NO. COA11-323
NORTH CAROLINA COURT OF APPEALS

Filed: 1 November 2011

STATE OF NORTH CAROLINA

v. Randolph County
No. 06 CRS 54587

GARY LANE COLE

Appeal by Defendant from judgment entered 27 October 2009 by Judge Edwin G. Wilson, Jr. in Randolph County Superior Court. Heard in the Court of Appeals 13 September 2011.

Attorney General Roy Cooper, by Assistant Attorney General M. Elizabeth Guzman, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Benjamin Dowling-Sendor, for Defendant-appellant.

HUNTER, JR., Robert N., Judge.

Gary Lane Cole ("Defendant") appeals his conviction for assault with a deadly weapon inflicting serious injury. On appeal, Defendant contends the trial court erred by (1) refusing to charge the jury with a special instruction on self-defense and (2) by erroneously instructing the jury on the law of self-defense as set forth in N.C.P.I. 308.45. After careful review, we find no error.

I. Factual & Procedural Background

The State's evidence at trial tended to show the following. Brad and Angelica Prevatt, along with their three children, lived on one side of a duplex in Ashboro, while Defendant, along with his girlfriend and their one-year-old child, occupied the other side. Defendant and Angelica had been friends for several years before Defendant helped Angelica acquire the neighboring apartment. Upon moving in, the Prevatts were friendly with Defendant. The Prevatts occasionally performed favors for Defendant—who was unemployed and without transportation—such as driving him around town and inviting him over for dinner.

On 2 May 2006, Angelica escorted Defendant on several errands before returning with Defendant to her apartment around 4:45 p.m. As Angelica prepared dinner, she observed Defendant consume two beers and a pill which Defendant said was Xanax. Defendant was visibly intoxicated when Brad arrived home from work approximately one hour later. After dinner, Angelica, Brad, and Defendant congregated in the living room where they smoked marijuana.

Brad became angry when he learned that Angelica had transported Defendant around town without Defendant offering

money to pay for gas. Defendant interjected and told Brad to stop yelling at Angelica. Brad then ordered Defendant to leave, but Defendant asserted he did not have to leave because he had helped Brad and Angelica acquire their apartment. When Brad threatened to call the police, Defendant jumped out of his seat and struck Brad in the face. Brad retaliated, knocking Defendant to the floor. Brad proceeded to jump on top of Defendant, and struck him repeatedly before Angelica separated the two men. Angelica pushed Defendant out the front door, and Defendant retreated to his apartment.

A short while later, Defendant emerged from his apartment and declared he was "ready for round two." With a beer bottle in one hand, Defendant approached the Prevatts' front porch and asked Angelica if she could take him to pick up his girlfriend and child. Angelica refused, and Defendant angrily hurled the beer bottle in the direction of the Prevatts' front door. The bottle narrowly missed the head of the Prevatts' two-year-old daughter, who was standing by her mother in the doorway. Brad, who witnessed the incident, ran out of the apartment and struck the Defendant in the face. Defendant produced a large kitchen knife from his pocket and plunged the knife into Brad's stomach. Brad struck Defendant once more before Defendant ran away with

the knife in hand. Brad's wound required emergency surgery, and he spent the next six days in the hospital recovering from his injuries.

Defendant's evidence at trial tended to show the following. Defendant voluntarily provided a statement to the police on the night of the altercation. In his statement, Defendant explained he had been at the Prevatt's apartment that evening when Brad became angry and started yelling. Angelica, Brad, and Defendant decided to smoke marijuana, hoping to calm Brad down. Brad and Defendant then began to argue and Brad threatened to call the police if the Defendant did not leave the apartment. Defendant replied, "F__k you, man." Brad "jumped up and got in [Defendant's] face," and Defendant hit Brad "in the mouth one time." Brad fought back and knocked Defendant to the floor. Brad produced a three-inch, wood-handled knife, with which he cut Defendant twice on the hand. Defendant wrestled the knife away from Brad, stabbed him one time, and then ran out of the Prevatt's apartment.

At trial, Officer Troy Vincent of the Asheboro Police Department testified that, in his experience, the cuts on Defendant's hands did not appear to come from a knife; they appeared to be more like an abrasion. Defendant admitted he was

the initial aggressor in the fight; however, he requested a special charge instructing the jury that the initial aggressor regains the right to act in self-defense once his opponent has escalated the fight by introducing deadly force. The trial court refused to give the requested instruction.

On 28 October 2009, the jury found Defendant "guilty" on the charge of assault with a deadly weapon inflicting serious injury pursuant to N.C. Gen. Stat. § 14-32(b) (2009). Judge Wilson sentenced Defendant to imprisonment for a period of 59 to 80 months. At the conclusion of sentencing, Defendant gave oral notice of appeal to this Court.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b), as Defendant appeals from the Superior Court's final judgment as a matter of right.

III. Analysis

A. Special Instruction on Self-Defense

Defendant first contends the trial court erred by denying his request for a special jury instruction pertaining to the law of self-defense. Specifically, Defendant requested the court to instruct the jury that the initial aggressor in an altercation, who started the altercation using non-deadly force, regains the

right to act in self-defense if his adversary resorts to deadly force so suddenly that the initial aggressor is unable to withdraw from the altercation safely.

1. *Standard of Review*

This Court reviews a trial court's decisions regarding jury instructions *de novo*. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "When a party's requested jury instruction is correct and supported by the evidence, the trial court is required to give the instruction." *Whiteside Estates, Inc. v. Highlands Cove, L.L.C.*, 146 N.C. App. 449, 464, 553 S.E.2d 431, 441 (2001), *disc. review denied*, 356 N.C. 315, 571 S.E.2d 220 (2002). On this basis, for an appeal to prevail, Defendant must show "that (1) the requested instruction was a correct statement of law and (2) was supported by the evidence, and that (3) the instruction given, considered in its entirety, failed to encompass the substance of the law requested and (4) such failure likely misled the jury." *Liborio v. King*, 150 N.C. App. 531, 534, 564 S.E.2d 272, 274, *disc. review denied*, 356 N.C. 304, 570 S.E.2d 726 (2002). "When a party aptly tenders a written request for a specific instruction which is correct in itself and supported by evidence, the failure of the court to give the instruction, at least in substance, is error." *Faeber*

v. E.C.T. Corp., 16 N.C. App. 429, 430, 192 S.E.2d 1, 2 (1972). However, the trial court need not give the exact instruction as requested and will not be found to be in error so long as "the substance of the requested instruction" is given. *Parker v. Barefoot*, 130 N.C. App. 18, 20, 502 S.E.2d 42, 44 (1998), *rev'd on other grounds*, 351 N.C. 40, 519 S.E.2d 315 (1999).

2. *Requested Instruction*

Pursuant to N.C. Gen. Stat. § 1A-1, Rule 51(b) (2009), Defendant submitted the following request for a special jury instruction:

> Even if the defendant voluntarily entered the fight, if the person fighting defendant resorted to deadly force so suddenly that defendant was unable to withdraw safely, the defendant would be justified in using self-defense.

In light of our Supreme Court's decision in *State v. Kennedy*, we find this to be an incorrect statement of the law.

In *State v. Kennedy*, the North Carolina Supreme Court held that when a defendant is the initial aggressor in an altercation and the counter-assault is so fierce that the original assailant cannot (1) withdraw from the combat and (2) advise his adversary of his intent to do so, the initial aggressor will not be entitled to the right of self-defense because he committed the first wrong and necessitated the killing. 169 N.C. 326, 330, 85

S.E. 42, 44 (1915). Although the State's evidence tended to show that the defendant wrongfully began the altercation, the defendant claimed that he killed the deceased only after the deceased assaulted him with a knife. *Id.* at 327-28, 85 S.E. at 42-43. Accordingly, he urged the court to instruct the jury that "a man who wrongfully brings on a fight may maintain the position of perfect self-defense because, at the time of the homicide, he was 'sorely pressed' and could not abandon the combat with any proper regard for his safety." *Id.* at 331, 85 S.E. at 44. The court rejected this contention, stating that:

> Where a prisoner makes an assault upon A, and is reassaulted so fiercely that the prisoner cannot retreat without danger of his life, and the prisoner kills A, held, that the killing cannot be justified upon the ground of self-defense. The first assailant does the first wrong and brings upon himself the necessity of slaying, and is therefore not entitled to a favorable interpretation of the law.

Id. at 329, 85 S.E. at 44 (quoting *State v. Brittain*, 89 N.C. 481, 500 (1883)); *see also State v. Marsh*, 293 N.C. 353, 354, 237 S.E.2d 745, 747 (1977) (holding initial aggressor regains the right to self-defense only if he abandons or withdraws from the fight and gives notice to his adversary that he has done so).

Defendant cites *State v. Washington*, 234 N.C. 531, 67 S.E.2d 498 (1951), *State v. Kennedy*, 91 N.C. 572 (1884), and

State v. Whetstone, ____ N.C. App. ____, 711 S.E.2d 778 (2011) in support of his requested jury instruction. However, the defendant in each of these cases was not the initial aggressor, and therefore the cases have no precedential value to support Defendant's contentions.

Defendant's requested instruction is a misstatement of the law. In *Kennedy*, our Supreme Court had occasion to extend the self-defense doctrine to encompass the circumstances presented in this case—where an adversary suddenly escalates the altercation by use of deadly force—but it declined to do so. *Kennedy* dictates our holding here. *See Kennedy*, 169 N.C. at 329, 85 S.E. at 44 and discussion *supra*. Defendant's assignment of error is overruled.

B. Jury Instruction on Burden of Persuasion

Defendant further contends the trial court erred by incorrectly instructing the jury on the law of self-defense as set forth in N.C.P.I. 308.45. Defendant asserts that in reading the following instruction to the jury, the court improperly placed the burden on *Defendant* to prove self-defense beyond a reasonable doubt:

> Now, the Defendant's actions are excused and he is not guilty, if he acted in self-defense. The State has the burden of proving from the evidence beyond a reasonable doubt that the Defendant's action was not

> in self-defense. If, from the evidence, you find beyond a reasonable doubt that the Defendant assaulted the victim with deadly force, that is force likely to cause death or great bodily harm, and that the circumstances would have created a reasonable belief in the mind of a person of ordinary firmness, that the assault was necessary or apparently necessary to protect himself from death or great bodily harm, and that the circumstances did create such belief in the Defendant's mind at the time he acted, such assault would be justified by self-defense. You, the jury, determine the reasonableness of the Defendant's belief from the circumstances appearing to him at the time.

Defendant acknowledges that this Court rejected his position on this precise issue in *State v. Perez*, 182 N.C. App. 294, 299-300, 641 S.E.2d 844, 849 (2007), and assigns error to preserve the issue for further review by our Supreme Court or the federal courts.

Finally, we note that Defendant has filed a motion for appropriate relief with this Court pursuant to N.C. Gen. Stat. § 15A-1415(b)(3) (2009). Defendant's motion is based upon new evidence and is prematurely before this Court. We dismiss Defendant's motion for appropriate relief without prejudice to re-file it at a later time.

IV. Conclusion

For the foregoing reasons, we find no error.

No error.

Judges MCGEE and ELMORE concur.

Report per Rule 30(e).