

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA05-1112

NORTH CAROLINA COURT OF APPEALS

Filed: 5 July 2006

STATE OF NORTH CAROLINA

v.

Buncombe County  
No. 04CRS064239

ELEANOR HOUSE

Appeal by defendant from judgment entered 8 March 2005 by Judge Richard L. Doughton in Buncombe County Superior Court. Heard in the Court of Appeals 19 April 2006.

*Attorney General Roy A. Cooper, III, by Assistant Attorney General Vanessa N. Totten, for the State.*

*Brannon Strickland, PLLC, by Marlet M. Edwards, for defendant-appellant.*

HUNTER, Judge.

Eleanor House ("defendant") appeals from judgment of the trial court entered upon a jury verdict finding her guilty of simple assault, a misdemeanor. In her single assignment of error, defendant contends the trial court committed plain error in submitting the case to the jury. We dismiss defendant's appeal.

On the afternoon of 26 October 2004, defendant had a heated argument with her neighbor, Laurie Ann Stephens ("Stephens"). Stephens testified that, during the argument, defendant became enraged and started "swinging at me, punches, and at that point I was backing up to avoid her thrusts at me." At one point defendant

"made nose-to-nose contact with [Stephens] and was screaming in [her] face." Stephens retreated to her residence to summon law enforcement. She stated that she "was really afraid that [defendant] was going to punch [her.]" A witness to the altercation confirmed Stephens' testimony, describing defendant's demeanor as "[u]pset" and "violent." Defendant "raised her fists towards [Stephens]," who "began to back up some to get a little further away from her."

Upon deliberation, the jury found defendant guilty of simple assault. The trial court imposed a suspended sentence of forty-five days of imprisonment and placed defendant on supervised probation for eighteen months. Defendant appeals.

Defendant contends the trial court erred in submitting the case to the jury, in that there was insufficient evidence of simple assault. Defendant, however, failed to move to dismiss the charge against her at the close of the State's evidence and at the close of all evidence. "A defendant in a criminal case may not assign as error the insufficiency of the evidence to prove the crime charged unless he moves to dismiss the action[.]" N.C.R. App. P. 10(b)(3). Defendant attempts to circumvent this bar by arguing plain error. "Plain error, however, only applies to jury instructions and evidentiary matters in criminal cases. While this is a criminal case, defendant's failure to [move] to dismiss does not trigger a plain error analysis." *State v. Freeman*, 164 N.C. App. 673, 677, 596 S.E.2d 319, 322 (2004) (citation omitted); see also *State v. Richardson*, 341 N.C. 658, 676-77, 462 S.E.2d 492, 504 (1995) (plain

error analysis unavailable where the defendant failed to properly preserve the issue of sufficiency of the evidence).

We note that, even had defendant preserved this issue for appellate review, there was sufficient evidence here to support the jury's verdict. Witnesses testified that defendant was yelling and swinging her fists at Stephens. Stephens testified she was "really afraid" and had to back up to avoid being struck by defendant. Stephens ran into her house and telephoned for law enforcement. Thus, in the light most favorable to the State, there was sufficient evidence that defendant committed an overt act that put Stephens in fear of immediate bodily harm. *State v. Roberts*, 270 N.C. 655, 658, 155 S.E.2d 303, 305 (1967) (reciting definition of assault).

Because defendant has failed to properly preserve an issue for appellate review, we dismiss her appeal.

Dismissed.

Judges MCGEE and STEPHENS concur.

Report per Rule 30(e).