

JURY REVIEW OF EVIDENCE

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I. Authority. G.S. 15A-1233 sets out the procedure for dealing with the jury's request to review testimony or evidence after the jury has begun deliberations. While the statute refers to situations involving jury requests to review evidence after deliberations have begun, trial judges should refrain from making statements at any stage of the proceedings that could be interpreted by jurors as preemptively foreclosing requests to review evidence. *Compare* *State v. Lyons*, 250 N.C. App. 698, 706-07 (2016) (trial court erred by making statements to jury prior to closing arguments emphasizing jury's role as fact-finder but "that suggested it would be futile for the jury to request to review witness testimony whatsoever"), *and* *State v. Johnson*, 164 N.C. App. 1, 19-20 (2004) (same with respect to trial judge's statements made prior to opening statements emphasizing jury's duty to pay attention and remember the evidence because "[t]here is no transcript to bring back there"), *with* *State v. Hayes*, 239 N.C. App. 539, 557-58 (2015) (distinguishing *Johnson* and finding trial judge did not err during jury instructions by stating that there was no written transcript of testimony but that if a request for review was made the judge would exercise his discretion and "make an effort to accommodate any reasonable request").

II. Procedure.

A. Jury Must Be Brought to Courtroom. If after retiring for deliberation the jury requests a review of testimony or other evidence, all jurors must be conducted to the courtroom. G.S. 15A-1233(a). All jurors must be present to hear both the request and the judge's response in open court. *State v. Ashe*, 314 N.C. 28, 32-36, 40 (1985) (requirement that court must conduct all jurors to the courtroom is mandated by both Art. I, § 24 of the state Constitution and G.S. 15A-1233(a); trial judge erred by hearing from and responding to the foreman, without the other jurors present); *State v. Nelson*, 341 N.C. 695, 700 (1995) (trial court erred by hearing only from foreperson in open court and giving foreperson evidence to bring back to the jury room); *see also* *State v. McLaughlin*, 320 N.C. 564, 568-70 (1987) (trial judge erred by responding to the jury's note requesting that certain testimony be re-read with a message to the jury through the bailiff denying the request; however, error was not of constitutional magnitude as the constitutional issue described in *Ashe* arises only when a trial judge instructs fewer than all jurors and thus violates unanimity requirements); *State v. Orellana*, 260 N.C. App. 110, 118-20 (2018) (same on constitutional issue).

- B. Notice to Parties.** The judge must notify the prosecution and the defendant of the jury's request. G.S. 15A-1233(a). It is best practice to hear from both sides before responding to the request.
- C. Exercise of Discretion.** The judge must exercise his or her discretion when responding to the jury's request. G.S. 15A-1233(a); *State v. Starr*, 365 N.C. 314, 318-19 (2011) (trial court erred by failing to exercise discretion); *Ashe*, 314 N.C. at 35, 40 (same).

Examples of factors that the trial court might consider in the exercise of its discretion include:

- the significance of the evidence, *State v. Lee*, 128 N.C. App. 506, 509 (1998) (no abuse of discretion when the judge approved the jury's request to review a fingerprint card that was significant identification evidence), *but see State v. Hair*, 292 N.C. App. 484, 487 (2024) (rejecting notion that trial court must inquire into the jury's view of the importance of the evidence when considering a request for review);
- a concern that the jury might give too much emphasis to the evidence that is reviewed and not properly consider the totality of the evidence, *State v. McVay*, 174 N.C. App. 335, 340-41 (2005) (no abuse of discretion when trial judge denied the jury's request to review testimony based on consideration of this factor); and
- the time, practicality, and difficulty involved with granting the request, *State v. Perez*, 135 N.C. App. 543, 555 (1999) (noting that this is a permissible factor).

After exercising his or her discretion in connection with the jury's request, the judge should expressly state on the record that he or she is granting or denying the request in his or her discretion. However, no further explanation is required. *Starr*, 365 N.C. at 319 (trial court is not required to state a reason for a discretionary ruling); *State v. Stevenson*, 211 N.C. App. 583, 589-90 (2011) (same). See section E.1. below for sample language to be used when denying such a request and section E.2. for sample language to be used when granting a request.

- D. Covered Evidence.** The statute only applies to evidence that has been admitted at trial. G.S. 15A-1233(a) (allowing reexamination in open court of "materials admitted into evidence"); G.S. 15A-1233(b) (allowing jury to take to the jury room "exhibits and writings which have been received in evidence"). The trial court does not have authority to allow the jury to review exhibits that have not been admitted into evidence. *State v. Cannon*, 341 N.C. 79, 84-85 (1995) (so stating); *see also State v. Bacon*, 326 N.C. 404, 417 (1990) (trial court properly denied jury's request to review a document that was used to refresh a witness's recollection and not admitted in evidence); *State v. Harrison*, 218 N.C. App. 546, 554 (2012) (regardless of absence of objection by any party, trial court erred by allowing jury room review of a written statement that had not been admitted in evidence); *State v. Combs*, 182 N.C. App. 365, 373 (error for trial court to allow jury room review of statement in a written police report that was read into evidence but not admitted as a writing), *aff'd per curiam*, 361 N.C. 585 (2007).

E. Judge's Response.**1. Denial.**

- a. Informing the Jury.** If the judge decides to deny the jury's request, the judge should so inform the jury. No specific language is required to do this, but the judge should make clear that he or she exercised discretion when making the decision, see section II.C above, and that the jury should rely on its recollection of the evidence. *State v. Starr*, 365 N.C. 314 (2011) (advising trial court judges that such a statement is sufficient). A judge should avoid statements indicating that the court "doesn't have the ability" or is "unable" to grant a jury request to review evidence. See *State v. Vann*, 386 N.C. 244, 253 (2024) (noting that case law indicates that such statements suggest a failure to exercise discretion); *Starr*, 365 N.C. at 318 (same).

Denying a request to review testimony because of the unavailability of a transcript and without a sufficient statement that the trial judge is aware of and is exercising his or her discretion is among the most common trial court errors appearing in appellate cases involving G.S. 15A-1233. See, e.g., *Starr*, 365 N.C. at 318-19; *Ashe*, 314 N.C. at 35; *State v. Nova*, 270 N.C. App. 509, 512-13 (2020). The North Carolina Supreme Court has noted that "[t]he existence of a transcript is, of course, not a prerequisite to permitting review of testimony" and that "[t]he usual method of reviewing testimony before a transcript has been prepared is to let the court reporter read to the jury his or her notes under the supervision of the trial court and in the presence of all parties." *Ashe*, 314 N.C. at 35, n.6.

The Court in *Starr* provided guidance to trial judges denying a jury's request to review testimony. The Court explained that a judge, after taking account of the facts of the case, may simply say "In the exercise of my discretion, I deny the request," thereafter instructing the jury to rely on its recollection of the testimony. 365 N.C. at 319; see also *State v. Maness*, 363 N.C. 261, 278 (2009) (noting that a trial court is not required to state a reason for a discretionary ruling and is presumed to have exercised discretion when no reason is given); *State v. Stevenson*, 211 N.C. App. 583, 590 (2011) (same).

Sample language that may be used to deny the jury's request is:

Members of the jury, the Court received a note from you as follows [Read note].

In the exercise of my discretion, I am denying your request [to review part of the testimony, etc.]. All of the evidence that you have heard during the course of this trial is important. It is the responsibility of the jury to remember all of the evidence. At this time, you may return to the jury room and continue with your

deliberations.

2. **Approval.**

- a. **Review in Open Court.** If the judge decides to allow the jury to review the testimony or evidence, the judge may direct that requested parts of the testimony be read to the jury and permit the jury to re-examine in open court the requested evidence. G.S. 15A-1233(a). Unlike a review in the jury room, which is discussed immediately below, the judge may allow a review in open court regardless of whether the parties consent. *State v. Talbot*, 234 N.C. App. 297, 301 (2014); *State v. Lee*, 128 N.C. App. 506, 509 (1998).
- b. **Review in Jury Room.** Upon request by the jury and with consent of all parties, the judge may in his or her discretion allow the jury to take to the jury room exhibits and writings which have been received in evidence. G.S. 15A-1233(b). It is error to allow review in the jury room absent consent of all parties. *State v. Mumma*, 372 N.C. 226, 233 (2019) (error to allow jury to review photographs in jury room over defendant's objection); *Cannon*, 341 N.C. at 83 (error to allow jury to take State's exhibits to jury room without the consent of all parties); *State v. Mason*, 222 N.C. App. 223, 232 (2012) (error to allow jury to review victim's translated statement to police and all defense exhibits in jury room over defendant's objection).
- c. **Review of Additional Evidence.** Regardless of whether the review is in open court or in the jury room, the judge may, in his or her discretion, also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested. G.S. 15A-1233(a) & (b). *Cf. Vann*, 386 N.C. at 254-55 (noting that trial court exercised discretion in granting jury's request to review an "extraction report" of the victim's phone and providing the jury with other evidence, including the victim's phone records for the two days prior to the offense, "which the jury did not specifically request, but that the court believed would be helpful").
- d. **Instructions to the Jury.** In *State v. Weddington*, 329 N.C. 202 (1991), the court stated that when allowing the jury's request to review certain evidence, "the trial court must instruct the jury that it must remember and consider the rest of the evidence." *Id.* at 208. Because the *Weddington* court went on to approve of the instructions given by the trial court, those instructions offer a model for use in other cases. In *Weddington*, the trial court instructed the jury as follows before the evidence was read:

Members of the jury, the Court, within its discretion, will ALLOW the testimony to be re-read to the jury. Before that is done, however, I instruct you that it is your duty, as jurors, to remember all of the testimony and all of the evidence.

The fact that the Court has merely allowed you to

hear a portion of the testimony, I [am] doing so, only in an effort to answer your request in regard to what you are seeking to hear.

Again, you're to take all of the evidence into consideration in your deliberations.

After the court reporter read the relevant testimony, the trial court then instructed the jury: "Members of the jury, again, as I told you at the outset, the Court permitted that, within the Court's discretion, based upon your request. It is your duty to recall and consider all of the evidence in your deliberations." *Id.*

While *Weddington* states that a trial court must instruct the jury to remember and consider the rest of the evidence, the Court of Appeals has held that it does not constitute per se abuse of discretion to omit such an instruction. *State v. Montgomery*, ___ N.C. App. ___, 901 S.E.2d 237, 242 (2024) (characterizing the statement in *Weddington* as dicta, stating: "[I]n the more than three decades since *Weddington*, no published decision has repeated such a proposition."). Nevertheless, it is good practice to instruct the jury in accord with *Weddington* when allowing a request to review evidence.

If the judge permits an exhibit to be taken to the jury room, the judge must, upon request, instruct the jury not to conduct any experiments with the exhibit. G.S. 15A-1233(b). The judge also should instruct the jury not to alter or change the exhibits in any way.