

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA23-708

Filed 4 June 2024

Wake County, No. 18 CRS 223187

STATE OF NORTH CAROLINA

v.

GEORGE LUIS MORALES, Defendant.

Appeal by Defendant from judgment entered 3 November 2022 by Judge William R. Pittman in Wake County Superior Court. Heard in the Court of Appeals 21 February 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Benjamin Thomas Spangler, for the State.

Stephen G. Driggers, PLLC, by Stephen G. Driggers, for Defendant-Appellant.

CARPENTER, Judge.

George Luis Morales (“Defendant”) appeals from judgment entered after a jury found him guilty of driving while impaired and speeding. On appeal, Defendant argues that the trial court erred by giving the jury coercive jury instructions. After careful review, we discern no error.

I. Factual & Procedural Background

On 16 December 2018, a Wake County Magistrate charged Defendant with driving while impaired and driving eighty-four miles per hour in a fifty-five mile-per-hour zone. On 16 September 2019, Wake County District Court Judge Daniel J. Nagle found Defendant guilty of both charges. Defendant appealed his conviction to Wake County Superior Court.

The State tried Defendant again in the 1 November 2022 criminal session of Wake County Superior Court. After both sides concluded their case on 2 November 2022, the trial court instructed the jury, and the jury began deliberations. That afternoon the jury submitted a note, asking the trial court: “What do we do if we are unable to reach a unanimous decision on the first count of driving while impaired?”

The trial court called the jury into the courtroom, and the jury foreperson told the trial court that they failed to reach a unanimous decision concerning the driving-while-impaired charge. After excusing the jury for the day, the trial court informed the parties that it was going to give an *Allen* charge the next morning to “see if [the jury would] come to a decision tomorrow afternoon.”

An *Allen* charge “is derived from the case of *Allen v. United States*, in which the United States Supreme Court approved the use of jury instructions that encouraged the jury to reach a verdict, if possible, after the jury requested additional instructions from the trial court.” *State v. Gordon*, 278 N.C. App. 119, 122, 862 S.E.2d 39, 43 (2021) (quoting *State v. Gettys*, 219 N.C. App. 93, 101 n.1, 724 S.E.2d 579, 585

n.1 (2012)); *Allen v. United States*, 164 U.S. 492, 501–02, 17 S. Ct. 154, 157, 41 L. Ed. 528, 531 (1896) (endorsing jury instructions that encourage a jury to reach a verdict).

The next day, the State requested an instruction in addition to the *Allen* charge: “just to repeat that the opening and closing arguments are not to be considered evidence, simply arguments of the attorneys.” Defendant did not object to the *Allen* charge or to the State’s requested instruction. The trial court then brought the jury into the courtroom and gave the *Allen* instruction. In doing so, the trial court stated, in relevant part:

You have a duty to consult with one another and to deliberate with a view toward reaching agreement if it can be done with[out] violence to individual judgment. Each juror must decide the case for himself or herself, but only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, you should not hesitate to reexamine your own views and change your opinion if you are convinced it is erroneous; however, you should not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

The trial court then delivered the State’s requested instruction. After issuing the instructions, the trial court received a printed note from the holdout juror explaining why the juror “must vote not guilty.” But after receiving the note, the trial court announced that “[s]ince the Court has received [the note], the jury has informed the Court that they have a verdict.”

The jury found Defendant guilty of both charges. The trial court sentenced Defendant to two concurrent sentences of thirty days in custody, suspended subject to twelve months of unsupervised probation. Defendant gave oral notice of appeal in open court.

II. Jurisdiction

This Court has jurisdiction under N.C. Gen. Stat. § 7A-27(b)(1) (2023).

III. Issue

The issue on appeal is whether the trial court’s jury instructions were coercive.

IV. Analysis

Defendant argues that the trial court plainly erred in its jury instructions because the *Allen* charge, coupled with the State’s requested instruction, was coercive. We disagree.

Defendant did not object to the *Allen* charge or the State’s requested instruction, so Defendant’s argument is unpreserved. *See Regions Bank v. Baxley Com. Props., LLC*, 206 N.C. App. 293, 298–99, 697 S.E.2d 417, 421 (2010) (“In order to preserve an issue for appellate review, the appellant must have raised that specific issue before the trial court to allow it to make a ruling on that issue.” (citing N.C. R. App. P. 10(b)(1))).

We, however, “review unpreserved issues for plain error when they involve either (1) errors in the judge’s instructions to the jury, or (2) rulings on the admissibility of evidence.” *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31

(1996) (citing *State v. Sierra*, 335 N.C. 753, 761, 440 S.E.2d 791, 796 (1994)). We will review these issues for plain error so long as the defendant “specifically and distinctly” argues plain error. N.C. R. App. P. 10(a)(4).

Accordingly, we will review the trial court’s jury instructions for plain error because Defendant “specifically and distinctly” argued that the jury instructions were plainly erroneous. *See id.*

To find plain error, we must first determine that an error occurred at trial. *See State v. Towe*, 366 N.C. 56, 62, 732 S.E.2d 564, 568 (2012). Second, the defendant must demonstrate that the error was “fundamental,” which means the error probably caused a guilty verdict and “seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings.” *State v. Grice*, 367 N.C. 753, 764, 767 S.E.2d 312, 320–21 (2015) (quoting *State v. Lawrence*, 365 N.C. 506, 518–19, 723 S.E.2d 326, 334–35 (2012)). Notably, the “plain error rule . . . is always to be applied cautiously and only in the exceptional case” *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)).

A trial court must correctly instruct the jury on the law. *See State v. Robbins*, 309 N.C. 771, 776, 309 S.E.2d 188, 191 (1983). A proper *Allen* charge is a correct jury instruction. *See Allen*, 164 U.S. at 501–02, 17 S. Ct. at 157, 41 L. Ed. at 531. Subsection 15A-1235(b) “is the legislatively[] approved version of the *Allen* charge.” *Gettys*, 219 N.C. App. at 102, 724 S.E.2d at 586. Under subsection 15A-1235(b), a trial court may instruct a jury on the following:

STATE V. MORALES

Opinion of the Court

- (1) Jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
- (2) Each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;
- (3) In the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and
- (4) No juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

N.C. Gen. Stat. § 15A-1235(b) (2023).

But “a trial judge has no right to coerce a verdict, and a charge which might reasonably be construed by a juror as requiring him to surrender his well-founded convictions or judgment to the views of the majority is erroneous.” *State v. Holcomb*, 295 N.C. 608, 614, 247 S.E.2d 888, 892 (1978) (citing *State v. Alston*, 294 N.C. 577, 592–93, 243 S.E.2d 354, 364 (1978)).

“To determine whether a defendant is entitled to a new trial as a result of the trial court’s *Allen* charge, the relevant question is whether the charge was coercive.” *Gettys*, 219 N.C. App. at 101, 724 S.E.2d at 586. We look to the totality of the circumstances to discern whether a charge was coercive. *See State v. Boston*, 191 N.C. App. 637, 643, 663 S.E.2d 886, 891 (2008).

For example, in *State v. Anderson*, the North Carolina Supreme Court found that the trial court’s instructions “gave the State an undue advantage over defendant” because a portion of the instructions were given with “peculiar emphasis.” 263 N.C.

124, 125, 139 S.E.2d 6, 7 (1964) (per curiam). There, the trial court told the jury: “if you cannot, if you don’t convict on this evidence, then the law or statute commonly referred to as the ‘drunken driving’ statute, would have no purpose and no effect.” *Id.* at 125, 139 S.E.2d at 7. The trial court’s statement indicated to the jury that the “defendant was guilty and should be convicted.” *Id.* at 125, 139 S.E.2d at 7. Therefore, the trial court’s charge unduly influenced the jury to reach a guilty verdict. *Id.* at 125, 139 S.E.2d at 7.

Jury instructions can also be coercive if a trial court fails to instruct the jury not to surrender individual judgment. *E.g., State v. Roberts*, 270 N.C. 449, 451, 154 S.E.2d 536, 537–38 (1967) (holding that jury instructions were coercive because the trial court “failed to instruct the jury that no one of them should surrender his conscientious convictions or his free will and judgment in order to agree with a majority of the jurors upon a verdict”).

Here, the trial court instructed the jurors of their “duty . . . to deliberate with a view toward reaching agreement if it can be done with[out] violence to individual judgment” and told them they “should not surrender [their] honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.” Additionally, as requested by the State, the trial court reminded the jury “that the opening and closing statements of the lawyers are not evidence, and they’re not to be considered by you as evidence.”

The trial court’s *Allen* charge was not coercive. *See Anderson*, 263 N.C. at 125,

139 S.E.2d at 7. The trial court clearly instructed the jury that none of them should surrender their convictions, *see Roberts*, 270 N.C. at 451, 154 S.E.2d at 537–38, and the trial court did not opine on the case or give “peculiar emphasis” to its instructions, *see Anderson* 263 N.C. at 125, 139 S.E.2d at 7. Rather, the trial court gave the *Allen* charge in full compliance with subsection 15A-1235(b). *See* N.C. Gen. Stat. § 15A-1235(b).

Giving the requested re-instruction on opening and closing statements was also not coercive. The trial court was required to accurately instruct the jury on the law, *see Robbins*, 309 N.C. at 776, 309 S.E.2d at 191, and opening and closing arguments are, indeed, not evidence, *see State v. Roache*, 358 N.C. 243, 289, 595 S.E.2d 381, 411 (2004). Moreover, the trial court’s additional instruction did not give the State an “undue advantage over defendant” because the trial court did not deliver the instruction with any “peculiar emphasis.” *See Anderson*, 263 N.C. at 125, 139 S.E.2d at 7.

In sum, the trial court read the statutory language for the *Allen* charge verbatim and proceeded to the State’s requested re-instruction, which was an accurate statement of the law. Therefore, the trial court’s jury instructions were not coercive, so the trial court did not err in giving them. *See id.* at 125, 139 S.E.2d at 7. Because the trial court did not err, it could not have plainly erred. *See Towe*, 366 N.C. at 62, 732 S.E.2d at 568.

V. Conclusion

STATE V. MORALES

Opinion of the Court

We conclude that the trial court's jury instructions were not coercive, so the trial court did not err.

NO ERROR.

Judges ARROWOOD and THOMPSON concur.

Report per Rule 30(e).