IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1142

Filed: 1 October 2019

Vance County, No. 16CRS5133

STATE OF NORTH CAROLINA

v.

TAMR UNIQUE DAYE, Defendant.

Appeal by defendant from judgment entered on or about 19 March 2018 by Judge Elaine M. O'Neal in Superior Court, Vance County. Heard in the Court of Appeals 7 August 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Matthew Tulchin, for the State.

Sean P. Vitrano for defendant-appellant.

STROUD, Judge.

Defendant appeals the judgment convicting her of second degree murder. Because the jury was erroneously instructed, we conclude defendant must receive a new trial.

I. Background

Much of the testimony regarding defendant's relationship with the decedent, Cory Cheek, Jr.,[1] was provided by defendant; as the State has not contradicted this evidence, we use it to provide a brief background. Through 2015 and 2016, defendant had an on-again, off-again romantic relationship with Mr. Cheek. At times the two lived together and eventually they had a child together, though their relationship was punctuated with domestic violence. Defendant testified Mr. Cheek had thrown bleach on her, dragged her outside the home naked, punched her in the face, and beaten her for up to 30 minutes at one time. Defendant had previously gotten a restraining order and domestic violence protective order against Mr. Cheek, but she dismissed the orders when she found out she was pregnant. On 1 May 2019, as a result of the beating, defendant got a warrant from the magistrate's office for the assault against her. On the evening of 14 May and into the early morning hours of 15 May, the defendant and Mr. Cheek ended up at the same nightclub and had a physical altercation. Later that night, they both ended up at a Denny's restaurant. At this point, the State and defendant's stories diverge.

The State's theory, supported mainly by testimony from defendant's former friend Je'cona Douglas who was also an eye witness, was that defendant went into Denny's and began arguing with Mr. Cheek. Eventually defendant came back outside

[1] Spelled as "Corey" in the transcript.

and Mr. Cheek was following her. Mr. Cheek then talked to a woman in another car, and defendant walked up to the car and shot him.

According to defendant, she went to Denny's and before she entered the restaurant, a friend told her Mr. Cheek would beat her up. Defendant turned around to leave, but Mr. Cheek followed her back to the car saying, "Bitch, where you going? You got me fucked up. Where my daughter at? I'm gonna kill you." Defendant saw Mr. Cheek reach for something in his pocket and was aware he often carried a gun; she reached for a gun in her pocketbook and shot him one time. Mr. Cheek died as a result of the wound. Defendant then went home and told her mother, and then went to the police station to inform them about what had happened.

Defendant was indicted for first degree murder. At trial defendant testified that she shot Mr. Cheek in self-defense though she did not use that term but explained in detail how she just "meant to shoot him. To get him off of me, to get him away from me, so he won't hurt me."

The trial court provided a modified self-defense jury instruction that deviated from the instructions as agreed upon by both defendant and the State. During the charge conference the following dialogue took place:

> THE COURT: Now, when we turn to page 4, I know there are some changes there. I'll let y'all start. From the State or the Defense?
>
> MS. PELFREY: Judge, it would be -- *it's the State's position that -- I don't think that there's any evidence*

> *that is before the Court that the Defendant was aggressor in provoking anything*. So I think that what the first full paragraph should read would be the Defendant would not be guilty of any murder or manslaughter if the Defendant acted in self-defense and did not use excessive force under the circumstances.
>
> THE COURT: Would you agree with that, Attorney Norman?
>
> MR. NORMAN: I would agree with that, Your Honor.
>
> THE COURT: All right. We'll make that change. And you may remain seated for this, please.

(Emphasis added.)

However, when the trial court actually instructed the jury it stated,

> The Defendant will be excused of First Degree Murder and Second Degree Murder on the grounds 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.
>
> In determining the reasonableness of the Defendant's belief, you should consider the circumstances as you find them to have existed from the evidence, including the size, age, and strength of the Defendant as compared to the victim; the fierceness of the assault, if any, upon the Defendant; whether the victim had a weapon in the victim's possession; and the reputation, if any, of the victim for danger and violence.
>
> The Defendant would not be guilty of any murder or manslaughter if the Defendant acted in self-defense and did not use excess force under the circumstances.
>
> A Defendant does not have the right to use excessive

> force. A Defendant uses excessive force if the Defendant uses more force than reasonably appeared to the Defendant to be necessary at the time of the killing.
>
> It is for you, the jury, to determine the reasonableness of the force used by the Defendant under all of the circumstances as they appear to the Defendant at the time.
>
> Therefore, in order for you to find the Defendant guilty of First Degree Murder or Second Degree Murder, the State must prove beyond a reasonable doubt, among other things, that the Defendant did not act in self-defense, *or failing in this, that the Defendant was the aggressor with the intent to kill or to inflict serious bodily harm upon the deceased.*
>
> If the State fails to prove that the Defendant did not act in self-defense *or was the aggressor with the intent to kill or to inflict serious bodily harm,* you may not convict the Defendant of either First or Second Degree Murder.

(Emphasis added.). Defendant was found guilty by a jury of second degree murder and sentenced to life imprisonment without parole. Defendant appeals.

II. Self-Defense Instruction

Defendant contends that it was reversible error for the trial court to provide the aggressor instruction.

A. Preservation

The State begins by noting defendant failed to object to the instruction and therefore preserve it. But our Supreme Court has stated specifically on the issue of a self-defense instruction,

> Though the trial court here agreed to instruct the jury on self-defense under N.C.P.I.–Crim. 206.10, it omitted the "no duty to retreat" language of N.C.P.I.–Crim.

> 206.10 without notice to the parties and did not give any part of N.C.P.I.–Crim. 308.10, the "stand-your-ground" instruction. While defendant offered ample evidence at trial that he acted in self-defense while standing in a public street where he had a right to be when he shot Epps, the trial court did not instruct the jury that defendant could stand his ground. The State nonetheless contends that defendant did not object to the instruction as given, thereby failing to preserve the error below and rendering his appeal subject to plain error review only.
>
> *When a trial court agrees to give a requested pattern instruction, an erroneous deviation from that instruction is preserved for appellate review without further request or objection.*
>
> > A request for an instruction at the charge conference is sufficient compliance with the rule to warrant our full review on appeal where the requested instruction is subsequently promised but not given, notwithstanding any failure to bring the error to the trial judge's attention at the end of the instructions.
>
> Because the trial court here agreed to instruct the jury in accordance with N.C.P.I.–Crim. 206.10, its omission of the required stand-your-ground provision substantively deviated from the agreed-upon pattern jury instruction, thus preserving this issue for appellate review under N.C.G.S. § 15A-1443(a).

State v. Lee, 370 N.C. 671, 675–76, 811 S.E.2d 563, 567 (2018) (citation and brackets omitted). Here, the trial court agreed to a specific instruction and to omit the aggressor language, yet actually provided aggressor language to the jury though both parties agreed there was no evidence to support it, so this issue is preserved even though defendant failed to object. *See id.*

B. Standard of Review

> The question of whether a trial court erred in instructing the jury is a question of law reviewed *de novo*. The standard of review set forth by this Court for reviewing jury instructions is as follows:
>
> > This Court reviews jury instructions contextually and in its entirety. The charge will be held 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.

State v. McGee, 234 N.C. App. 285, 287, 758 S.E.2d 661, 663 (2014) (citations, brackets, and ellipses omitted).

C. Aggressor Instruction

On appeal, the State argues the evidence could support a theory that defendant was the aggressor, by instigating the encounter with Mr. Cheek which led to the shooting. But the State contended at trial that "I don't think that there's any evidence that is before the Court that the Defendant was aggressor in provoking anything." "Our Supreme Court has long held that where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts." *State v. Holliman*, 155 N.C. App. 120, 123, 573 S.E.2d 682, 685 (2002) (citations and quotation marks omitted). We reject the State's attempt to now argue the opposite of what it did before

the trial court. Further, by advocating for a self-defense instruction, but contending there was *no evidence defendant was the aggressor*, the State was necessarily contending an imperfect self-defense instruction based upon this theory was not appropriate:

> A defendant is entitled to a jury instruction on self-defense when there is evidence from which the jury could infer that he acted in self-defense.
>
> 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. For defendant to be entitled to an instruction on either perfect or imperfect self-defense, the evidence must show that defendant believed it to be necessary to kill his adversary in order to save himself from death or great bodily harm. In addition, defendant's belief must be 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.
>
> A defendant cannot benefit from perfect self-defense and can only claim imperfect self-defense, if he was the aggressor or used excessive force. Where there is evidence that defendant acted in self-defense, the court must charge on this aspect even though there is contradictory evidence by the State or discrepancies in defendant's evidence.

State v. Broussard, 239 N.C. App. 382, 385, 768 S.E.2d 367, 369–70 (2015) (citations and quotation marks omitted).

Based upon the State's theory and evidence, defendant was not acting in perfect or imperfect self-defense by instigating the encounter which led to her

shooting Mr. Cheek; she was not acting in self-defense at all. *See id.* Based upon the defendant's theory and evidence, Mr. Cheek came out of Denny's, confronted her, and began reaching for what she believed to be his gun, so she acted to defend herself. Defendant's evidence supports an instruction of perfect self-defense or imperfect self-defense if the jury determined she used excessive force under the circumstances, but not imperfect self-defense based the theory she was the aggressor. *See generally id.* Thus, the only theory of imperfect self-defense supported by the evidence would be whether defendant used excessive force in defending herself from Mr. Cheek. *See generally id.* This was the basis of the State's request for the modified jury instruction: "So I think that what the first full paragraph should read would be the Defendant would not be guilty of any murder or manslaughter if the Defendant acted in self-defense and did not use excessive force under the circumstances."

The State then contends that even if the aggressor instruction was given in error, it was not prejudicial. We disagree. The only major fact in dispute was why defendant shot Mr. Cheek. Defendant claimed perfect self-defense; the State claimed she intentionally shot him, perhaps out anger. The jury did not find perfect self-defense was applicable, but we have no way of knowing why. It is entirely possible that due to the instruction the jury believed defendant was acting to protect herself from an imminent threat and that she did not use excessive force, but she was the aggressor because she went to Denny's and thereafter initiated an encounter, and

thus self-defense was not applicable. *See generally McGee*, 234 N.C. App. at 287, 758 S.E.2d at 663 (noting defendant must show not only error in the instruction but that "such error was likely, in light of the entire charge, to mislead the jury"). We note that the jury did not find defendant guilty of first degree murder, but only second degree murder, which tends to indicate it rejected the State's theory at least to some extent. Because both parties agreed there was no evidence to support an aggressor instruction, this language should not have been included and likely misled the jury, which was provided two different versions of events and three possible crimes -- first degree murder, second degree murder, and voluntary manslaughter -- on the verdict sheet. *Id.* The erroneous aggressor instruction may have led the jury to believe defendant's claim of self-defense, even if they found it to be credible, did not apply. *See id.*

III. Conclusion

We conclude defendant must receive a new trial.

New Trial.

Judges BRYANT and DIETZ concur.

Report per Rule 30(e).