An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA17-460

Filed: 2 January 2018

Mecklenburg County, Nos. 14 CRS 212746, 14752

STATE OF NORTH CAROLINA

v.

JAMARICK YAMON HORTON

Appeal by defendant from judgment entered 30 September 2016 by Judge Gregory R. Hayes in Mecklenburg County Superior Court. Heard in the Court of Appeals 13 December 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Kevin G. Mahoney, for the State.

Cooley Law Office, by Craig M. Cooley, for defendant-appellant.

CALABRIA, Judge.

Where the trial court's answer to the jury's question merely clarified the jury's understanding of the trial court's instructions, the trial court did not impermissibly opine on how the jury should apply the facts to the law. We find no error.

I. Factual and Procedural Background

On 31 March 2014, a shooting occurred in Charlotte, which claimed the life of Alquez Thompson. Jamarick Yamon Horton ("defendant") was arrested in relation to the shooting, and charged with, *inter alia*, possession of a firearm by a felon. Defendant was indicted for possession of a firearm by a felon, and attaining habitual felon status. In his first trial on those charges, the court declared a mistrial due to a hung jury. After retrial, the jury returned verdicts finding defendant guilty of both possession of a firearm by a felon and attaining habitual felon status. The trial court found, in accordance with defendant's admission, that defendant had, "during the 10-year period prior to the commission of" the offenses for which he was indicted, "been found . . . to be in willful violation of the conditions of probation imposed pursuant to a suspended sentence[.]" The court found this aggravating factor outweighed any mitigating factors, of which the trial court found none, and consolidated the charges for judgment, sentencing defendant to a minimum of 138 and a maximum of 178 months in the custody of the North Carolina Department of Adult Correction.

Defendant appeals.

II. Standard of Review

"The statutory prohibitions against expressions of opinion by the trial court contained in N.C.G.S. § 15A-1222 and N.C.G.S. § 15A-1232 are mandatory. A defendant's failure to object to alleged expressions of opinion by the trial court in

violation of those statutes does not preclude his raising the issue on appeal." *State v. Young*, 324 N.C. 489, 494, 380 S.E.2d 94, 97 (1989).

"It is well settled in this jurisdiction that in determining the propriety of the trial judge's charge to the jury, the reviewing court must consider the instructions in their entirety, and not in detached fragments." *State v. Wright*, 302 N.C. 122, 127, 273 S.E.2d 699, 703 (1981). "One of the cardinal rules governing appellate review of trial court instructions is that the charge will be read contextually and an excerpt will not be held prejudicial if a reading of the whole charge leaves no reasonable grounds to believe that the jury was misled." *State v. Alston*, 294 N.C. 577, 594, 243 S.E.2d 354, 365 (1978).

III. Analysis

In his sole argument on appeal, defendant contends that the trial court erred by impermissibly expressing an opinion as to how the facts of the case applied to the law. Specifically, defendant contends that the trial court "erred by expressing its opinion that the facts presented by the jury in question eight did, in fact, constitute constructive possession." We disagree.

At the jury charge conference, the State presented its proposed instructions, to which defendant did not object. The trial court subsequently instructed the jury on the charge of possession of a firearm by a felon, and specifically constructive possession, as follows:

The defendant has been charged with possessing a firearm after having been convicted of a felony. For you to find the defendant guilty of this offense, the State must prove two things beyond a reasonable doubt.

First, that on August the 8th, 2008 in the Superior Court of Mecklenburg County the defendant was convicted of the felony that was committed on March 23rd, 2008, in violation of the laws of the State of North Carolina.

The defendant has agreed or stipulated to this element, and you may accept it as true without further proof.

And second, that thereafter the defendant possessed a firearm. Possession of a firearm may be either actual or constructive. A person has actual possession of a firearm if the person has it on his person, is aware of its presence, and either alone or together with others has both the power and intent to control its disposition or use.

A person has constructive possession of a firearm if the person does not have it on his person, but is aware of its presence and has either alone or together with others both the power and intent to control its disposition or use.

A person's awareness of the presence of a firearm, and the person's power and intent to control its disposition or use may be shown by direct evidence or may be inferred from the circumstances.

If you find beyond a reasonable doubt that a firearm was found in a certain bedroom, and that the defendant exercised control over that bedroom, whether or not the defendant owned it, this would be a circumstance from which you may infer that the defendant was aware of the presence of the firearm, and had the power and intent to control its disposition or use.

After the jury retired for deliberation, it raised numerous questions of the trial court. The eighth question was as follows:

> Is the language "If you find beyond a reasonable doubt that a firearm was found in [a] certain bedroom . . . . would be a circumstance from which you may infer that the defendant was aware of the firearm . . ." an example of constructive possession[?]

The trial court asked the parties their thoughts, and defendant objected, noting:

> I would object to that, I mean, the Court saying yes. I think if they want the instruction reread to them on possession, then the Court can. But the Court can't say yes. That would be participating in the deliberations and providing them with an answer.

The trial court disagreed, stating that it believed the question to be "a clear legal question that has a clear legal answer," and responded to the jury as follows:

> And in the Court's discretion that is a legal question and the answer to that question is yes.

Defendant subsequently raised an issue with the trial court's response. Specifically, defendant argued:

> I think only answering the question yes, if you find beyond a reasonable doubt that a firearm was found in a bedroom, and the defendant exercised control over that bedroom, whether or not the defendant owned it, this would be a circumstance from which you may say that the defendant was aware of its presence and had the power and intent to control the disposition or use. And that's circumstantial constructive possession.
>
> I think it was improper that the entire instruction should have been read to the jury.

The trial court responded that it had researched the matter as well, and expressed an intent to amend its answer. The trial court asked if the parties had any objection; neither the State nor defendant objected, but defendant moved for a mistrial, which the trial court denied. The trial court then returned the jury to the courtroom, and instructed it as follows:

> And the other one was is the language, quote, if you find beyond a reasonable doubt that a firearm was found in a certain bedroom, dot, dot, dot, dot, would be a circumstance in which you may infer that the defendant was aware of the presence of the firearm, dot, dot, dot, closed quotes, an example of constructive possession.
>
> Disregard my prior answer of yes, because it needs further explanation. Disregard that prior answer of yes. You've not acted on that answer yet, so I want to correct it based on some research that I did during lunch.
>
> The correct answer is yes, that may be an example whereby you, the jury, could find constructive possession. However, that is a determination that must be made unanimously by the jury after considering the entire charge on that issue. Now I'm going to read that entire charge on that issue to you again.

The trial court then re-issued the instruction on the charge of possession of a firearm by a felon.

On appeal, defendant contends that the jury, after extensive deliberations, "wanted to know how the *trial court* would *apply* the constructive possession case law

to the facts contained in" the instruction, and that the trial court erred in opining on how it – the court, as opposed to the jury – would apply the facts to the law.

"The judge 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." N.C. Gen. Stat. § 15A-1222 (2015). Additionally, "[i]n instructing the jury, the judge shall not express an opinion as to whether or not a fact has been proved and shall not be required to state, summarize or recapitulate the evidence, or to explain the application of the law to the evidence." N.C. Gen. Stat. § 15A-1232 (2015). Defendant, citing *State v. Larrimore*, 340 N.C. 119, 155, 456 S.E.2d 789, 808 (1995), argues that the trial court's answer to the jury "cross[ed] into the realm of impermissible opinion," because it violated the statutory prohibition against explaining to the jury how the trial court would apply the law to the facts. Defendant further contends that the trial court's subsequent amendment to its comments did not eliminate any prejudice from its initial answer, but rather further prejudiced defendant, because the trial court was still informing the jury how it would apply facts to law.

It is worth noting that the trial court's original instruction to the jury, to which defendant did not object, tracked the language of the North Carolina Pattern Jury Instructions. Specifically, N.C.P.I. Crim. 104.41, concerning possession, states that:

> [If you find beyond a reasonable doubt that a(n) [substance] [article] was found [in] [on] [at] certain [premises] [place] and that the defendant exercised control over [those premises] [that place] whether or not the defendant owned

> [them] [it], this would be a circumstance from which you may infer that the defendant was aware of the presence of the [substance] [article] and had the power and intent to control its disposition or use.]

N.C.P.I. Crim. 104.41. The trial court filled in the blanks accordingly:

> If you find beyond a reasonable doubt that a firearm was found in a certain bedroom, and that the defendant exercised control over that bedroom, whether or not the defendant owned it, this would be a circumstance from which you may infer that the defendant was aware of the presence of the firearm, and had the power and intent to control its disposition or use.

The jury's question to the trial court appeared to be one seeking clarification. Specifically, the jury asked whether the language of this instruction was "an example of constructive possession[.]" The answer to that question – whether the language in an instruction on constructive possession described constructive possession – was obviously "yes." The trial court's response to the jury was not an expression of opinion on the ultimate facts of the case to be found by the jury. Rather, it was an acknowledgement that, if the jury found those facts to be true beyond a reasonable doubt, it should find that defendant constructively possessed a firearm.

Reading the trial court's response to the jury in connection with its instruction on the charge of constructive possession, to which defendant did not object and which the trial court repeated alongside its answer to the jury's question, we hold that the trial court did not impermissibly opine on an application of the facts to the case law, but rather clarified the meaning of the instruction.

It is true that the instruction provided that, if the jury found the facts to be true, it "may infer" the existence of constructive possession, and that the trial court's initial answer to the jury's question suggested that, if the jury found the facts to be true, it "was" constructive possession. However, the trial court's subsequent amendment to its language clarified any possible misunderstanding, by noting that "that may be an example whereby you, the jury, could find constructive possession[,]" and once more emphasizing that the jury must make its own unanimous findings.

The trial court repeatedly emphasized that it was the role of the jury to consider the credibility of witnesses, to weigh the evidence, and to find the ultimate facts. Accordingly, we hold that "a reading of the whole charge leaves no reasonable grounds to believe that the jury was misled." *Alston*, 294 N.C. at 594, 243 S.E.2d at 365. We therefore find no error in the trial court's answer to the jury's questions.

NO ERROR.

Judges DAVIS and TYSON concur.

Report per Rule 30(e).