IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-968

Filed: 19 November 2019

Gaston County, Nos. 15 CRS 59186-87, 59230, 16 CRS 8087

STATE OF NORTH CAROLINA

v.

DARREN ANDREW ADAMS

Appeal by defendant from judgment entered 1 November 2017 by Judge Jeff Carpenter in Superior Court, Gaston County. Heard in the Court of Appeals 10 April 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sandra Wallace-Smith, for the State.

Sarah Holladay for defendant-appellant.

STROUD, Judge.

Defendant argues on appeal that the trial court erred in its jury instruction on self-defense, he received ineffective assistance of counsel, and he was not given an opportunity to be heard before the trial court entered a civil judgment for attorney's fees. Even though the trial court did not include the instruction on self-defense in its final mandate, because "the trial court made it clear to the jury that a verdict of not

guilty by reason of self-defense was permissible, and under what circumstances the jury should return such a verdict[,] we find no error by the trial court." *State v. McNeil*, 196 N.C. App. 394, 404, 674 S.E.2d 813, 820 (2009). We deny Defendant's IAC claim and vacate and remand for further proceedings on Defendant's civil judgment for attorney's fees.

I. Background

At trial, the State's evidence tended to show that on 20 August 2015, Defendant was using methamphetamine in a motel room with Joshua Gilliland, Kara, and Alice.[1] In the early morning of 21 August 2015, Mr. Gilliland and Defendant left the room, and Defendant returned alone. After being propositioned by Defendant about having a threesome, Kara and Alice left the room. Mr. Gilliland returned in the morning to pick up some of Kara's belongings. Defendant and Mr. Gilliland discussed the situation and decided to rent the room for the rest of the weekend. Mr. Gilliland went to pay for the room while Defendant used drugs.

Defendant testified when Mr. Gilliland returned to the room, they got into a fight, and Defendant claimed that Mr. Gilliland pulled out what he believed to be a knife. Defendant regularly carried a gun and shot Mr. Gilliland. After he was shot, Mr. Gilliland dropped a screwdriver. Defendant left a note on Mr. Gilliland's body

[1] We have used pseudonyms to protect the privacy of participants not charged with a crime.

which said, "knife self-defense." Mr. Gilliland's body and the note were found by a motel manager later in the day.

Defendant attempted to leave the motel in Mr. Gilliland's vehicle but was unable to get it to start. Defendant got a ride from a friend and they were pulled over because the tag and inspection had expired. The friend was issued a citation and Defendant drove the vehicle because his friend did not have a valid driver's license. Defendant drove to meet a second friend, Hannah. After driving Hannah to the DMV because she did not have a valid license, they got into a confrontation and Defendant hit Hannah with his fist and gun. Hannah was able to get away from Defendant, and someone who observed the incident called 911. Police found Defendant in nearby heavy vegetation. When the officers searched Defendant, they found two phones and a folding knife. Officers were unable to locate Defendant's gun. Several days later, after reviewing surveillance video, an office manager in a nearby building saw Defendant in the video, found a gun, and called the police.

Defendant was indicted for first degree murder of Mr. Gilliland, assault with a deadly weapon, assault on a female, and first degree kidnapping. Defendant was tried before a jury at the 23 October 2017 session of Superior Court, Gaston County. Defendant testified, and his defense to the first degree murder charge rested entirely on self-defense. In the charge conference the trial court indicated it would use part of N.C.P.I.-Crim 206.10 "first degree murder where a deadly weapon is used, covering

all lesser included homicide offenses and self-defense felony." On 1 November 2017, the jury found Defendant guilty of first degree murder and first degree felony murder as to Mr. Gilliland and assault with a deadly weapon, assault on a female, and second degree kidnapping as to Hannah. The trial court consolidated the convictions and sentenced Defendant to life without parole. The trial court also entered a civil judgment for Defendant to pay court costs, jail fees, and attorney's fees. Defendant gave notice of appeal in open court.

II. Standard of Review

Defendant argues we should review his argument *de novo*, as he contends the trial court failed to give a pattern jury instruction it was planning to give.

> [A] request for an instruction at the charge conference is sufficient compliance with Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure 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.

State v. Withers, 179 N.C. App. 249, 255, 633 S.E.2d 863, 867 (2006) (brackets omitted) (quoting *State v. Ross*, 322 N.C. 261, 265, 367 S.E.2d 889, 891 (1988)).

Defendant contends the final mandate omitted this sentence from N.C.P.I.-Crim 206.10:

> And finally, if the State has failed to satisfy you beyond a reasonable doubt that the defendant did not act in self-defense, that the defendant was the aggressor, or that the defendant used excessive force, then the

> defendant's action would be justified by self-defense; and it would be your duty to return a verdict of not guilty.

The record shows that the trial court did plan to give, and did provide, an instruction based upon N.C.P.I.-Crim 206.10, although it did not include this sentence. But during the charge conference, the trial court and counsel were not simply referring to a list of numbered pattern jury instructions; they were discussing a written "working draft" of the pattern jury instruction as customized for this case. Defendant did not request the modification to the jury instructions he argues as error on appeal regarding the final mandate in regard to self-defense.

On 30 October 2017, the trial court told both parties' counsel about a "working draft" of potential jury instructions for consideration, and this draft included N.C.P.I.-Crim 206.10. However, the "working draft" is not in our record, only the final written version as prepared after the charge conference and incorporating the modifications to the instruction and the transcript of the instructions as given. The next day, the charge conference resumed, and the trial court discussed the "working draft" with counsel. Both the State's counsel and Defendant's counsel made various requests for modifications to the jury instructions. Based upon the transcript, the "working draft" did not include the self-defense instruction in the final mandate, but Defendant did not request any changes to this part of the instructions. The primary changes to the instructions relating to self-defense were made to distinguish between the instructions applicable to the killing of one victim, Mr. Gilliland, as opposed to the

assault charges regarding Hannah, since self-defense was not applicable to those charges.

Because the trial court gave the jury instructions as discussed at the charge conference and included the modifications allowed based upon requests by both the State and Defendant, our standard of review is plain error.

> Plain error is "error so fundamental that it tilted the scales and caused the jury to reach its verdict convicting the defendant." "In deciding whether a defect in the jury instruction constitutes 'plain error', [sic] the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt."

State v. McNeil, 196 N.C. App. at 400, 674 S.E.2d at 817-18 (alteration in original) (citations omitted).

III. Self-Defense Instruction

Defendant argues "the trial court erred or committed plain error by failing to give the final mandate on self-defense when instructing the jury as to premediated and deliberated murder." (Original in all caps.) The State argues that "the trial court sufficiently charged the jury on self-defense." The State also maintains Defendant failed to prove any potential error was prejudicial.

In *State v. Dooley*, the trial court failed to give a specific instruction on self-defense in its final mandate to the jury. 285 N.C. 158, 203 S.E.2d 815 (1974). Our Supreme Court held:

> We agree with defendant that a specific instruction on self-defense should have been given by the trial judge in his final mandate to the jury. Defendant's defense rested solely on self-defense. Although the court prior to the final mandate explained the law relating to self-defense, in his final instruction he omitted any reference to self-defense other than to say "but [if] you are satisfied that the defendant killed Thomas without malice, or that he killed him in the heat of a sudden passion, and that in doing so, that he used excessive force in the exercise of self-defense, it would be your duty to return a verdict of manslaughter." Here in the final mandate the court gave special emphasis to the verdicts favorable to the State, including excessive use of force in self-defense as a possible verdict. At no time in this mandate did the court instruct the jury that if it was satisfied by the evidence that defendant acted in self-defense, then the killing would be excusable homicide and it would be their duty to return a verdict of not guilty.
>
> The failure of the trial judge to include not guilty by reason of self-defense as a possible verdict in his final mandate to the jury was not cured by the discussion of the law of self-defense in the body of the charge. By failing to so charge, the jury could have assumed that a verdict of not guilty by reason of self-defense was not a permissible verdict in the case.

Id. at 165-66, 203 S.E.2d at 820 (alteration in original). Following *Dooley*, this Court has consistently held that when the trial court fails to include a self-defense instruction in the final mandate it is reversible error resulting in a new trial. *See, e.g., State v. Withers*, 179 N.C. App. at 256, 633 S.E.2d at 868 ("We thus hold that the trial court's failure to specifically instruct the jury as to a verdict of not guilty by reason of self-defense in the final mandate was reversible error, and we remand for a new trial.").

In *State v. McNeil*, the trial court instructed the jury on self-defense in the main body of the charge, but failed to instruct on self-defense in the final mandate as follows:

> Now, ladies and gentlemen of the jury, if you find from the evidence beyond a reasonable doubt that on or about the alleged date, that is, March the 15th last year, 2007, the Defendant, Mr. McNeil, intentionally *but not in self-defense* killed the victim, Mr. Barnes, thereby proximately causing the victim's death and that the Defendant acted with malice, with premeditation and with deliberation, it would be your duty to return a verdict of guilty of first degree murder. If you do not so find or have a reasonable doubt as to one or more of these things, you will not return a verdict of first degree murder.
>
> If you do not find the Defendant guilty of first degree murder, you must determine whether he is guilty of second degree murder. If you find from the evidence beyond a reasonable doubt that on or about the alleged date, March 15th, 2007, the Defendant, Mr. McNeil, intentionally and with malice *but not in self-defense* wounded the victim, Mr. Barnes, thereby proximately causing Mr. Barnes' death, it would be your duty to return a verdict of guilty of second degree murder. If you do not so find or . . . have a reasonable doubt as to one or more of these things, you will not return a verdict of second degree murder.
>
> If you do not find the Defendant guilty of second degree murder, you must consider whether he's guilty of voluntary manslaughter. If you find from the evidence beyond a reasonable doubt that on or about the alleged date, March 15, 2007, the Defendant, Mr. McNeil, intentionally wounded the victim, Mr. Barnes, and thereby proximately caused Mr. Barnes' death and that the Defendant, Mr. McNeil was the aggressor in bringing on the fight or use of excessive force, it would be your duty to return a verdict of guilty of voluntary manslaughter *even if the State has failed to prove that the Defendant did not act in self-defense.* Or if you find from the evidence beyond a reasonable doubt

> that on or about the alleged date, March 15th, 2007, the Defendant, Mr. McNeil, intentionally and *not in self-defense* wounded the victim, Mr. Barnes, and thereby proximately caused the victim's death but the State has failed to satisfy you beyond a reasonable doubt that the Defendant did not act in the heat of passion upon adequate provocation, it would be your duty to return a verdict of guilty of voluntary manslaughter.
> If you do not so find or have a reasonable doubt as to one or more of these things, ladies and gentlemen, then you would return a verdict of not guilty.

196 N.C. App. at 402-03, 674 S.E.2d at 819 (alteration in original). The *McNeil* Court concluded:

> Although the trial court did not include "not guilty by reason of self-defense" as a possible verdict in its final mandate, the jury instructions considered as a whole were correct. "Many decisions of this Court hold that 'a charge must be construed contextually, and isolated portions of it will not be held prejudicial when the charge as a whole is correct.'" Here, when the trial court's instructions to the jury are considered as a whole, "[w]e think the jury clearly understood that the burden was upon the State to satisfy it beyond a reasonable doubt that [D]efendant did not act in self-defense and clearly understood the circumstances under which it should return a verdict of not guilty by reason of self-defense." Unlike in *Dooley* and *Tyson*, the trial court made it clear to the jury that a verdict of not guilty by reason of self-defense was permissible, and under what circumstances the jury should return such a verdict.

Id. at 404, 674 S.E.2d at 819-20 (citations omitted) (alterations in original) (quoting *State v. Jones*, 294 N.C. 642, 653, 243 S.E.2d 118, 125 (1978)).

Here, the trial court instructed the jury on self-defense in the main body of the charge, and the trial court's final mandate included the following instructions:

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant, acting with malice and *not in self-defense*, wounded the victim with a deadly weapon thereby proximately causing the victim's death, that the defendant intended to kill the victim, and that the defendant acted after premeditation and with deliberation, it would be your duty to return a verdict of guilty of first-degree murder. If you do not so find or have a reasonable doubt as to one or more of these things you will not return a verdict of guilty of first-degree murder but will determine whether the defendant is guilty of second-degree murder.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant intentionally and with malice, *but not in self-defense*, wounded the victim with a deadly weapon, thereby proximately causing the victim's death, it would be your duty to return a verdict of guilty of second-degree murder. If you do not so find or have a reasonable doubt as to one or more of these things you will not return a verdict of guilty of second-degree murder but will determine whether the defendant is guilty of voluntary manslaughter.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant intentionally wounded the victim with a deadly weapon and thereby proximately caused the victim's death, used excessive force -- or used excessive force, it would be your duty to find the defendant guilty of voluntary manslaughter *even if the State has failed to prove that the defendant did not act in self-defense*.

Or if you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant intentionally, *and not in self-defense*, wounded the victim with a deadly weapon and thereby proximately caused the victim's death, but the State has failed to satisfy you beyond a reasonable doubt that the defendant did not act in the heat of passion upon adequate provocation, it would be your duty to return a verdict of guilty of voluntary manslaughter. If you do not so find or have a reasonable doubt as to one or more of these things it would be your

> duty to return a verdict of not guilty.

(Emphasis added.)

The trial court's final mandate to the jury was almost identical to the final mandate in *State v. McNeil*, 196 N.C. App. 394, 674 S.E.2d 813. Accordingly,

> when the trial court's instructions to the jury are considered as a whole, "[w]e think the jury clearly understood that the burden was upon the State to satisfy it beyond a reasonable doubt that [D]efendant did not act in self-defense and clearly understood the circumstances under which it should return a verdict of not guilty by reason of self-defense."

Id. at 404, 674 S.E.2d at 820 (alterations in original). The trail court's failure to include the final instruction on self-defense does not rise to the level of plain error, and this argument is overruled.

IV. Ineffective Assistance of Counsel

Defendant argues that his trial counsel was ineffective by failing to request a jury instruction on self-defense for the felony murder charge where the underlying felony was robbery with a dangerous weapon. To show ineffective assistance of counsel,

> the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial whose result was reliable. Unless a defendant

> makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process which renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984); *see also State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985). "The merits of an ineffective assistance of counsel claim will be decided on direct appeal only 'when the cold record reveals that no further investigation is required.'" *State v. Friend*, ___ N.C. App. ___, ___, 809 S.E.2d 902, 906 (2018) (quoting *State v. Thompson*, 359 N.C. 77, 122-23, 604 S.E.2d 850, 881 (2004)).

Defendant argues in his brief:

> During the charge conference, defense counsel stated that "under the current case law," he was not seeking a jury instruction on self-defense as to the felony murder theory of first-degree murder. It was believed that such an instruction would not be appropriate because "there is no application of self-defense to the robbery with a dangerous weapon" underlying the felony murder charge. Defense counsel was acting under a misapprehension of the law of self-defense as it relates to felony murder, to the prejudice of [Defendant].

(Parentheticals omitted.)

Our Supreme Court has held that "[a]s to felony murder, self-defense is available only to the extent that it relates to applicable underlying felonies. We fail to see how defendant could plead self-defense to a robbery the jury found he had attempted to commit himself." *State v. Jacobs*, 363 N.C. 815, 822, 689 S.E.2d 859, 864 (2010) (citation omitted). Yet, Defendant quotes a concurrence in *State v. Lee*,

370 N.C. 671, 678, 811 S.E.2d 563, 568 (2018) (Martin C.J., concurring) to support his argument that North Carolina General Statute § 14-51.3(a) and (a)(1) "at least partially abrogated—and may have completely replaced—our State's common law concerning self-defense[.]" North Carolina General Statute § 14-51.3 provides as follows:

> (a) A person is justified in using force, except deadly force, against another when and to the extent that the person reasonably believes that the conduct is necessary to defend himself or herself or another against the other's imminent use of unlawful force. However, a person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to be if either of the following applies:
>
> (1) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another.
>
> (2) Under the circumstances permitted pursuant to G.S. 14-51.2.
>
> (b) A person who uses force as permitted by this section is justified in using such force and is immune from civil or criminal liability for the use of such force, unless the person against whom force was used is a law enforcement officer or bail bondsman who was lawfully acting in the performance of his or her official duties and the officer or bail bondsman identified himself or herself in accordance with any applicable law or the person using force knew or reasonably should have known that the person was a law enforcement officer or bail bondsman in the lawful performance of his or her official duties.

N.C. Gen. Stat. § 14-51.3 (2017).

Defendant contends that based upon the provision that "[a] person who uses force as permitted by this section is justified in using such force and is immune from civil or criminal liability for the use of such force," *id.*,

> if the jury found that [Defendant] was justified in using deadly force against Joshua Gilliand, he could not be convicted of felony murder, despite common law precedent to the contrary. [Defendant] was entitled to an instruction on self-defense as to felony murder because the jury could reasonably have found that he shot Gilliand in self-defense after Gilliand attacked him with a screwdriver.

We need not speculate on whether North Carolina General Statute § 14-51.3 "partially abrogated" or "completely replaced" the common law as to self-defense, since self-defense is simply not applicable to armed robbery. As did our Supreme Court in *Jacobs*, "we fail to see how defendant could plead self-defense to a robbery the jury found he had attempted to commit himself," even under North Carolina General Statute § 14-51.3. *State v. Jacobs*, 363 N.C. at 822, 689 S.E.2d at 864. This Court and our Supreme Court have held that in the context of felony murder, self-defense does not apply to robbery; Defendant's counsel did not provide deficient representation by failing to request this instruction, and Defendant's claim of IAC is overruled.

V. Civil Judgment for Attorney's Fees

Defendant has petitioned this Court to issue a writ of certiorari "pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure, to review the civil

judgment for attorney's fees entered by" the trial court. In our discretion, we grant Defendant's petition.

Defendant argues that

> [t]he trial court failed to inform [Defendant] that he had a right to be heard on the question of attorney's fees. The trial court failed to inform [Defendant] of the number of hours counsel claimed or the amount of money he would be ordered to pay as a result.

The State concedes that "Defendant was not given notice or an opportunity to be heard before the court entered the civil judgment, which was required." Accordingly, we vacate the civil judgment for attorney's fees and remand to the trial court for further proceedings on this issue. *See State v. Friend*, ___ N.C. App. ___, ___, 809 S.E.2d 902, 907 (2018) ("[B]efore entering money judgments against indigent defendants for fees imposed by their court-appointed counsel under N.C. Gen. Stat. § 7A-455, trial courts should ask defendants—personally, not through counsel—whether they wish to be heard on the issue. Absent a colloquy directly with the defendant on this issue, the requirements of notice and opportunity to be heard will be satisfied only if there is other evidence in the record demonstrating that the defendant received notice, was aware of the opportunity to be heard on the issue, and chose not to be heard.").

VI. Conclusion

Defendant received a fair trial free from prejudicial error. However, Defendant was entitled to notice and an opportunity to be heard on the civil judgment for attorney's fees. We vacate and remand Defendant's civil judgment for attorney's fees to allow Defendant to receive notice and an opportunity to be heard.

NO ERROR IN PART; VACATED AND REMANDED IN PART.

Judges BRYANT and COLLINS concur.

Report per Rule 30(e).