An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA13-730
NORTH CAROLINA COURT OF APPEALS

Filed: 3 December 2013

STATE OF NORTH CAROLINA

v.

Granville County
No. 11 CRS 52679

DANIEL L. COMPEL,
Defendant.

Appeal from judgment entered 17 January 2013 by Judge Henry W. Hight, Jr. in Granville County Superior Court. Heard in the Court of Appeals 18 November 2013.

Roy Cooper, Attorney General, by Donald R. Teeter, Sr., Special Deputy Attorney General, for the State.

Charlotte Gail Blake, for defendant-appellant.

MARTIN, Chief Judge.

A jury found defendant guilty of first-degree trespass. The trial court suspended a sentence of forty-five days in the custody of the local sheriff and placed defendant on supervised probation for eighteen months. Defendant filed timely notice of appeal from the judgment.

Charlotte Hester testified that she and her family inherited from her grandfather a twenty-five acre farm at 4168

Rock Brook Road, most of which "is fenced in." Her brother, Ervin Green, took care of the property. Defendant began keeping his horses on the farm without permission in 2010. Although she had difficulty contacting him, Mrs. Hester told defendant by telephone to remove the horses prior to 11 December 2011, but he refused. On 11 December 2011, she and her husband, Essex, went to the farm and discovered that they "couldn't get in the gate because glue ha[d] been put in our locks." They had to remove the gate in order to enter the farm. Defendant appeared, "screaming, telling [them] to leave his horses alone" and "to leave [their] own property." Mr. and Mrs. Hester called the sheriff's department.

Ervin Green testified that, three years ago, he agreed to allow defendant to keep his horses on the farm for one month – "[un]til March" 2010 - in exchange for $200.00. When defendant's check for $200.00 bounced, however, Mr. Green told defendant to remove the horses from the property. Defendant tried to give Mr. Green another check, but he would not take it. Defendant ignored Mr. Green's demands to leave the property and kept his horses on the land for three years, until Mrs. Hester intervened. When Mrs. Hester contacted law enforcement to have

the horses removed, defendant tried to claim the land by asserting "that nobody down there owned [it]."

Granville County Sheriff's Deputy Holden Wilkins testified that, prior to 11 December 2011, he told defendant four or five times that the Hesters did not want him or his horses on the property. When Deputy Wilkins was dispatched to the farm on 11 December 2011, the Hesters again stated that "[t]hey wanted [defendant] and his horses off the property." On the day of his arrest for trespassing, defendant told Deputy Wilkins, "[T]his is no one's property. I'm going to apply for the deed for it. This is no one's property. I'm getting my paperwork together. I'm going to apply for the deed to this land."

Defendant testified that he began pasturing his thirteen horses on the subject property on 2 February 2010 and kept them there until July 2012. Mr. Green agreed to lease him the pasture if defendant repaired the fences on the property. After mending the fences, defendant gave Mr. Green a check "for two hundred dollars for a year lease." Mr. Green in turn gave defendant a key to a gate on the property. Defendant copied the key and returned the original to Mr. Green two days later. Although defendant tended his horses every day, he did not see Mr. Green on the property again until October 2010, when Mr.

Green informed defendant that someone had stolen a tree stand from the property and asked if he had seen anyone suspicious. During their meeting, defendant "gave [Mr. Green] a money order in the amount of two hundred dollars ($200.) for the following year." Defendant "had no contact with any of the Hesters" in person or by telephone until they showed up at the farm on 11 December 2011 and had him arrested for trespassing. He did not put glue in the gate padlocks and was unaware that his check to Mr. Green had bounced until the day of his trial in January 2013. Defendant believed he had "valid permission to remain on that property through [January 2012]."

On appeal, defendant claims that the trial court erred in instructing the jury on the elements of first-degree trespass, as follows:

> For you to find the defendant guilty of this offense, the State must prove two things beyond a reasonable doubt.
>
> First, that the defendant remained on the premises of another so enclosed and secured as to demonstrate clearly an intent to keep out intruders. *A fence around the premises would clearly demonstrate an intent to keep out intruders*.
>
> And second, that the defendant remained on the premises without authorization.

(Emphasis added). *See* N.C. Gen. Stat. § 14-159.12(a)(1) (2011). Defendant argues that the instruction "[a] fence around the premises would clearly demonstrate an intent to keep out intruders" amounted to an impermissible judicial expression of opinion in violation of N.C.G.S. §§ 15A-1222 and -1232.[1] Defendant further contends that the trial court's instructional error "gutted [his] defense" by "remov[ing] his theory of defense from the jury's consideration."

"In instructing the jury, the judge shall not express an opinion as to whether or not a fact has been proved . . . ." N.C. Gen. Stat. § 15A-1232 (2011); *see also* N.C. Gen. Stat. § 15A-1222 (2011) ("[The court] may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury."). However, a court may tailor its jury instructions to the evidence adduced at trial and the specific allegations raised against a defendant. *See State v. Robinson*, 40 N.C. App. 514, 520, 253 S.E.2d 311, 315 (1979). In determining whether a court has expressed an

[1]Defendant urges this Court to adopt a *de novo* standard of review because no objection is required to preserve for appeal a trial court's statutory violation. *See State v. Young*, 324 N.C. 489, 494, 380 S.E.2d 94, 97 (1989). The State argues for a plain error standard, inasmuch as defendant is challenging a jury instruction to which he did not object at trial. *See* N.C.R. App. P. 10(a)(1), (4). Because we find the alleged error to be harmless, we will assume the higher standard of review applies.

opinion, a jury charge "must be read as a whole" and "construed contextually." *State v. Rich*, 351 N.C. 386, 393-94, 527 S.E.2d 299, 303 (2000). "'[U]nless it is apparent that such infraction of the rules might reasonably have had a prejudicial effect on the result of the trial, the error will be considered harmless.'" *State v. Larrimore*, 340 N.C. 119, 155, 456 S.E.2d 789, 808 (1995) (quoting *State v. Perry*, 231 N.C. 467, 471, 57 S.E.2d 774, 777 (1950)); *see also* N.C. Gen. Stat. § 15A-1443(a) (2011).

Initially, we note that the trial court did not instruct the jury that the evidence, in fact, proved the existence of a fence around the premises of 4168 Rock Brook Road. Moreover, defendant freely acknowledged the existence of the fence, testifying that he repaired it as part of his agreement with Mr. Green.

Our Supreme Court has endorsed the use of peremptory instructions in criminal trials where uncontroverted evidence, if credited by the jury as true, would resolve an issue of fact before the jury as a matter of law. *See State v. Hedgepeth*, 330 N.C. 38, 54, 409 S.E.2d 309, 318-19 (1991). Such instructions may be used to establish, for example, that a particular injury is "serious" or a particular weapon "deadly" for purposes of an

assault offense. *See id.* ("In the absence of conflicting evidence, a trial judge may instruct the jury that injuries to a victim are serious as a matter of law if reasonable minds could not differ as to their serious nature."), *appeal after remand*, 350 N.C. 776, 517 S.E.2d 605 (1999); *State v. Torain*, 316 N.C. 111, 119, 340 S.E.2d 465, 470 ("[W]here the alleged deadly weapon and the manner of its use are of such character as to admit of but one conclusion, the question as to whether or not it is deadly . . . is one of law, and the Court must take the responsibility of so declaring." (emphasis and internal quotation marks omitted)), *cert. denied*, 479 U.S. 836, 93 L. Ed. 2d 277 (1986). However, we have found no decision addressing the use of a peremptory instruction in a trespassing case to establish whether a landowner's use of a particular means of securing or enclosing property "demonstrate[s] clearly an intent to keep out intruders" as a matter of law.

Assuming, *arguendo*, that the trial court's instruction was error, we find defendant has failed to show a reasonable possibility that it affected the jury's verdict. *See* N.C. Gen. Stat. § 15A-1443(a). Contrary to his argument on appeal, defendant did not base his defense on the theory that the owners of the farm did not manifest their intention to exclude

intruders. Instead, defendant focused his case on the second element of the offense, insisting that he had Mr. Green's permission to be on the property on 11 December 2011 pursuant to their lease agreement. In his opening statement, counsel forecast this defense to the jury as follows:

> [Defendant] will present evidence that he had permission to be on this tract of land in question . . . . And it's [his] contention that he did have permission to have his horses on this property and to be on that property as well.

Insofar as defendant suggested additional grounds for innocence during his testimony, defendant averred that all of the prosecution's witnesses were lying and expressed his doubt that the Hesters actually owned the property. Having carefully reviewed the evidence, we find no reasonable possibility that the jury would not have found defendant guilty of first-degree trespassing had the court omitted the challenged sentence from its charge. Accordingly, we conclude that any error was harmless.

No error.

Judges HUNTER, JR. and DILLON concur.

Report per Rule 30(e).