IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1231

Filed: 5 November 2019

Wayne County, No. 16CRS050564

STATE OF NORTH CAROLINA

v.

GREGORY SCOTT COBURN, Defendant.

Appeal by defendant from judgment entered on or about 15 December 2017 by Judge William W. Bland in Superior Court, Wayne County. Heard in the Court of Appeals 20 August 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Melissa H. Taylor, for the State.

Franklin E. Wells, Jr., for defendant-appellant.

STROUD, Judge.

Defendant appeals a judgment convicting him of assault with a deadly weapon inflicting serious injury. On appeal defendant argues the trial court should have instructed the jury on defense of habitation based upon North Carolina General Statute § 14-51.2. Because defendant invited any error in the trial court's instructions as to self-defense and defense of habitation, defendant has waived review of this issue, including plain error review. We thus conclude there was no error in defendant's trial .

I. Background

The State's evidence showed that Mr. William Howard Lancaster, Jr. had owned the home where he also resided for 32 years. Mr. Lancaster was an acquaintance of defendant and allowed defendant to move into the home at a time when defendant was struggling to find a stable living arrangement. Defendant occasionally paid Mr. Lancaster for the accommodations. Mr. Lancaster did not consider himself to be renting the room but rather "helping [defendant] out" until he was able to get a job and move. Defendant lived with Mr. Lancaster for approximately four months, and in February of 2016, Mr. Lancaster asked defendant to leave. Shortly thereafter, Mr. Lancaster went to the home with Tony Anderson. Mr. Anderson and defendant got into an argument and a physical altercation ensued. Mr. Lancaster testified he saw defendant hit Mr. Anderson with a crowbar and a bat and spray fire at Mr. Anderson using an aerosol can and a lighter. Mr. Lancaster tried to break up the fight, and defendant stabbed him in the leg with a knife from his back pocket.

Defendant also testified in his own defense. Defendant said he was renting a room from Mr. Lancaster. One Friday Mr. Lancaster came home and told defendant if he messed with one of the women who was visiting the home he would "cut [his] guts out." Defendant left the house on Saturday morning and did not return until

Sunday. Defendant was packing up when Mr. Lancaster and his son[1] threatened defendant; defendant called 911. The police came and when they left, Mr. Lancaster, Mr. Anderson, and Mr. Lancaster's son went into defendant's room, "cornered me in the back of my bedroom and was jumping at me" and threatened defendant. Defendant called 911 again because he "needed help," and he "was scared they were going to, you know, really hurt me, jump on me." Defendant claimed he was defending himself when he pulled out the knife.

Defendant was indicted for assault with a deadly weapon with intent to kill inflicting serious injury and attempted voluntary manslaughter. The trial court dismissed some of the charges against defendant and submitted only assault with a deadly weapon inflicting serious injury to the jury, and the jury found defendant guilty. The trial court entered judgment and sentenced defendant to a minimum of 29 months and a maximum of 44 months imprisonment. Defendant appeals.

II. Preservation of Issue on Appeal

Defendant's only issue on appeal is whether the trial court erred in failing to instruct the jury on defense of habitation. The State contends defendant failed to preserve this issue for appeal because he did not request an instruction regarding defense of habitation. Defense of habitation was discussed from the beginning of the

[1] The record does not include the age of Mr. Lancaster's son, but it appears he was an adult. Mr. Lancaster's son left the scene "before the Sheriff got there" so the extent of his participation in the incident is not clear.

trial, based upon a pretrial motion, until the end, during the charge conference. Defendant filed several motions prior to trial; one alleged he was immune from prosecution based upon defense of habitation under North Carolina General Statutes §§ 14.51.2 and 15A-954. The trial court denied defendant's pretrial motion to dismiss based upon "immunity" from prosecution and defendant has not challenged this ruling appeal. After all of the evidence was presented, defendant made several more motions, particularly regarding self-defense and the alleged defender's reasonable belief of the need to use force. Defendant did argue for defense of habitation. The trial court then stated,

> I'm going to talk with each of the lawyers as we do this, so we kind of have an idea what's coming, and then get it firmly on the record. . . . Let's officially be in recess until a quarter to 2:00, and but let me speak to you all in chambers.

Upon return to the courtroom the trial court stated, "I appreciate the assistance and professional attitude of counsel as we worked through lunch addressing some of these issues." The trial court listed the introductory pattern jury instructions it intended to give and then addressed the jury instructions regarding self-defense and stated,

> Now, on the substantive charge, particularly as to the self-defense, the same issues, which were challenging in 14-51.2 and 14-51.3 made this, ah . . . charge challenging; however, we're proceeding with assault with a deadly weapon inflicting serious injury.

> And then, including the defense of self-defense. When you go to the self-defense instruction, 308.45, in the pattern jury instruction, which, of course, is not the law, but is a dedicated attempt to properly instruct on the law, that instruction, 308.45, has a note well where it says if the assault occurred in the Defendant's home, place of residence, or place of motor vehicle, use North Carolina Pattern Jury Instruction 308.8, defense of habitation. And we looked at that, the Court looked, and all of us looked together at that defense of habitation. It . . . under the facts as -- or the evidence as it's developed, and in this case, I mean I really think all of us agreed, but I'll speak only for the Court. That under the evidence as we've heard, 308.45, that self-defense instruction fit best and was appropriate even under the law in the facts or the evidence as it's come up here[.]

The trial court then asked, "Anybody wish to be heard on these instructions?" The State's attorney did not and defendant's attorney stated:

> Judge, the only exception the Defendant would note is in the self-defense instruction 308.45, it provides that if the circumstances would have created a reasonable belief in the mind of a person of ordinary firmness, we believe that to be an inaccurate statement under the law, under 14-51.3, and if you would note our exception to that portion for the record, Judge.

Defendant did not request an instruction on defense of habitation under North Carolina General Statute § 14-52.2.

The trial court later brought up defense of habitation again, stating,

> Also, the, ah . . . but there was certainly timely filed a notice of self-defense by the Defendant, there was no specific request for the defense of habitation, or abode or whatever it's called. But, ah . . . and there was some discussion whether that had to be mandatory, because it's in a house

> that, ah -- stated the reasons that we're proceeding here which seemed applicable to the evidence in this case.

The trial court again noted self-defense as the appropriate instruction and asked if defendant's attorney would like to say anything further to which he responded, "No, sir."

The trial court then instructed the jury as to self-defense and not as to defense of habitation, and once the jury had left the courtroom asked counsel, "Are there any additions or corrections to the instructions as they were read?" Defendant's counsel renewed the earlier request regarding the wording of the "reasonable belief" portion of the self-defense instruction. At 4:59 p.m., the trial court brought the jury back into the courtroom and had them recess for the evening; again, the trial court asked if defendant's counsel had anything further, and he did not.

The following day, the jury reached its verdict, and at no point during the charge conference or the conversations until the close of the trial did defendant's attorney mention giving a jury instruction on the defense of habitation. Yet on appeal, defendant raises only one issue – that the trial court erred in failing to give a defense of habitation instruction.

Defendant contends this issue regarding the instruction on defense of habitation is preserved because the charge conference was not recorded in its entirety in contravention of North Carolina General Statute § 15A-1231. North Carolina General Statute § 15A-1231 provides:

> (b) Before the arguments to the jury, the judge must hold a recorded conference on instructions out of the presence of the jury. At the conference the judge must inform the parties of the offenses, lesser included offenses, and affirmative defenses on which he will charge the jury and must inform them of what, if any, parts of tendered instructions will be given. A party is also entitled to be informed, upon request, whether the judge intends to include other particular instructions in his charge to the jury. The failure of the judge to comply fully with the provisions of this subsection does not constitute grounds for appeal unless his failure, not corrected prior to the end of the trial, materially prejudiced the case of the defendant.
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> (c) After the arguments are completed, the judge must instruct the jury in accordance with G.S. 15A-1232.
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> (d) All instructions given and tendered instructions which have been refused become a part of the record. Failure to object to an erroneous instruction or to the erroneous failure to give an instruction does not constitute a waiver of the right to appeal on that error in accordance with G.S. 15A-1446(d)(13).

N.C. Gen. Stat. § 15A-1231 (2017).

Defendant contends that the trial court and counsel discussed the jury instructions during the lunch break and the entire conference was therefore not recorded. Defendant essentially argues that if *all* of a charge conference is not recorded, the defendant can raise *any* issue regarding the instructions on appeal because the statute requires the conference to be recorded and if it is not, there is no way of knowing all of the issues raised before the trial court. We agree that North Carolina General Statute § 15A-1231 provides that the entire charge conference

should be recorded, and that is the better practice, but where the entire charge conference is not recorded, defendant must show he was "materially prejudiced" based upon the trial court's failure to comply: "The failure of the judge to comply fully with the provisions of this subsection does not constitute grounds for appeal unless his failure, not corrected prior to the end of the trial, materially prejudiced the case of the defendant." *Id.*

In these circumstances, even though a portion of the conference was not recorded, defendant cannot show material prejudice from the failure to record the entire conference. *See id.* Before the trial court spoke with counsel off the record during the break, he clarified he wanted to ensure that when they returned all of the issues would be "firmly on the record." The trial court summarized on the record the discussions with counsel regarding the jury instructions during lunch; defendant had no objections or additions to the trial court's summary regarding the defense of habitation. In addition, on the record, the trial court *twice* mentioned the possibility of giving an instruction on defense of habitation and invited counsel to address this issue. But defendant instead focused on the self-defense instruction, specifically on the portion regarding reasonable belief, but did not mention or request defense of habitation, despite the extensive discussion of defense of habitation prior to the charge conference. Further, even after the instructions were given, defendant failed to raise any objection regarding the defense of habitation. Although some discussion

regarding jury instructions was not recorded, the possibility of providing a jury instruction regarding defense of habitation was discussed at length on the record. Despite direct questions by the trial court, defendant did not request the instruction. We agree with the State that defendant has not shown material prejudice from failure to record the entire charge conference. *See id.*

Defendant next contends that even if his argument regarding instruction on defense of habitation was not properly preserved, the trial court plainly erred in failing to instruct the jury on defense of habitation.

> Because our courts operate using the adversarial model, we treat preserved and unpreserved error differently. . . . Unpreserved error in criminal cases . . . is reviewed only for plain error.
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> . . . .
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> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings[.]

State v. Lawrence, 365 N.C. 506, 512-18, 723 S.E.2d 326, 330-34 (2012) (citations and quotation marks omitted).

But plain error review is not available where the defendant has invited the error he seeks to raise on appeal:

> It is well established that a defendant who causes or joins in causing the trial court to commit error is not in a position to repudiate his action and assign it as ground for a new trial. Under the doctrine of invited error, a party cannot complain of a charge given at his request, or which is in substance the same as one asked by him. Moreover, a defendant who invites error waives his right to all appellate review concerning the invited error, including plain error review.

State v. Jones, 213 N.C. App. 59, 67, 711 S.E.2d 791, 796 (2011) (citations, quotations, ellipses, and brackets omitted).

As discussed above, the theory of defense of habitation under North Carolina General Statute § 14-52.2 was addressed several times during the trial. Although a portion of the charge conference was not recorded, defendant cannot show material prejudice as to the instructions as to self-defense and specifically defense of habitation because this issue was discussed on the record. The trial court specifically asked about giving this instruction twice, and defendant did not request it, nor did defendant request any addition to the instructions after they were given. Because of the extensive discussion regarding defense of habitation, defendant's failure to request an instruction on defense of habitation, and defendant's failure to object to the instructions as given, if there was any error in failing to provide the instruction, this error was invited and is not subject to plain error review. *See id.* This argument is overruled.

III. Conclusion

For the foregoing reasons, we conclude there was no error in defendant's trial.

NO ERROR.

Chief Judge McGEE and Judge MURPHY concur.