

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.

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). Both the jury's request and the judge's response must be made 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); *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; explaining that the constitutional issue mentioned in *Ashe* applies only when a trial judge instructs fewer than all jurors and thus violates unanimity requirements); *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).

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); *Ashe*, 314 N.C. at 35, 40 (trial court erred by failing to exercise discretion). 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);
- 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. *State v. Stevenson*, ___ N.C. App. ___, 710 S.E.2d 304, 308 (2011). See section E.1. below for sample language to be used when denying such a request.

- D. Covered Evidence.** The statute only applies to evidence that has been admitted at trial, G.S. 15A-1233(a) ("materials admitted into 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).

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 consider all of the evidence. *State v. Weddington*, 329 N.C. 202, 207-08 (1991). When the judge denies a request to review testimony stating only that a transcript is not available or cannot be produced, cases have held that the record failed to demonstrate an exercise of discretion. See, e.g., *Ashe*, 314 N.C. at 35. The N.C. 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." *Id.* at 35, n.6. Sample language that can 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.]. [Although not required, you may explain the reason for your denial, e.g.: The jury has the responsibility of recalling all of the evidence. To begin rehearing particular parts of the testimony would tend to emphasize part of the evidence without giving equal time to other parts of the evidence in this case. For that reason, it is best not to have one part of the evidence repeated for you.] 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. 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. *Cannon*, 341 N.C. at 83 (trial court erred by allowing the jury to take evidence to the jury room without the consent of all parties).
- 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, allow the jury to 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).
- d. **Instructions to the Jury.** In *State v. Weddington*, 329 N.C. 202 (1991), the court stated that when ruling on the jury's request, 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." *Id.* It continued: "The fact that the Court has merely allowed you to hear a portion of the testimony, I will [sic] 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." *Id.* 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.*

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). It

also makes sense to instruct the jury not to alter or change the exhibits in any way.

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