IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-334

No. COA20-486

Filed 6 July 2021

Vance County, No. 18CRS050265

STATE OF NORTH CAROLINA

v.

VINSTON LEVI KEARNEY, JR., Defendant.

Appeal by Defendant from judgment entered 25 September 2019 by Judge John M. Dunlow in Vance County Superior Court. Heard in the Court of Appeals 23 March 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General G. Mark Teague, for the State-Appellee.

Daniel J. Dolan, for the Defendant-Appellant.

GORE, Judge.

¶ 1 Vinston Levi Kearney, Jr. ("Defendant") appeals from judgment entered upon a jury verdict of guilty of assault with a deadly weapon inflicting serious injury. Defendant argues that the trial court reversibly erred in the self-defense instruction it gave to the jury and by failing to intervene during the Prosecution's closing argument.

I. Procedural History

¶ 2 Defendant Vinston Levi Kearney, Jr. was indicted on 5 February 2018 for assault with a deadly weapon with intent to kill inflicting serious injury on Johnell Terry Kearney ("Ms. Terry"). The case came on for trial on 23 September 2019. On 25 September 2019, a jury returned a verdict of guilty of assault with a deadly weapon inflicting serious injury. Defendant was sentenced to 38-58 months' imprisonment. Defendant gave written notice of appeal on 14 October 2019. Defendant filed a petition for writ of certiorari contemporaneously with his brief requesting appellate review pursuant to N.C. Gen. Stat. §§ 15A-1444(e)&(g), and N.C.R. App. P. 21, as a result of defects in the 14 October 2019 written notice of appeal. In our discretion, we allow the petition for writ of certiorari.

II. Factual Background

¶ 3 At trial, the evidence tended to show the following: Defendant and Ms. Terry were married for thirty-one years, before their divorce in 2009. After the divorce, Defendant moved out of the home he shared with Ms. Terry during their marriage. In 2014, upon falling ill and unable to work and care for himself, Defendant moved back in with Ms. Terry. Defendant and Ms. Terry lived in separate rooms in the home. Upon recovering, Defendant began paying half the utility bills in the home and made repairs throughout the home.

¶ 4 Sometime in 2017, the second bathroom in the home shared by Ms. Terry and Defendant fell in disrepair, leaving only the bathroom in Ms. Terry's room functional. A disagreement arose between Ms. Terry and Defendant relating to the bathroom. On the morning of 26 January 2018, Ms. Terry approached Defendant and asked him for his share of the utility bills and for him to resume making court ordered alimony payments (which Defendant temporarily had ceased when he fell ill, with Ms. Terry's consent). Defendant initially expressed he believed he no longer had to pay alimony. Later that day Defendant told his and Ms. Terry's adult son that Ms. Terry had asked him for the alimony payments. That evening when Defendant came home, Ms. Terry confronted him and asked him why he told their son about the request for alimony. Then, according to Ms. Terry, as Defendant was walking away he turned, told Ms. Terry "I'm sick of you," and began to beat her. According to Ms. Terry, Defendant first beat her with his hands then he hit her with a coat rack, hard enough that the coat rack broke in half. As a result of the incident, Ms. Terry required 56 stiches in her head, surgery to repair a broken arm, a five-day hospital stay, and physical therapy to regain mobility in her arm.

¶ 5 Defendant maintains that Ms. Terry started the physical altercation by putting her hands on him first. Defendant asserts that Ms. Terry began "talking ugly" to him once he entered the house that afternoon. Defendant claims that when he attempted to go to his room, Ms. Terry stopped him from closing the door and then

"ripped out at [his] throat and spit in [his] face." As a result, Defendant grabbed Ms. Terry, they both hit the floor, and Defendant claims he blacked out at that point. Defendant says that when he came to his senses, he "saw her laying there in the floor." Defendant was also treated at a hospital for injuries he sustained in the altercation.

¶ 6 After a three-day trial, the trial court held a jury charge conference where the court informed both parties of the instructions it thought appropriate. During the conference, after the State opposed the giving of a self-defense instruction to the jury, Defendant argued that a self-defense instruction would be proper. The trial court agreed to instruct the jury with North Carolina Pattern Jury Instruction 308.45 on self-defense.

¶ 7 The trial court instructed the jury on 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, assault inflicting serious injury, simple assault, and self-defense. The trial court gave the self-defense instruction after giving the instruction for each substantive offense, not as part of each final mandate. After excusing the jury to commence its deliberations, the trial court asked, "Are there any objections or specific requests for corrections or additions to the instructions from the State?" The State answered, "No, sir." The trial court then asked the Defendant the same question, who answered, "No, Your Honor."

III. Discussion

¶ 8 Defendant argues on appeal that the trial court reversibly erred by omitting self-defense instructions in its final mandate of substantive offense charges, reversibly erred by failing to give a complete self-defense instruction, and erred by failing to intervene *ex mero motu* in response to the Prosecution's grossly improper closing argument.

A. *Preservation and Standard of Review for Challenges to Jury Instructions*

¶ 9 We first determine to what extent Defendant preserved these issues for our review.

¶ 10 Defendant contends that his jury instruction argument is preserved for review. Defendant argues because he requested a self-defense instruction at the charge conference and the trial court agreed to give the instruction, but failed to accurately give the instruction, the issue is preserved despite his failure to object to the given instruction at trial.

¶ 11 Where a defendant has properly preserved their argument pertaining to jury instructions, the appellate court reviews the jury instructions *de novo*. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). On appeal, a defendant is required to show both that the challenged jury instruction was erroneous and that such error prejudiced the defendant. N.C. Gen. Stat. § 15A-1442(4)(d) (2020). "A defendant is prejudiced . . . when there is a reasonable possibility that, had the error

in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 1443(a) (2020).

¶ 12 The State argues this issue is only reviewable for plain error because Defendant did not object to the self-defense instruction given before the trial court.

¶ 13 Pursuant to our Rules of Appellate Procedure:

> A party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict, stating distinctly that to which objection is made and the grounds of the objection; provided that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

N.C.R. App. P. 10(a)(2).

¶ 14 However, our Supreme Court has recently held, that if a trial court agrees to give a specific pattern jury instruction and omits any part of that instruction, its omission substantively deviates from the agreed-upon jury instruction, and automatically preserves the issue for appellate review under N.C. Gen. Stat. § 15A-1443(a). *State v. Lee*, 370 N.C. 671, 675–76, 811 S.E.2d 563, 567 (2018). Thus, an omission of any part of the pattern jury instruction equates to a failure to give the requested jury instruction. *Id.*; *see also State v. Richardson*, 270 N.C. App. 149, 155, 838 S.E.2d 470, 475 (2020). Further, our Supreme Court has held that "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." *State v. Ross*, 322 N.C. 261, 265, 367 S.E.2d 889, 891 (1988) (internal citation omitted).

¶ 15 When an erroneous deviation from an instruction occurs "it is the trial court's failure to give the agreed-upon instruction which is preserved for appellate review without further request or objection." *Richardson*, 270 N.C. App. at 155, 836 S.E.2d at 475. However, a request for a pattern jury instruction only preserves a challenge to the failure of the trial judge to give that instruction, the manner in which the trial judge gives an instruction is not preserved by the request for that instruction. *See State v. Gordon*, 104 N.C. App. 455, 458, 410 S.E.2d 4, 7 (1991).

¶ 16 Here, the trial court, on its own volition, informed the parties at the charge conference that it would give N.C.P.I.–Crim 308.45 on self-defense. Given the opportunity to object to the proposed instructions the State objected to the self-defense instruction and Defendant presented arguments as to why the instruction should be given. The trial court, after hearing arguments, decided that a self-defense instruction was warranted, and it would give N.C.P.I.–Crim. 308.45. However, the trial court omitted the portion of N.C.P.I.–Crim. 308.45 stating a defendant has no duty to retreat. As the trial court did not completely fail to give the agreed-upon instruction, Defendant's argument that the trial court erred in not giving the self-

defense mandate following each substantive offense mandate was not preserved for appellate review. However, Defendant's argument that the trial court erred by failing to give a complete self-defense instruction is preserved for appellate review.

¶ 17 Defendant, in an alternative argument, "specifically and distinctly" contended the trial court's error in giving the final mandate amounted to plain error. Thus, we must analyze the issue for plain error. N.C.R. App. P. 10(a)(4) ("In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.").

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where [the error] is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (internal quotations and citations omitted).

B. Self-Defense Jury Instruction

¶ 18 "When analyzing jury instructions, we must read the trial court's charge as a whole." *State v. Fowler*, 353 N.C. 599, 624, 548 S.E.2d 684, 701 (2001). "We construe the jury charge contextually and will not hold a portion of the charge prejudicial if the charge as a whole is correct." *Id.* "If the charge as a whole presents the law fairly and clearly to the jury, the fact that isolated expressions, standing alone, might be considered erroneous will afford no ground for a reversal." *State v. McWilliams*, 277 N.C. 680, 685, 178 S.E.2d 476, 479 (1971) (citation omitted).

¶ 19 The trial court instructed the jury on 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, assault inflicting serious injury, simple assault, and self-defense. After instructing the jury on the definition of each theory of guilt, the trial court gave an instruction on self-defense, which is almost verbatim the same as N.C.P.I.–Crim. 308.45, aside from excluding the language that Defendant had no duty to retreat.

¶ 20 Defendant first argues the trial court reversibly erred by giving the final mandate on self-defense separate from the final mandate on the substantive offenses. As discussed above, this argument was not preserved and is reviewed for plain error. Defendant points out that a "note well" in N.C.P.I.–Crim 308.45 states:

> The trial judge is reminded that this instruction must be combined with the substantive offense instruction in the

> following manner: (1) the jury should be instructed on the elements of the charged offense; (2) the jury should then be instructed on the definition of self-defense set out in this instruction below; (3) the jury should then be instructed on the mandate of the charged offense; and (4) the jury should be instructed on the mandate for self-defense as set out below in this instruction.

N.C.P.I.–Crim 308.45 (2019). Defendant relies on *State v. Dooley*, which states "[t]he 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." 285 N.C. 158, 165–66, 203 S.E.2d 815, 820 (1974). Defendant asserts that this error is similar to that in *Dooley*, and therefore, "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.* 285 N.C. at 166, 203 S.E.2d at 820.

¶ 21 However, this case is distinguishable from *Dooley*. In *Dooley*, the trial court gave no final mandate on self-defense at all. *See* 285 N.C. at 164–65, 203 S.E.2d at 819. Here, the trial court gave a final mandate on self-defense, it just did so in a separate and distinct mandate from the substantive offenses. Further, this Court has explained that if the instruction "taken contextually . . . adequately explained to the jury that they could find the defendant not guilty by reason of self-defense" then the trial court did not have to give a self-defense instruction with each offense instructed on. *State v. Carter*, 42 N.C. App. 325, 330, 256 S.E.2d 532, 539 (1979). Here, the trial court erred in the order of instructions it gave, but it ultimately gave the final

mandate enumerated in N.C.P.I.–Crim 308.45. It cannot be said that the trial court's error had a "probable impact on the jury's finding that the defendant was guilty." *Odom*, 307 N.C. at 660, 300 S.E.2d at 378. Therefore, the trial court did not commit plain error by failing to give the self-defense mandate with each substantive mandate.

¶ 22 Defendant also argues that the trial court reversibly erred by failing to give a complete self-defense instruction. As discussed, this issue was preserved for appeal and is reviewed *de novo*. On appeal Defendant must show a reasonable possibility that, had the trial court not erred, a different result would have been reached at trial. *See Lee*, 370 N.C. at 677, 811 S.E.2d at 567.

¶ 23 Defendant argues that the self-defense instruction given was not complete and was erroneous because it failed to instruct the jury that Defendant had no duty to retreat, and it incorrectly instructed the jury regarding whether Defendant had a reasonable apprehension of death or great bodily harm.

¶ 24 A person does not have a duty to retreat but may stand his ground. *See* N.C. Gen. Stat. § 14-51.3 (2020) "Accordingly, when, as here, the defendant presents competent evidence of self-defense at trial, the trial court must instruct the jury on a defendant's right to stand his ground, as that instruction informs the determination of whether the defendant's actions were reasonable under the circumstances, a critical component of self-defense." *Lee*, 370 at 675, 811 S.E.2d at 566 (citation

omitted). Here, the trial court agreed to instruct the jury on self-defense under N.C.P.I.–Crim. 308.45, but it omitted the "no duty to retreat" language of N.C.P.I.–Crim. 308.45, without notice to the parties. At the charge conference the trial court concluded that Defendant had presented sufficient evidence to warrant the self-defense instruction. If Defendant offered sufficient evidence to support giving a self-defense instruction, then sufficient evidence was offered to support a complete self-defense instruction. *See State v. Davis*, 177 N.C. App. 98, 102, 627 S.E.2d 474, 477 (2006) ("A comprehensive self-defense instruction requires instructions that a defendant is under no duty to retreat if the facts warrant it. . .").

¶ 25 When a defendant is entitled to a self-defense instruction and the trial court omits the stand-your-ground language the trial court has erred. Here, the trial court omitted the portion of N.C.P.I.–Crim. 308.45 that instructs the jury that an individual acting in self-defense has no duty to retreat and may stand their ground. Therefore, the trial court erred. When a trial court errs in the jury instruction given, the defendant is entitled to a new trial if the error was prejudicial. *See State v. Bass*, 371 N.C. 535, 542, 819 S.E.2d 322, 326 (2018). An error is prejudicial if "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a); *see Lee*, 370 N.C. at 676, 811 S.E.2d at 567. This Court reasoned in *State v. Coley*, that when a defendant was entitled to a self-defense instruction and

one was not given and is subsequently found not guilty of charges involving an intent to kill, but is found guilty of a lesser included offense, the defendant was prejudiced and is entitled to a new trial. 263 N.C. App. 249, 258, 822 S.E.2d 762, 768 (2018), *affirmed*, 375 N.C. 156, 846 S.E.2d 455 (2020). Here, Defendant was found not guilty of all charges involving an intent to kill but was found guilty of the lesser included charge of assault with a deadly weapon inflicting serious injury. Therefore, following the logic employed in *Coley*, we find that had a complete self-defense instruction been given there is a reasonable possibility a different result would have been reached at trial. As a result, Defendant was prejudiced by the trial court's error and is entitled to a new trial.

¶ 26 Defendant also argues that the trial court erred in giving the self-defense instruction because the trial court should have included all the offenses in the portion of the mandate which related to "protect the defendant from death or serious bodily injury." Defendant submits that the trial court did not make a proper distinction between the self-defense standard applicable if the jury found the weapon used to be a deadly weapon compared to the applicable standard if the jury found the weapon was not a deadly weapon. However, here, the trial court gave the self-defense mandate as stated in N.C.P.I.—Crim 308.45. Further, assuming *arguendo*, that the trial court did err in the final mandate, Defendant was not prejudiced. Defendant's argument would only have an impact on the jury's decision if the jury found the

weapon used was not a deadly weapon. However, Defendant was convicted of assault with a deadly weapon inflicting serious injury. As a result, we find this argument is not persuasive.

¶ 27 Our ruling on the jury instruction issue is dispositive. Therefore, we decline to review Defendant's remaining arguments.

IV. Conclusion

¶ 28 For the foregoing reasons we find Defendant is entitled to a new trial.

NEW TRIAL.

Judges DIETZ and MURPHY concur.

Report per Rule 30(e).