No. 24-92 TWENTY-EIGHTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Buncombe County
	)	Nos. 21-CRS-90695,
MATILDA RAE BLISS and	)	21-CRS-90691
MELISSA ANN COIT,	)	
Defendants.	)	

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D E F E N D A N T S - A P P E L L A N T S ' B R I E F

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D E F E N D A N T S - A P P E L L A N T S ' B R I E F

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ISSUES PRESENTED

I. Did the trial court err in concluding that the First Amendment did not protect Defendants' rights to report on and record the Asheville Police Department's response to a protest in a public park on Christmas night 2021?

II. Were the trial court's responses to a jury note seeking instruction on the applicability of the First Amendment and Defendants' press status likely to have misled the jury and prejudiced the verdicts?

INTRODUCTION

In some ways, the City of Asheville is not unique. Like many municipalities, Asheville is grappling with difficult questions about its relations with the homeless community. And like other cities, Asheville has seen clashes between police and protesters on controversial topics.

But Asheville is unusual in one way. In other cities, when journalists were arrested while covering protests or clearings of homeless encampments, the charges were almost always dropped. *See, e.g.*, *Judge Dismisses Charges Against Oregon Journalist April Fonseca Ehrlich*, Reporters Committee for Freedom of the Press (Sept. 8, 2022), http://tinyurl.com/2wu52v8p. Other examples can be found on the U.S. Press Freedom Tracker, which documents incidents between reporters and police. The database reveals that over the past decade, at least twenty-one reporters were arrested for trespassing. *Trespass*, U.S. Press Freedom Tracker, http://tinyurl.com/2sb2fs8u. In only *five* of those incidents did the cases proceed to trial.

Defendants Matilda Bliss and Melissa ("Veronica") Coit represent two of the five. On Christmas night 2021, these journalists went to a public park and covered the clearing of a protest on a matter of intense

debate. By the end of the night, their hands, once holding up cameras, were placed in cuffs. In the wake of their arrests, more than forty-five media and legal organizations called for the City to drop all charges because "[p]rosecuting the journalists is not only bad policy but violates the First Amendment." *More than 45 Orgs Call to Drop Charges Against Asheville Journalists*, Freedom of the Press Foundation (May 3, 2023), http://tinyurl.com/3p34txxt. But the City pressed on, resulting in convictions that are not just legally erroneous, but fundamentally at odds with First Amendment doctrine. This Court should correct that error and ensure that freedom of the press remains a bulwark of liberty in North Carolina. *See* N.C. Const. art. I, § 14.

STATEMENT OF THE CASE

Defendants were arrested and charged with second-degree trespass on the night of 25 December 2021. (R pp 5, 26). Defendants were tried and convicted before the Honorable Calvin Hill at the 19 April 2023 session of the Criminal District Court of Buncombe County, from which they appealed for a jury trial *de novo* in Superior Court. (R p 1). On 6 June 2023, the Honorable Alan Thornburg, Buncombe County Superior Court Judge presiding, heard arguments on Defendants' motion to

dismiss. (R p 320). After Judge Thornburg denied the motion, finding that the ordinance under which Defendants had been charged was not facially unconstitutional, (R p 320), Defendants were tried and convicted before a jury on 15 June 2023 in the Criminal Superior Court of Buncombe County, the Honorable Thomas Davis presiding. (R pp 365, 368). On 22 June 2023, Judge Davis issued a written ruling denying Defendants' motion to dismiss, finding that the ordinance was not unconstitutional as applied to them. (R p 371).

Following their Superior Court convictions on 15 June 2023, Defendants gave notice of appeal in open court. (R p 369); *see also* N.C. R. App. P. 5(a) (joinder of criminal defendants on appeal). Transcripts of the trial and two prior hearings were ordered on 24 August 2023 and delivered on 1 November 2023. (R pp 382–88). Defendants served the proposed record on 15 December 2023, (R p 394), which was settled via expiration of time on 18 January 2024 and filed in the Court of Appeals on 31 January 2024. (R p 395). The case was docketed on 5 February 2024.

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

Defendants' convictions at their Superior Court trial are final judgments. The Court of Appeals has appellate jurisdiction pursuant to N.C.G.S. § 15A-1441.

STATEMENT OF THE FACTS

Bliss and Coit were journalists employed by *The Asheville Blade*, an online publication that has reported on Asheville politics for nearly ten years. (R p 97). *The Blade*, which styles itself as a "leftist" news outlet, routinely criticizes the city government and the Asheville Police Department ("APD"). (R pp 72, 83–84). Some of *The Blade*'s strongest criticism of APD has concerned the department's methods of clearing homeless encampments and responding to corresponding protests. (R pp 72–73). In 2021, APD removed over twenty homeless encampments. (R p 75). These actions attracted scrutiny from several local journalists, including Bliss and Coit. (R pp 73–74).

On 19 December 2021, advocates for the city's homeless population began another multi-day protest in Aston Park, a public park owned and operated by the city. (R pp 76, 187). Neither Bliss nor Coit covered the first day of the protest; however, upon hearing accounts of potentially

newsworthy interactions between APD officers and protesters, Bliss began reporting the story for *The Blade* on the second day. (T pp 555–56). She returned to the protest on three additional dates, including its final night. (T p 563). Her coverage included photographs and posts to *The Blade*'s public social media channels, many of which expressed support for the protest. (T p 558).

On the protest's first day, APD officers informed the protesters that their presence in the park after 10 p.m. would subject them to arrest for trespass under a city ordinance establishing a curfew in public parks. (R p 77, 197). Three days later, an officer warned protesters that they might be committing felony littering. (R p 77). But APD did not take official action against the protesters until Christmas night, one week after the protest had started. (R p 78). Shortly after 10 p.m. that night, officers began dismantling the protesters' tents and artwork and telling protesters to vacate the park. (R p 78).

Bliss and Coit—who had joined her colleague in the park after deciding to bring her a Christmas dinner—were the first people whom officers approached. (R p 78). At that point, Bliss and Coit had each started capturing video and/or audio of the officers' actions. (R p 78). Bliss

produced her *Blade*-issued press credentials identifying herself as a journalist; while Coit did not have her credentials on hand, both Defendants repeatedly informed officers of their media status. (R p 79); *see also* (Doc. Ex. 11) (photograph of credentials). Neither Bliss nor Coit interfered with the officers' actions. (R p 79); (T pp 476–77) (testimony of Lt. Michael McClanahan). Despite displaying press credentials, verbally informing the officers they were journalists reporting on a story, remaining out of the officers' way, and actively recording footage of the protest sweep, Bliss and Coit were asked to leave the scene along with the protesters. (R pp 78–79).

Officers also suggested that Bliss and Coit could leave the park and observe from a spot outside the park's boundaries—roughly 150 feet away and down a steep hill—where they almost certainly would not have been able to see, hear, or capture audio or video, especially in the dark of night. (R p 27); *see also* (T pp 415, 477, 600–01) (testimony from two officers and Defendant Bliss). When Bliss and Coit refused to leave, the officers arrested them. (R p 80).

Bodycam footage from Lt. Michael McClanahan, the officer who led APD's response that night, captured an officer stating, "Why don't we do

[Defendants] first, since they're videotaping." (R p 78). The footage also depicts officers acknowledging Defendants' press status at other points, such as when one remarked: "Here's your other member of the press. Wonder if [she's] going to wise up." (R p 79).

At the Superior Court trial, the court ruled as an initial matter that the applicability of First Amendment defenses was a legal question outside the jury's scope. (T p 782); *see also* (R pp 377–78) (order denying motion to dismiss). It limited the jury to considering the factual question of whether Bliss and Coit had trespassed under the pattern instructions in N.C.P.I–Crim. 214.31A. (R pp 341–46). After the jury began deliberations, the foreperson submitted a note to the court asking for guidance. It read, in relevant part: "We would like clarification as to . . . if there was an instruction on the applicability of the [First] Amendment. . . . [and] if we are allowed to consider the defendants' status as members of the press as a potential exemption from the applicable ordinance." (R p 361).

When reviewing the note outside the jury's presence, the court confirmed to counsel that it had not instructed the jury on the First Amendment. (R pp 350–52). The question about press status prompted a

lengthier discussion. The court told counsel that it intended to answer the jury's question as follows: "[Y]ou are entitled to consider all the evidence in determining the guilt or innocence of the defendants, *and that would include what you find in regard to their status [as press].*" (R p 355) (emphasis added). The court reasoned: "[The jurors] can find these individuals not guilty for whatever reason they want. . . . They have that province. They have that right." *Id.* However, upon objection from the State, the court also expressed concern that such an answer could lead the jury to effectively go beyond the factual bounds of trespass and into the legal question of whether Bliss and Coit's actions were protected by the First Amendment. (R p 356).

When the jurors returned to the courtroom, the court gave the following instructions:

> [The next question you asked] is, "We would like clarification as to if there was an instruction on the applicability of the First Amendment." The answer to that is, no, there was not such an instruction. The issue of whether or not the defendants' First Amendment constitutional rights, particularly the free speech, [sic] is a question of law that will be decided by the Court, not by the jury.
>
> Now, as to the last question, it says, "We would like clarification as to if we are allowed to consider the defendants' status as members of the press as a potential exemption from

> the applicable ordinance." My instruction to you is, you are entitled to consider all the evidence in this case.

(R p 359). The jurors returned to the jury room and soon thereafter returned guilty verdicts for both Bliss and Coit. (T p 865).

STANDARD OF REVIEW

Defendants' as-applied constitutional challenge receives *de novo* review. *State v. Shackelford*, 264 N.C. App. 542, 551 (2019). When a judgment potentially violates the First Amendment, this review entails "an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *State v. Bowen*, 282 N.C. App. 631, 636 (2022) (quoting *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984)); *see also Snyder v. Phelps,* 580 F.3d 206, 218 (4th Cir. 2009) (outlining the "enhanced appellate review" required by First Amendment doctrine), *aff'd*, 562 U.S. 443 (2011). If the Court determines that the State has violated Defendants' constitutional rights, the State must prove that the error was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b).

Defendants' challenge to the court's response to the jury note also receives *de novo* review because it raises a question of law—namely, whether the court's answers would have confused or misled the jury on

the applicability of the First Amendment. *See Hammel v. USF Dugan, Inc.*, 178 N.C. App. 344, 347 (2006) (holding that a jury charge is sufficient if it leaves no reasonable cause to believe the jury was misled or misinformed). A trial court's decision to grant or deny a jury's request for additional instruction is reviewed only for an abuse of discretion. *See, e.g.*, *State v. Guarascio*, 205 N.C. App. 548, 563–64 (2010). But a challenge to the substance of the additional instruction presents a legal question. *State v. Edwards*, 239 N.C. App. 391, 393 (2015) ("It is axiomatic that we review questions of law *de novo*.") (cleaned up).[1]

ARGUMENT

This Court should reverse for two reasons. First, the trial court erred in denying Defendants' as-applied constitutional challenge. Under the test that the U.S. Supreme Court articulated in *Press-Enterprise Co. v. Superior Court*, Defendants' reporting should have received First Amendment protection. *See* 478 U.S. 1 (1986) [hereinafter "*Press-Enterprise II*"]. This Court should apply the *Press-Enterprise II* test and

[1] The trial court's response to a jury question is treated as an additional instruction, *Martin v. Pope*, 257 N.C. App. 641, 648 (2018). Thus, the note itself should also be considered a request for jury instruction.

hold that Defendants' convictions violated the First Amendment. In the alternative, this Court can hold that the park curfew was a generally applicable law that substantially burdened the Defendants' newsgathering and fails heightened scrutiny. *See PETA v. N.C. Farm Bureau Fed'n*, 60 F.4th 815, 827–28 (4th Cir. 2023) (discussing need to apply heightened scrutiny to generally applicable laws that burden newsgathering activities.)

Second, even if this Court concludes that First Amendment protections do not apply to Bliss and Coit, the trial court's response to the jury note was prejudicial error. Under our Supreme Court's holding in *State v. Leigh*, 278 N.C. 243 (1971), the Court should, at a minimum, reverse and remand for a new trial.

I. THE FIRST AMENDMENT PROTECTED DEFENDANTS IN THEIR NEWSGATHERING ACTIVITIES.

The press plays the vital role of guarding "against the miscarriage of justice" by subjecting "the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559–60 (1976) (quoting *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966)). To play this role, reporters must be able to gather information on matters of public concern. "[W]ithout some protection for seeking out the

news, freedom of the press could be eviscerated." *Beaufort Cnty. Bd. of Educ. v. Beaufort Cnty. Bd. of Comm'rs*, 184 N.C. App. 110, 115 (2007) (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)). It is "[n]o surprise then, that scores of Supreme Court and circuit cases apply the First Amendment to safeguard the right to gather information as a predicate to speech." *PETA,* 60 F.4th at 829. The convictions of Bliss and Coit are a dangerous step toward the evisceration of freedom of the press in North Carolina. This Court can correct that error based on well-established First Amendment precedent. There are two lines of inquiry that point in the same direction. First, Bliss and Coit had a qualified right of access to the protest clearing under the *Press-Enterprise II* test, and the City failed to narrowly apply the curfew to serve its interest. In the alternative, this Court can hold that the curfew was a generally applicable law that substantially burdened Defendants' speech and fails First Amendment scrutiny. *See PETA*, 60 F.4th at, 827–28.

A. Defendants had a qualified right of access to the clearing.

Bliss and Coit's right to access the protest clearing is governed by the test laid out by the U.S. Supreme Court in *Press-Enterprise II*. While

the test was first developed in relation to access to criminal trials, it has since been applied in various contexts, including press access to government-owned land. *See, e.g.*, *Leigh v. Salazar*, 677 F.3d 892, 899–900 (9th Cir. 2012) (applying *Press-Enterprise II* to a horse roundup on federal land). Under the *Press-Enterprise II* test, courts determine (1) "whether the place and process have historically been open to the press and general public" and (2) "whether public access plays a significant role in the functioning of the particular process in question." *Press-Enterprise II*, 478 U.S. at 8. If the answer to both questions is yes, then the party seeking access has a qualified right of access that "may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id.* at 9 (quoting *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984)) [hereinafter *Press-Enterprise I*)]. In the Fourth Circuit, the government can overcome the presumption of access only by showing a compelling interest and that the restriction on newsgathering is accomplished by narrowly tailored means. *Doe v. Public Citizen*, 739 F.3d 246, 266 (4th Cir. 2014).

The first part of the *Press-Enterprise II* test is clearly met in this case. City parks are traditional public fora, historically open to the public and the press. Furthermore, journalists play a vital role in police accountability. Therefore, the State must show that the park curfew, as applied to Defendants, was justified by a compelling government interest and was narrowly tailored. While maintaining public parks may be a compelling interest, the State has not shown that barring the journalists from covering a newsworthy event furthered that interest. Finally, the park curfew was not narrowly tailored because it left Bliss and Coit with no adequate alternative means of reporting on police responses to the protest.

1. City parks have historically been open to the public.

First, city parks are public fora historically open to the public and press. In *State v. Barber*, this Court described parks as "quintessential community venue[s]." 281 N.C. App. 99, 108 (2021) (contrasting parks with the General Assembly building, which it held was not an unlimited public forum). Indeed, parks fit within the category of spaces "historically associated with the free exercise of expressive activities," which are "considered, without more, to be 'public forums.'" *United States v. Grace*,

461 U.S. 171, 177 (1983). The trial court here confirmed that "Aston Park is . . . a traditional public forum as that term is defined," as did the State. (R pp 187, 373). Therefore, the first prong of the *Press-Enterprise II* test is met.

2. Access to protests in public forums enhances police accountability.

The second prong of the test is also met because access to public forums during protests serves a significant purpose in enhancing government accountability. The Supreme Court has recognized that "many governmental processes operate best under public scrutiny." *Press-Enterprise II*, 478 U.S. at 8. Interactions between police and members of the public are one such example. Consequently, every federal circuit court to squarely consider the question has held that there is a First Amendment right to record public police activity. *See Fields v. City of Philadelphia*, 862 F.3d 353, 355 (3d Cir. 2017); *Turner v. Driver*, 848 F.3d 678, 688 (5th Cir. 2017); *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 595–602 (7th Cir. 2012); *Glik v. Cunniffe*, 655 F.3d 78, 83 (1st Cir. 2011); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995). As the Fifth Circuit stated, "[f]ilming the police contributes to the public's ability to hold the

police accountable, ensure that police officers are not abusing their power, and make informed decisions about police policy." *Turner*, 848 F.3d at 689. Pointedly, the circumstances surrounding George Floyd's death were revealed only "because citizens standing on a sidewalk exercised their First Amendment rights." *Index Newspapers LLC v. United States Marshals Serv.*, 977 F.3d 817, 831 (9th Cir. 2020). When they were arrested, Bliss and Coit were observing and filming police activity to report on and thereby enhance police accountability.

While the police-recording cases cited above focused on rights of the public at large, the Supreme Court has emphasized the important ways in which journalists serve as "surrogates for the public." *Richmond Newspapers v. Virginia*, 448 U.S. 555, 573 (1980). In a society where individuals have "limited time and resources" to observe "at first hand" the operations of government, citizens necessarily rely on the press to bring them "in convenient form the facts of those operations." *Cox. Broad. Corp. v. Cohn*, 420 U.S. 469, 491–92 (1975). This argument carries special force here, because it is unlikely that many members of the public were available to watch police clear a protest after 10 p.m. on Christmas night.

(R p 78). Bliss and Coit were acting as surrogates for the public while covering the clearing of the protest.

Parks have been historically open to the public; furthermore, access during protests enhances government accountability. Thus, Bliss and Coit meet the first two prongs of the *Press-Enterprise II* test, giving them a qualified right of access to the park. That presumption of access may only be overcome if the City can show that its curfew was narrowly tailored to further a compelling government interest.

3. As applied, the curfew was not narrowly tailored to further the City's interest in maintaining its parks.

The City asserts an interest in keeping its public parks "safe, clean, and accessible to all." (R p 191). Assuming this is a compelling interest, the curfew was not tailored to accomplish its goals as applied to Defendants' newsgathering activities. The City has failed to show that (1) excluding Bliss and Coit furthered its interest in maintaining its parks and (2) that this exclusion left open ample alternative channels of communication. Thus, the City cannot overcome Defendants' qualified right of access to the park.

First, the exclusion of Bliss and Coit did not further the City's interest in keeping its parks safe and clean. Specifically, the trial court

found that the City had an interest "in ensuring and protecting: the ability of the general public to use and enjoy the Park facilities, the viability and maintenance of the facilities, the public's health, safety and welfare, and the City's parks and public property from overuse and unsanitary conditions." (R p 378). Excluding Defendants—journalists who were covering the clearing of a protest in the park as opposed to participating in the protest—did not advance these interests. Defendants were not interfering with police, so their presence did not jeopardize safety. Bliss testified that, when police approached, she "would make sure that [she] was giving explicit space for what they were doing." (T p 578). Nor were Defendants littering or otherwise making the park unsanitary or unclean. Their First Amendment activity, which consisted of standing aside, observing, and filming police activity, touched none of the concerns that underlie the curfew. Thus, closing off the forum to Bliss and Coit was not "essential" to furthering the City's interest. *See Press-Enterprise II*, 478 U.S. at 9.

In this regard, the case at hand is readily distinguishable from *State v. Barber,* 281 N.C. App. 99. There, the defendant led a group of 50 loudly chanting protesters through the General Assembly. *Id.* at 101.

After refusing to leave the premises, the defendant was arrested for trespassing. *Id.* The court found that the government could prohibit speech that interfered with "the ability of members and staff to carry on legislative functions." *Id.* at 108. But as noted above, unlike the General Assembly building, Aston Park is a traditional public forum. Further, unlike the defendant in *Barber*, Bliss and Coit were not engaged in the behavior the curfew sought to curtail. They did not interfere with police, whereas the defendant in *Barber* did interfere with legislative functions.

Other courts have found that dispersing journalists engaged in newsgathering, rather than unlawful behavior, did not further government interests. In *Index Newspapers LLC v. United States Marshals Service*, the Ninth Circuit upheld a preliminary injunction that forbade federal officials from arresting journalists for not dispersing after the issuance of a dispersal order. 977 F.3d at 823–24. The court in *Index Newspapers* also clarified that the district court had not thereby granted a "special exemption" to the press; instead, "it found that dispersing the press was not essential to protecting the government's interests." *Id.* at 831. The same clarification is key here. The trial court mistakenly believed that Defendants were "asking the City to enforce the [curfew] in

a discriminatory unconstitutional content[-]based manner." (R p 373). But that is not the case. Rather, Defendants argue that excluding them from the park was not essential to protecting the City's interest in keeping its facilities safe and clean.

Another instructive example is *Goyette v. City of Minneapolis*, in which the police were enjoined from using physical force and chemical agents against journalists covering protests after George Floyd's death. No. 20-cv-1302, 2021 U.S. Dist. LEXIS 208359, at *1, *3, *7–8 (D. Minn. Oct. 28, 2021). The court recognized that "members of the press clearly were engaged in news-gathering activities, such as observing and recording protests and law enforcement activities, as opposed to *participating* in an unlawful assembly." *Id.* at *14 (emphasis in original). The same distinction can be made here, where Defendants were not participants in the protest. *See* (T pp 723–25) (testimony of David Forbes). The trial court noted that Bliss "had been with the participants for several hours before the police arrived and indications are she has views aligned with the participants." (R p 375–76). But Bliss's personal views are irrelevant to her journalistic right of access and her presence in the park. *See, e.g.*, *Wright v. Fred Hutchison Cancer Rsch. Ctr.*, 206

F.R.D. 679, 681 n.2 (W.D. Wash. 2002) (noting that the First Amendment protects both objective and opinionated reporting). When journalists cover protests, they must be in the same place as the protesters to gather the news. Interviewing and observing protesters are good journalistic practices, not evidence of participation.

Further, the First Amendment analysis asks not how long Bliss and Coit were at the park but what they were doing when police arrived to clear the encampment. The undisputed record shows, and the trial court found, that they were engaged in newsgathering. (R p 376) ("[T]he conduct of gathering information as the defendants were engaging [in], for dissemination of their views and the view of *The Blade*, is speech requiring First Amendment analysis."). Finally, Bliss and Coit made their purposes abundantly clear to the police. Shortly before her arrest, Coit told police she was "working [and] covering a story about things that are happening." (R p 79). Similarly, Bliss showed her press badge to the officers and said she was "covering the event as press." (R p 80).

Finally, the curfew was not narrowly tailored as applied because it left open no adequate alternative means for covering the protest. *See Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)

(holding that content neutral time, place and manner restrictions must "leave open ample alternative channels for communication"); *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994) (opining that laws that "foreclose an entire medium of expression" are particularly suspect). The trial court erroneously found that the park curfew left open adequate alternatives for Bliss and Coit to observe and film, including (1) obtaining interviews and information from those arrested and other witnesses, (2) viewing activity from outside the park, and (3) obtaining public records from the City, the courts, and the police, including body cam videos released to the public. (R p 378.) None of the alternatives cited by the trial court was a sufficient substitute for gathering news from an ongoing event of public significance.

First, there was no opportunity to report on police activity from outside the park. Police ordered Defendants to leave the park entirely, incorrectly suggesting that they could still report from a sidewalk that was down a hill and at least 150 feet away. (R p 27). Given that it was dark, it almost certainly would have been impossible to see, hear, or record the sweep from that vantage point. (R p 4); *see also* (T pp 415, 477, 600–01). The suggestion of "obtaining interviews and information from

those arrested and other witnesses" was similarly inadequate. Anyone who remained in the park during the sweep was arrested, so "other witnesses" were not available to capture video or audio. (R p 374). And, while public records are an important source of information for news reporting, they are often not available for weeks, or as in this case, years, after an event takes place. (R p 183) (noting that APD did not release bodycam footage from this incident until February 2023).

Finally, the claim that obtaining ex post facto interviews and public records are sufficient alternatives to watching events as they unfold ignores both the importance of real-time reporting and the watchdog role of the press. As Professor Gregg Leslie, a media law expert, explained in the context of this case, there is a fundamental difference between attending a briefing and "being at the place where news occurs." (R p 104). "Firsthand accounts, buttressed by video evidence, enhance accuracy and credibility in reporting and increase transparency and reader trust." *PETA*, 60 F.4th at 829. When journalists are blocked from covering an event, they are unable to serve in their accountability-enhancing role as "surrogates for the public." *See Richmond Newspapers*, 448 U.S. at 573.

In sum, Bliss and Coit had a qualified right of access to the park, a traditional public forum. The City failed to show how excluding these journalists furthered the purpose of keeping its parks clean and safe. The City also failed to leave open ample alternative channels for newsgathering activities. Therefore, when applied to Bliss and Coit, the curfew was not narrowly tailored.

B. The curfew is a generally applicable law that fails heightened scrutiny.

In the alternative, the park curfew is a generally applicable law that substantially and unjustifiably burdened Defendants' speech. As explained above, newsgathering is a predicate to speech and thus an activity protected by the First Amendment. *PETA*, 60 F. 4th at 829. In PETA, the Fourth Circuit reaffirmed that "[g]eneral or not, the First Amendment applies when [a law] is used to silence protected speech." *Id.* at 828. Therefore, the park curfew as applied to Bliss and Coit's newsgathering is subject to heightened First Amendment scrutiny.

The curfew's wide sweep fails heightened scrutiny. As explained in Part I-A above, the curfew was not narrowly tailored as applied to Defendants. Excluding Bliss and Coit from the park did nothing to advance the City's claimed interests in safety and cleanliness. Neither

Defendant interfered with police while gathering news. And applying the curfew to Defendants left no adequate alternatives for them to cover the clearing. The trial court claimed that "[n]othing in this ordinance regulates or prevents anyone from gathering information." (R p 377). Yet as applied to Bliss and Coit, the curfew did exactly that. Their arrests violated the First Amendment.

II. THE TRIAL COURT ERRED IN ITS RESPONSE TO THE JURY NOTE AND PREJUDICED THE JURY, MANDATING A NEW TRIAL.

North Carolina's courts have zealously protected the traditional role of juries in applying free speech and free press principles in criminal cases. A trial court "must instruct the jury in a manner that ensures the defendant's First Amendment rights will not be violated." *State v. Taylor*, 270 N.C. App. 514, 566 (2020) [hereinafter *Taylor I*] (citing *Leigh*, 278 N.C. at 252). The trial court's responses to two questions in the jury note (the "First Amendment question" and the "press status question," respectively) caused the jurors to incorrectly believe that they could not consider either the First Amendment or Defendants' status as journalists in their deliberations. As a result, the verdicts were prejudiced. Even

viewed independently of Defendants' as-applied challenge to the curfew, the jury charge error requires a new trial under our Supreme Court's decision in *State v. Leigh*, 278 N.C. 243 (1971).

A. The challenge to the jury instructions was preserved for appeal.

A challenge to jury instructions is preserved on appeal if the objecting party "objects thereto before the jury retires to consider its verdict . . . *provided that opportunity was given to the party to make the objection* . . . ." N.C. R. App. P. 10(a)(2) (emphasis added). *See also* N.C.G.S. § 15A-1234(c) ("Before the judge gives additional instructions, he must inform the parties generally of the instructions he intends to give and afford them an opportunity to be heard.") Here, considering the jury charge in its entire context, the trial court gave instructions that substantially deviated from what it had told defense counsel it intended to say, thus depriving counsel of the opportunity to object with specificity.

When the court was conferring with the parties about how to answer the First Amendment question, it had the following exchange with defense counsel Alan Graf:

> THE COURT: [T]he issue of whether or not the defendant[s'] constitutional rights have been violated under the First Amendment is a matter of law that the Court will decide, and that issue is not for the jury.

> MR. GRAF: But, Your Honor, that wasn't an actual jury instruction, and the question was—
>
> THE COURT: Well, I will answer it no. I mean, I will give the instruction, *but then I won't go on and tell them anything further on that issue, that point. That's kind of explaining why I didn't give it to them.*

(R pp 357–58) (emphasis added). In other words, the trial court indicated that it would confirm for the jury that it had not given any instruction on the First Amendment and provide no further explanation or instruction as to why. Upon that response, the court immediately summoned the jury without allowing counsel to finish his argument and without hearing further objection. (R p 357–58).

When the jurors returned, the court first told them that it had not given First Amendment instructions. But it then added that the First Amendment was not a matter for the jury. *See* (R p 359). This response meaningfully deviated from how the court previously had told defense counsel it intended to respond—without any further explanation or instruction on First Amendment rights, (R pp 357–58)—and substantially deviated from the pattern jury instructions previously given, which did not mention the First Amendment.

These deviations violated the statutory mandate that parties must have an opportunity to respond to intended instructions. N.C.G.S. § 15A-1234(c). "When a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial." *State v. Combs*, 226 N.C. App. 87, 92 (2013) (cleaned up). And when a trial court agrees to give a requested pattern instruction, "an erroneous deviation from that instruction is preserved for appellate review without further request or objection." *State v. Lee*, 370 N.C. 671, 676 (2018).

Accordingly, Defendants preserved their challenges to the entire jury charge, which incorrectly added an affirmative instruction *not* to consider the First Amendment after not mentioning the First Amendment at all in the pattern trespass instructions and not giving counsel an opportunity to object.

B. The court's answers to the jury note likely misled the jury to believe it could not consider First Amendment values in reaching its verdicts.

The trial court's response to the jury's questions likely misled the jurors into mistakenly thinking they could not consider the First Amendment or its underlying principles in their deliberations. The

purpose of the jury charge "is to give a clear instruction which applies the law to the evidence in such manner as to assist the jury in understanding the case and in reaching a correct verdict." *State v. Smith*, 360 N.C. 341, 346 (2006). When examining an instruction that may have confused or misled a jury, the reviewing court considers "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." *Id.* at 347 (quoting *Boyde v. California*, 494 U.S. 370, 380 (1990)). The appealing party bears the burden of demonstrating not only that error occurred but also "that such error was likely, in light of the entire charge, to mislead the jury." *Id.* (quoting *Robinson v. Seaboard Sys. R.R.*, 87 N.C. App. 512, 524 (1987)). This Court considers the sufficiency of a jury charge "contextually and in its entirety." *Hughes v. Webster*, 175 N.C. App. 726, 730 (2006).

Here, examining the entirety and context of the jury charge, the court's response likely misled the jury into believing that it could not consider the First Amendment and the role of the press in its deliberations. Initially, the court charged the jury with pattern trespass instructions that made no mention of the First Amendment. *See* (R pp 341–48). At defense counsel's request, the court had tweaked the wording

in the second element of the pattern instructions from "without authorization" to "without legal right." (T pp 782–83). But even with this modification, the court's initial instructions did not explain the meaning of "legal right." *See* (R pp 341–48).

The possibility of a newsgathering defense nonetheless played a part in the jury's deliberations, as shown by its request for clarification on the applicability of the First Amendment and Defendants' press status. The court's responses to the questions raised by the jurors likely confused them even further. The court first explained that it had not instructed the jury on the First Amendment. (R p 359). But it then continued: "The issue of whether or not the defendants' First Amendment constitutional rights, particularly the free speech, [sic] is a question of law that will be decided by the Court, not by the jury." *Id.*

The second part of the court's response, when taken alongside the first part and the original trespass instructions, likely confused the jury by adding unnecessary information about the purely legal nature of the First Amendment inquiry. Generally, a court's inclusion of unnecessary information in its jury instructions "may be treated as [harmless] surplusage" if it does not confuse the issue and could not have altered the

result. *See Abernethy Land & Fin. Co. v. First Sec. Tr. Co.*, 214 N.C. 478, 482 (1938).

But that is not the case here. The first part of the court's response ("No, there was not such an instruction") implied nothing as to whether the jury could consider the First Amendment. On its own, this response would have been consistent with the omission of the First Amendment from the pattern instructions. But with its additional remark that the First Amendment question was one "of law [to] be decided by the Court, not the jury," (R p 359), the court incorrectly suggested that the jurors could not consider the First Amendment in rendering their verdicts. The additional remark functioned as a prohibition *against* considering the First Amendment in their deliberations.

The court's subsequent response to the press status question compounded the confusion. The court responded to the jury's press status question with an avoidance tactic, essentially restating its instructions to "consider all the evidence in this case." (R p 359). Normally, this would fall within the court's discretion. *See, e.g.*, *State v. Hazel*, 243 N.C. App. 741, 745 (2015). But when combined with initial pattern instructions that did not mention the First Amendment and a superfluous, unexplained

instruction that the First Amendment issue was not for the jury's determination, the court's avoidance was improper.

A reasonable jury would have three takeaways after receiving the initial instructions and the court's answers: (1) that the court had tasked it with deciding whether Defendants had trespassed; (2) that it had not only received no instruction on the First Amendment, but had also been affirmatively told *that it was not to decide the First Amendment's application at all*; and (3) that its specific question about Defendants' press status—a status linked to the First Amendment—had been ignored in favor of a vague command to "consider all the evidence." From these premises, lay jurors would conclude that they could consider neither press status nor the First Amendment in their verdicts.

That conclusion would be incorrect. Defendants do not contend that the jury should have decided questions of pure law. *See Dennis v. United States*, 341 U.S. 494, 513 (1951) ("Whether the First Amendment protects the activity which constitutes the violation of the statute must depend upon a judicial determination of the scope of the First Amendment applied to the circumstances of the case."). But the jury was entitled to at least consider the First Amendment and related principles, such as the

status of Defendants as journalists engaged in newsgathering activities, in its deliberations. The trial court acknowledged to counsel that the jury had the right to include press status in their deliberations of guilt or innocence, but its jury charge effectively foreclosed such consideration. *See* (R p 355) ("[The jurors] can find these individuals not guilty for whatever reason they want. . . . They have that province. They have that right.").

The court's answers further confused the jury by failing to adequately distinguish the court's role in applying the law of the First Amendment from the jury's role in finding guilt or innocence. Jurors in a case involving complicated mixed questions of law and fact, such as this one, should not be expected to neatly divorce their responsibilities from those of the court—especially here, when the court did not explain to the jury what it meant to remain in the park "without legal right." Trial counsel had argued in depth about the factfinder's unclear role in evaluating First Amendment defenses. *See, e.g.*, (T pp 118–24). Even the justices of our Supreme Court have reached different conclusions on which aspects of a First Amendment defense are factual or legal. *Compare State v. Taylor*, 379 N.C. 589, 619 (2021) [hereinafter *Taylor II*]

(Earls, J., concurring in part) ("The majority collapses this distinction [between law and fact].") *with id.* at 610–11 (Morgan, J.) (writing that the majority "refrained from drawing such factual conclusions").

The trial court's failure to clarify the relevant law and the respective roles of the court and jury likely misled the jurors and confused their understanding of the issues. Because of this confusion, the court's response to the jury's questions was prejudicial.

C. The jury's traditional role is to safeguard against government encroachment on speech and press freedoms in criminal trials.

The jury charge improperly discouraged the jury from exercising its traditional role of safeguarding against government encroachment on the rights of free speech and press in criminal trials.

Historically, the robust exercise of jury power has been particularly important in criminal prosecutions potentially implicating free speech and the free press. This link between the Sixth and First Amendments dates to at least 1735, when journalist John Peter Zenger was tried before a colonial jury for the seditious libel of New York's royal governor. *See* Jon P. McClanahan, *The 'True' Right to Trial by Jury: The Founders' Formulation and Its Demise*, 111 W. Va. L. Rev. 791, 792–93 (2009). The

jury famously refused to convict Zenger, contrary to the presiding judge's instructions.

Had it followed instructions, the jury would have found Zenger guilty. The judge instructed the jury to decide only whether Zenger had published the libelous statements, not their truth or falsity. *Id*. at 792. But the jury, deliberating amidst rising anti-British sentiment and the encouragement of Zenger's lawyer, refused to convict. *Id.* In response, the British took steps to restrict the jury trial right for colonists accused of crimes against the Crown. *Id*.

The Zenger trial eventually "became a rallying cry for the Revolution" and is founding-era evidence of the strength of the protections of the Sixth Amendment. *Id*. Over 250 years later, Justice David Souter opined, "That [Zenger] had to be in the minds of the Framers is beyond cavil." *Jones v. United States*, 526 U.S. 227, 247 (1999). Zenger's account of his acquittal was reprinted fourteen times in the half-century between the trial and the ratification of the Sixth Amendment. Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 874 (1994).

"More than any formal law book, it became the American primer on the role and duties of jurors." *Id.*

Even after ratification of the First Amendment, the jury was seen as "the primary protector of free speech." Frederick Schauer, *The Role of the People in First Amendment Theory*, 74 Calif. L. Rev. 761, 765 (1986) [hereinafter Schauer, *Role of the People*]. Justice Samuel Chase was impeached after he prevented a criminal defendant (and publisher) from arguing to the jury that the Sedition Act of 1798 was unconstitutional. *See* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1191 (1991) (discussing *United States v. Callender*).

The jury's role is especially crucial in press freedom cases like those of Zenger or Bliss and Coit. The facts in these cases are often undisputed. Zenger did not deny publishing the allegedly seditious statements, Schauer, *Role of the People* at 762–63, just as Defendants do not dispute that they remained in the park after 10 p.m. But the undisputed nature of the facts makes the jury's ability to consider First Amendment principles especially important. If the court forbids or discourages jurors from taking First Amendment principles into account after the defendant has asserted them, the jury's role "is inconsequential, limited to the

resolution of rarely disputed factual questions." *Cf. id.* at 763 (explaining this idea in the context of Zenger's trial).

That is not the expansive role that the Framers intended for the jury, nor the one the U.S. Supreme Court articulates today. *See United States v. Haymond*, 139 S. Ct. 2369, 2377 (2019) ("While trial practices can change in the course of centuries and still remain true to the principles that emerged from the Framers' design, this Court has not hesitated to strike down other innovations that fail to respect the jury's supervisory function.") (cleaned up). A limited jury role is inconsistent with the one enshrined in our state constitution, which has contained this "prized protection against tyranny" since 1776. *See* John V. Orth & Paul M. Newby, *The North Carolina State Constitution* 80–81 (2d. ed. 2013).

In this case, the answer to the jury questions that the court initially proposed—"[Y]ou are entitled to consider all the evidence in determining the guilt or innocence of the defendants, and that would include what you find in regard to their [press] status"—would have honored the jury's traditional role in guarding against government overreach. The proposed answer would have mitigated any concern that the jury would have addressed purely legal questions by reframing the question in

evidentiary terms (consider "all the evidence in determining the guilt or innocence of the defendants"), while providing a non-prejudicial answer. Defendants' press status was part of the evidence offered at trial; the jurors were entitled to consider that status and the First Amendment values it entails.

Importantly, such an instruction would not have encouraged juror nullification. *See* Jenny E. Carroll, *Policing Protest: Speech, Space, Crime, and the Jury*, 133 Yale L.J. 175, 259 (2023) (explaining the difference between juror nullification and juror consideration of First Amendment values). Nullification is "the jury's knowing and deliberate rejection of the evidence or refusal to apply the law." *State v. Kelly*, 221 N.C. App. 643, 648 (2012). The trial court acknowledged the distinction between jury nullification and instructing a jury to fully weigh the evidence: "For me to tell them, 'Yes, you can address a potential exemption,' would probably be wrong, but to tell them they can find the guilt or innocence, which, in essence, would amount to an exemption, I think they're entitled to do that." (R pp 355–56). Unfortunately, the court did not give that instruction. It instead omitted any reference to

Defendants' press status in its answer, thereby improperly discouraging the jury from considering that fact in their deliberations.

D. The outcome of Defendants' trial was prejudiced by the complete jury charge and should be overturned under our Supreme Court's holding in *State v. Leigh*.

North Carolina courts have zealously protected the traditional role of juries in applying free speech and free press principles in criminal cases. Three years ago, this Court cited *State v. Leigh* for the proposition that "the trial court must instruct the jury in a manner that ensures the defendant's First Amendment rights will not be violated." *Taylor I,* 270 N.C. App. at 566 (citing *Leigh*, 278 N.C at 252).

Leigh is not a strong case for categorical First Amendment protection from generally applicable laws. In *Leigh*, the defendant was convicted of obstruction of justice after he encouraged a man suspected of assault not to cooperate with the investigating officer by making "loud, raucous, and abusive" comments that "delayed and obstructed for a period of several minutes the officer's attempt to continue his investigation" and eventually "forced the officer to leave the scene in order to talk to [the suspect]." *Leigh*, 278 N.C. at 248–49. On appeal, the defendant argued that he had been exercising his First Amendment

rights. *Id.* at 251. The Supreme Court rejected this contention, expressing disdain for the idea that the First Amendment precluded prosecution for criminal behavior. *Id.*

Nonetheless, the Supreme Court reversed and remanded for a new trial because the trial court's instructions "failed to explain and apply the law to the evidence." *Id.* In its jury charge, the trial court had summarized the defendant's argument without referring to his free speech rights. *Id.* at 251–52. The defendant argued that this charge could have led the jury to convict him for protected speech. *Id.* at 251. The Court agreed:

> The general rule is that merely remonstrating with an officer on behalf of another, or criticizing or questioning an officer while he is performing his duty, when done in an orderly manner, does not amount to obstructing or delaying. . . . It logically follows that a citizen may advise another of his constitutional rights in an orderly and peaceable manner while the officer is performing his duty . . . .
>
> Nowhere in the charge did the trial judge explain the law or apply the law to the evidence concerning defendant's contention. Of course, if all defendant did was to advise Blount of his constitutional rights in an orderly and peaceable manner, defendant would not be guilty of the offense charged. It was error for the trial judge to fail to so charge.

Id. at 251–52 (cleaned up).

While the facts in Defendants' underlying cases can be meaningfully distinguished from the facts in *Leigh* in several ways—significantly, Defendants' actions consisted solely of observing and filming and did *not* disrupt APD's response to the protest—the jury charge in their case is sufficiently analogous to merit a new trial. *Leigh* held that "the trial court must instruct the jury in a manner that ensures the defendant's First Amendment rights will not be violated." *Taylor I*, 270 N.C. App. at 566 (citing *Leigh*, 278 N.C. at 252). Even assuming that the trial court in the present case correctly concluded that the legal question of the First Amendment's applicability was not for the jury, its response to the jury note effectively discouraged the jury from considering the First Amendment or its underlying principles, such as protection for the newsgathering activities of the press. The jury's inclusion of the First Amendment and press status questions in its note demonstrates that these issues had arisen during deliberation. The court's answers therefore misled the jury and prejudiced the outcome of the trial.

Our state's appellate courts and their federal counterparts have each applied an abundance of caution, erring on the side of defendants,

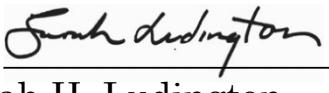
when reviewing jury instructions in cases implicating the First Amendment. Given the elevated role that juries have historically played in applying free speech and free press principles, this careful approach is both unsurprising and entirely proper. Applied here, the trial court's responses to the jury note likely misled the jury and prejudiced the trial's outcome. Even if the Court does not hold that the First Amendment protected Defendants' actions, the prejudicial error in the trial court's jury charge warrants a new trial.

CONCLUSION

Defendants' convictions violated the First Amendment. Their convictions should be overturned and the charges against them dismissed. In the alternative, the trial court's jury instructions were likely to have misled the jury and prejudiced the verdicts, warranting a new trial.

Respectfully submitted, this 22nd day of March 2024.

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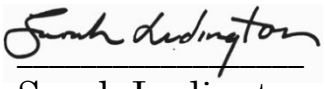
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the North Carolina Rules of Appellate Procedure, counsel for Defendants-Appellants certifies that the forgoing brief, which is prepared using a 14-point font proportionally spaced font with serifs, is fewer than 8,750 words (exclusing covers, captions, indexes, tables of authorities, counsel's signature block, certificate of service, this certificate of compliance, and appendixes) as reported by word processing software.

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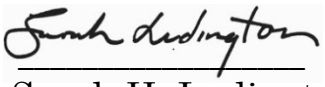
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The undersigned hereby certifies that the foregoing Defendants-Appellants' Brief was filed electronically and served via email pursuant to Rule 26(c) of the North Carolina Rules of Appellate Procedure, addressed to:

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No. 24-92 TWENTY-EIGHTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

STATE OF NORTH CAROLINA	)	
	)	
v.	)	
	)	From Buncombe County
MATILDA RAE BLISS and	)	
MELISSA ANN COIT,	)	
Defendants.	)	

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APPENDIX

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It's as simple as that. The evidence is overwhelming, and the State respectfully asks that you return a verdict of guilty.

THE COURT: All right. Members of the jury, all of the evidence has been presented. It is now your duty to decide from this evidence what the facts are. You must now apply the law which I am about to give you to those facts.

It is absolutely necessary that you understand and apply the law as I give it to you and not as you think it is or as you might like it to be. This is important because justice requires that everyone tried for the same crime be treated in the same way and have the same law applied.

The defendant has entered a plea of not guilty. The fact that the defendant has been charged is no evidence of guilt. Under our system of justice, when a defendant pleads not guilty, the defendant is not required to prove the defendant's innocence. The defendant is presumed to be innocent. The State must prove to you that defendant is guilty beyond a reasonable doubt.

Now, a reasonable doubt is a doubt based on reason and common sense arising out of some or all of the evidence that has been presented or lack or insufficiency of the evidence as the case may be.

Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of the defendants'

guilt. You are the sole judges of the believability of the witnesses. You must decide for yourselves whether to believe the testimony of any witness. You may believe all, any part, or none of a witness's testimony.

In deciding whether to believe a witness, you should use the same tests of truthfulness that you use in your everyday lives. Among other things, these tests may include the opportunity of a witness to see, hear, know, or remember the facts or occurrences about which the witness testified; the manner and appearance of the witness; any interest, bias, prejudice or partiality the witness may have; the apparent understanding and fairness of the witness; whether the testimony is reasonable; and whether the testimony is consistent with other believable evidence in the case.

You are the sole judges of the weight to be given any evidence. If you decide that certain evidence is believable, you must then determine the importance of that evidence in light of all other believable evidence in the case.

There are two types of evidence from which you may find the truth as to the facts of a case: direct and circumstantial evidence. Direct evidence is the testimony of one who asserts actual knowledge of a fact, such as an eyewitness.

Circumstantial evidence is proof of a chain or group of facts and circumstances indicating the guilt or innocence of a defendant. The law makes no distinction between the weight to be given to either direct or circumstantial evidence, nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all the evidence in the case.

After weighing all the evidence, if you are not convinced of the guilt of the defendants beyond a reasonable doubt, you must find the defendants not guilty.

You may find that a witness is interested in the outcome of this trial. You may take a witness's interest into account in deciding whether you believe the witness. If you believe the testimony of the witness in whole or in part, you should treat what you believe the same as any other believable evidence.

Videos were introduced into evidence in this case. These videos may be considered by you as evidence of facts they illustrate or show. The defendant Melissa Ann Coit has been charged with second-degree trespass. For you to find this defendant guilty of this offense, the State must prove three things beyond a reasonable doubt:

First, that this defendant remained on the premises of another; second, that this defendant did so without legal right; and, third, that this defendant had

been notified not to remain there by an authorized person.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date, this defendant remained on the premises of another without a legal right and that this defendant had been notified not to remain there by an authorized person, it would be your duty to return a verdict of guilty of this charge.

If you do not so find or have a reasonable doubt as to any of these things, it would be your duty to return a verdict of not guilty of this charge.

The defendant Matilda Rae Bliss has been charged with second-degree trespass. For you to find this defendant guilty of this offense, the State must prove three things beyond a reasonable doubt:

First, that this defendant remained on the premises of another; second, that this defendant did so without legal right; and, third, that this defendant had been notified not to remain there by an authorized person. If you find from the evidence beyond a reasonable doubt that on or about the alleged date, this defendant remained on the premises of another without a legal right and that this defendant had been notified not to remain there by an authorized person, it would be your duty to return a verdict of guilty of this charge.

If you do not so find or have a reasonable doubt

as to any of these things, it would be your duty to return a verdict of not guilty of this charge.

Now, members of the jury, you have heard the evidence and the arguments of counsel. If your recollection of the evidence differs from that of the attorneys, you are to rely solely upon your recollection. Your duty is to remember the evidence whether called to your attention or not. You should consider all the evidence, arguments, contentions and positions urged by the attorneys and any other contention that arises from the evidence.

The law requires the presiding judge to be impartial. You should not infer from anything I have done or said that the evidence is to be believed or disbelieved, that a fact has been proved or what your findings ought to be. It is your duty to find the facts and to render a verdict reflecting the truth. All 12 of you must agree to your verdict. You cannot reach a verdict by a majority vote. When you have agreed upon a unanimous verdict, your foreperson should so indicate on the verdict forms.

After reaching the jury room, your first order of business is to select your foreperson. You may begin your deliberations when the bailiff delivers the verdict forms to you. Your foreperson should lead the deliberations.

When you have unanimously agreed upon your verdicts and are ready to announce them, your foreperson

should record your verdicts, sign and date the verdict forms, and notify the bailiff by knocking on the jury room door. You will then be returned to the courtroom, and your verdicts will be announced.

Now, members of the jury, I will send one copy of these jury instructions when I send the verdict sheets back. Your foreperson should make them available to any of you if you want to refer back to these instructions.

Also, during your deliberations, should any needs, questions, or concerns arise during your deliberations, have your foreperson write down as specifically as possible what your need, question, or concern is, knock on the door, give it to the bailiff. Don't ask the bailiff. Just give it to the bailiff. The bailiff will bring it to me, and I will, with the attorneys, will try to address your need, question, or concern.

Members of the jury, those of you that have notes, you may take your notes back with you to the jury deliberation room. Also, too, I'm going to ask that you leave all the exhibits in your chair. Do not take those back with you.

If you need them or you have to reflect -- review back to them or something, just have your foreperson write that note down, let us know what it is, and we'll try to deal with it, but if you will leave all your exhibits in

your chair and take your notes with you.

Now, as to Ms. Langley, you keep your seat. I got different instructions for you.

And as to Mr. Resnik, on behalf of the state and county court system, again, I want to thank you for serving your duty. If you need a note for your employer or otherwise, if you'll step back down to the jury assembly room where that clerk is. She will be glad to provide that for you, but with -- you can leave. You are able to leave.

Don't go back to the jury room. You are also relieved from any obligation to not to talk about the case. You can talk about it as freely as you want to. That doesn't mean you have to, though. If you don't want to, you don't have to. Sometimes the attorneys may like to contact you to kind of get your feelings, see what your -- what the situation is because it may help them in another case at another time, but you are free to go.

And you can exit the courtroom as the jury goes out, okay?

All right. Members of the jury, those of you who took notes, take your notes with you. Leave your exhibits in your chairs. Follow the directions of the bailiff. You will retire to the jury room, and that will include you, Ms. Boldrin. And when you come back in, you can take his seat if you ever come back in the courtroom.

Oh, also, I want to say, too, if you come back in the courtroom, whether it's for a note or anything else, have your foreperson stick in the envelope the verdict sheets whether you've -- whether you have rendered a verdict or not and just bring those verdict sheets. The verdict sheets will flow in and out of the courtroom as you all flow in and out of the courtroom.

All right. Thank you.

(The jury pool was escorted out of the courtroom at 10:24 a.m.)

THE COURT: Let the record reflect that we are outside the presence of the jury.

All right. Ms. Langley, I'm going to ask you to step down to the jury assembly room. I'm going to hold you. I don't know how long -- if this goes into next week, I have to keep you on the leash here for this jury.

ALTERNATE JUROR: Okay.

THE COURT: Now, I'm going to send you down to the jury assembly room. Just make yourself comfortable down there. We will try to keep in touch with you, and I'll let you know as we go on what goes on and what we're going to do.

If they render a verdict, we will send for you and have you come back up, but then you are still under all these instructions. You cannot talk about the case. Don't

§ 15A-1234. Additional instructions.

(a) After the jury retires for deliberation, the judge may give appropriate additional instructions to:

(1) Respond to an inquiry of the jury made in open court; or

(2) Correct or withdraw an erroneous instruction; or

(3) Clarify an ambiguous instruction; or

(4) Instruct the jury on a point of law which should have been covered in the original instructions.

(b) At any time the judge gives additional instructions, he may also give or repeat other instructions to avoid giving undue prominence to the additional instructions.

(c) Before the judge gives additional instructions, he must inform the parties generally of the instructions he intends to give and afford them an opportunity to be heard. The parties upon request must be permitted additional argument to the jury if the additional instructions change, by restriction or enlargement, the permissible verdicts of the jury. Otherwise, the allowance of additional argument is within the discretion of the judge.

(d) All additional instructions must be given in open court and must be made a part of the record. (1977, c. 711, s. 1.)

§ 15A-1443. Existence and showing of prejudice.

(a) A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant. Prejudice also exists in any instance in which it is deemed to exist as a matter of law or error is deemed reversible per se.

(b) A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless.

(c) A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct. (1977, c. 711, s. 1.)

N.C. R. App. P. 10

Rule 10 - Preservation of Issues at Trial; Proposed Issues on Appeal

(a)Preserving Issues During Trial Proceedings.

(1)General. In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion. Any such issue that was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, including, but not limited to, whether the judgment is supported by the verdict or by the findings of fact and conclusions of law, whether the court had jurisdiction over the subject matter, and whether a criminal charge is sufficient in law, may be made the basis of an issue presented on appeal.

(2)Jury Instructions. A party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict, stating distinctly that to which objection is made and the grounds of the objection; provided that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

(3)Sufficiency of the Evidence. In a criminal case, a defendant may not make insufficiency of the evidence to prove the crime charged the basis of an issue presented on appeal unless a motion to dismiss the action, or for judgment as in case of nonsuit, is made at trial. If a defendant makes such a motion after the State has presented all its evidence and has rested its case and that motion is denied and the defendant then introduces evidence, defendant's motion for dismissal or judgment in case of nonsuit made at the close of State's evidence is waived. Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal.
A defendant may make a motion to dismiss the action, or for judgment as in case of nonsuit, at the conclusion of all the evidence, irrespective of whether defendant made an earlier such motion. If the motion at the close of all the evidence is denied, the defendant may urge as ground for appeal the denial of the motion made at the conclusion of all the evidence. However, if a defendant fails to move to dismiss the action, or for judgment as in case of nonsuit, at the close of all the evidence, defendant may not challenge on appeal the sufficiency of the evidence to prove the crime charged.

If a defendant's motion to dismiss the action, or for judgment as in case of nonsuit, is allowed, or shall be sustained on appeal, it shall have the force and effect of a verdict of "not guilty" as to such defendant.

(4)Plain Error. In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

(b)Appellant's Proposed Issues on Appeal. Proposed issues that the appellant intends to present on appeal shall be stated without argument at the conclusion of the printed record in a numbered list. Proposed issues on appeal are to facilitate the preparation of the record on appeal and shall not limit the scope of the issues presented on appeal in an appellant's brief.
(c)Appellee's Proposed Issues on Appeal as to an Alternative Basis in Law. Without taking an appeal, an appellee may list proposed issues on appeal in the printed record based on any action or omission of the trial court that was properly preserved for appellate review and that deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken. An appellee's list of proposed issues on appeal shall not preclude an appellee from presenting arguments on other issues in its brief. Portions of the record or transcript of proceedings necessary to an understanding of such proposed issues on appeal as to an alternative basis in law may be included in the record on appeal by agreement of the parties under Rule 11(a), may be included by the appellee in a proposed alternative record on appeal under Rule 11(b), or may be designated for inclusion in the transcript of proceedings, if one is filed under Rule 9(c)(2).

N.C. R. App. P. 10

287 N.C. 671; 303 N.C. 716; 309 N.C. 831; 312 N.C. 803; 368 N.C. 1067; 324 N.C. 613; 354 N.C. 609; 363 N.C. 901; 369 N.C. 763; Order Dated 17 November 2020.

Amended 8/26/2020; amended November 17, 2020, effective 1/1/2021; amended 1/14/2021; amended October 13, 2021, effective 1/1/2022.

casetext
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SECOND-DEGREE TRESPASS. G.S. 14-159.13. MISDEMEANOR.

NOTE WELL: By G.S. 14-159.14 first and second degree trespass have been designated lesser-included offenses of breaking or entering a building under G.S. 14-54 (see N.C.P.I.--Crim. 214.30 and N.C.P.I.--Crim. 214.34) and lesser-included offenses of felonious breaking or entering a vehicle or boat under G.S. 14-56 (see N.C.P.I.--Crim. 214.40).

The defendant has been charged with second-degree trespass.

For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt:

First, that the defendant [entered] [remained] on the premises of another.

Second, that the defendant did so without authorization.

And Third,

(a) [the defendant had been notified not to [enter] [remain there] by [the owner] [a person in charge of the premises] [a lawful occupant] [an authorized person]]

(b) [the premises were posted, in a manner reasonably likely to come to the attention of intruders with notice not to enter.]

If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant [entered] [remained] on the premises of another without authorization and that

(a) the defendant had been notified not to [enter] [remain] by [the owner] [a person in charge of the premises] [a lawful occupant] [an authorized person],

(b) the premises were posted, in a manner reasonably likely to come to the attention of intruders, with notice not to enter the premises, it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to any of these things, it would be your duty to return a verdict of not guilty.