15A-1212 governs challenges for cause. An individual juror may be challenged for cause by any party if the juror:
 - ▶ Does not have the qualifications required by G.S. 9-3.
 - ▶ Is incapable by reason of mental or physical infirmity of rendering jury service.
 - ▶ Has been or is a party, a witness, a grand juror, a trial juror, or otherwise has participated in civil or criminal proceedings involving a transaction which relates to the charge against the defendant.
 - ▶ Has been or is a party adverse to the defendant in a civil action or has complained against or been accused by him in a criminal prosecution.
 - ▶ Is related by blood or marriage within the sixth degree to the defendant or the victim of the crime.
 - ▶ Has formed or expressed an opinion as to the guilt or innocence of the defendant.
 - ▶ Is presently charged with a felony.
 - ▶ As a matter of conscience, regardless of the facts and circumstances, would be unable to render a verdict in accordance to N.C. law.
 - ▶ For any other cause is unable to render a fair and impartial verdict.

Selection Procedure

- ▶ For cause challenges continued:
 - ▶ Certain phrases are determinative in challenges for cause. For example, you may ask a prospective juror if their views or experience would “prevent or substantially impair” his ability to hear the case.
 - ▶ *Wainright v. Witt*, 469 U.S. 412 (1985) (established the standard for challenges for cause, that being when the juror’s views would “prevent or substantially impair the performance of his duties in accord with his instructions and oath);
 - ▶ *State v. Cummings*, 326 N.C. 298 (1990) (holding State’s challenge for cause is proper against jurors whose views against the death penalty would “prevent or substantially impair” their performance of duties as jurors).

Selection Procedure

- ▶ Mechanics of jury selection:
 - ▶ The prosecutor is required to question prospective jurors first and, when satisfied with a panel of twelve, he passes the panel to the defense. This process is repeated until the panel is complete. N.C. Gen. Stat. 15A-1214(d).
 - ▶ Regarding challenges, when a juror is challenged for cause, the party should state the ground(s) so the trial judge may rule. No grounds need be stated when exercising a peremptory challenge.
 - ▶ Preserving a denial of cause challenge or sustained objection to your line of questioning requires exhaustion of peremptory challenges and a showing of prejudice from the ruling. See, e.g., *State v. Billings*, 348 N.C. 169 (1998).
 - ▶ Regarding juror rehabilitation, the trial judge must exercise discretion in determining whether to permit rehabilitation of particular jurors. Issues include whether a juror is **equivocal in his response**, clear and explicit in his answer, or if additional examination would be a purposeless waste of valuable court time. *State v. Johnson*, 317 N.C. 343 (1986).

Our Jury Selection Method: Modified Wymore

- ▶ In the beginning, use the lecture method. Spend a few minutes educating the jury about the criminal justice system and the jury's preeminent role, magnifying the moment and simplifying the process.
 - ▶ I often tell the jury that nobody in the courtroom supports the charge of Driving While Impaired. While we are here because Mr. Smith is charged with DWI, you will recall her honor has informed you that the fact that Mr. Smith is charged with that offense is evidence of nothing, is simply the mechanism that gets us here today, and that in this moment and throughout the trial you are to see Mr. Smith as innocent.
 - ▶ Take this opportunity and use the lecture method to establish leadership and credibility.
- ▶ Next, transition to the listener method, asking many open-ended group questions followed by precise individual questions.
 - ▶ Speak to every juror, even if only to greet and acknowledge them, but more often address specific comments, backgrounds, or engage them in areas of concern.
 - ▶ Always address concerning issues, stripping and re-stripping per Wymore. We strip by using uncontroverted facts (e.g., "my client blew a .30") and by addressing extraneous issues and circumstances (i.e., inapplicable facts and defenses like "this is not an accident case") as they arise to find jurors who do not have the ability to be fair and impartial or hear the case. Stripping – telling bad facts in *voir dire* – also accomplishes drawing the sting.
- ▶ Last, isolate and insulate each juror per Wymore, attempting to create 12 individual juries (not jurors) who will respect the process.
 - ▶ Isolation means that each juror makes an individual, personal judgment.
 - ▶ Insulation means each juror understands he makes his decision with the knowledge and comfort it will be respected, he will not be bullied or intimidated by others, and that the court and parties will respect his decision.
 - ▶ In essence, every juror serves as a jury, and his decision should by right be treated with respect and dignity. These concepts are intended to equip individual jurors to stick with and stand by their convictions.

REFERENCES

1. *Voir Dire*: 15A-1211 to 1217
2. Jury Trial Procedure: 15A-1221 to 1243
3. Bifurcation: 15A-928
4. Jury Instruction Conference: Gen. R. of Prac, 21; 15A-1231

NEED

1. Witness List
2. Jury Profile
3. Jury Pool List
4. 12 Leaders/They save themselves

VOIR DIRE

(Humble/vulnerable; Introduce/tell about self/firm/defendant; Charge; Innocent/Not guilty; Use analogy)

EXPLAIN THE PROCESS

1. Search for truth: not CSI; often slow and deliberate.
2. Ideal jury: fair and impartial cross section of community.
3. Juror service: Pinnacle of public service; conscience of community; protect/preserve process.
4. You bring life experience and common sense.
5. May be a great juror in one case but not another.
6. Judge: gatekeeper/governor of trial. Will tell us all we need to know.
7. Length of trial.

GROUP QUESTIONS

(You, close friend, family member)

8. News accounts?
9. Ever employed us? Other side of legal proceeding? DLF adverse to you?
10. Ever been on a jury or a witness in a trial where I was the lawyer?
11. Ever associate with DA's? (Know/served with/visit in home/relationship to favor/disfavor?)
12. Know defendant?
13. Know victim/family?
14. Know any witnesses?
15. Ever serve on jury? (Inform of different civil/criminal burdens of proof) Verdict? Respected?
16. Ever testified as witness/participant in legal proceeding?
17. You/family/close friends in law enforcement?
18. You/family/close friends been victims of a crime/had similar experience?
19. Any strong opinions regarding this type of charge; "touched" by this type of crime; be fair and impartial?
20. Examples: MADD, Leadership Rowan, believe any use is wrong, gun owners, NRA, CCP vs. Prison Ministry, LGBT, reluctant juror

INDIVIDUAL QUESTIONS

21. Where live? Employment? Spouse? Family/children?
22. Any disability/physical/medical problems?
23. Any personal/business commitments?
24. Any specialized medical/psychological, legal/law enforcement, scientific/forensic training?

KEY POINTS

25. Supervise any employees?
26. Know anyone else on the jury panel/pool?
27. Ever serve as sworn LEO or similar capacity?
28. Military service?
29. Rescue squad/EMS/Fire Dept, service?
30. Teacher/Pastor/Church member/Government employee?
31. Serve on another jury this week?

PROCESS OF TRIAL

32. State goes first; defense goes last; do not decide; address judge's instruction.
33. Will be objections/interruptions based on rules of evidence/procedure? Matters of law.
34. **DRAW THE STING/STRIP**. Cover **BAD/UNDISPUTED FACTS/AFFIRMATIVE DEFENSES** or **IRRELEVANT ISSUES/FACTS** (weapons, bad injuries, criminal record, drugs, alcohol, relationships, etc.). The law recognizes certain defenses. Not every death, injury or bad act is a crime.
35. Race/gender/religion issues? (white victim/black defendant); Batson; Prima facie case (raise inference?)/Race-neutral reasons/Purposeful discrimination? Judge elicit?

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36. Some witnesses are everyday folks. Will anyone give testimony of LEO any greater weight solely because he wears a uniform? Judge will charge on credibility of witnesses. Promise to follow law?

37. You may hear from expert witnesses. Can you consider?

38. The charge is _____. Judge will explain the law. Burden of proof is “beyond a reasonable doubt” (fully satisfies/entirely convinces). State must prove each and every element beyond burden. Promise to hold to burden? Same burden as Capital Murder.

39. Defendant presumed innocent. Defendant may choose, or not choose, to take the stand. He remains clothed with the presumption of innocence now and throughout this trial. Not a blank chalk board or level playing field. Will you now conscientiously apply the presumption of innocence to the Defendant?

40. Must you hear from the Defendant to follow the law? Must the Defendant “prove his innocence?” You are “not to consider” whether defendant testifies. PJI - Crim. 101.30

CONCLUSION

41. You have the right to hear and see all the evidence, voice your opinion, and have it respected by others.

42. You are to “reason together...but not surrender your honest convictions” as deliberate toward the end of reaching a verdict. You are “not to do violence to your individual judgment.” “You must decide the case for yourself.” N.C. Gen. Stat. §15A-1235.

43. Use your “sound and conscientious judgment.” Be “firm but not stubborn in your convictions.” PJI – Crim. 101.40.

44. Believe the opinions of other jurors are worthy of respect? Will you?

45. No crystal ball. Do you know of any reason this case may not be good for you? Any questions I haven’t asked that you believe are important?

CHALLENGES FOR CAUSE

1. Grounds. N.C. Gen. Stat. § 15A-1212.

a. Is incapable by reason of mental or physical infirmity.

b. Has been or is a party, witness, grand juror, trial juror, or otherwise has participated in civil or criminal proceedings involving a transaction which relates to the charge.

c. Has been or is a party adverse to the defendant in a civil action, or has complained against or been accused by him in a criminal prosecution.

d. Is related by blood or marriage within the sixth degree to the defendant or victim of the crime.

e. Has formed or expressed an opinion as to the guilt or innocence of defendant.

f. Is presently charged with a felony.

g. As a matter of conscience, would be unable to render a verdict with respect to the charge in accord with the law.

h. For any other cause is unable to render a fair and impartial verdict.

BUZZ PHRASES

1. Substantially impair? Automatically vote? *State v. Cummings*, 326 N.C. 298 (1990); *State v. Chapman*, 359 N.C. 328 (2005).

2. Juror statement he could follow the law but defendant’s failure to testify would “stick in the back of his mind” while deliberating should have been excused for cause. *State v. Hightower*, 331 N.C. 636 (1992).

3. “Stake-out” questions? Defense has a right to a full opportunity to make diligent inquiry into “fitness and competency to serve” and “determine whether there is a basis for a challenge for cause or a peremptory challenge.” N.C. Gen. Stat. § 15A-1214(c). Ask: Can you consider? *State v. Roberts*, 135 N.C. App. 690 (1999). Can you set aside your opinion and reach decision solely upon evidence?

4. After telling jurors the law requires them to deliberate to try to reach a verdict, it is permissible to ask “if they understand they have the right to stand by their beliefs in the case.” *State v. Elliot*, 344 N.C. 242 (1996).

5. “A juror can believe a person is guilty and not believe it beyond a reasonable doubt.” Hence, it is error for D.A. to argue if a juror believes the defendant is guilty then he necessarily believes it BRD. *State v. Corbin*, 48 N.C. App. 194 (1980).

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English (United States)

Focus 99%

Decision Making Fundamentals

- ▶ Do not be afraid of people who have strong personalities and opinions, so long as they are not immediately identifiable as against your cause. 12 strong opinions = 12 individual juries. Weak jurors who are followers will simply go along with the majority, effectively shrinking your jury.
- ▶ You will not have the ability to “select” your individual jurors; rather, only the ability to deselect bad jurors. Deselect those who – without hearing any facts, law, or argument – will hurt your client. Move for cause if possible.
- ▶ Jurors bring personal bias and preconceived notions about crime, trials, and the criminal justice system. You must find out whether they lean with you or the prosecution.
- ▶ Jurors decide cases based on bias and beliefs, regardless of the judge's instructions.
- ▶ There is little correlation between the similarity of the demographic factors (e.g., race, gender, age, ethnicity, education, etc.) of a juror and defendant and how one will vote.
- ▶ Hypothetical questions about the justice system result in aspirational answers and have little meaning.

Fine Art Techniques

- ▶ Comfortable and safe *voir dire* will cause you to lose. Do not fear bad answers; embrace them.
- ▶ Tell jurors about incontrovertible facts or your affirmative defense(s). Be prepared to address the law on staking-out the jury for a judge who restricts your approach in this area. Prior to jury selection, the judge must inform prospective jurors of any affirmative defenses for which notice was given pretrial unless withdrawn. N.C. Gen. Stat. 15A-1213.
- ▶ Tell jurors they have a personal safety zone. Be careful of and sensitive to a juror's personal experience.
- ▶ When a juror expresses bias, the best approach is counter-intuitive. Do not stop or redirect them. Immediately address and confront the issue. Mirror the answer back, invite explanation, reaffirm the position, and then remove for cause. Use the moment to teach the jury the fairness of your position.
- ▶ Consider what the juror needs to know to understand the case and what you need to know about the juror.

Integrating *Voir Dire* into Closing Argument

- ▶ At the end of closing argument, return to the central ideas covered in *voir dire*. Remind jurors of their promises to purposefully re-isolate and re-insulate the jury before stating your theme and asking them to return a verdict of not guilty:
 - ▶ Promised you believed each of your fellow jurors are worthy of respect;
 - ▶ Promised you would work together towards the ends of reaching a unanimous verdict;
 - ▶ Yet at the same time you promised you would not surrender your conscientious convictions nor do violence to your individual judgment;
 - ▶ Promised you would apply the presumption of innocence and that you saw Mr. Smith as innocent. That presumption applies even in this moment. Do you see it?
 - ▶ This is the most important day in Mr. Smith's life, because while tomorrow and in the days that follow you and I will go on with our other duties, your decision will follow Mr. Smith forever.
 - ▶ Tell jurors to stand up for two or three themes you've already touched on and then ask them to return a verdict of not guilty.