

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-802

Filed: 4 December 2018

New Hanover County, No. 15CRS051090

STATE OF NORTH CAROLINA

v.

TYLER DEION GREENFIELD, Defendant.

Appeal by Defendant from judgments entered 23 February 2017 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 8 February 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Jess D. Mekeel, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Kathryn L. VandenBerg, for the Defendant.

DILLON, Judge.

Defendant appeals his convictions for first-degree felony murder and for assault with a deadly weapon with intent to kill inflicting serious injury (AWDWIKISI). For the following reasons we reverse the judgments and remand as follows: (1) with respect to the AWDWIKISI conviction, Defendant is entitled to a new trial; and (2) with respect to the first-degree felony murder conviction, the trial court shall vacate that judgment and enter judgment convicting Defendant of second-degree murder.

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I. Background

Defendant was convicted of assault and murder for shooting two victims, killing one of them, during a drug deal gone bad.

On 2 February 2015, Defendant was at Jon's¹ home to buy marijuana. Jon's girlfriend, Beth, was also there. The State's evidence tended to show that Defendant shot Jon and Beth while trying to rob Jon.

Defendant, however, testified as follows: Defendant went to buy marijuana from Jon. While in Jon's living room, Defendant picked up a gun from Jon's coffee table which he thought "looked cool." As Defendant was inspecting Jon's gun, Beth became nervous and pointed a gun at Defendant. Defendant then threatened to shoot Beth if Beth did not put her gun down. Beth put down her gun, and Defendant turned to leave. As Defendant was leaving, Jon shot at Defendant. Fearing for his life, Defendant returned fire, intending to shoot Jon but not intending to shoot Beth. Some of Defendant's return fire killed Jon and injured Beth.

Defendant was tried for killing Jon and for assaulting Beth. The jury was instructed on the doctrine of "transferred intent." The jury was also instructed on "self-defense" as to the murder charge but not the assault.

For Jon's death, the jury indicated on the verdict sheet that it had found Defendant guilty of *both* first-degree felony murder (based on the felony of

¹ Pseudonyms are used to protect the identities of the victims.

AWDWIKISI) and of second-degree murder. Based on this verdict, the trial court entered judgment convicting Defendant of the greater charge, first-degree felony murder.

For the assault on Beth, the jury found Defendant guilty of AWDWIKISI. The trial court entered judgment based on this verdict.

The trial court sentenced Defendant to life imprisonment without parole. Defendant timely appealed.

II. Analysis

Defendant argues that the trial court committed four errors. We conclude that, except with respect to error in the jury instruction, the trial court did not commit reversible error, as explained in Section II. A. below.

We conclude that the trial court did commit reversible error in its jury instructions resulting in Defendant's convictions for the assault of Beth and the first-degree felony murder of Jon. However, we conclude that the error did not affect the jury's verdict that Defendant had committed second-degree murder when he shot Jon. Accordingly, for the reasons stated in Section II. B. below, we vacate the judgments entered convicting Defendant of assault and first-degree felony murder and remand for a new trial on the assault charge for the assault on Beth and for entry of judgment for second-degree murder for the death of Jon.

A. Defendant's Arguments Concerning Closing Argument and Evidence

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Defendant makes three arguments, unrelated to the jury instructions, which we conclude do not warrant relief on appeal. We address each in turn.

1. Prosecutor's Closing Argument

Defendant argues that the trial court failed to intervene *ex mero motu* concerning two statements made by the prosecutor during closing arguments.

Defendant complains of the prosecutor's statement that "[t]he reason we're here [is that] the defendant will not accept responsibility for his actions." Defendant argues that "[t]he prosecutor's statement invited the jury to hold against [Defendant] his invocation of his constitutional right to plead not guilty and to stand trial before an impartial jury." Our Supreme Court, however, has held that constitutional arguments regarding closing instructions which are not objected to are waived:

Defendant seeks a new trial on the ground that the court's errors [in not intervening *ex mero motu* during the prosecutor's closing based on the State and Federal constitutions and on N.C. Gen. Stat. § 15A-1230].

Because defendant did not object to any of these arguments below, no constitutional argument could have been presented to the trial court. As noted above, failure to raise a constitutional issue at trial generally waives that issue for appeal. [Citations omitted.] Accordingly, we will review these purported errors for a violation of N.C.G.S. § 15A-1230.

State v. Phillips, 365 N.C. 103, 135, 711 S.E.2d 122, 145 (2011).

Here, Defendant did not object to the prosecutor's statement. Therefore, we are compelled to conclude that Defendant has failed to preserve any constitutional

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argument concerning the prosecutor's statement. And unlike the defendant in *Phillips*, Defendant here has not made any argument under N.C. Gen. Stat. § 15A-1230. Further, we conclude that any error in this regard did not amount to plain error. Therefore, Defendant's argument concerning this statement is overruled.

Defendant also complains of the prosecutor's statement that "[p]erhaps [Defendant] had [the weapon] in some other robbery [and] discharged it then." This statement suggests that Defendant may have committed another offense, though there is no evidence that he had done so. The State contends the statement was relevant to the prosecution's theory that Defendant had disposed of the weapon shortly after the shooting, which was evidence of Defendant's guilt.

Defendant did not object to the statement. Where there is no objection, our standard of review is whether the remarks were "so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *State v. Trull*, 349 N.C. 428, 451, 509 S.E.2d 178, 193 (1998).

We have reviewed the prosecutor's statement in context with the entire closing argument, and we conclude that the statement, if improper, was not so grossly improper to require intervention by the trial court. In so holding, we note other cases where similar or more inflammatory statements were held not to require intervention by the trial court. *See, e.g., State v. Marino*, 229 N.C. App. 130, 135, 747 S.E.2d 633, 637 (2013) (holding that a prosecutor's speculation "that this was not the first time

defendant had driven impaired,” while improper, did not warrant a new trial). *See also State v. Oxendine*, 330 N.C. 419, 423, 410 S.E.2d 884, 886 (1991). Therefore, we conclude that the trial court did not commit reversible error by failing to intervene *ex mero motu* during the prosecutor’s closing argument.

2. Evidence Concerning Character of the Victim

Defendant argues that the trial court erred in excluding evidence that the deceased victim (Jon) was a gang leader, had a “thug” tattoo, and had previously been convicted of armed robbery. Defendant contends that he had offered this evidence to show Jon’s violent character which would be relevant to his self-defense argument. Defendant argues that the evidence was admissible under Rules 404(a) and 405(b) of our Rules of Evidence and that the trial court’s refusal violated his constitutional right to present his defense.

Rule 404(a) provides that an accused may offer evidence of “a pertinent trait of [the victim’s] character.” N.C. Gen. Stat. § 8C-1, Rule 404(a) (2017). Our Supreme Court has stated that a defendant claiming self-defense “may produce evidence of the victim’s character tending to show [] that the victim was the aggressor” and may be done so “through testimony concerning the victim’s general reputation for violence[.]” *State v. Corn*, 307 N.C. 79, 85, 296 S.E.2d 261, 265-66 (1982).

Rule 405 of our Rules of Evidence provides *how* character evidence may be offered. N.C. Gen. Stat. § 8C-1, Rule 405 (2017). Rule 405(a) states that evidence

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concerning the victim's reputation may be offered. *Id.* Rule 405(b) states that evidence concerning "specific instances of [the victim's] conduct" may be offered. *Id.* Defendant specifically argues that his evidence concerning Jon's character was admissible under Rule 405(b); he makes no argument under Rule 405(a).

We conclude that the evidence concerning Jon's gang membership, his possession of firearms, and his tattoo do not involve "specific instances of conduct" admissible under Rule 405(b). Therefore, we conclude that the trial court did not err by excluding this evidence. Further, we note that there was evidence presented to the jury that Jon was a drug dealer and possessed multiple guns in his residence at the time of the shooting.

Regarding the victim's prior conviction for armed robbery, the trial court specifically ruled that the evidence was inadmissible under Rule 403, based on its conclusion that unfair prejudice outweighed the probative value of the evidence. *State v. Coffey*, 345 N.C. 389, 404, 480 S.E.2d 664, 673 (1996) (stating that the trial court may still exclude otherwise admissible evidence if it determines that "its probative value [is outweighed by] the danger of unfair prejudice"). Whether otherwise admissible evidence should be excluded under Rule 403 is left to the sound discretion of the court. *State v. Hoffman*, 349 N.C. 167, 184, 505 S.E.2d 80, 90-91 (1998). Here, Defendant has made no argument that the trial court erred in excluding

Jon's prior conviction under Rule 403. Therefore, we conclude that Defendant failed to meet his burden on appeal as to this issue.

3. Detective's Opinion Testimony

Defendant argues that the trial court committed plain error by allowing a detective testifying for the State to express his "opinion [that Defendant] had already confessed to felony murder." Our Supreme Court has stated that it reviews "unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996). Under Rule 10(a)(4) of our Rules of Appellate Procedure, an appellant must demonstrate that a "judicial action" amounted to error. Presumably, here, Defendant is arguing that the trial court should have intervened to strike the detective's testimony concerning his belief that Defendant had confessed to felony murder. Assuming, *arguendo*, that the trial court committed error, we conclude that the argument is moot in light of our reversal of Defendant's felony murder conviction, as explained in Section II. B. below. Further, assuming that the argument is not moot, we conclude that any error by the trial court was not "so basic, so prejudicial, so lacking in its elements that justice cannot have been done," and, therefore, did not rise to the level of plain error. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

B. Jury Instructions on "Transferred Intent" and "Self-Defense"

We conclude that the jury instructions require us to vacate Defendant's convictions for the assault of Beth and the first-degree felony murder of Jon, but not for the jury's verdict finding Defendant guilty of the second-degree murder of Jon. But before discussing our conclusions regarding the jury instructions as to each charge specifically, we first discuss generally the "transferred intent" and "self-defense" instructions given to the jury.

1. Transferred Intent

The trial court gave a general instruction on "transferred intent." Our Supreme Court has described transferred intent as follows:

It is an accepted principle of law that where one is engaged in an affray with another and unintentionally kills a bystander or a third person, his act shall be interpreted with reference to his intent and conduct towards his adversary. Criminal liability, if any, and the degree of homicide must be thereby determined. Such a person is guilty or innocent exactly as [if] the fatal act had caused the death of his adversary. It has been aptly stated that "The malice or intent follows the bullet."

State v. Wynn, 278 N.C. 513, 519, 180 S.E.2d 135, 139 (1971).² Therefore, under the "transferred intent" rule, if a defendant shoots at A in the heat of passion, without malice, but hits B, he is guilty of voluntary manslaughter. If he shoots A in self-defense but hits B, he is not guilty by reason of self-defense.

² This holding in *Wynn* regarding "transferred intent" was most recently affirmed by our Supreme Court in 1998 in *State v. Davis*, 349 N.C. 1, 37, 506 S.E.2d 455, 475 (1998) and by our Court just last year in *State v. Cox*, ___ N.C. App. ___, ___, 808 S.E.2d 339, 348 (2017).

The instruction regarding transferred intent given in this case was an accurate statement of the law. The trial court told the jury:

If the defendant intended to harm one person but instead harmed a different person, the legal effect would be the same as if the defendant had harmed the intended victim.

This instruction, as given, allowed the jury to convict Defendant for killing Jon even if they believed Defendant was *intending* to shoot Beth when he hit Jon. And it allowed the jury to convict Defendant for assaulting Beth even if they believed Defendant was intending to shoot Jon when he hit Beth.

2. Self-Defense

The State's evidence tended to show that Defendant shot both Jon and Beth during a robbery attempt. Defendant admitted that he shot Jon and Beth, but only to protect himself. Specifically, Defendant testified that (1) Jon shot first; (2) Defendant then returned fire in self-defense as he tried to escape the room in fear that Jon was going to kill him; and (3) Defendant was only trying to hit Jon in his return fire; he was not shooting at Beth.

When instructing on the homicide of Jon, the trial court instructed the jury that it could find Defendant not guilty or guilty of a lesser charge based on self-defense. But the trial court did not instruct the jury on self-defense with respect to the assault on Beth. The instruction on this count, coupled with the transferred intent instruction, created a likelihood of confusion within the jury. Based on our

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State's jurisprudence, as explained below, the application of self-defense does not turn on whom Defendant actually shot, but rather on whom he intended to shoot. That is, as explained below, Defendant was entitled to a self-defense instruction on the homicide of Jon and the assault of Beth, but only if the jury determined that those crimes were committed with shots *intended* for Jon.

Defendant was *not* entitled to any self-defense instruction for the shots which the jury determined he *intended* for Beth, whether they struck Beth or Jon. Defendant was not so entitled because he testified that he did not intend to hit Beth, but that he was only shooting at Jon. Defendant also testified that he was only in imminent fear of being killed by Jon. He testified that Beth had already put down her gun before he returned fire. *See, e.g., State v. Cook*, ___ N.C. App. ___, ___, 802 S.E.2d 575, 577 (2017), *affirmed per curiam*, 370 N.C. 506, 809 S.E.2d 566 (2018) (holding that a defendant was not entitled to a self-defense instruction where he testified that he was not intending to shoot the victim when he fired the gun).

But based on Defendant's testimony, he *was* entitled to the self-defense instruction for all the shots he intended to fire at Jon, *whether they actually killed Jon or injured Beth*. That is, based on Defendant's testimony that Jon was shooting at Defendant, Defendant was entitled to the self-defense instruction with regard to any shots the jury determined he *intended* for Jon and which hit Jon. And based on

the “transferred intent” instruction, Defendant was also entitled to a “self-defense” instruction with regard to any shots intended for Jon *but which* actually struck Beth.

C. Jury Verdicts and Judgments

1. Count 1 – Homicide of Jon

On Count 1, Defendant was charged with Jon’s homicide. The trial court instructed the jury on a number of theories, including first-degree felony murder, first-degree premeditation/deliberation murder, second-degree murder, and voluntary manslaughter.

On its verdict sheet, the jury checked boxes indicating that it was finding Defendant guilty of *both* first-degree felony murder, based on the felony of AWDWIKISI, *and* of second-degree murder. Based on this verdict (and because Defendant only killed one person), the trial court entered judgment only on the greater charge, first-degree felony murder.

a. First-Degree Felony Murder Judgment – Reversible Error

We conclude that the jury instructions concerning first-degree felony murder based on AWDWIKISI constituted reversible error because the instructions allowed the jury to convict Defendant on this theory even if they believed that Defendant *had intended* to shoot Jon rather than Beth with the fatal shot(s). Specifically, it would be error for the jury to base its felony murder conviction for the killing of Jon on a felony that Defendant *was intending to assault Jon*.

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Where a defendant intentionally assaults A with a gun which causes A's death (and there is no other felony involved), the State cannot elevate an otherwise act of second-degree murder or voluntary manslaughter to first-degree murder based solely on the fact that the defendant committed the deadly assault with a deadly weapon. Otherwise, *every instance* where a defendant commits a homicide with a gun would constitute first-degree felony murder.³

Based on a holding by our Supreme Court, however, if the jury believed that Defendant *intended* to shoot Beth with the shot(s) that killed Jon, the jurors were free to convict Defendant of first-degree felony murder based on AWDWIKISI. Specifically, in *State v. Terry*, our Supreme Court held that a defendant who fires a deadly weapon at A (Beth, in our case), but hits B (Jon), is guilty of first-degree felony murder of B (Jon), based on the fact that the defendant was committing the felony of assault with a deadly weapon on A when he killed B. *State v. Terry*, 337 N.C. 615, 622, 447 S.E.2d 720, 723-24 (1994). Though this holding seems to be in direct conflict

³ If every homicide involving a deadly weapon were elevated in this manner, a defendant who shoots his spouse in the heat of passion, without premeditation and deliberation, would be liable for first-degree felony murder rather than simply voluntary manslaughter. Or a defendant who shoots and kills someone with malice, but without premeditation and deliberation, would still be guilty of first-degree murder rather than second-degree murder. Such results are clearly not the intent of the General Assembly, nor are they reflected in our Supreme Court's jurisprudence.

with the “transferred intent” rule stated by our Supreme Court in *Wynn*, we are bound to follow it.⁴

We, however, cannot determine from the jury instructions or from the verdict sheet whether the jury believed Defendant, when he shot Jon, was *intending* to shoot Jon or *intending* to shoot Beth. That is, the instructions did not clearly inform the jury that it could find Defendant guilty of first-degree felony murder based on AWDWIKISI *only if* it determined that the fatal bullet was meant for Beth. And there was evidence presented from which the jury could have inferred either finding. Therefore, we conclude that the jury instructions with respect to Defendant’s conviction for first-degree felony murder constituted reversible error.

b. Second-Degree Murder Verdict – No Reversible Error

In addition to finding Defendant guilty of first-degree felony murder for Jon’s death, the jury also found Defendant guilty of second-degree murder. As stated above, the trial court entered judgment only on the first-degree felony murder verdict.

Second-degree murder occurs where a defendant kills another human being with malice. *State v. Williams*, 288 N.C. 680, 691, 220 S.E.2d 558, 567 (1975). Where the defendant uses a deadly weapon to commit an assault, malice can be presumed.

⁴In *Terry*, the Supreme Court did not apply its “transferred intent” rule to determine defendant’s culpability when he fired at A but shot B. Rather, the Court held that first-degree felony murder was appropriate, notwithstanding whether the defendant shot with premeditation or merely in the heat of passion. Accordingly, it could be argued that *Terry* conflicts with the statement in *Wynn* that “the malice or intent follows the bullet.”

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State v. Lang, 309 N.C. 512, 525-26, 308 S.E.2d 317, 323-24 (1983). “[A] pistol or a gun is a deadly weapon.” *State v. Benson*, 183 N.C. 795, 799, 111 S.E. 869, 871 (1922).

In this case, on the charge of second-degree murder, the jury was instructed on self-defense. We conclude that, for this jury verdict, there was no reversible error. It does not matter whether the jury believed Defendant was shooting at Jon or at Beth when he killed Jon. If the jury believed Defendant was shooting at Jon, the verdict is valid because the jury was given the opportunity to acquit based on self-defense, but declined to do so. And if the jury believed that Defendant shot Jon while trying to shoot Beth, he was not entitled to a self-defense instruction with respect to any shot intended for Beth because he testified that he was not in imminent fear of Beth.

c. Mandate on Homicide Count

We vacate the judgment convicting Defendant guilty of first-degree felony murder. But since there was no reversible error with respect to the second-degree murder verdict, based on the reasoning of our Supreme Court in *State v. Stokes*, we remand for entry of judgment convicting Defendant of second-degree murder.⁵ *State v. Stokes*, 367 N.C. 474, 479-80, 756 S.E.2d 32, 36 (2014).

2. AWDWIKISI of Beth

⁵ In *Stokes*, our Supreme Court cited a line of cases with approval where there was evidence to support a conviction of a greater charge, but the instructions left out an essential element of that greater charge, resulting in an instruction on a lesser charge. *State v. Stokes*, 367 N.C. 474, 479-80, 756 S.E.2d 32, 36 (2014). The Court held that it was appropriate to remand for entry on the lesser charge. *Id.*

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The trial court instructed the jury that it could convict Defendant of AWDWIKISI for the injuries to Beth. The trial court did not give an instruction of self-defense as to this charge. This was error because we do not know if the jury determined that the shot that struck Beth was meant for Jon, which may have been legally justified under self-defense, or if it was meant for Beth. That is, with the transferred intent instruction, it is possible that the jury convicted Defendant of AWDWIKISI, though believing that Defendant intended all his shots to hit Jon, as he testified. And based on transferred intent, he should have been acquitted if the jury believed he was firing at Jon in self-defense. As our Supreme Court stated in *Wynn* with respect to transferred intent: “Such a person is guilty *or innocent* exactly as [if] the fatal act had caused the death of his adversary.” *Wynn*, 278 N.C. at 519, 180 S.E.2d at 139 (emphasis added).

The State might argue that the failure to instruct on self-defense was not prejudicial because the jury must have determined that Defendant did not shoot at Jon in self-defense based on the finding of guilt for second-degree murder. But this ignores the possibility that the jury found Defendant guilty of second-degree murder for shots intended for Beth, for which he was not entitled to any self-defense instruction, and that the jury found Defendant guilty of assaulting Beth with shots intended for Jon, for which he was entitled to a self-defense instruction. We simply cannot know what the jury was thinking. Therefore, Defendant is entitled to a new

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trial with respect to the assault charge. On remand, assuming the evidence is the same, the jury must be instructed on self-defense for the shots the jury believed were intended for Jon that hit Beth.

III. Conclusion

The judgments below are vacated. Defendant is entitled to a new trial with respect to the AWDWIKISI conviction. Regarding the first-degree felony murder conviction, we remand for entry of judgment convicting Defendant of second-degree murder.

VACATED AND REMANDED.

Judge INMAN concurs.

Judge STROUD dissents by separate opinion.

STROUD, Judge, dissenting.

I concur in the result of the majority opinion in granting defendant a new trial on AWDWIKISI, but I dissent on the remainder of the charges because I would grant defendant a new trial on all charges. The facts and resulting various charges were somewhat confusing on their own, but the jury instructions and verdict sheet only made the case more confusing by muddling the issues, elements, and legal standards applicable to each charge. Portions of the jury instructions misstated the law and overall the instructions are likely to have misled the jury. Although some portions of the jury instructions are correct statements of the law, it is not possible to separate the AWDWIKISI conviction from the tangled mess of theories and charges. I would therefore reverse and grant a new trial on all charges.

I briefly restate the background since it is important to an understanding of the issues and appropriate jury instructions. On 2 February 2015, defendant and a friend went to Jon's⁶ home to buy marijuana. An altercation started and shots were fired by at least three guns. Jon ultimately died from gunshot wounds. Defendant and Jon's girlfriend, Beth, were also shot but survived. The State and defendant presented different theories at trial on what happened between defendant's arrival at Jon's home and the shootings. The State's theory of the case was that defendant

⁶ Pseudonyms will be used to protect the identity of the participants who were not charged with a crime in this case and the deceased victim.

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and his friend attempted to rob Jon and murdered him: defendant attempted to rob Jon at gunpoint; Beth grabbed a gun; defendant threatened to shoot Jon in the head if Beth did not put her gun down; Beth put the gun down; and defendant began firing, striking both Jon and Beth. Defendant's theory of the case was self-defense: he went to buy marijuana from Jon and saw a gun on the coffee table; he picked it up to look at it because it "looked cool" "like something off a movie[;]" Jon "started going crazy[;]" Beth grabbed a gun and pointed it at defendant; defendant threatened to shoot if Beth did not put the gun down; Beth put the gun down; defendant turned to run and Jon shot him; defendant began shooting behind himself "as many times as I can till I got to the door."

Defendant was indicted for first and second-degree murder and attempted robbery with a dangerous weapon of Jon and the attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury ("AWDWIKISI") of Beth. Defendant argued self-defense to the jury. The jury found defendant guilty of first-degree felony murder with the underlying felony being assault, second-degree murder, and AWDWIKISI. The trial court sentenced defendant to life imprisonment without parole. Defendant appealed.

Defendant challenges the jury instructions regarding self-defense. Defendant contends the trial court should have provided a self-defense instruction for the AWDWIKISI and felony murder charges. Defendant argues that

[b]y limiting the jury instructions so that self-defense could not be applied to the assault charges against . . . [Beth] – standing alone or underlying the felony-murder charge – the trial court usurped the jury’s function, and Mr. Greenfield was denied his right to present a defense and to a trial by jury.

Defendant specifically contends that within the trial court’s self-defense instruction it should have included his proposed instruction on transferred intent because defendant’s “intent of defending himself against . . . [Jon] transferred to the shooting of . . . [Beth].”⁷

We review jury instructions as a whole to determine if the law was presented correctly and to ensure that the jury was not misled regarding the applicable law:

This Court reviews jury instructions contextually and in its entirety. The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed. Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury. If 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

⁷ Under the doctrine of transferred intent “[i]t is an accepted principle of law that where one is engaged in an affray with another and unintentionally kills a bystander or a third person, his act shall be interpreted with reference to his intent and conduct towards his adversary. . . . Such a person is guilty or innocent exactly as if the fatal act had caused the death of his adversary. It is aptly stated that the malice or intent follows the bullet.” *State v. Goode*, 197 N.C. App. 543, 550, 677 S.E.2d 507, 512 (2009) (citation, quotation marks, and brackets omitted).

substance.

State v. Cornell, 222 N.C. App. 184, 190–91, 729 S.E.2d 703, 708 (2012) (citation, ellipses, and brackets omitted). This Court’s review of the jury instructions as a whole is conducted *de novo*. See *State v. Cruz*, 203 N.C. App. 230, 235, 691 S.E.2d 47, 50, *aff’d per curiam*, 364 N.C. 417, 700 S.E.2d 222 (2010) (“Our Court reviews a trial court’s decisions regarding jury instructions *de novo*.”).

The trial court must instruct the jury on self-defense if there is any evidence in the record from which it can be determined that it was necessary or reasonably appeared to be necessary for defendant to kill his adversary in order to protect himself from death or great bodily harm. Moreover, the trial court must provide a self-defense instruction if the above criteria is met even though there is contradictory evidence by the State or discrepancies in the defendant’s evidence. With regard to whether a defendant is entitled to a jury instruction on self-defense, the trial court must consider the admissible evidence in the light most favorable to the defendant.

Before 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.

Id. at 235-36, 691 S.E.2d at 50-51 (citations, quotation marks, and brackets omitted).

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The trial court did not provide a self-defense instruction in general on the AWDWIKISI or felony murder charge; furthermore, the trial court did not provide a transferred intent instruction on the one self-defense instruction it did provide on first and second-degree murder and voluntary manslaughter. Thus, the only specific self-defense instruction the jury received was as to Jon, and not to Beth:

The defendant would be excused of first-degree murder on the basis of malice, premeditation, and deliberation, and second-degree murder on the ground of self-defense if, first, the defendant believed it was necessary to kill the victim in order to save the defendant from death or great bodily harm.

And second, the circumstances as they appeared to the defendant at the time were sufficient to create such a belief in the mind of a person of ordinary firmness.

The State does not argue that defendant did not present evidence which would support his theory of self-defense, but only that defendant was not credible and that since the trial court instructed the jury on self-defense as to some of the charges, the jury instructions as a whole were sufficient. This argument fails for two reasons. The defendant's credibility is not a consideration for this Court; that is a determination for the jury to make. *See State v. Hannon*, 118 N.C. App. 448, 451, 455 S.E.2d 494, 496 (1995) ("It is fundamental to a fair trial that the credibility of the witnesses be determined by the jury."). Also, when reviewing a trial court's failure to instruct jurors on a self-defense theory, this Court must consider the evidence in the light most favorable to defendant. *See Cruz*, 203 N.C. App. at 235, 691 S.E.2d at 51.

Defendant's evidence presented at trial, if believed, would support an instruction of self-defense on both the AWDWIKISI and felony murder charges as he testified: he went to Jon's home to buy marijuana, with no intent to rob anyone; Jon became so upset when he picked up a gun to look at it that Beth intervened pointing a gun at him; and he was the first person shot, as he was trying to run away, shooting back only to defend himself.

Thus, the jury retired to deliberate with the self-defense instruction applying only to "COUNT 1" for "First-Degree Murder with Premeditation and Deliberation Or Second-Degree Murder Or Voluntary Manslaughter" against Jon. Further compounding the lack of a self-defense instruction, the State's closing argument repeatedly stressed that self-defense could not be used for felony murder stating,

Premeditation, deliberation, malice. These are all concepts we'll talk about in just a second, but they don't apply to felony murder. Also what doesn't apply is self-defense. Self-defense also doesn't apply to felony murder. . . .
. . . Self-defense does not apply to felony murder. Again, stress that over and over again. There's not a need to apply self-defense to felony murder that the defendant is charged with.

Thus, with these confusing instructions and statements from the State, the jury retired to deliberate with a somewhat confusing verdict sheet. The verdict sheet presented options for eight different theories of murder or manslaughter under COUNT 1, and the jury was instructed on self-defense as applied to only three of those eight theories. The verdict sheet with the jury's answers to the various theories

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shows the following for the crimes listed under COUNT 1:

COUNT 1⁸

Guilty of First-Degree Murder;

Under the felony-murder rule, determine whether the defendant committed:
(Mark all that apply)

_____ Attempted Robbery

_____ Attempted First-Degree Murder

Assault with a Deadly Weapon with Intent to Kill Inflicting Serious
Injury

_____ Assault with a Deadly Weapon Inflicting Serious Injury

_____ Assault with a Deadly Weapon with Intent to Kill

_____ Or Not Guilty

Or

_____ First-Degree Murder with Premeditation and Deliberation

Or

Second-Degree Murder

Or

_____ Voluntary Manslaughter

⁸ The verdict sheet did not identify the victim of each Count. Jon was the victim of each crime under Count 1, but four of the underlying felonies could have been regarding Beth. The crimes against Beth were therefore identified both in Count 1, as potential felonies to support felony murder, and separately in Counts 2 and 4 for attempted first-degree murder and the three forms of assault.

Or

_____ Not Guilty

The verdict sheet is confusing, even to this Court. The jury indicated its confusion as well when it wrote a note to the court asking, “Please explain why it matters that we address both theory’s since it[']s for the same count? Why is there an ‘or’ instead of an ‘and’ in the charge sheet.”

Adding one more layer of confusion, instead of giving the self-defense instructions as requested by defendant, the trial court instead instructed the jury on accident “[a]s to the charges of attempted murder and assault with a deadly weapon with intent to kill inflicting serious injury of” Beth. After the instructions were given, defense counsel noted his objection to the accident instruction:

the language in it that an injury is accidental if it’s unintentional, and Judge, I believe that under self-defense an act under self defense would be an intentional act, just that it would lawfully be an intentional act.

THE COURT: I understand what you’re saying but I did not give a self-defense instruction for that.

MR. SHOTWELL: I understand, but I’m saying under the theory that if his actions were lawful under self-defense, then by definition they would be intentional.

Thus, in summary, the trial court’s instructions deliberately separated the instruction for first-degree murder based on premeditation and deliberation, second-degree murder; and voluntary manslaughter for which self-defense would apply from

the felony murder instructions for which self-defense would not apply. The trial court then instructed on accident, although there was no evidence to support this instruction, and did not instruct on self-defense for AWDWIKISI and felony murder, though there was evidence to support those instructions. Ultimately, the jury found defendant not guilty of attempted robbery with a deadly weapon and did not use this as the basis for the felony murder conviction; this part of the verdict indicates that the jury did not believe the State's theory of the case that defendant went to Jon's home and attempted to rob him. The jury actually found defendant guilty of felony murder based only on "Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury[;]" this is the same crime they found defendant guilty of committing against Beth; this is the crime for which defendant unsuccessfully requested a self-defense instruction.

Overall, considering the instructions in their entirety, with the lack of a self-defense instruction which was supported by the evidence, the inclusion of an accident instruction which was not supported by the evidence, the State's jury argument emphasizing that self-defense could not be used for felony murder, the layout of the verdict sheet and the jury's question about it, and the not guilty verdict as to attempted robbery with a deadly weapon, I would conclude the jury may have been "misled" by the jury instructions and the result may have been different if the jury

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STROUD, J., dissent

had been instructed on self-defense as to AWDWIKISI. Generally *Cornell*, 222 N.C. App. at 191, 729 S.E.2d at 708.

I would therefore reverse defendant's convictions and grant defendant a new trial on all charges.