

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-218

Filed: 3 November 2015

Henderson County, No. 12 CRS 50798

STATE OF NORTH CAROLINA

v.

OTHA RAY BAREFOOT

Appeal by Defendant from judgment entered 17 July 2014 by Judge C. Phillip Ginn in Henderson County Superior Court. Heard in the Court of Appeals 26 August 2015.

*Attorney General Roy Cooper, by Assistant Attorney General Melissa H. Taylor, for the State.*

*Leslie Rawls for Defendant.*

INMAN, Judge.

Defendant Otha Barefoot (“Defendant”) appeals the judgment entered after a jury convicted him of first degree murder. On appeal, Defendant argues that: (1) the trial court violated his Fourteenth Amendment right to due process by improperly shifting the burden of proof to Defendant when instructing on involuntary manslaughter, and (2) the trial court erred by refusing to provide an instruction on the defense of workplace.

After careful review, we find no error.

### **Factual and Procedural Background**

On 26 February 2012, Paul Bradish (“Bradish”) arrived at Smiley’s Flea Market in Henderson, North Carolina (“Smiley’s”). Smiley’s is an open area market with rows of tables where sellers display their merchandise. Defendant and Bradish were both regular sellers at Smiley’s and had a history of antagonistic exchanges. On the morning of 26 February, Defendant and Bradish argued. Ultimately, Defendant shot Bradish five times. Bradish died as a result of a gunshot wound to the head.

After police officers arrived at Smiley’s, placed Defendant under arrest, and took him to the station, Defendant provided a written voluntary statement to Henderson County Detective Darrin Whitaker which claimed that Bradish had threatened to kill Defendant several times. According to Defendant, he and Bradish had ongoing disputes over Defendant’s prices in the months prior to the February altercation. Defendant alleged that on several occasions, Bradish told Defendant that he would kill him and “beat [Defendant’s] ass.”

On the morning of the altercation, Defendant alleged in his statement to police that Bradish said something to him that Defendant could not understand. When Defendant confronted him, Bradish approached Defendant’s table at Smiley’s, threatened him, and lunged at him as if he were going to come over the table. Defendant got his gun and, when Bradish reached for his pocket, shot Bradish three

times. When Bradish “kept coming” at him, Defendant shot him two more times in the head. According to Defendant, he only killed Bradish because he thought Bradish “might try to kill [him]” and because Bradish was “looking for trouble.” Defendant’s ex-girlfriend Joleena Mathis testified at trial about Bradish’s threatening behavior toward Defendant that occurred in the months prior to the incident. Both Defendant’s parents also testified at trial about the ongoing disputes Defendant claimed to have had with Bradish.

At the charge conference, Defendant requested a jury instruction on defense of habitation pursuant to North Carolina’s “Stand Your Ground” law, arguing that the evidence showing that Bradish “tried to come over the tables into [Defendant’s] [work] area” supported the instruction. The State objected to the instruction, claiming that because Smiley’s did not have a tent, roof, or any type of structure over it, Smiley’s did not constitute a “workplace,” as that term is defined by statute. Moreover, according to the State, because Bradish had a right to be where he was when Defendant killed him, there was no forcible entry, a required showing for the defense of habitation instruction. The trial court agreed with the State and refused to instruct on the defense . On 17 July 2014, the jury found Defendant guilty of first degree murder. The trial court sentenced defendant to life imprisonment. Defendant timely appeals.

### **Analysis**

Defendant argues that the trial court deprived him of his right to due process by improperly shifting the burden of proof to Defendant when it instructed on involuntary manslaughter. Furthermore, Defendant contends that he was entitled to an instruction on the defense of habitation and that the trial court's refusal to do so requires a new trial.

**I. Improper Jury Instruction on Involuntary Manslaughter**

First, we must determine whether Defendant properly preserved this issue on appeal. Defendant contends that since the State requested, and the court agreed on, the instruction on involuntary manslaughter during the charge conference, Defendant was not required to request it in order to satisfy Rule 10(a)(2) of the North Carolina Rules of Appellate Procedure. The State argues that Defendant's failure to specifically request the instruction and failure to object once it was given afford Defendant appellate relief only upon a showing of plain error.

At the charge conference, the State specifically requested an instruction on involuntary manslaughter. The trial court agreed to give it. Thus,

[b]ecause the State requested this instruction, and the trial court agreed to give it, the defendant's counsel had no reason to make his own request for this instruction. The State's request, approved by the defendant and agreed to by the trial court, satisfied the requirements of Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure and preserved this question for review on appeal.

STATE V. BAREFOOT

*Opinion of the Court*

*State v. Keel*, 333 N.C. 52, 56-57, 423 S.E.2d 458, 461 (1992); *see also State v. Barrow*, 216 N.C. App. 436, 445, 718 S.E.2d 673, 679 (2011). Accordingly, the State's request for a jury instruction on involuntary manslaughter satisfied Rule 10(a)(2), and we review this issue *de novo*, *State v. Pender*, 218 N.C. App. 233, 243, 720 S.E.2d 836, 842 (2012).

At the beginning of the instructions, Judge Ginn properly instructed the jury on the State's burden to prove Defendant's guilt beyond a reasonable doubt and that if the State fails to meet its burden, the jury must find Defendant not guilty. The trial court went on to properly instruct the jury on self-defense, first degree murder, second degree murder, voluntary manslaughter, and involuntary manslaughter, including the fact that the State must prove every element beyond a reasonable doubt. After instructing in detail on each individual possible verdict, Judge Ginn summarized all the possible verdicts, emphasizing that if the jury has a reasonable doubt as to any element of the charge, it must not return a verdict of guilty. However, at the end of the instructions, the trial court attempted to give an overview of the crimes by explaining:

You can see that there's kind of a hierarchy here before I finish involuntary manslaughter. You first consider first degree murder. If you come to a unanimous verdict on that one that he is guilty, you're done. If you determine he is not guilty, then you go to the second level which is second degree murder. And you have to go through that same process. And as you go down through this process, the final crime that you come to is involuntary.

STATE V. BAREFOOT

*Opinion of the Court*

*So if you find from the evidence beyond a reasonable doubt that he is not guilty of the first three crimes that you will consider and you get to involuntary manslaughter and you determine that he is guilty of involuntary manslaughter, because on the alleged date the defendant committed the offense of recklessly discharging a firearm thereby proximately causing the alleged victim's death, it's obviously going to be your obligation to return a verdict at that time to the involuntary manslaughter.*

Clearly, the trial court's above emphasized instruction improperly explained the burden of proof. However, as noted by our Court, this erroneous instruction must be construed in light of the entire charge:

When the appealing party properly objects to jury instructions at trial, we review the instructions as a whole in order to ascertain whether, in context, an erroneous instruction likely misled the jury. We previously have explained that [t]he [jury] charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed. . . . The party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by [the] instruction. Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.

*State v. Marshall*, 206 N.C. App. 580, 582, 696 S.E.2d 894, 896-97 (2010) (internal quotation marks and citation omitted). As clarified by our Supreme Court: "If the charge presents the law fairly and clearly to the jury, the fact that some expressions, standing alone, might be considered erroneous will afford no ground for reversal."

STATE V. BAREFOOT

*Opinion of the Court*

*State v. Fowler*, 353 N.C. 599, 624, 548 S.E.2d 684, 701-702 (2001) (internal quotation marks and citation omitted).

It is clear that the trial court's statement that the jury should only consider involuntary manslaughter if it finds beyond a reasonable doubt that defendant was not guilty of first degree murder, second degree murder, or voluntary manslaughter was erroneous. However, the trial court properly instructed the jury that the State has the burden of proof when it instructed on each individual crime, including involuntary manslaughter, and again when it summed up each charge. Viewed contextually and in their entirety, while there was an error in the single jury instruction, it is not likely that this error misled the jury given the numerous other times that the trial court correctly instructed on the burden of proof.

We find the trial court's misstatement similar to the one made in *State v. Baker*, 338 N.C. 526, 564, 451 S.E.2d 574, 597 (1994). In *Baker*, the trial court properly instructed on the State's burden of proof for the charges of murder, common law robbery, and first degree kidnapping. *Id.* at 564-65, 451 S.E.2d at 597. However, after instructing the jury properly on the kidnapping charge, the trial court concluded as follows: "However, if you do not so find, or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of guilty." *Id.* at 564, 451 S.E.2d at 597.

STATE V. BAREFOOT

*Opinion of the Court*

On appeal, the defendant argued that the trial court committed prejudicial error when it improperly instructed on kidnapping. However, our Supreme Court disagreed, noting that

This Court has repeatedly held that a lapsus linguae not called to the attention of the trial court when made will not constitute prejudicial error when it is apparent from a contextual reading of the charge that the jury could not have been misled by the instruction. In the instant case, the trial court repeatedly instructed the jury that the State had the burden of proving defendant was guilty beyond a reasonable doubt. The court also instructed that “[a]fter weighing all the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find him not guilty.” In addition, in its instructions on murder and common-law robbery, the court stated that if the jurors did not find each element had been shown, it would be their duty to return a verdict of not guilty. Reading the charge in its entirety, we are convinced the jurors could not have been misled by the omission complained of.

*Id.* at 565, 451 S.E.2d at 597 (internal citation omitted).

As in *Baker*, Judge Ginn repeatedly instructed the jury that the State had the burden of proving Defendant was guilty beyond a reasonable doubt, including when it instructed in detail on involuntary manslaughter, and emphasized that, if the jury did not find each element of the charge had been proven beyond a reasonable doubt, it must find Defendant not guilty. Thus, as in *Baker*, reading the charge in its entirety, the incorrect statement regarding the burden of proof when Judge Ginn provided a “hierarchy” of the charges would not mislead the jury.



STATE V. BAREFOOT

*Opinion of the Court*

The facts of the present case are distinguishable from those in *State v. Hunt*, 192 N.C. App. 268, 664 S.E.2d 662 (2008). In *Hunt*, the trial court properly instructed the jury on first degree murder, second degree murder, and involuntary manslaughter. *Id.* at 270, 664 S.E.2d at 664. However, the instruction on voluntary manslaughter included a misstatement:

Now, the burden is on the State to prove beyond a reasonable doubt that the defendant did not act in the heat of passion upon adequate provocation, but rather that he acted with malice. *If the defendant fails to meet this burden*, the defendant can be guilty of no more than voluntary manslaughter.

*Id.* at 271, 664 S.E.2d at 664. Although the trial court first properly instructed the jury as to the burden of proof, it incorrectly instructed the jury that the burden was on the defendant in the next sentence. *Id.* On appeal, this Court concluded that it was “unable to conclude that the instructional error did not have a probable impact on the jury’s finding of guilt” because

[t]his is not a case with a singular misstatement where the trial court repeatedly instructed the jury that the State had the burden of proving that defendant was guilty beyond a reasonable doubt. Nor is this a case where the trial court made a misstatement of law which was preceded by several correct instructions. Instead, the trial court made a misstatement as to the burden of proof for the voluntary manslaughter charge and then provided that same misstatement to the jury in writing, along with the correct second degree murder and involuntary manslaughter charges.

*Id.* (internal quotation marks and citations omitted).

Unlike the instructions in *Hunt*, the instructions at issue in this case included a “singular misstatement,” *id.*, after the trial court repeatedly instructed the jury that the burden of proof was on the State to prove every element of the charge beyond a reasonable doubt. Furthermore, the misstatement was not provided to the jury in writing. Thus, *Hunt* is distinguishable, and we are bound by *Baker*.

## **II. The Defense of Workplace**

Next, Defendant argues that the trial court erred by refusing to provide an instruction on the defense of habitation, which includes the defense of one’s workplace. We disagree.

As discussed above, we review challenges to the trial court’s rulings regarding jury instructions *de novo*. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). Our Supreme Court has held that “[i]f a request is made for a jury instruction which is correct in itself and supported by evidence, the trial court must give the instruction at least in substance.” *State v. Harvell*, 334 N.C. 356, 364, 432 S.E.2d 125, 129 (1993). “In order to have the court instruct the jury on a defense, the defendant must present some credible evidence on every element of the defense.” *State v. Sanders*, 201 N.C. App. 631, 635, 687 S.E.2d 531, 535 (2010).

Pursuant to N.C. Gen. Stat. § 14-51.2 (b), which is commonly referred to as North Carolina’s “Stand Your Ground” law,

The lawful occupant of a home, motor vehicle, or workplace  
is presumed to have held a reasonable fear of imminent

STATE V. BAREFOOT

*Opinion of the Court*

death or serious bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or serious bodily harm to another if both of the following apply:

(1) The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a home, motor vehicle, or workplace, or if that person had removed or was attempting to remove another against that person's will from the home, motor vehicle, or workplace.

(2) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.

Section 14-51.2(a)(4) defines a “workplace” as “[a] building or conveyance of any kind, whether the building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it, including a tent, which is being used for commercial purposes.”

At the jury conference, the State argued that the habitation instruction did not apply because: (1) there was no roof over Smiley’s in the area where Bradish was killed; and (2) there was no evidence that the victim did not have a right to be at the public open air market at the time he was killed. Here, it is not necessary to resolve the issue of whether Smiley’s constituted a “workplace,” as defined in N.C. Gen. Stat. § 14-51.2(a)(4), because all the evidence suggests that Bradish had a legal right to be at Smiley’s and that he was often at the market as both a seller and customer. Therefore, the trial court was not required to give a jury instruction on defense of

STATE V. BAREFOOT

*Opinion of the Court*

habitation because there is no evidence that Bradish had “unlawfully and forcibly” entered Smiley’s, a required showing for a defendant to be entitled to the defense of habitation instruction. *See e.g., Sanders*, 201 N.C. App. at 636, 687 S.E.2d at 535-36. Therefore, the trial court did not err by refusing to give Defendant’s requested instruction.

**Conclusion**

Based on the reasons above and our review of the record and relevant caselaw, we find no error in Defendant’s trial.

NO ERROR.

Judges CALABRIA and STROUD concur.

Report per Rule 30(e).