IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1246

Filed: 7 August 2018

Edgecombe County, No. 15 CRS 52194

STATE OF NORTH CAROLINA

v.

ALPHONZO HARVEY

Appeal by defendant from judgment entered 24 May 2017 by Judge Milton F. Fitch Jr. in Edgecombe County Superior Court. Heard in the Court of Appeals 16 May 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Thomas O. Lawton III, for the State.

Jeffrey William Gillette for defendant-appellant.

DAVIS, Judge.

Alphonzo Harvey ("Defendant") appeals from his conviction for second-degree murder. On appeal, Defendant argues that the trial court erred by denying his request for a self-defense instruction. After a thorough review of the record and applicable law, we conclude that Defendant received a fair trial free from error.

Factual and Procedural Background

The State's evidence at trial tended to establish the following facts: On 11 August 2015, Defendant was at a local convenience store near his mobile home when he saw one of his friends, Tobias Toler. Defendant told Toler that he was having a group of friends over for drinks at his mobile home and invited Toler to join the group.

Later that day, Toler arrived at Defendant's home. Four of Defendant's friends were also at the mobile home, and the group was drinking alcohol, listening to music, and dancing in the trailer. Toler was drinking a "40 ounce of Old Gold," a beer with a high alcohol content, out of a plastic bottle.

At some point, Toler was dancing with Mona Lisa Smith, a woman with whom Defendant had at one point been in a romantic relationship. Smith and Toler were "giggling and laughing and dancing" together.

Toler began staggering "all over [the] house about to break . . . stuff up [sic] in the house." He "started getting real loud and went to cussing and fussing." Defendant, who had consumed three or four beers by this time, realized that Toler was drunk and ordered him to leave the mobile home "about seven, eight times." Toler refused to leave the trailer until Defendant did so as well.

As Defendant walked out of the trailer, Toler followed him to the front steps of the mobile home and "said he ought to whip [Defendant's] damn a[**]." Toler then walked down the front steps with the plastic beer bottle still in his hand.

Defendant started to go back inside the trailer, but upon realizing that Toler had not left his property, he went back outside to confront him. He asked Toler: "[D]idn't I tell you [to] leave my damn house[?]" Toler found "a piece of broke [sic] off little brick" and threw it at Defendant, cutting his finger.

At that point, Toler reached into his pocket and pulled out a small, black pocketknife. Toler told Defendant that "I will f[***] you up." Defendant once again told Toler to leave at which point Defendant "hit [Toler] in the face[.]" Defendant then went back inside the trailer and grabbed a knife[1] from the top of his cabinet.

When he returned outside, Defendant approached Toler while swinging in Toler's direction the knife Defendant had obtained from the mobile home. Toler attempted to move Defendant's motorized scooter, which was resting against the side of the trailer. However, the scooter fell to the ground, breaking its headlights. Toler then threw the plastic beer bottle in Defendant's direction, but the bottle did not actually make contact with Defendant. At that point, Toler slipped and fell but immediately stood back up.

Defendant approached Toler, "ma[d]e a stabbing motion about three times[,]" and stabbed Toler once in the chest, puncturing his heart. Toler tried to run away but eventually fell down in a neighbor's yard.

[1] Witnesses testified that this knife resembled "an iron pipe with a blade on the end of it."

Following the stabbing, Defendant did not approach Toler's body. Instead, he walked back inside the trailer, pulled out a tissue, and wiped off the blood from the blade of his knife. Defendant then returned the knife to its place on the top of his cabinet. He walked outside of his trailer and proceeded to burn the bloody tissue.

Defendant was subsequently arrested and charged with first-degree murder. A jury trial was held beginning on 22 May 2017 before the Honorable Milton F. Fitch, Jr. in Edgecombe County Superior Court. The State presented testimony from ten witnesses. Defendant testified on his own behalf.

During the charge conference, Defendant requested a self-defense instruction along with an instruction on voluntary manslaughter. The trial court denied both requests, and the jury was instructed solely on first-degree murder and the lesser-included offense of second-degree murder. No self-defense instruction was given.

On 24 May 2017, the jury found Defendant guilty of second-degree murder. The trial court sentenced Defendant to a term of 483 to 592 months imprisonment. Defendant gave oral notice of appeal.

Analysis

On appeal, Defendant argues that the trial court erred by denying his request for a jury instruction on self-defense. "Our Court reviews a trial court's decisions regarding jury instructions *de novo*." *State v. Jenkins*, 202 N.C. App. 291, 296, 688 S.E.2d 101, 105, *disc. review denied*, 364 N.C. 245, 698 S.E.2d 665 (2010). It is well

established that "[a] trial judge should not give instructions which present to the jury possible theories of conviction not supported by the evidence." *State v. Odom*, 99 N.C. App. 265, 272, 393 S.E.2d 146, 150 (citations omitted), *disc. review denied*, 327 N.C. 640, 399 S.E.2d 332 (1990). However, "[i]f a party requests a jury instruction which is a correct statement of the law and which is supported by the evidence, the trial judge must give the instruction at least in substance." *State v. Cornell*, 222 N.C. App. 184, 191, 729 S.E.2d 703, 708 (2012) (citation omitted).

Defendant contends that he was entitled to an instruction on either perfect self-defense or imperfect self-defense.[2] "There are two types of self-defense: perfect and imperfect. Perfect self-defense excuses a killing altogether, while imperfect self-defense may reduce a charge of murder to voluntary manslaughter." *State v. Locklear*, 349 N.C. 118, 154, 505 S.E.2d 277, 298 (1998) (citation omitted), *cert. denied*, 526 U.S. 1075, 143 L. Ed. 2d 559 (1999).

> A defendant is entitled to an instruction on perfect self-defense as an excuse for a killing when evidence is presented tending to show that, at the time of the killing:
>
> > (1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and

[2] Defendant did not request an instruction based on the castle doctrine pursuant to N.C. Gen. Stat. § 14-51.2(b) or § 14-51.3(a)(1). Indeed, to the contrary, his counsel expressly told the trial court that such an instruction was not warranted on these facts. Nor has he argued in this appeal that the trial court's failure to nevertheless give an instruction on the castle doctrine amounted to plain error. *See State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012) ("To have an alleged error reviewed under the plain error standard, the defendant must 'specifically and distinctly' contend that the alleged error constitutes plain error."). Therefore, the applicability of the castle doctrine is not at issue in this appeal.

> (2) defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; and
>
> (3) defendant was not the aggressor in bringing on the affray, i.e., he did not aggressively and willingly enter into the fight without legal excuse or provocation; and
>
> (4) defendant did not use excessive force, i.e., did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

State v. Gappins, 320 N.C. 64, 70-71, 357 S.E.2d 654, 659 (1987) (citation omitted).

"Imperfect self-defense arises when only elements (1) and (2) are established, in which case a defendant would remain guilty of at least voluntary manslaughter. However, both elements (1) and (2) in the preceding quotation must be shown to exist before the defendant will be entitled to the benefit of either perfect or imperfect self-defense." *State v. Hughes*, 82 N.C. App. 724, 727, 348 S.E.2d 147, 150 (1986).

Our Supreme Court has held that

> [b]efore the defendant is entitled to an instruction on self-defense, two questions must be answered in the affirmative: (1) Is there evidence that the defendant in fact formed a belief that it was necessary to kill his adversary in order to protect himself from death or great bodily harm, and (2) if so, was that belief reasonable? If both queries are answered in the affirmative, then an instruction on self-defense must be given. If, however, the evidence requires a negative response to either question, a self-defense

> instruction should not be given.

State v. Moore, 363 N.C. 793, 796, 688 S.E.2d 447, 449 (2010) (citation omitted). "In determining whether an instruction on . . . self-defense must be given, the evidence is to be viewed in the light most favorable to the defendant." *Id.* (citation omitted).

The Supreme Court has consistently held that a defendant cannot benefit from a self-defense instruction where he claims that the killing was accidental. *See, e.g.*, *State v. Blankenship*, 320 N.C. 152, 155, 357 S.E.2d 357, 359 (1987) ("defendant's evidence tended to show that the shooting was an accident" and, therefore, he was not entitled to self-defense instruction). Similarly, a defendant is not entitled to a self-defense instruction where he testifies that he merely intended to scare the victim but killed him instead. *See, e.g.*, *State v. Williams*, 342 N.C. 869, 873, 467 S.E.2d 392, 394 (1996) (no self-defense instruction was required where "defendant testified that he fired his pistol three times into the air to scare [the murder victim] and the others and make them retreat so he could leave the area"); *State v. Lyons*, 340 N.C. 646, 662, 459 S.E.2d 770, 779 (1995) (self-defense instruction was not appropriate where "from defendant's own testimony regarding his thinking at the critical time, it is clear he meant to scare or warn and did not intend to shoot anyone"); *see also State v. Cook*, __ N.C. App. __, __, 802 S.E.2d 575, 577 (2017) ("[A] person under an attack of deadly force is not entitled to defend himself by firing a warning shot, even if he believes that firing a warning shot would be sufficient to stop the attack; he must shoot to kill

or injure the attacker to be entitled to the instruction."), *aff'd per curiam*, __ N.C. __, 809 S.E.2d 566 (2018).

This Court has also held that "[a] defendant's unsuccessful attempt to remove himself from [a] fight is circumstantial evidence that he believed it necessary to kill his adversary to save himself from death or great bodily harm." *State v. Broussard*, 239 N.C. App. 382, 387, 768 S.E.2d 367, 370 (2015); *see id.* (trial court properly denied defendant's request for jury instruction on imperfect self-defense where uncontroverted evidence showed defendant "fully and aggressively participated in the altercation" that resulted in stabbing of victim). In addition, the Supreme Court has made clear that a self-defense instruction is not warranted based solely on the defendant's testimony that he was scared at the time he used deadly force. *Lyons*, 340 N.C. at 662, 459 S.E.2d at 779 ("[D]efendant's self-serving statement that he was 'scared' is not evidence that defendant formed a belief that it was necessary to kill in order to save himself." (citation omitted)).

In the present case, Defendant's evidence did not establish that he believed it was necessary to kill Toler in order to protect himself from serious bodily harm or death. Defendant attempts to argue on appeal that the evidence at trial demonstrated that Toler was attacking him with a beer bottle, a brick, and finally a pocketknife. Based on these provocations, Defendant contends, he had a reasonable fear of great bodily harm or death and was, therefore, justified in stabbing Toler.

However, this argument is not borne out by Defendant's actual testimony. At trial, Defendant testified on direct examination, in pertinent part, as follows:

> [DEFENSE COUNSEL:] And what did you go back in the trailer for?
>
> [DEFENDANT:] That's when I got the knife.
>
> [DEFENSE COUNSEL:] Did you think to just lock the door and not let him in?
>
> [DEFENDANT:] He was still standing right there. I just kept on asking him to leave.
>
> [DEFENSE COUNSEL:] What did you think he was going to do?
>
> [DEFENDANT:] I thought he would leave, go ahead on and leave.
>
> . . . .
>
> [DEFENSE COUNSEL:] So what was your purpose in going back in the trailer and picking up that knife?
>
> [DEFENDANT:] Because I was scared he was going to try and hurt me.
>
> [DEFENSE COUNSEL:] What happened next?
>
> [DEFENDANT:] Well, after everything happened, I got him one time where he took my scooter and put it on the ground and broke all my lights out of there and everything.
>
> [DEFENSE COUNSEL:] And when he knocked your scooter over, were his hands empty at that point?
>
> [DEFENDANT:] Yeah.

[DEFENSE COUNSEL:] And did he leave the yard then?

[DEFENDANT:] After the accident, he left then.

[DEFENSE COUNSEL:] What?

[DEFENDANT:] After the accident happened to him, he left, he ran out of the yard then.

[DEFENSE COUNSEL:] But I'm talking about after he -- had you touched him at all?

[DEFENDANT:] Did I touch him at all when –

[DEFENSE COUNSEL:] Did you touch Toby at all?

[DEFENDANT:] Yeah, he hit me and I hit him back one time.

[DEFENSE COUNSEL:] With your fist?

[DEFENDANT:] With my fist, yeah.

. . . .

[DEFENSE COUNSEL:] And what were you doing with that knife?

[DEFENDANT:] I had it because I kept on asking him to leave there and he had his knife in his hand.

[DEFENSE COUNSEL:] Well, what were you doing with your knife?

[DEFENDANT:] I tried to make him leave.

[DEFENSE COUNSEL:] But how? What were you doing?

[DEFENDANT:] I didn't do nothing.

[DEFENSE COUNSEL:] Were you just holding it or were you–

[DEFENDANT:] I didn't do nothing. Just holding it in my hand. I didn't do nothing.

[DEFENSE COUNSEL:] At any point did you go and use your knife to physically remove him?

[DEFENDANT:] No, he came up on me, coming up on me. He was walking up on me with his knife. That's when I had my knife.

. . . .

[DEFENSE COUNSEL:] And at what point did you hit him with your knife?

[DEFENDANT:] I didn't, I just hit – he –

THE COURT: Did what?

[DEFENDANT:] Huh, sir.

THE COURT: You did what?

[DEFENDANT:] I said hit him right there.

[DEFENSE COUNSEL:] After you hit him right there with it, what did he do?

[DEFENDANT:] He ran to the road.

[DEFENSE COUNSEL:] What was going on in your mind at that point?

[DEFENDANT:] I thought he just ran away. I

didn't know what was going on with him.

[DEFENSE COUNSEL:] Did you think you had hurt him?

[DEFENDANT:] I didn't think so. I thought he just got scared and ran.

[DEFENSE COUNSEL:] Did he finally leave your property?

[DEFENDANT:] Yeah, he ran to the road, yeah.

[DEFENSE COUNSEL:] Did you see him fall down?

[DEFENDANT:] Yeah, I saw him.

[DEFENSE COUNSEL:] What did you think when he fell down?

[DEFENDANT:] I thought – I just thought he was just drunk. That's what I was thinking.

Defendant testified to the following on cross-examination:

[PROSECUTOR:] Okay. Did you tell him what [the knife] was?

[DEFENDANT:] Huh-Uh (No.) No.

[PROSECUTOR:] Did you swing it like this before you opened it? (Indicating.)

[DEFENDANT:] No.

[PROSECUTOR:] Did you take it out like this? (Indicating.)

[DEFENDANT:] Yup.

. . . .

[PROSECUTOR:] Did you swing like this with it? (Indicating.)

[DEFENDANT:] I don't know how I did it.

[PROSECUTOR:] Okay. At some point, did you take this weapon right here, Number 32, and jab it into Mr. Toler?

[DEFENDANT:] I don't know how I did it with [sic]. I don't know how I done it.

[PROSECUTOR:] So you don't even know that you did this.

[DEFENDANT:] I remember a little bit. But I thought I ain't know I really had stuck him, though.

. . . .

[PROSECUTOR:] And you walked back inside, did you check on Toby?

[DEFENDANT:] No, I didn't.

[PROSECUTOR:] Well, you knew he was done then, didn't you?

[DEFENDANT:] No, I didn't.

[PROSECUTOR:] Then why didn't you keep swinging?

[DEFENDANT:] Why I keep swinging.

[PROSECUTOR:] I mean, if you're using force against him you're trying to get him to stop, right? You're trying to get him off that property. You want him to go.

> When you stuck him, did he fall down or did he take off going?
>
> [DEFENDANT:] He took off.
>
> [PROSECUTOR:] And you knew that, didn't you?
>
> [DEFENDANT:] I saw him take off.
>
> . . . .
>
> [PROSECUTOR:] You just said you testified when Mr. Moore was asking you questions you said numerous times that you thought the victim was going to leave.
>
> [DEFENDANT:] I did –
>
> [PROSECUTOR:] Didn't you think he was going to leave?
>
> [DEFENDANT:] I thought he would.

The above-quoted testimony fails to satisfy the requirements for an instruction on self-defense because it does not establish that (1) Defendant was actually being attacked by Toler such that he actually feared great bodily harm or death as a result of Toler's actions; and (2) he inflicted the fatal blow to Toler in an attempt to protect himself from such harm. Both defense counsel and the prosecutor provided multiple opportunities for Defendant to clarify his muddled account of the fatal incident and to demonstrate that he possessed the requisite fear of death or serious bodily harm at the time of the stabbing. However, despite these opportunities, Defendant never clearly testified that he feared he was in such danger as a result of Toler's actions

with the pocketknife in the moments proceeding the stabbing. Nor did he ever testify as to facts demonstrating that such a fear would have been reasonable — i.e., that Toler lunged at him with the pocketknife, that Toler made any stabbing motions with the pocketknife, or that the pocketknife was even pointed in Defendant's direction.

We are unable to conclude that Defendant's ambiguous statements that Toler "came up on me" and "was walking up on me with his knife" are sufficient to meet his burden. While, as noted above, we are required to view the evidence on this issue in the light most favorable to Defendant, this does not give us the authority to fill in key gaps in a defendant's testimony. *See State v. Hatcher*, 231 N.C. App. 114, 118, 750 S.E.2d 598, 601 (2013) ("[A]lthough we must consider the evidence in the light most favorable to the State, that does not mean we must take pieces of evidence out of context."); *State v. Revels*, 195 N.C. App. 546, 552, 673 S.E.2d 677, 682 ("It has long been the law that evidence which merely shows it possible for the fact in issue to be as alleged, or which raises a mere conjecture that it was so, is an insufficient foundation for a verdict, and should not be left to the jury." (citation, quotation marks, and brackets omitted)), *disc. review denied*, 363 N.C. 379, 680 S.E.2d 204 (2009).

Defendant's testimony also fails to demonstrate that his fear of such harm caused him to inflict the fatal blow to Toler's chest. Indeed, Defendant's failure to expressly admit to stabbing Toler with his knife further undercuts his ability to argue that the stabbing was committed as an act of self-defense. Once again, Defendant

was given multiple opportunities to clarify his testimony and elaborate on this issue. Yet his answers on both direct-examination and cross-examination were insufficient to warrant a self-defense instruction.

We wish to emphasize that there are no "magic words" a defendant must use to satisfy the elements of self-defense. There must, however, be evidence sufficient to show that the defendant used deadly force to protect himself based on his fear that he was about to suffer death or great bodily harm. No such evidence exists here. Instead, Defendant's testimony was replete with statements that he "didn't do nothing" and was "[j]ust holding [the knife] in my hand." At one point, when asked whether he took the knife and stabbed Toler, Defendant responded, "I don't know how I did it." Defendant further testified that he did not even realize he had actually stabbed or hurt Toler and that he thought Toler fell down simply because he was drunk. Finally, Defendant characterized the encounter during his testimony as an "accident" at three separate times.

As the dissent correctly states, "[a]n affirmative defense is one in which the defendant says, 'I did the act charged in the indictment, but I should not be found guilty of the crime charged because . . . .' " *State v. Caddell*, 287 N.C. 266, 289, 215 S.E.2d 348, 363 (1975) (citation omitted). The dissent is also correct that where competent evidence supports every element required for a self-defense instruction, such an instruction must be given and the jury must be allowed to weigh the

credibility of the witnesses and the other evidence bearing on the issue. But the fatal flaw in the dissent's analysis is that here Defendant never actually said — either literally or in words that could *reasonably* be so construed: "I did the act charged in the indictment . . . ." Thus, the evidence did not support an instruction on self-defense.

Without adequate supporting evidence, the dissent asserts that Defendant "essentially admitted" that he believed it was necessary to strike Toler to protect himself from great bodily harm. Moreover, it further states that Defendant "intended to hit the victim with the blade of his knife" without pointing to any testimony that truly supports this assertion or, for that matter, shows Defendant actually admitted to stabbing Toler at all. By repeating its flawed characterization of Defendant's testimony over and over, the dissent strives to manufacture a proposition that is simply not borne out in Defendant's testimony as if the mere act of repetition will make it so.

In reaching its conclusion, the dissent fails to recognize the distinction between, on the one hand, taking the evidence in the light most favorable to the defendant and, on the other hand, putting words in the defendant's mouth. While purporting to do the former, the dissent actually does the latter. Rather than pointing to genuine discrepancies in the evidence presented at trial, the dissent instead engages in a tortured reconstruction of Defendant's testimony in order to

manufacture new meaning and fill in key gaps that exist in Defendant's description of the events at issue.

As shown above, Defendant was given multiple opportunities on both direct and cross-examination to testify that (1) he intended to stab Toler; and (2) he did so based on a reasonable fear that doing so was necessary to save himself from great bodily harm. But despite these opportunities, Defendant never did so. Had Defendant's actual testimony conformed to the characterization set out in the dissent, then perhaps a self-defense instruction would have been warranted. However, there is a disconnect between what Defendant actually said on the witness stand and what the dissent apparently believes he said.

To cite only one example, the dissent states that Defendant "testif[ied] that he stabbed the victim" when, in fact, Defendant only stated that he "hit" the victim. Defendant was then asked by defense counsel "at what point did you hit him with your knife?" Defendant responded, "I didn't . . ." Instead of accepting this answer as Defendant denying that he "hit him with [the] knife[,]" the dissent instead construes this portion of his testimony as meaning the opposite of what Defendant actually said.

Moreover, while the dissent discusses *State v. Richardson*, 341 N.C. 585, 581 S.E.2d 724 (1995), that case does not control our resolution of the present action. The sole issue before the Supreme Court in *Richardson* was whether the trial court had erred by instructing the jury that in order for the defendant to receive an instruction

on self-defense it was required to find that "it appeared to the defendant and he believed it to be necessary to *kill* the deceased in order to save himself from death or great bodily harm . . . ." *Id.* at 593, 461 S.E.2d at 729. The Supreme Court held that the instruction given by the trial court did not improperly imply that the defendant needed to possess a specific intent to kill the victims in order to be entitled to the instruction. *Id.*

Here, our holding is not based on the proposition that Defendant must have formed the specific intent to kill Toler in order to be entitled to a self-defense instruction. To the contrary, our decision today is based on the failure of Defendant's own testimony and the other evidence of record to satisfy the legal principles of self-defense articulated by our Supreme Court over the past two decades. *See, e.g.*, *State v. Locklear*, 349 N.C. 118, 155, 505 S.E.2d 277, 298 (1998) ("Defendant offered no evidence that at the time of the shooting he believed, reasonably or unreasonably, that it was necessary to kill the victim in order to protect himself from imminent death or great bodily harm."). Defendant has failed to demonstrate that he had a genuine fear of great bodily harm or death that was reasonable under the circumstances and that he stabbed Toler in an attempt to prevent such harm. Therefore, the issue before the Supreme Court in *Richardson* is not before us.[3]

[3] Nor is the outcome of the present case altered by the other decisions cited by the dissent. *See, e.g.*, *State v. Lee*, 370 N.C. 671, 676-77, 811 S.E.2d 563, 567 (2018) (holding that trial court improperly omitted "stand-your-ground" provision from self-defense instruction); *State v. Carter*, 357

Finally, the dissent incorrectly suggests that our holding is based on our assessment that Defendant's testimony lacks credibility — a determination that must be left to the jury. To the contrary, our holding is that even taking Defendant's testimony as true and viewing the evidence in the light most favorable to him, he has still failed to meet the requirements for a self-defense instruction. Thus, the dissent's lofty rhetoric about the importance of fair trials and the role of the jury in our system of justice is misplaced. Here, Defendant *had* a fair trial, and the jury *was* allowed to perform its proper role in assessing the credibility of the witnesses and weighing the evidence.

For all of these reasons, we conclude that the trial court properly denied Defendant's request for a jury instruction on self-defense. *See, e.g.*, *Williams*, 342 N.C. at 873, 467 S.E.2d at 394 ("The defendant is not entitled to an instruction on self-defense while still insisting that he did not fire the pistol at anyone, that he did not intend to shoot anyone and that he did not know anyone had been shot.").

Conclusion

For the reasons stated above, we conclude that Defendant received a fair trial free from error.

NO ERROR.

Judge INMAN concurs.

N.C. 345, 361, 584 S.E.2d 792, 803 (2003) (declining to reconsider wording of self-defense instruction approved of in *Richardson*), *cert. denied*, 541 U.S. 943, 158 L. Ed. 2d 368 (2004).

Judge DILLON dissents by separate opinion.

Report per Rule 30(e).

No. COA17-1246 – STATE v. HARVEY

DILLON, Judge, dissenting.

I. Summary

A defendant is not "guaranteed a *perfect* trial." *State v. Greene*, 285 N.C. 482, 496, 206 S.E.2d 229, 238 (1974) (emphasis added). But he is "entitled to a *fair* trial." *State v. Garcell*, 363 N.C. 10, 44, 678 S.E.2d 618, 639 (2009) (emphasis added).

When a defendant is charged with committing an act and the State has put on evidence that the defendant committed the act, the defendant may assert as his defense that "it wasn't me" *or* "it didn't happen" *or* "I did do it, but for a lawful reason."

Here, Defendant was indicted for fatally stabbing the victim with a knife. The State's called witnesses who testified that they saw Defendant stab the victim with a knife. Defendant even admitted on the stand that he stabbed the victim with a knife. The State's witnesses suggested that the Defendant acted unprovoked. Defendant, though, said he stabbed the victim because the victim approached him brandishing a pocketknife, after having threatened to kill him with it.

The jury was instructed that if they found that Defendant intentionally stabbed the victim with a deadly weapon that proximately caused the victim's death, they could convict Defendant of second-degree murder. *See, e.g., State v. Patterson*, 297 N.C. 247, 253, 254 S.E.2d 604, 608 (1979) (malice and unlawfulness can be inferred upon "proof of the intentional infliction of a wound with a deadly weapon

proximately resulting in death"). However, the jury was *not* instructed that they could otherwise acquit Defendant or convict him of manslaughter if they found that Defendant had acted in self-defense.

Defendant's trial was not only imperfect, but it was unfair. The jury was only asked to determine whether Defendant committed an act that he essentially admitted to on the stand. The jury was not allowed to determine if Defendant acted in self-defense. When deciding on which crimes to instruct a jury, the presiding judge must view the matter through a lens which casts the evidence in a light most favorable to the *State*. And, here, the evidence in this light supported an instruction on second-degree murder. But when deciding on which defenses to instruct the jury, the presiding judge must forget what he has just seen, he must "change glasses" to view the matter through a lens which only allows him to see the evidence in the light most favorable to the defendant. And, here, the evidence, when viewed through this lens, supported an instruction on self-defense. The key factual issue in the case was *not* whether Defendant stabbed the victim, but whether Defendant acted in self-defense.

Admittedly, the State's evidence was strong, and Defendant's self-serving testimony was not the model of clarity. The majority contends that Defendant never expressly said the "magic words," that he intended to stab at the victim but referred to the stabbing as an accident and, therefore, he was not entitled to an instruction on self-defense. However, giving Defendant the benefit of every reasonable inference,

his testimony suggests that he was in imminent fear of being stabbed and that he used his knife with the intent to stop the victim's approach. It could be inferred that he swung the knife at the victim. At the very least, it can be inferred that he brought the knife up to chest level to block the victim's approach. In either case, he used the knife in a way that was intended to strike the victim if the victim got close enough to stab Defendant.

Simply put, Defendant was entitled to have *the jury* determine whether he was telling the truth or if the State's eye-witnesses were telling the truth, no matter how probable I believe that the jury would have reached the same verdict anyway. N.C. Const. art. I, § 24. *See State v. Moses*, 13 N.C. 452, 458 (1830) (Justice Ruffin explaining "that the *weight* of the evidence is for the jury; they hold the scales for that" (emphasis in original)). Just as judges should not legislate from the bench, *see N.C. State Bd. Of Educ.*, ___ N.C. ___, ___, 814 S.E.2d 67, 74 (2018) (stating that a "statute enacted by the General Assembly is presumed to be constitutional [where] the statute [can] be upheld on any reasonable ground"), judges, in a jury trial, should not weigh the evidence from the bench:

> [I]f there be any competent evidence, relevant and tending to prove the matter in issue, it is "the true office and province of the jury" to pass upon it; although the evidence may be so slight, that any one will exclaim, "certainly no jury will find the fact upon such insufficient evidence" still, *the Judge has no right to put his opinion in the way of the free action of the jury*[.]

State v. Allen, 48 N.C. 257, 262-63 (1855) (emphasis added). *See also State v. Rodriguez*, ___ N.C. ___, ___, 814 S.E.2d 11, 27-28 (2018) ("[T]he credibility of the witnesses, the weight of the testimony, and conflicts in the evidence are matters for the jury to consider and pass upon, with the reviewing court lacking any responsibility for passing on the credibility of witnesses or weighing the testimony." (Citations and internal marks omitted.)).

II. Discussion

Self-defense is an affirmative defense to the crime of second-degree murder. *See State v. Lee*, 370 N.C. 671, 811 S.E.2d 563 (2018) (reversing a conviction of second-degree murder for failure to instruct on an aspect of self-defense). As our Supreme Court has explained, "[a]n affirmative defense is one in which the defendant says, "I did the act charged in the indictment, but I should not be found guilty of the crime charged because * * *." *State v. Caddell*, 287 N.C. 266, 289, 215 S.E.2d 348, 363 (1975). And since a defendant asserting self-defense has essentially admitted to the act, a trial court commits reversible error by failing to instruct on self-defense when supported by evidence, even if there is no request for the instruction. *See State v. Dooley*, 285 N.C. 158, 163, 203 S.E.2d 815, 818 (1974).

Also, since second-degree murder does not require that the accused acted with the intent to kill, the accused need not have struck the victim with an intent to kill to be entitled to a self-defense instruction, so long as he intended to *strike the blow*.

Admittedly, there is language from certain Supreme Court decisions which suggests otherwise. *See State v. Locklear*, 349 N.C. 118, 154, 505 S.E.2d 277, 298 (1998) (stating that self-defense is available where the defendant "believed *it to be necessary to kill the deceased* in order to save himself from death or serious bodily harm" (emphasis added)); *State v. Gappins*, 320 N.C. 64, 70, 357 S.E.2d 659 (1987) (same). However, our Supreme Court has explained that such language is not to be construed as to require that an accused intended the death of the victim, only that he intended the blow, as explained in *State v. Richardson*, 341 N.C. 585, 461 S.E.2d 724 (1995).

In *Richardson*, the defendant was convicted of second-degree murder. On appeal, the defendant claimed that the instruction on self-defense was confusing since it *suggested* that the defense was only available if the jury determined that the defendant intended to kill, even though there was no such requirement to convict the defendant of second-degree murder. Our Supreme Court rejected this argument, stating that the instruction for self-defense did *not* mean that the defendant must have had the specific intent to kill to be entitled to a self-defense instruction, only that he had the intent to strike the victim with the blow which caused the death:

> Contrary to the Court of Appeals' decision, the language in the self-defense instruction does not read into the defense an "intent to kill" that is not an element of second-degree murder. A killing in self-defense involves an admitted, intentional act, as does second-degree murder. However, simply because defendant admitted intentionally committing an act resulting in death does not mean that defendant has admitted forming a specific "intent to kill."

* * *

> The jury was thus instructed that second-degree murder involved an "intentional killing," but it was also specifically instructed that an intentionally killing did not refer to the "presence of a specific intent to kill." The jury was instructed that defendant would be excused of committing second-degree murder if he "reasonably believed it was necessary to kill the victim in order to save himself from death or great bodily harm." There is no reason to suppose that the jury read the self-defense language to include as an element that defendant formed a "specific intent to kill" the victims. . . . Reviewing the instructions given to the jury, we conclude that the jury would not have interpreted the self-defense instruction to include a specific intent to kill, an element not necessary for a conviction of second-degree murder.

Id. at 594-95, 461 S.E.2d at 730-31. This holding was reaffirmed in 2003. *State v. Carter*, 357 N.C. 345, 361, 584 S.E.2d 792, 803 (2003) (stating that "[a]fter carefully examining defendant's argument, we find no reason to depart from our prior holding [in *Richardson*]"). And just this past April, our Supreme Court reiterated that self-defense remains available for those charged with *second*-degree murder. *Lee*, *supra*.[4]

[4] There are cases where the Supreme Court has stated that self-defense is not available where the defendant claims that the death was an "accident." However, each of those cases involves a situation where the defendant stated that he did not intend to strike the blow. For instance, the instruction is not available where a defendant states that he killed the victim when his gun accidentally fired. *State v. Blankenship*, 320 N.C. 152, 357 S.E.2d 357 (1987). And the instruction is not warranted when a defendant claims he was only firing a warning shot, not intending to strike the victim. *State v. Cook*, ___ N.C. ___, 809 S.E.2d 566 (2018). These cases, though, do not apply to the present case, where Defendant testified that he *did* intend to strike the victim with the blow which resulted in the victim's death, though he referred to the victim's death in parts of his testimony as an "accident."

We must be mindful that "[w]here there is evidence that [the] defendant acted in self-defense, the court *must* charge on this aspect even though there is contradictory evidence by the State or *discrepancies in [the] defendant's evidence*." *State v. Dooley*, 285 N.C. 158, 163, 203 S.E.2d 815, 818 (1974) (emphasis added). That is, we are to view the evidence in the light most favorable to Defendant, giving Defendant the benefit of every reasonable inference.

In this case, the evidence at trial from both the State and Defendant suggests that the victim was a guest in Defendant's residence; that Defendant asked the victim to leave; that the victim left the dwelling but remained in the yard; that the victim threatened Defendant with seriously injury and even death[5]; that the victim threw a beer bottle and a brick at Defendant; and that Defendant went back inside his house to retrieve a knife and then came back outside. Otherwise, there is a sharp divergence in the evidence.

Witnesses for the State essentially testified that Defendant walked back outside with his knife, walked over to the victim, and proceeded to "make a stabbing motion about three times," one of which fatally punctured the victim's heart.[6]

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[5] Witnesses testified that the victim told Defendant that he would "f**k [him] up" and that he was going to "kill [his] dumb a**" before throwing a brick at him.

[6] In its recitation of the facts, the majority opinion at times relies on the State's evidence, such as testimony that Defendant came outside with his knife and, without further provocation, stabbed the victim. However, in assessing Defendant's argument on appeal, it is our duty to look at the evidence in the light most favorable to Defendant.

However, Defendant's testimony, when viewed in the light most favorable to Defendant and giving him the benefit of every reasonable inference, was sufficient to submit the issue of self-defense to the jury. Specifically, in this light, the evidence tended to show as follows:

> The victim exited Defendant's residence but continued to refuse to leave:
>
> DEFENSE COUNSEL: How many times did you ask [the victim] to leave altogether? Both from inside [your residence] and outside [your residence].
>
> DEFENDANT: I told him about seven or eight times.

Rather than leave, even according to several State witnesses, the victim remained in Defendant's yard, refusing to leave, and threatened to seriously injure Defendant:

> DEFENSE COUNSEL: You said in your statement that you heard [Defendant] tell [the victim] to leave his house.
>
> STATE WITNESS: Yes, he did.
>
> DEFENSE COUNSEL: And he told him twice to leave his house.
>
> STATE WITNESS: Yes.
>
> DEFENSE COUNSEL: And was this when he was outside?
>
> STATE WITNESS: They was outside, yes.
>
> DEFENSE COUNSEL: And did [the victim] leave?
>
> STATE WITNESS: Not at that time.
>
> DEFENSE COUNSEL: In fact, that's when [the victim] said to [Defendant] I will f**k you up, correct?

> STATE WITNESS: Yes, that was – yes, yes.

And after threatening Defendant, the victim threw a bottle and part of a brick at Defendant as Defendant stood just outside his front door:

> DEFENDANT: . . . he throwed the beer then took a piece of broke off little brick. That's why I had that spot on my finger. . . . [7]

The victim then pulled out a pocketknife and threatened to kill Defendant, who was then unarmed:

> DEFENDANT: Well, he took out [a pocketknife]. *He told me he ought to kill my damn ass with it.*

(Emphasis added.) Defendant then went inside to fetch his knife:

> DEFENDANT: When he pulled [his pocketknife out,] I went in the house and that's when I had get the knife.

Defendant fetched his knife *because he feared that the victim was going to hurt him with a pocketknife*, as Defendant continued to ask the victim to leave:

> DEFENSE COUNSEL: So what was your purpose in going back in the trailer and picking up the knife.
>
> DEFENDANT: Because I was scared he was going to try and hurt me.
>
> * * *
>
> DEFENSE COUNSEL: [When you returned outside with the knife,] what was [the victim] saying?

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[7] State witnesses stated the victim threatened to "f**k" Defendant up, but did not throw the bottle until after Defendant threw punches. However, Defendant stated that he did not throw a punch until after the victim swung first. In any event, it is for the jury to decide the credibility of the State witnesses on this point.

DEFENDANT: He still had the knife in his hand.

DEFENSE COUNSEL: And what did you do at that point?

DEFENDANT: I asked him to leave.

Defendant testified that he did not want to fight the victim; but that he only returned to ask the victim to leave:

PROSECUTOR: You wanted to get into a fight, didn't you?

DEFENDANT: No, I was trying to avoid it.

PROSECUTOR: You were trying to avoid it.

DEFENDANT: Yeah, that's why I asked him to leave.

Defendant testified that when he came back outside with a knife, he did not approach the victim, but rather the victim, while holding the pocketknife that he had early threatened to kill Defendant with, "came up" on Defendant. And when the victim was close enough to stab Defendant, Defendant struck the victim with his knife:

> DEFENSE COUNSEL: At any point did you go and use your knife to physically remove him?
>
> DEFENDANT: No, he came up on me, coming up on me. He was walking up on me with his knife. That's when I had my knife.

Defendant explained that he struck the victim because he was scared that the victim would hurt him:

> DEFENDANT: . . . but when he had a knife out, that's the only thing would come to mind. He was going to hurt me.

Additionally, it could be reasonably inferred that Defendant acted to protect his home, as he asked the victim, repeatedly, to leave. In any event, Defendant states a number of times that he hit the victim at this point. It may be argued that from parts of Defendant's testimony that a reasonable inference could be made that Defendant did not intend to strike the victim *with the knife*:

> DEFENSE COUNSEL: And at what point did you hit him with your knife?
>
> DEFENDANT: I didn't, I just hit – he –

He was interrupted before finishing his answer, but shortly thereafter, it could be reasonably inferred that he *did* intend to hit the victim with the knife:

> DEFENDANT: I hit him right there.
>
> DEFENSE COUNSEL: After you hit him right there *with it* , what did you do?
>
> DEFENDANT: He ran to the road.

(Emphasis added.) And on cross-examination, it could be reasonably inferred that Defendant stated that he intended to hit the victim *with the blade of his knife*:

> PROSECUTION: Did you swing [the knife] like this before you opened it? (Indicating.)
>
> DEFENDANT: No.
>
> PROSECUTION: Did you take it out like this?
>
> DEFENDANT: *Yes*.
>
> PROSECUTION: Did you swing it like this *with it*? (Indicating.)

> DEFENDANT: I don't know *how* I did it.
>
> * * *
>
> DEFENDANT: I remember a little bit. But I thought I ain't know I really had struck him, though.

(Emphasis added.) Admittedly, Defendant's memory was foggy on some details, specifically whether he swung the knife in the manner as indicated by the prosecutor. And Defendant stated that he was not sure that he had actually stabbed the victim. But these facts do not negate a reasonable inference that he did *intend* to strike the victim with the blade of his knife. Any discrepancies among possible reasonable inferences from Defendant's testimony must be resolved in Defendant's favor.[8]

When viewed in this light, I conclude that Defendant has satisfied his burden to submit the issue of self-defense to the jury. The evidence shows that Defendant feared death or serious bodily harm as he stabbed the victim *and* that his fear was reasonable. Indeed, Defendant stabbed the victim as the victim, rather than honoring Defendant's repeated requests to leave his yard, approached Defendant at Defendant's front door, still holding the pocketknife that he previously threatened to kill Defendant with and after having assaulted Defendant with a brick and a bottle. Clearly, the victim was close enough to carry out his threat when Defendant stabbed

[8] I do not see what difference it makes whether Defendant intended to strike *with the knife* or merely strike *with his hand* that was holding the knife. In either case, Defendant intentionally struck out of fear of being stabbed.

the victim. I disagree with the majority that Defendant, here, was required to wait for the victim to actually stab at Defendant before Defendant's actions could be considered reasonable by a juror.

Also, there was evidence that Defendant was not the aggressor. In hindsight, maybe he should have remained in his home and not returned outside with a knife. However, the fact that he returned with a knife does not foreclose a finding that he was not the aggressor. It could be reasonably inferred (in fact Defendant essentially stated) that Defendant retrieved his knife only to protect himself and his home, and not to fight the victim, as he continued to ask the victim to leave his yard. And it could be reasonably inferred that Defendant did not use excessive force. The victim had threatened to kill Defendant and walked up to Defendant holding a pocketknife and got close enough to stab Defendant with that pocketknife. The victim had already assaulted Defendant and would not leave Defendant's yard. Assuming, though, that the evidence conclusively showed that Defendant *was* the aggressor or he *did* use excessive force, he was still entitled to an instruction on imperfect self-defense. *See, e.g., State v. Robinson*, 188 N.C. 784, 786, 122 S.E. 617, 618 (1924) (instructing that one who commits an act which would normally constitute second degree murder but who does so in self-defense is still guilty of voluntary manslaughter if he uses excessive force in his defense).

III. Conclusion

I may have voted to convict Defendant. The State presented overwhelming evidence from several disinterested neighbors who testified that Defendant stabbed the victim multiple times unprovoked. Only Defendant's self-serving testimony suggests that he acted in self-defense. And Defendant made some poor choices. Maybe he would been have been better off just staying in his home, hoping that the victim would not try to regain entry. However, I was not on the jury, and I have no way of knowing what each juror was thinking. Defendant essentially admitted to the stabbing. Therefore, some jurors possibly did not resolve whether they believed the State's witnesses or Defendant. And some jurors might not have totally believed the State witnesses who said Defendant stabbed a defenseless victim three times, as the jury *did acquit* Defendant on the charge of first-degree murder.

In any event, there may be a temptation to let the verdict stand based on the State's overwhelming evidence and on Defendant's poor decisions. But where Defendant's defense was *not* "I didn't do it" or "It didn't happen," but rather "Yes, I did it, but I acted in self-defense," Defendant was entitled to have a jury pass on the merit of his defense. Perhaps the jury would have convicted him of manslaughter or have acquitted him. Or maybe they would have been hung. Or, perhaps more probable, they would have convicted Defendant of second-degree murder anyway. But even if there had been 50 eye-witnesses testifying for the State that Defendant acted unprovoked against Defendant's self-serving testimony suggesting that he

acted in self-defense, the trial court would still have been *required* to instruct the jury on self-defense. The jury holds the scale and must be trusted to reach a just result. And, when properly instructed, whatever result the jury reaches is, under our Constitution, the just result.