NO. COA01-1192

NORTH CAROLINA COURT OF APPEALS

Filed: 19 November 2002

STATE OF NORTH CAROLINA

v. Chatham County
Nos. 99 CRS 006212-006214,
GEORGE HAMPTON SPIVEY, 050307, 050352, 050355-050357
Defendant.

Appeal by defendant from judgments entered 6 April 2001 by Judge A. Leon Stanback in Chatham County Superior Court. Heard in the Court of Appeals 15 August 2002.

Attorney General Roy Cooper, by Assistant Attorney General Jennie Wilhelm Mau, for the State.

Russell J. Hollers, III, for defendant-appellant.

EAGLES, Chief Judge.

George Hampton Spivey ("defendant") appeals from judgments entered on jury verdicts finding him guilty of one count of statutory rape, three counts of statutory sexual offense and four counts of indecent liberties with a child. After careful consideration of the briefs and record, we discern no prejudicial error.

The State's evidence tended to show that defendant and Edna Spivey ("Edna") met in 1990 and were married in 1997. Prior to their marriage, they had a daughter, B.S., in 1991. Defendant had

two daughters from a previous marriage, J.S. and A.S. Edna had a daughter from a previous relationship, L.T. ("victim"). The victim was four years old when Edna and defendant met in 1990.

In the early summer of 1999, the victim, approximately thirteen years old, worked at a store near her home. Defendant would wake the victim up in the morning and take the victim to work in his van. On some mornings, defendant would force the victim to either have sexual intercourse with him or perform oral sex on him. The victim and her family took a trip to King's Dominion during the 4 July 1999 holiday weekend. Defendant forced the victim to have sexual intercourse with him in his van at the campground while the rest of the family was in another area of the park. On the morning of 13 July 1999, defendant awakened the victim in order for her to catch the school bus for summer school. On this morning, defendant asked the victim for oral sex and made the victim perform oral sex on him. While the victim was attending summer school, defendant would wake the victim up approximately every other morning between 3:00 a.m. and 5:00 a.m. and have sexual intercourse with her or make the victim perform oral sex on him.

In the afternoon of 14 July 1999, defendant went to the bathroom to take a shower and motioned for the victim to come into the bathroom. Inside the bathroom, defendant told the victim to perform oral sex on him and the victim complied. Later that afternoon, the victim and her boyfriend were lying on the victim's bed in her bedroom. Defendant saw the victim and her boyfriend kissing. Defendant called the victim a slut, slapped her, threw

her against a wall and choked her. Edna returned home and defendant left for work. Edna saw that the victim's face and neck were red. She asked the victim if defendant had ever touched her. The victim then told her mother about the sexual abuse she suffered by defendant. At this time, A.S. told Edna she too had been sexually abused by defendant. Edna notified the police.

With respect to the victim, defendant was charged with one count of statutory rape, three counts of statutory sexual offense and four counts of indecent liberties with a child. Defendant was also charged with one count of statutory sexual offense against his daughter A.S. and one count of taking indecent liberties with a minor against another daughter, J.S. The jury returned verdicts of not guilty of the charges involving A.S. and J.S. but found defendant guilty of all charges involving the victim. The trial court sentenced defendant to a minimum term of imprisonment of 460 months and a maximum term of 570 months. Defendant appeals.

On appeal, defendant contends that the trial court erred in: failing to provide defendant with certain information from documents sent to the trial court from the Chatham County Department of Social Services; allowing certain testimony from the victim and admitting certain exhibits; admitting certain testimony from Edna Spivey, Etta Foushee and Glen Hackney; allowing the expert opinion testimony of Dr. Karen St. Claire; instructing the jury on expert testimony; failing to intervene *ex mero motu* during the State's closing argument; and failing to affirmatively exercise its discretion pursuant to G.S. § 15A-1233. Additionally,

defendant contends that the trial court committed plain error in failing to intervene during "vouching" testimony of Jeanne Arnts. After careful consideration, we discern no prejudicial error.

Defendant presents arguments relating to 11 of the 16 assignments of error in the record on appeal. Any assignments of error not argued in defendant's brief are deemed abandoned. N.C.R. App. P. 28(b)(6).

Defendant first contends that the trial court erred in failing to provide defendant with certain information from documents sent to the trial court from the Chatham County Department of Social Services.

First, we note that counsel for the defendant apparently unsealed and reviewed documents sealed by the trial court after an *in camera* review.

> A defendant who is charged with sexual abuse of a minor has a constitutional right to have the records of the child abuse agency that is charged with investigating cases of suspected child abuse, as they pertain to the prosecuting witness, turned over to the trial court for an *in camera* review to determine whether the records contain information favorable to the accused and material to guilt or punishment. *If the trial court conducts an in camera inspection but denies the defendant's request for the evidence, the evidence should be sealed and "placed in the record for appellate review." On appeal, this Court is required to examine the sealed records* . . . .

State v. McGill, 141 N.C. App. 98, 101, 539 S.E.2d 351, 355 (2000) (citations omitted) (emphasis added). This Court does not condone counsel's unilateral unsealing and reviewing of sealed documents without an appropriate court order authorizing access. Our records

do not reflect a request by defense counsel or an order allowing counsel to review these sealed records. Counsel's conduct is sanctionable.

Defendant argues that these records contained exculpatory, relevant and material information relevant to his defense. Defendant specifically argues that an intake report for the victim from Holly-Hill Charter Behavioral Health System is exculpatory. This report states that the victim was depressed about "sexual abuse that her uncle did to her." Defendant also contends that this information could have been used to impeach the victim "with prior inconsistent statements wherein she named another person as the perpetrator."

"On appeal, this Court is required to examine the sealed records to determine if they contain information that is 'both favorable to the accused and material to [either his] guilt or punishment.'" *McGill*, 141 N.C. App. at 101, 539 S.E.2d at 355 (citations omitted). "'Favorable' evidence includes evidence which tends to exculpate the accused, as well as 'any evidence adversely affecting the credibility of the government's witnesses.'" *Id.* at 102, 539 S.E.2d at 355 (citations omitted). "Evidence is material if there is 'a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.'" *State v. Thompson*, 139 N.C. App. 299, 306, 533 S.E.2d 834, 839-40 (2000)

(quoting *United States v. Bagley*, 473 U.S. 667, 682, 87 L. Ed. 2d 481, 494 (1985)).

Here, the one statement from the victim is neither favorable to defendant nor material.

> "Evidence which tends to show nothing more than that someone other than the accused had an opportunity to commit the offense, without tending to show that such person actually did commit the offense and that therefore the defendant did not do so, is too remote to be relevant and should be excluded."

State v. Brewer, 325 N.C. 550, 564, 386 S.E.2d 569, 576 (1989) (quoting *State v. Britt*, 42 N.C. App. 637, 641, 257 S.E.2d 468, 471 (1979)), *cert. denied*, 495 U.S. 951, 109 L. Ed. 2d 541 (1990). The victim's statement was merely that she was depressed because of "sexual abuse that her uncle did to her." This statement does not show that the "uncle" committed the offenses charged here or that defendant did not commit the charged offenses. Also, based on the evidence here, there is no reasonable probability that the outcome would have been different had this statement been disclosed. In addition, defendant was also tried on charges of abusing the victim's sister, A.S. Defendant was aware of A.S.'s allegation about abuse by her "Uncle Pete." This assignment of error is overruled.

Defendant next argues that the trial court erred in allowing certain testimony from the victim and admitting certain exhibits in evidence. We do not agree.

At trial, the victim testified about other incidents of sexual abuse by defendant that were not the subject of the indictments.

This testimony also provided a foundation for the introduction in evidence of nine exhibits by the State. These exhibits included photographs of the victim partially dressed, two vibrators and a book entitled "Magic of Sex." The victim testified that defendant took photographs of her with her towel pulled down while she was getting out of the shower. Other photographs were of the victim's breasts and of the victim while defendant put his arms on her breasts. The victim also testified about incidents where defendant would insert a vibrator into her vagina. Further, the victim testified that defendant told her to watch an "adult" movie on the television. After the movie finished, defendant asked the victim for a "quickie" and then defendant had sexual intercourse with the victim.

Defendant contends that the testimonial and exhibit evidence should have been excluded because they were inadmissible character evidence and that any probative value was outweighed by their prejudicial effect. Defendant argues that the trial court did not make specific findings regarding any similarities or remoteness in time between the Rule 404(b) evidence and the crimes charged, so as to explain the trial court's reasoning or that show the exercise of its discretion. We are not persuaded.

Rule 404(b) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

G.S. § 8C-1, Rule 404(b) (2001). Our courts have held that Rule 404(b) is a rule of inclusion. *State v. Golphin*, 352 N.C. 364, 443, 533 S.E.2d 168, 221 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001).

> Thus, "even though evidence may tend to show other crimes, wrongs, or acts by the defendant and his propensity to commit them, it is admissible under Rule 404(b) so long as it also 'is relevant for some purpose *other than* to show that defendant has the propensity for the type of conduct for which he is being tried.'"

State v. Frazier, 344 N.C. 611, 615, 476 S.E.2d 297, 299 (1996) (citations omitted) (emphasis in original). Our courts have "been liberal in allowing evidence of similar offenses in trials on sexual crime charges." *Id.* at 615, 476 S.E.2d at 300.

In denying defendant's motion *in limine* to exclude this Rule 404(b) evidence, the trial court stated that the evidence tends to show "plan, scheme, or design, or purpose on the part of the defendant." The trial court also stated that he had not heard anything that "would be objectionable." The trial court also ruled on the remoteness of time issue by stating that "the time of the offenses and the time of the 404(b) evidence, they are not so remote as to be inapplicable to this circumstance." Here, the evidence shows a pattern of sexual incidents between defendant and the victim which is indicative of a plan, scheme, design, and purpose. The evidence is not too remote in time. The testimony showed that the abuse began when the victim was approximately four or five years old. "[A] ten-year gap between incidents is not sufficiently remote in time to preclude admission under 404(b)."

State v. Williamson, 146 N.C. App. 325, 334, 553 S.E.2d 54, 60 (2001), disc. review denied, 355 N.C. 222, 560 S.E.2d 366 (2002). Further, "[w]hen similar acts have been performed continuously over a period of years, the passage of time serves to prove, rather than disprove, the existence of a plan." *State v. Shamsid-Deen*, 324 N.C. 437, 445, 379 S.E.2d 842, 847 (1989). The majority of the testimony and exhibits related to incidents that occurred contemporaneously or within months of the misconduct charged here.

Further, Rule 403 does not prohibit this evidence. Rule 403 states that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." G.S. § 8C-1, Rule 403 (2001). The decision to admit or exclude evidence pursuant to Rule 403 is within the trial court's discretion. *State v. Wallace*, 351 N.C. 481, 523, 528 S.E.2d 326, 352-53, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000), *reh'g denied*, 531 U.S. 1120, 148 L. Ed. 2d 784 (2001). "A trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986). Here, defendant has not shown an abuse of discretion by the trial court. This assignment of error is overruled.

Defendant also contends that the trial court erred in admitting certain testimony from Edna Spivey ("Edna"), Etta Foushee ("Foushee"), and Glen Hackney ("Hackney"). Defendant argues that the testimony of these three witnesses was inadmissible since it corroborated the Rule 404(b) evidence that should not have been admitted. We do not agree.

The testimony of Edna Spivey, Foushee, and Hackney was offered and admitted for the purpose of corroborating the victim's testimony. "'Corroborative evidence by definition tends to "strengthen, confirm, or make more certain the testimony of another witness."'" *State v. Rhue*, __ N.C. App. __, __, 563 S.E.2d 72, 77 (2002) (citations omitted). Because we have determined that the victim's testimony regarding the Rule 404(b) evidence was admissible, the testimony of these three witnesses is admissible for the purpose of corroborating the victim's testimony. This assignment of error is overruled.

Defendant next contends that the trial court erred in allowing the expert opinion testimony of Dr. Karen St. Claire, M.D. ("Dr. St. Claire"), in its instructions to the jury on expert testimony, and in failing to intervene *ex mero motu* during the State's closing argument. We do not agree.

Defendant argues that Dr. St. Claire stated that she had an opinion with respect to whether the victim's injuries were "consistent with a child who had been sexually abused" but never actually stated her opinion. Instead, Dr. St. Claire testified as to the factors that led to her unstated opinion. Defendant also

argues that the trial court's instruction on expert witnesses "told the jury that [Dr. St. Claire] had given an opinion." Defendant further argues that the State took improper advantage of this error in closing argument by arguing to the jury that Dr. St. Claire testified that in her opinion the victim's "medical evaluation was consistent with a sexually abused chid." Defendant contends that the trial court should have intervened *ex mero motu*.

Rule 702(a) of the North Carolina Rules of Evidence states that "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." G.S. § 8C-1, Rule 702(a) (2001). "[A]n expert medical witness may render an opinion pursuant to Rule 702 that sexual abuse has in fact occurred if the State establishes a proper foundation, i.e. physical evidence consistent with sexual abuse." *State v. Dixon*, 150 N.C. App. 46, 52, 563 S.E.2d 594, 598, *writ and temporary stay allowed*, 355 N.C. 752, 565 S.E.2d 185 (2002).

Here, defendant did not object to the State tendering Dr. St. Claire "as a medical doctor specializing in pediatrics" and "an expert in the area of medical evaluation and diagnosis of child sexual abuse." Dr. St. Claire performed a physical examination of the victim and testified that she observed a "very broad notch" or "deep notch which is an absence of hymen." Dr. St. Claire further testified that the absence of the hymen in that area is a

"significant finding" and "an abnormal finding." The State asked Dr. St. Claire:

> Q And based on your years of study in this field and your practical application of your studies and your treatment of patients in your office over the years, were you able to form an opinion as to whether [the victim's] medical evaluation, the entire medical evaluation, including your physical evaluation, was consistent with a child who had been sexually abused?

The trial court then overruled defendant's objection based on an inadequate foundation. The questioning continued:

> Q Were you able to form an opinion?
>
> A Yes, I was.
>
> Q And what was your opinion?
>
> A If I can add to that broadly, all of the elements that go into forming that opinion are in the report that we prepared. And those consist of the elements that were obtained in terms of the medical evaluation, which were reviewed and the case reviewed, and which brought us to the conclusion about whether this child had a history consistent with having been sexually abused. And again, that was based on both her physical exam which was abnormal, many presenting symptoms during her own personal interview including her really sad demeanor during part --

Defendant then objected due to Dr. St. Claire not being present at the victim's interview. The trial court sustained the objection but allowed the State to lay a foundation with respect to the interview. Dr. St. Claire later testified about how she obtained the information regarding the victim's demeanor and what the victim indicated in the interview.

> A The information is part of the case review. As we review all of the information, I provide the part of the medical evaluation that was the physical exam that I performed, the information they obtained from [the victim] and her mother. Ms. Arnts, her part of the medical evaluation is to interview the child. And she presented that at the case review. We prepare a report where all of that information is recorded. And the two of us are responsible in the preparation of this report. And that is the basis of the evaluation that we did, the medical evaluation.

Dr. St. Claire later testified that due to the notch in the victim's hymen "the conclusion is that there has been penetrating trauma that has torn the hymen in that area" and that it "indicates that something has disrupted the hymen in that area."

A careful review of the transcript reveals that Dr. St. Claire did not explicitly state her "opinion as to whether [the victim's] medical evaluation, . . . was consistent with a child who had been sexually abused." Dr. St. Claire testified that she performed a physical examination and reviewed the report prepared by Arnts in developing her opinion. If Dr. St. Claire had explicitly testified that in her opinion the victim was sexually abused or the victim's condition was consistent with a child who had been sexually abused, that opinion would be admissible. An expert opinion that a victim has been sexually abused is admissible when that opinion is based on a physical exam and a medical history of the victim. *See State v. Brothers*, __ N.C. App. __, __, 564 S.E.2d 603, 608 (2002).

At trial, defendant objected to the proposed instruction on expert witnesses. The trial court overruled defendant's objection and instructed the jury that:

> The expert opinion testimony that the medical evaluation of [the victim] was consistent with child sexual abuse may be considered by you only if you find that it does corroborate the victim's testimony at this trial. That is, if you believe this opinion testimony tends to support the testimony of the victim, the testimony is admitted solely for the purpose of corroboration and not as substantive evidence.

Defendant argues that this instruction told the jury that Dr. St. Claire had given an opinion.

The basis for defendant's objection to the proposed instruction at trial was based on the admissibility of the opinion, not whether Dr. St. Claire actually stated an opinion. Defendant stated that he "object[ed] to the introduction or -- for the stating of that opinion at trial. I will similarly object to that instruction being given." The proposed instruction conformed to the pattern jury instructions for expert witnesses. After the trial court instructed the jury, defendant only stated that "the only objection I have is the one I have raised previously." Defendant did not offer a substitute instruction.

Defendant also argues that the trial court failed to intervene *ex mero motu* in the State's closing argument. The State argued that:

> [Dr. St. Claire] had the history of what went on. She had access to Jeanne Arnts and her interview. And you have seen the interview and what [the victim] said, so I'm not going to go into that. And with all of that

> information, she came up still with a medical diagnosis -- with an opinion -- that the medical evaluation showed that [the victim] was consistent with a sexually abused child. She didn't say: I make no opinion, no findings of fact because she had sex with somebody else. I can't do that. She looked at everything, and she took this witness stand, and she told you that in her opinion, [the victim's] medical evaluation was consistent with a sexually abused child.

"When a defendant fails to object to the arguments at trial, he must establish that the remarks were so grossly improper that the trial judge abused his discretion by failing to intervene *ex mero motu*." *State v. Castor*, 150 N.C. App. 17, 30, 562 S.E.2d 574, 583 (2002). "[T]o warrant a new trial, the prosecutor's remarks must have perverted or contaminated the trial such that they rendered the proceedings fundamentally unfair." *State v. Mann*, 355 N.C. 294, 307-08, 560 S.E.2d 776, 785 (2002), *cert. denied*, __ U.S. __, __ L. Ed. 2d __ (Nov. 4, 2002) (No. 02-6059). "However, statements contained in closing arguments to the jury are not to be placed in isolation or taken out of context on appeal. Instead, on appeal we must give consideration to the context in which the remarks were made and the overall factual circumstances to which they referred." *State v. Green*, 336 N.C. 142, 188, 443 S.E.2d 14, 41, cert. denied, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994).

Dr. St. Claire did testify that she had an opinion. She also testified that the notch in the victim's hymen was due to a "penetrating trauma." While Dr. St. Claire did not specifically state what her opinion was, her testimony considered in its entirety would not render the State's closing argument grossly

improper or the proceedings fundamentally unfair. These assignments of error are overruled.

Defendant further contends that the trial court committed plain error in not intervening during "vouching" testimony of Jeanne Arnts ("Arnts"). Arnts, a clinical social worker, conducted an interview of the victim as part of the victim's medical evaluation. Defendant contends that the following three instances of testimony by Arnts constitute inadmissible vouching. Arnts testified that: "[t]hat's the kind of detail that I think it would be hard for her to come up with otherwise"; "[y]ou know, I think what she described is very believable context"; and "I felt that the context in which she gave that was very believable and provided corroboration. Was it absolute? No; but it provided corroboration for her validity." Defendant argues that these statements constitute testimony about the believability of the victim's testimony and that it vouched for the victim's credibility.

"In order to prevail under a plain error analysis, a defendant must show: (1) there was error; and (2) without this error, the jury would probably have reached a different verdict." *State v. Hamilton*, __ N.C. App. __, __, 563 S.E.2d 292, 296 (2002). "Reversal for plain error is only appropriate where the error is so fundamental that it undermines the fairness of the trial, or where it had a probable impact on the guilty verdict." *State v. Floyd*, 148 N.C. App. 290, 295, 558 S.E.2d 237, 240 (2002).

"Expert opinion testimony is not admissible to establish the credibility of the victim as a witness." *Dixon*, 150 N.C. App. at

52, 563 S.E.2d at 598. "[A]n expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith." *State v. Stancil*, 355 N.C. 266, 267, 559 S.E.2d 788, 789 (2002). "The fact that this evidence may support the credibility of the victim does not alone render it inadmissible." *State v. Kennedy*, 320 N.C. 20, 32, 357 S.E.2d 359, 367 (1987). "However, those cases in which the disputed testimony concerns the credibility of a witness's accusation of a defendant must be distinguished from cases in which the expert's testimony relates to a diagnosis based on the expert's examination of the witness." *State v. Bailey*, 89 N.C. App. 212, 219, 365 S.E.2d 651, 655 (1988).

Here, the excerpts complained of by defendant were in response to questions regarding characteristics of sexually abused children. On cross examination, defendant asked Arnts the following:

> Q Now, when you are conducting your evaluations and your interviews, doing your interviews, that you are looking for certain things to tell you whether or not in your opinion what's being told you to actually happened or whether it's a fabrication or whether it's a fantasy or whether it's been suggested to a person. Is that fair?
>
> A Yes.
>
> Q And one of the things that you are looking for are details --
>
> A Yes.

On redirect, the State asked Arnts:

> Q And you had talked about or you were asked on cross -- about whether or not you looked for certain things to try [sic] determine if a child is fantasizing making it up, telling you. What is it that you do look for for trying to determine in your own mind whether or not a child is fantasizing or making it up or whatever?
>
> . . . .
>
> A We do look for suggestibility of the child. . . . We look very specifically for a child to be able to provide specific contextual details.
>
> . . . .
>
> Q And that's detail, is it not?
>
> A I think so. That's a piece of information that I don't know how she would have gotten otherwise. I mean it wasn't -- she said: This is what he told me. She described her experiences with that. That's the kind of detail that I think it would be hard for her to come up with otherwise.

On re-cross examination, defendant questioned Arnts again on details.

> A I don't think 14 year olds though were privy to that medical problem. But she could have gotten the information elsewhere. It's possible. You know, I think what she described is very believable context. But it's not absolute that she could have only gotten it from there.
>
> . . . .
>
> A So, I mean, I felt that the context in which she gave that was very believable and provided corroboration. Was it absolute? No; but it provided corroboration for her validity.

The three statements defendant contends are improper vouching were clarifications or responses to defendant's cross examination of Arnts. The first section of testimony complained of occurs on re-direct in response to questions raised on cross examination by defendant. Arnts testified regarding the procedure and method she used to evaluate the victim and her story. The other two sections were on re-cross examination by defendant who continued to question Arnts about the methods she used to evaluate the victim. Arnts testified about the characteristics of sexually abused children and their ability to impart detail. Arnts testified about the procedure she, as a clinical social worker, used to evaluate the victim's story. Arnts was not testifying about the credibility of the victim.

Even if admission of this testimony was error, it does not constitute plain error. "Plain error is error 'so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached.'" *State v. Hannah*, 149 N.C. App. 713, 720, 563 S.E.2d 1, 6 (quoting *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988)), *disc. review denied*, 355 N.C. 754, 566 S.E.2d 81 (2002). Here, the victim testified about the instances of sexual abuse. Other witnesses corroborated the victim's accounts of sexual abuse. Physical evidence of sexual abuse existed in the form of Dr. St. Claire's conclusion "that there has been penetrating trauma that has torn the hymen." In light of the evidence introduced at trial,

we cannot say that these three statements by Arnts tipped the scales against defendant.

Next defendant contends that the trial court erred in failing to exercise its discretion pursuant to G.S. § 15A-1233. Defendant argues that the trial court did not properly exercise its discretion in refusing to provide a transcript for the jurors upon the jury's request. Defendant contends that the trial court's refusal here is similar to the trial court's refusal in *State v. Barrow*, 350 N.C. 640, 517 S.E.2d 374 (1999). We are not persuaded.

In *Barrow*, a capital case, the jury requested a transcript of the testimony from four witnesses. *Id.* at 645, 517 S.E.2d at 377. The trial court refused the request stating that it did not "have the ability to" provide a transcript. *Id.* *Barrow* went on to state that "the trial court stated that it did not have the *ability* to present the transcript to the jury, indicating a failure to exercise discretion." *Id.* at 648, 517 S.E.2d at 379 (emphasis in original).

Here, after deliberating for approximately one hour and twenty minutes, the jury sent a note to the trial court requesting "a transcript of the trial for our discussion." The trial court brought the jury back to the courtroom and stated:

> I am sorry to say that I cannot do that. That's not available. And it would just take too much time. And everything in the transcript wouldn't be fitting your discussions. You are going to have to, as best you can, rely on your recollection of what was presented during the course of the trial. And that's all I can tell you about that.

The jury returned to its deliberations and reached a verdict approximately sixty-five minutes later.

Here, the jury did not request certain testimony for review as in *Barrow*, but "a transcript of the trial." G.S. § 15A-1233(a) (2001) states:

> If the jury after retiring for deliberation *requests a review of certain testimony* or other evidence, the jurors must be conducted to the courtroom. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence.

(Emphasis added.) The situation here is analogous to *State v. Abraham*, 338 N.C. 315, 451 S.E.2d 131 (1994). There, the jury requested "'copies of the transcripts[.]'" *Id.* at 354, 451 S.E.2d at 152. In response, the trial court stated "'[i]t is not possible for you to have transcripts to take into the jury room. You are going to have to rely on your individual, and collective recollection as to what transpired.'" *Id.* *Abraha*m held that:

> While N.C.G.S. § 15A-1233(a) gives the trial court the discretion to permit the jury to reexamine writings that have been received into evidence and to rehear specific parts of trial testimony, it does not give the trial court authority, discretionary or otherwise, to provide copies of trial transcripts to jurors.

Id. Here the trial court did not have authority to provide a transcript of the entire trial to the jury. Accordingly, the trial court did not err in denying this request by the jury.

Accordingly, we discern no prejudicial error.

No prejudicial error.

Judges WALKER and BIGGS concur.

Report per Rule 30(e).