IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1013

Filed: 5 July 2017

Union County, Nos. 15 CRS 50380; 50920-21

STATE OF NORTH CAROLINA

v.

JASON CHARLES KONIFKA

Appeal by defendant from judgment entered 10 March 2016 by Judge Ted S. Royster in Union County Superior Court. Heard in the Court of Appeals 7 March 2017.

*Attorney General Joshua H. Stein, by Assistant Attorney General Joseph H. Hyde, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender James R. Grant, for defendant-appellant.*

ELMORE, Judge.

Defendant Jason Charles Konifka appeals from a judgment entered after a jury convicted him of three counts of statutory sex offense with a minor and three counts of indecent liberties with a child. On appeal, defendant contends the trial court erred

by responding improperly to a jury question regarding the weight to be accorded the minor-victim's testimony and by unjustifiably shackling him in leg irons during trial.

The first alleged error presents three issues: whether the trial court (1) abused its discretion by reinstructing the jury in a manner that failed to answer its question and by refusing defendant's request to give additional reinstructions; (2) committed structural error because its reinstruction and an additional impromptu statement unconstitutionally diluted the burden of proof; and (3) reversibly erred under N.C. Gen. Stat. § 15A-1234(c) by adding that impromptu statement without first notifying the parties and providing defendant an opportunity to object.

The second alleged error presents two issues: whether the trial court reversibly erred by unjustifiably shackling defendant during trial in violation of (1) N.C. Gen. Stat. § 15A-1031(1) and (2) his rights to due process under the United States Constitution. *See Deck v. Missouri,* 544 U.S. 622, 626 (2005) ("[T]he Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial.").

Because we conclude the court neither abused its discretion nor unconstitutionally diluted the burden of proof in its response to the jury's question, and because we conclude the impromptu statement falls outside the purview of N.C. Gen. Stat. § 15A-1234(c), we hold the court did not err as to the first three issues.

Because we conclude the record is inadequately developed to meaningfully assess the extent to which defendant was prejudiced by being shackled during trial, we dismiss his *Deck* challenge without prejudice to his right to reassert it in a subsequent post-conviction motion for appropriate relief (MAR) before the trial court and thus decline to address the merits of his related N.C. Gen. Stat. § 15A-1031(1) challenge.

## *I. Background*

On 27 April 2015, defendant was indicted on three counts of statutory sex offense with a thirteen-, fourteen-, or fifteen-year-old and three counts of indecent liberties with a child. At trial, the State's evidence tended to show the following facts.

In January 2015, defendant was living in North Carolina with his wife, Holly, their nine-year-old daughter, S.K., and Holly's two minor sons, fifteen-year-old C.A. and seventeen-year-old A.A. Defendant and his wife had been together for about ten years and moved from upstate New York to North Carolina in 2013 or 2014.

In the afternoon of 25 January 2015, defendant, Holly, and S.K. visited family in the neighborhood, while C.A. and A.A. stayed home and played video games. Around midnight the boys went to bed. The boys had separate, adjoining bedrooms and each went to his own room. Defendant, Holly, and S.K. returned home around 1:00 a.m.

At some point during the night, Holly awoke to find defendant leaving C.A.'s bedroom. Defendant claimed he entered C.A.'s bedroom to investigate a noise, which

he determined was A.A. leaving C.A.'s bedroom. When Holly asked C.A. why defendant was in his room, C.A. reluctantly confessed that he awoke to defendant "sucking on [his] penis." This occurred three separate times that night, and each time C.A. pushed defendant away, went back to sleep, and then awoke to defendant sexually abusing him. The third time is when Holly awoke, turned on the light, and saw defendant leave C.A.'s bedroom.

Holly angrily confronted defendant, who denied C.A.'s allegation. Holly checked on A.A., who appeared to be asleep, and later stated that he had never left his bedroom. Holly and defendant continued to argue. Defendant continued to deny any wrongdoing and even called the police, who interviewed C.A., A.A., Holly, and defendant about what had happened that night. C.A. reported that he awoke three times to defendant sexually abusing him. Defendant reported that he had gotten up to get an electronic cigarette, heard a noise toward the boys' bedrooms, and went to investigate it. C.A. later informed Holly that defendant had sexually abused him in a similar manner on multiple occasions in North Carolina and that this has been going on since New York.

Defendant was arrested and charged with three counts of statutory sex offense with a minor and three counts of indecent liberties with a child. Prior to trial, the trial court cautioned the parties not to bring any attention to the fact that defendant was shackled in leg irons attached to a four-foot long chain locked to the floor. The

court notified the parties that he intended to have the bailiff, a "pretty large fellow," stand in a manner that would block the jury's view when the jury entered and exited the jury box. Defense counsel noted the jury would need to walk right by the defense table at certain points of trial and raised a concern that if the jury saw defendant shackled, it would give the jury "such a bad flavor . . . that [defendant] couldn't get a fair trial." In response, the trial court directed the bailiff to stand in position to demonstrate and also suggested defense counsel could help by standing in a manner to further obstruct the view, which he did. The record does not disclose that defendant or his counsel raised any other objection to the shackles.

At trial, Holly, C.A., A.A., and the investigating officers testified. Defendant presented no evidence. During its close, the State argued the case "boils down to whether or not you believe [C.A.]" and that C.A. had no reason to lie about his allegation that defendant sexually abused him. After charging the jury on the burden-of-proof and reasonable-doubt, credibility-of-witness, and weight-of-the-evidence pattern jury instructions, as well as the charges against defendant, the jury retired to deliberate.

During its deliberation, the jury sent a note inquiring: "Do we make our decision based off of whether we believe the child or not?" After conferring with trial counsel, the judge informed the parties that it intended to reinstruct on the credibility-of-witness and weight-of-the-evidence pattern jury instructions. Over

defendant's objection, the judge declined to reinstruct also on the burden-of-proof and reasonable-doubt pattern jury instructions. After reinstructing the jury, the judge added: "[U]nderstand it's your duty to try to determine what the truth in this case is[.]"

The jury subsequently returned verdicts finding defendant guilty on all counts. The trial court consolidated the convictions into two judgments, and sentenced defendant to two consecutive terms of 240 – 300 months' imprisionment. Defendant appeals.

## *II. Jury Question Response*

Defendant first contends the trial court erred in responding to the jury's question about the weight to be accorded C.A.'s testimony because it failed to correctly answer the inquiry and unconstitutionally diluted the burden of proof. We disagree.

### A. Answering the Jury's Inquiry

After charging the jury, the judge may give additional instructions in response to a jury deliberation question. N.C. Gen. Stat. § 15A-1234(a)(1) (2015). The judge may also "repeat other instructions to avoid giving undue prominence to the additional instructions." *Id.* § 15A-1234(b) (2015). "[T]he trial court is in the best position to determine whether further additional instruction will aid or confuse the jury in its deliberations, or if further instruction will prevent or cause in itself an undue emphasis being placed on a particular portion of the court's instructions."

*State v. Hazel*, ___ N.C. App. ___, ___, 779 S.E.2d 171, 173 (2015) (quoting *State v. Prevette*, 317 N.C. 148, 164, 345 S.E.2d 159, 169 (1986)).

Accordingly, we review a trial court's response to a jury question under an abuse-of-discretion standard. *See, e.g.*, *State v. Smith*, 194 N.C. App. 120, 126, 669 S.E.2d 8, 13 (2008) ("[W]hether to repeat previously given instructions to the jury is reviewed for abuse of discretion." (citing *Prevette*, 317 N.C. at 164, 345 S.E.2d at 169)); *State v. Marshall*, ___ N.C. App. ___, ___, 784 S.E.2d 503, 506 (2016) ("[T]he court's choice of whether to use counsel's requested response is 'a matter within its discretion . . . .' " (quoting *State v. Herring*, 322 N.C. 733, 742, 370 S.E.2d 363, 369 (1988))). " 'Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.' " *State v. Roache*, 358 N.C. 243, 284, 595 S.E.2d 381, 408 (2004) (citing *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)).

Where a trial court refuses to answer directly a jury question "clearly . . . asking for clarification on a point of law" by misconstruing the question as one of fact, or to at least reinstruct on the elements of offenses when "it is clear the jury did not understand the differences in the degrees of the offenses and did not understand how [a material fact] would affect the degree of guilt as to both offenses," a new trial is warranted. *See State v. Hockett*, 309 N.C. 794, 801, 309 S.E.2d 249, 252 (1983) (awarding new trial where jury "inquir[ed] as to the effect of . . . a [material factual]

finding upon their determination of guilt on the various offenses charged" and judge refused to answer or to reinstruct on charged offenses). However, where "it d[oes] not appear from the jur[y]'s question that they were confused about the burden of proof," a trial court does not abuse its discretion by refusing to reinstruct on the burden of proof and reasonable doubt. *See State v. Harper*, 96 N.C. App. 36, 42, 384 S.E.2d 297, 300 (1989) (finding no abuse of discretion where court refused the defendant's requested reinstruction when jury inquired about whether it could consider as substantive evidence a fact first stated during defense counsel's closing argument).

Here, the jury asked: "Do we make our decision based off of whether we believe the child or not?" During the jury-response conference, the judge and trial counsel deliberated about the proper response:

> [DEFENSE]: . . . I think the question takes us into the realm of the government's burden of proof and reasonable doubt . . . .
>
> THE COURT: What I think I'm going to do is read the two charges one about they can believe -- you know, they're the sole judges of the believability of a witness and then read the one about weight. Once they decide what part, if any, they believe then they're supposed to determine what weight that is with all of the other believable evidence . . . . And I think that's really the only two charges that I can give them that would have any weight on trying to answer the question.
>
> [DEFENSE]: . . . I would also ask the Court to maybe consider giving the instruction that the burden of proof is always with the government and beyond a reasonable doubt.

> THE COURT: I think that's reasonable. That's the law. What say you, [State]?
>
> [PROSECUTION]: I have no objection to that, Judge.

However, after reading aloud the pattern jury instructions on the four proposed reinstructions, the judge decided against reinstructing on the burden of proof and reasonable doubt:

> THE COURT: . . . I don't think that's really what they're struggling with[.] . . . I'm still back to those first two, the credibility of the witness and the weight of the evidence seems to be the only two I can think of, unless you all can show me the other one that would really hit on what they're asking about.
>
> [DEFENSE]: I would just ask you to give the instruction you just read. For the record I think that's hitting close enough to what I was looking for.
>
> THE COURT: Do you have any objection if we do the burden of proof, reasonable doubt, [State]? As I say I don't know that that really is what they're asking.
>
> [PROSECUTION]: Judge, I think the credibility of the witness and the other one, not the burden of proof.
>
> THE COURT: [Defense], unless you come up with a specific charge that because they're basically hitting on what [the State] argued to them, basically.
>
> [DEFENSE]: . . . My concern is that to give piecemeal instructions which may not fully answer the jury's question would elevate the gravitas of one jury instruction over others, perhaps. The other problem I can see is that to answer the jury's question may take us or the Court into the realm of making an improper comment of credibility or

> acceptance of the weight of the government's case. . . . I can't quite articulate it as well as I want to but when the jury says can we convict him with this alone, I think the answer to that maybe would be best not to answer. . . .
>
> THE COURT: . . . *I think to answer the question yes would be improper, but I think to give those two charges, which pretty much tell exactly what they're supposed to do would be sufficient*. Unless you come up with some other specific pattern charge that deals with this question, then I think pretty much that's what I'm going to do.
>
> . . . .
>
> THE COURT: . . . . Let the record so reflect that the Court has declined to read pattern jury charge 101.10 which is burden of proof and reasonable doubt and the Court's doing that because it would fall into exactly what [defense] was arguing against, which is giving piecemeal instructions. *And they don't seem to have any problem with the burden of proof or reasonable doubt, the problem is with primarily only one piece of evidence, that seems to be against the Defendant. And the question seems to hit on part of the State's argument, so I think these two charges cover that and anything would* [sic] *be confusing* . . . .

(Emphasis added.) The trial court then reinstructed on credibility of witness and weight of the evidence, but did not reinstruct on the burden of proof and reasonable doubt.

Unlike in *Hockett*, the judge here attempted to answer what it determined to be the jury's question, and the jury was not clearly asking for clarification on a point of law. The jury's question neither was aimed at an element of an offense nor indicated confusion on a legal matter which would affect its decision to find defendant

guilty of mutually exclusive offenses. Similar to *Harper*, the jury's question did not indicate confusion about the burden of proof; rather, its inquiry appeared to center on the weight to be accorded C.A.'s testimony. Reviewing the entire jury-response conference transcript, it is clear the judge thoughtfully considered the nature of the question and thoroughly reasoned through its response.

Accordingly, we hold the trial court did not abuse its discretion in answering the jury's question by reinstructing on credibility of witness and weight of the evidence, and by refusing defendant's request to reinstruct also on the burden of proof and reasonable doubt.

**B. Diluting the Burden of Proof**

Defendant next contends the court committed structural error because its response placed undue emphasis on instructions concerning the jury's fact-finding function to the exclusion of instructions on the State's burden of proving defendant guilty beyond a reasonable doubt. Defendant asserts the court's reinstruction on credibility of witness and weight of the evidence, in conjunction with an impromptu statement reminding the jury of its truth-finding duty, unconstitutionally diluted the burden of proof, thereby violating his Sixth Amendment right to a jury verdict of guilty beyond a reasonable doubt. Because this alleged structural error implicates two related issues, and the State contends defendant failed to preserve each issue, we discuss these threshold preservation issues first.

*1. Constitutional Issue Preservation*

The State asserts defendant waived appellate review of his constitutional challenge by failing to raise it below.

"Structural error, no less than other constitutional error, should be preserved at trial." *State v. Garcia*, 358 N.C. 382, 410, 597 S.E.2d 724, 745 (2004). "Constitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal." *State v. Rawlings*, 236 N.C. App. 437, 443–44, 762 S.E.2d 909, 914 (2014) (citing *State v. Tirado*, 358 N.C. 551, 571, 599 S.E.2d 515, 529 (2004)). However, where a constitutional challenge not "clearly and directly presented to the trial court" is implicit in a party's argument before the trial court, it is preserved for appellate review. *See State v. Murphy*, 342 N.C. 813, 822, 467 S.E.2d 428, 433 (1996) (holding preserved a constitutional issue "not specifically argued" nor "clearly and directly presented to the trial court" but "implicit in the defendant's argument" and thus "implicitly presented to the trial court"); *see also State v. Spence*, 237 N.C. App. 367, 371, 764 S.E.2d 670, 674–75 (2014) (holding preserved a constitutional issue not directly presented to trial court where "[i]t [was] apparent from the context that the defense attorney's objections were made in direct response to the trial court's ruling to remove all bystanders from the courtroom—a decision that directly implicates defendant's constitutional right to a public trial").

Here, the jury-charge transcript reveals that after the court informed the parties of its proposed response to reinstruct on credibility of witness and weight of the evidence, but not on the burden of proof and reasonable doubt, defense counsel objected on the following grounds:

> [DEFENSE]: . . . My concern is that to give piecemeal instructions which may not fully answer the jury's question would elevate the gravitas of one jury instruction over others, perhaps. . . . [T]o answer the jury's question may take us or the Court into the realm of making an improper comment of credibility or acceptance of the weight of the government's case. . . .

As reflected, it is apparent defense counsel objected on grounds that the selective reinstructions would elevate the jury's fact-finding function to the exclusion of the State's burden of proof. As in *Murphy* and *Spence*, although defendant did not clearly and directly present his Sixth Amendment challenge to the trial court, implicit in his objection was an argument that the court's proposed response may dilute the State's burden of proof, thereby violating his Sixth Amendment right to a jury verdict based on proof beyond a reasonable doubt. Accordingly, we hold defendant's constitutional challenge is preserved for appellate review.

*2. Impromptu Statement Issue Preservation*

The State also asserts defendant waived appellate review of his argument concerning the court's impromptu statement reminding the jury of its truth-finding duty by failing to object to the statement after the court gave its response.

Under the North Carolina Rules of Appellate Procedure, to preserve instructional error arising from a court's failure to give a requested instruction, "a request for instructions constitutes an objection." *State v. Rowe*, 231 N.C. App. 462, 469, 752 S.E.2d 223, 227 (2013) (citing *State v. Collins*, 334 N.C. 54, 61, 431 S.E.2d 188, 192 (1993)). Yet ordinarily a requested response is insufficient to preserve alleged instructional error arising from language added by a trial court to a pattern jury reinstruction absent a specific objection to that added language. *See Marshall*, ___ N.C. App. at ___, 784 S.E.2d at 506.

In *Marshall*, we rejected the defendant's argument that his request for a certain instruction in response to a jury question preserved his challenge to a statement added by the trial court to the State's requested pattern jury instruction. *Id.* at ___, 784 S.E.2d at 506. In that case, during the jury-response conference, the trial court informed the parties it was rejecting the defendant's requested response and accepting the State's proposed instruction, but also adding a statement unrequested by either party. *Id.* at ___, 784 S.E.2d at 506. After asking for objections, the State asked the judge to repeat its added statement, and then agreed to the proposed response. The defendant objected—but only to the court's refusal to use his requested response. *Id.*

On appeal, the defendant argued the trial court erred by adding that statement to its response. We held the defendant's request for a different response failed to

preserve for appellate review his challenge to the court's added statement absent a specific objection to that added statement. *Id.* at ___, 784 S.E.2d at 507. We explained:

> [Defense counsel's] request that the court use his . . . instruction is insufficient to preserve an objection to the newly added language from the trial court. The court already had heard from the parties and decided to provide the pattern jury instruction requested by the State, rather than the . . . instruction submitted by [the defense]. Now, the court proposed adding a new sentence not contained in the pattern jury instruction. To preserve an objection to *that* newly added sentence, which departed from the pattern instruction, [defense counsel] needed to specifically object to *that* sentence and tell the trial court why it was improper.

*Id.* In reaching this holding, we reasoned: "If we were to hold that simply requesting that the court provide [defense counsel's] desired instruction . . . was sufficient to preserve an objection to this newly added sentence, it would undermine the purpose of requiring parties to state distinctly what portion of the jury instruction is objectionable and why." *Id.* (citing N.C. R. App. P. 10(a)(2); *State v. Oliphant*, 228 N.C. App. 692, 696, 747 S.E.2d 117, 121 (2013) (noting that Rule 10(a)(2)'s purpose is to encourage parties to inform the trial court of instructional errors so that it can correct them before the jury deliberates, thereby eliminating the need for a new trial)).

Here, defendant challenges the following language the trial court added to its proposed response, language to which he did not specifically object:

> Now, hopefully that answers your question for you and I'm going to send you back, please, and of course we're -- the Court is here at your disposal so if you have other questions or need further assistance, we're here to try to help you, but you *understand it's your duty to try to determine what the truth in this case is* and I'm going to send you back and let you continue your deliberations.

(Emphasis added.)

Unlike in *Marshall*, during the jury-response conference here, the court never informed the parties of its intent to add this statement to its response nor explicitly provided the parties an opportunity to object. Additionally, because this challenged statement directly implicates the grounds underlying defendant's implicit constitutional objection—that the court's selective reinstruction would dilute the burden of proof by placing undue emphasis on the jury's fact-finding function—neither is there concern defendant failed to inform the trial court of this alleged instructional error nor state distinctly why he would find this added language objectionable. Because we hold that defendant preserved his constitutional challenge, pursuant to which this additional language is a component, we hold this argument is preserved to the extent it implicates that constitutional challenge.

*3. Discussion*

"The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009) (citing *State v. Tate*, 187 N.C. App. 593, 599, 653 S.E.2d 892, 897 (2007)).

> Structural error is a rare form of constitutional error resulting from structural defects in the constitution of the trial mechanism which are so serious that a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence.

*State v. Garcia*, 358 N.C. 382, 409, 597 S.E.2d 724, 744 (2004) (internal citations and quotation marks omitted). Structural "error[ ] is reversible *per se*." *Id.* Because "the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt," *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993), one recognized structural error is "constitutionally deficient jury instructions on reasonable doubt," *Garcia*, 358 N.C. at 409, 597 S.E.2d at 744 (citing *Sullivan,* 508 U.S. at 278).

Defendant's reliance on *Sullivan* to support his argument that the court's response unconstitutionally diluted the burden of proof is misplaced. In *Sullivan*, the Court found structural error where the trial court gave a *defective* reasonable-doubt instruction. *Id.* at 277 (noting the reasonable-doubt instruction was "essentially identical to the one held unconstitutional in *Cage v. Louisiana*, 498 U.S. 39 (1990) (*per curiam*)"). Here, contrarily, the trial court gave a correct reasonable-doubt instruction by reciting verbatim the burden-of-proof and reasonable-doubt pattern jury instructions. *See* N.C.P.I.–Crim. 101.10 (2011). Nonetheless, defendant argues the court's prior correct instruction has no bearing on this alleged error arising from its jury-question response.

"A trial court's instructions to the jury must be construed contextually and in their entirety." *State v. Williams*, 308 N.C. 47, 63, 301 S.E.2d 335, 346 (1983). "[I]f, when so construed, it is sufficiently clear that no reasonable cause exists to believe the jury was misled or misinformed any exception to the charge will not be sustained . . . ." *State v. McKinnon*, 306 N.C. 288, 300, 293 S.E.2d 118, 126 (1982) (citing *State v. Watson*, 294 N.C. 159, 240 S.E.2d 440 (1978)).

In this case, after reciting the burden-of-proof and reasonable-doubt pattern jury instructions, the trial court instructed the jury six other times that the State bore the burden of proving defendant's guilt beyond a reasonable doubt. In responding to the jury's question regarding the weight to be accorded C.A.'s testimony, the court declined to reinstruct on the burden-of-proof and reasonable-doubt pattern jury instructions. Rather, the court reinstructed on the pattern jury instructions for credibility of witness and the weight of the evidence and then added: "[I]t's your duty to try to determine what the truth in this case is . . . ."

When considering in context the court's entire response in light of its initial instruction and the nature of the jury's question, we conclude the reinstruction and impromptu statement did not unconstitutionally dilute the burden of proof nor mislead the jury about the State's burden of proving defendant guilty beyond a reasonable doubt. *See id.* Accordingly, we hold the trial court's response did not amount to structural error.

**C. N.C. Gen. Stat. § 15A-1234(c)**

Defendant also contends the court reversibly erred under N.C. Gen. Stat. § 15A-1234(c) by failing to inform the parties before adding to its response the statement: "[U]nderstand it's your duty to try to determine what the truth in this case is."

"[W]hen a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial." *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985) (citation and quotation marks omitted); *see also State v. Combs*, 226 N.C. App. 87, 92, 739 S.E.2d 584, 588 (2013) (holding a challenge to the court's procedure under N.C. Gen. Stat. § 15A-1234(d) was properly preserved absent objection at trial). *But see State v. Ross*, 207 N.C. App. 379, 391, 700 S.E.2d 412, 421 (2010) (holding that the defendant waived appellate review of an issue argued under N.C. Gen. Stat. § 15A-1234(c) by failing to object at trial).

N.C. Gen. Stat. § 15A-1234(c) (2015) mandates that "[b]efore the judge gives additional instructions, he must inform the parties generally of the instructions he intends to give and afford them an opportunity to be heard." However, "[w]here the trial judge simply repeats . . . instructions previously given and does not add substantively to those instructions, the latter instructions are not 'additional instructions' as that term is contemplated in section 15A-1234(c)." *State v. Rich*, 132

N.C. App. 440, 448, 512 S.E.2d 441, 447 (1999) (citation, quotation marks, and brackets omitted), *aff'd*, 351 N.C. 386, 527 S.E.2d 299 (2000); *see also State v. Smith*, 188 N.C. App. 207, 212–13, 654 S.E.2d 730, 735 ("[A] reiteration of the court's original instructions [in response to a jury question] . . . cannot be characterized as additional instructions. We therefore hold that it was unnecessary for the court to inform the parties of the supplemental instructions it intended to give." (citation omitted)), *appeal dismissed and disc. rev. denied*, ___ N.C. ___, 667 S.E.2d 274 (2008).

Here, before jury charge, the trial court instructed the jury that it will have to "determine what the facts are or what the truth is in this case" and that it's the "[jury's] duty to decide from this evidence what the facts are." After charging the jury, the court instructed: "It is your duty to find the facts and to render a verdict reflecting the truth." Before the jury retired to deliberate, the court stated: "[Y]ou'll start your deliberations and hopefully find the truth of this case . . . ."

Because the challenged statement—"understand it's your duty to try to determine what the truth in this case is"—simply repeated prior statements made to the jury and did not add substantively to prior instructions, we conclude it was not an "additional instruction" as contemplated by N.C. Gen. Stat. § 15A-1234. Therefore, we hold the court did not violate N.C. Gen. Stat. § 15A-1234(c)'s mandate by failing to inform the parties before adding this statement to its response.

### *III. Shackling*

Defendant contends the trial court violated N.C. Gen. Stat. § 15A-1031 and his constitutional right to due process under the Fifth and Fourteenth Amendments to the United States Constitution by unjustifiably shackling him during trial.

"[T]rial in shackles is inherently prejudicial." *State v. Tolley*, 290 N.C. 349, 367, 226 S.E.2d 353, 367 (1976). "[T]he Fifth and Fourteenth Amendments prohibit the use of physical restraints *visible to the jury* absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial." *Deck v. Missouri*, 544 U.S. 622, 626 (2005) (emphasis added). Because *visible* courtroom shackling is "inherently prejudicial" and its negative effects ordinarily "cannot be shown from a trial transcript," the Supreme Court has held that "where a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice"; rather, "[t]he State must prove 'beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained.' " *Id.* Under *Deck*, therefore, the burden shifts to the State only when unjustified courtroom shackles are visible to the jury.

Here, the trial court, without explanation or discussion appearing in the record, ordered defendant to remain in leg shackles throughout trial, and the record is unclear whether or to what extent these shackles were visible to the jury. The

entire discussion concerning the need for and the visibility of the shackles is confined to these few paragraphs of transcript:

> THE COURT: I guess we can do that when we bring in -- also for the record *taking into account the sheriff's request*, of course has the responsibility, we're going to have to be careful during jury selection. During the trial the Defendant will be dressed in street clothes as required but he will have on leg shackles and there will be a four foot long chain that locks him to the floor so he can't leave, and of course the bailiff is going to stand as the jury comes up, he's a pretty large fellow, he'll block the view. But I just wanted to alert everybody we need to be careful that we don't bring any attention.
>
> Now, do you want to be heard on that matter, [Defense]?
>
> [DEFENSE]: My only concern, your Honor, is that -- and again I respect the Court's analysis, but as the jury's reporting to the jury box to be voir dired, they have to pass right past our table. And it may be possible to hide the shackles and the device that, you know, I'll leave that in the Court's discretion, that would be my concern. Being shackled for a case like this I think would give such a bad flavor with the Defendant to the jury that he couldn't get a fair trial.
>
> THE COURT: Deputy L'Heuruex, stand over there where you'll be standing. I want everybody to see how that blocks the view. (demonstrating)
>
> THE COURT: And of course you'll be on the other side too, [Defense].
>
> [DEFENSE]: What we could do is I could squeeze down further towards that end when the jury's coming in.

(Emphasis added.)

Because we cannot ascertain from the record the extent to which the shackles were visible to the jury or why the trial court ordered defendant shackled during trial, these issues require further evidentiary development before meaningful appellate review of defendant's alleged shackling error. Since the record is inadequately developed to assess defendant's *Deck* claim on direct appeal, we decline to address it and dismiss this claim without prejudice to defendant's ability to reassert it before the trial court in a post-conviction MAR. *Cf. State v. Al-Bayyinah*, 359 N.C. 741, 753, 616 S.E.2d 500, 509–10 (2005) (dismissing ineffective assistance of counsel claim brought on direct appeal without prejudice to pursue collateral relief where "[t]rial counsel's strategy and the reasons therefor are not readily apparent from the record, and more information must be developed to determine if defendant's claim satisfies the *Strickland* test"); *Gonzalez v. Pliler*, 341 F.3d 897, 904 (9th Cir. 2003) (remanding shackling claim for evidentiary hearing where record inadequately developed to meaningfully assess prejudice arising from shackling). In light of our dismissal of defendant's *Deck* claim, we decline to address defendant's related statutory challenge.

Nonetheless, we emphasize that "[t]he law has long forbidden routine use of visible shackles during the guilt phase; it permits a State to shackle a criminal defendant *only in the presence of a special need*. This rule has deep roots in the common law." *Deck*, 544 U.S. at 626 (emphasis added); *see also State v. Tolley*, 290 N.C. 349, 365, 226 S.E.2d 353, 366 (1976) (explaining that, as a "general rule . . . a

defendant in a criminal case is entitled to appear at trial free from all bonds or shackles except in extraordinary instances"). Yet "the rule against shackling is subject to the exception that the trial judge, *in the exercise of his sound discretion*, may require the accused to be shackled when such action is necessary to prevent escape, to protect others in the courtroom or to maintain order during trial." *Tolley*, 290 N.C. at 367, 226 S.E.2d at 367 (emphasis added); *see also* N.C. Gen. Stat. § 15A-1031 (2015). "If the judge orders a defendant or witness restrained, he must[, *inter alia*,] [e]nter in the record out of the presence of the jury and in the presence of the person to be restrained and his counsel, if any, the reasons for his action . . . ." N.C. Gen. Stat. § 15A-1031(1). A court's decision to shackle a defendant "*must* be supported by adequate findings." *State v. Jackson*, 162 N.C. App. 695, 700, 592 S.E.2d 575, 578 (2004). In dicta, this Court has stated: "[A] decision by a sheriff to shackle a problematic criminal defendant in a jail setting or in transferring a defendant from the jail to a courtroom, is not, without a trial court order supported by adequate findings of fact, sufficient to keep a defendant shackled during trial." *State v. Sellers*, ___ N.C. App. ___, ___, 782 S.E.2d 86, 88 (2016). Defendant's related statutory argument is dismissed without prejudice.

## *IV. Conclusion*

The court did not abuse its discretion in reinstructing on credibility of witness and weight of the evidence and refusing to reinstruct on the burden of proof and

reasonable doubt in response to the jury's question concerning the weight to be accorded C.A.'s testimony. Nor did the court's reinstruction and impromptu statement amount to structural error, since it did not unconstitutionally dilute the State's burden of proving defendant guilty beyond a reasonable doubt. Additionally, the court did not violate N.C. Gen. Stat. § 15A-1234(c) because its added statement was not an "additional instruction" as statutorily contemplated.

Because the record is inadequately developed to review defendant's *Deck* claim, which directly implicates the prejudice analysis required under N.C. Gen. Stat. § 15A-1031, we dismiss defendant's *Deck* claim without prejudice to his right to reassert it in a subsequent MAR proceeding before the superior court and decline to address his related statutory challenge.

NO ERROR IN PART; DISMISSED WITHOUT PREJUDICE IN PART.

Judges DIETZ and TYSON concur.

Report per Rule 30(e).