

34.2 Requests to Review Testimony and Exhibits During Deliberations

- A. Review of Testimony and Exhibits in Open Court
 - B. Review of Exhibits in the Jury Room
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A. Review of Testimony and Exhibits in Open Court

During deliberations, juries will frequently send requests to the trial judge seeking a review of testimony or exhibits introduced at trial. Before hearing and ruling on such requests, the trial judge must summon all jurors to the courtroom. G.S. 15A-1233(a); *State v. McLaughlin*, 320 N.C. 564 (1987) (trial judge erred when he sent a message through the bailiff to the jury denying its request to review trial testimony of two witnesses); *see also State v. Ashe*, 314 N.C. 28 (1985) (finding statutory error in trial judge's summoning only the foreperson to the courtroom to address the jury's request to review a portion of the testimony and also holding under article I, section 24 of the N.C. Constitution that all the elements of a trial should be viewed and heard simultaneously by all twelve jurors).

Practice note: The lack of an objection to the trial judge's failure to return the jury to the courtroom after a jury request for review of evidence pursuant to G.S. 15A-1233(a) will not preclude the defendant from raising the issue on appeal. *See State v. McLaughlin*, 320 N.C. 564 (1987). However, if you *consent* to a procedure that does not comply with the statutory mandate, it may be extremely difficult for the appellate attorney to show that the statutory violation prejudiced the defendant. *See State v. Nobles*, 350 N.C. 483, 506 (1999) (trial judge erred in failing to conduct the jury to the courtroom after jury requested to see evidence but defendant failed to show prejudice since (1) his counsel agreed "with the trial court when it erroneously thought it had discretion whether to bring the jury to the courtroom"; (2) there was unanimous agreement by all concerning the items requested by the jury; and (3) "the prosecution and the defense consented to permitting the jury to have those items"). The N.C. Court of Appeals later stated in *State v. Pointer*, 181 N.C. App. 93, 99 (2007), that "when a defendant's lawyer consents to the trial court's communication with the jury in a manner other than bringing the jury back into the courtroom, the defendant waives his right to assert a ground for appeal based on failure to bring the jury back to the courtroom." This holding appears to be inconsistent with *Nobles* because in that case the N.C. Supreme Court granted review of the issue even though the defendant consented to the procedure in that case. *See State v. Williams*, 215 N.C. App. 412, 423 n.2 (2011) ("consistent with *Nobles*," court of appeals addressed merits of defendant's argument and found error in trial judge's failure to return jury to courtroom to discuss exhibit request, but defendant failed to meet burden of showing prejudice where he consented to the jury's receiving the items and had no objection to

submitting the items to the jury without bringing them to the courtroom); *accord State v. Harrison*, 218 N.C. App. 546 (2012) (to same effect).

G.S. 15A-1233(a) also requires the trial judge, after hearing the jury's request, to exercise his or her discretion in deciding whether or not to grant the request. *State v. Helms*, 93 N.C. App. 394 (1989); *see also Ashe*, 314 N.C. 28 (the statutory requirement that the trial judge exercise discretion in deciding whether to allow the jury's request to review evidence is a codification of the common law rule). After exercising discretion, and after giving notice to the prosecutor and to the defendant, the trial judge may direct that parts of the testimony be read to the jury and permit the jury to reexamine the requested materials. The reexamination of requested materials must take place in open court (unless the parties consent as discussed under subsection B., below). The judge, in his or her discretion, may also have the jury review other evidence that relates to the same factual issue so as not to give undue prominence to the evidence requested. G.S. 15A-1233(a).

When the trial judge fails to exercise his or her discretion under G.S. 15A-1233(a) under the erroneous belief that he or she has no power to grant the jury's request, error has been committed. *See State v. Johnson*, 346 N.C. 119 (1997); *see also State v. Chapman*, 244 N.C. App. 699 (2016); *State v. Long*, 196 N.C. App. 22 (2009). This failure to exercise discretion, like the failure to summon all jurors to the courtroom when a request to review testimony or exhibits is made (discussed above), is preserved even when the defendant fails to object. *See State v. Starr*, 365 N.C. 314 (2011). If the error is prejudicial to the defendant, he or she is entitled to a new trial. *See State v. Lang*, 301 N.C. 508 (1980); *see also Ashe*, 314 N.C. 28, 35 (finding reversible error where trial judge failed to exercise discretion in denying jury's request to review testimony; judge apparently felt he could not grant the request because he stated, "There is no transcript at this point. You and the other jurors will have to take your recollection of the evidence . . ."); *State v. Hatfield*, 225 N.C. App. 765 (2013) (finding trial judge's failure to exercise discretion in denying jury's request to hear the female prosecuting witness's testimony amounted to prejudicial error where defendant had directly contradicted her testimony at trial and she was the only eyewitness to the alleged crimes).

It is also considered a failure to exercise discretion and so a violation of G.S. 15A-1233(a) for a trial judge to make statements that preemptively foreclose the jury from making a request to review testimony or evidence. If the purpose of the statute is violated, error will be found even in the absence of a jury request for review. *See State v. Lyons*, ___ N.C. App. ___, 793 S.E.2d 755, 762 (2016) (finding that trial judge failed to exercise discretion where his comments made before closing arguments suggested to the jury that it would be futile to request review of witness testimony; his "unequivocal statement that jurors '[would not] have the option,' during deliberations, to ask the court 'what . . . [a] witness really [said]'" suggested the court lacked the ability to even consider such a request"); *State v. Johnson*, 164 N.C. App. 1 (2004) (finding error where trial judge told the jury prior to trial that they should play close attention to the evidence because he did not have the ability to give them a transcript of what was said during trial); *see also State v. Haqq*, 232 N.C. App. 690 (2014) (unpublished) (same).

The trial judge has no authority to permit the jury to review exhibits or other materials if the requested items have not been received into evidence. *See State v. Bacon*, 326 N.C. 404 (1990) (trial judge correctly refused jury's request to see police report that was not introduced into evidence); *State v. Combs*, 182 N.C. App. 365 (2007) (trial judge erred in sending police report to jury room for review where the report had not been admitted into evidence).

B. Review of Exhibits in the Jury Room

Unlike jury review of exhibits or testimony in open court, consent of all parties is required before the jury may take requested exhibits into the jury room. G.S. 15A-1233(b); *see also State v. Barnett*, 307 N.C. 608 (1983). The rationale behind the rule against exhibits in the jury room without consent of all parties is that the jury should make its decision based on what was offered in open court, and not on comparisons or inferences made about the evidence in the jury room, “because the opposite party ought to have an opportunity to reply to any suggestion of an inference contrary to what was made in open court.” *See Doby v. Fowler*, 49 N.C. App. 162, 163 (1980) (quoting *Watson v. Davis*, 52 N.C. 178, 181 (1859)).

A trial judge does not have the “consent of all parties” under G.S. 15A-1233(b) if the defendant objects to the exhibit going back to the jury room. *See State v. Mason*, 222 N.C. App. 223 (2012). However, a failure to object to the trial judge's decision to allow the jury to review exhibits in the jury room will constitute consent by implication. *See State v. Rogers*, 52 N.C. App. 676, 688 (1981) (stating that “defendant impliedly consented to this action when he failed to object to the jury's request to take the exhibits into the jury room”); *see also State v. Byrd*, 50 N.C. App. 736, 743 (1981) (“While we believe that the better practice should be for the trial judge to determine whether or not the parties consent before allowing the jury request, we nevertheless hold that having failed to enter an objection or otherwise indicate his lack of consent, the defendant waived his right to object.”).

Allowing the jury to view exhibits without the consent of all parties is not reversible error per se, and the party asserting the error on appeal must demonstrate that he or she was prejudiced thereby. *State v. Thomas*, 132 N.C. App. 515 (1999); *see also State v. Poe*, 119 N.C. App. 266 (1995) (finding prejudicial error where trial judge sent a statement by a State's witness to jury room over defendant's objection); *State v. Platt*, 85 N.C. App. 220 (1987) (same).

Whether jurors are allowed to take requested exhibits into the jury room is within the trial judge's discretion even if all the parties consent. If the judge permits the jury to take the exhibits or materials into the jury room, he or she may also have the jury take additional material or first review other evidence relating to the same factual issue so as not to give undue prominence to the evidence taken to the jury room, and, on request, must instruct the jury not to conduct any experiments with the exhibits while in the jury room. G.S. 15A-1233(b); *see also Poe*, 119 N.C. App. 266, 274 (finding prejudicial error where trial judge denied jury's request to hear testimony of the two co-defendants and State's witness

Carter but allowed the jury to take Carter's written statement into the jury room over objection; court stated that "we believe there exists a reasonable possibility and a reasonable assumption that the jury may have inadvertently given more weight to Mr. Carter's statement"). G.S 15A-1233(b) only applies to exhibits and writings and does not prohibit the jury from taking the judge's written instructions into the jury room during deliberations. *See State v. Bass*, 53 N.C. App. 40 (1981).

Practice note: Before consenting to the jury taking an exhibit into the jury room, you should carefully consider how the jury may use the exhibit during its deliberations and whether it would be in the defendant's best interest to consent. If the trial judge, without obtaining consent from all parties, sends an exhibit to the jury room that you believe is harmful to the defendant's case, object on the record to ensure preservation of the issue on appeal.
