An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-821

Filed 05 September 2023

Wilson County, No. 20CRS52052

STATE OF NORTH CAROLINA

v.

ALIN JYMIL GATLING, Defendant.

Appeal by defendant from judgment entered 18 February 2022 by Judge William D. Wolfe in Wilson County Superior Court. Heard in the Court of Appeals 6 June 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Daniel P. Mosteller, for the State-appellee.

Law Office of Caryn Strickland, by Caryn Devins Strickland, for defendant-appellant.

GORE, Judge.

Defendant, Alin Jymil Gatling, appeals his second-degree murder conviction sentencing him to 228 months to 286 months imprisonment and restitution in the amount of $5,000.00. Upon review of the parties' briefs and the record, we vacate the judgment and remand for a new trial.

I.

On 28 June 2020, defendant approached the victim, Donald Aycock, to question him regarding claims by defendant's friends that Aycock shouted racial slurs at them, threatened to shoot them, and to beat them with his golf club as they walked by his balcony on the street. Just prior, defendant's friends had called him and asked him to bring his gun after their encounter with Aycock. As defendant approached Aycock's home, he saw Aycock on his balcony and asked him if Aycock called his friends "niggers." Aycock replied, "[t]hat's what they is, ain't they?" Defendant responded, "Excuse me?"

According to defendant, Aycock then began walking down his stairs, picked up a golf club and stated, "make your move, mother fucker." Aycock swung his golf club at defendant's face such that defendant testified he had to dodge the club. Defendant then pulled out his gun and shot Aycock multiple times, claiming he did so "on impulse . . . . It was more instinct than thinking." Defendant fled the scene, gave his gun to his friend, switched clothes, and went home. The next day, after he was apprehended by the police, defendant confessed to the shooting and claimed self-defense.

Defendant testified at trial he was acting in self-defense, but also admitted he might have used excessive force when he shot Aycock. After the State and defense rested, the trial court determined there was evidence sufficient to support a self-defense jury instruction over the State's objections. The trial court agreed to charge the jury with the N.C.P.I-Crim. 206.10 self-defense instruction, but it omitted the

following: "the defendant has no duty to retreat in a place where the defendant has a lawful right to be." Additionally, the trial court did not include the "stand-your-ground" instruction from N.C.P.I-Crim. 308.10 that is referenced through footnote in the N.C.P.I-Crim. 206.10 self-defense instruction. Defendant questioned the trial court about the exclusion of these portions. The trial court stated it deleted that portion because, "The defendant will have a lawful right to be in the defendant's home, own premises, place of residence, workplace, or motor vehicle. And it's only to be given in those circumstances. There's no evidence of that. So that's why I deleted it."

The State argued multiple times during its closing argument that defendant had the ability to retreat and chose not to, and suggested the failure to retreat eliminated the possibility defendant acted in self-defense. The trial court charged the jury on first degree murder, second degree murder, and voluntary manslaughter. It used the altered self-defense instructions and instructed the jury it could find defendant guilty of voluntary manslaughter under an imperfect self-defense theory. The jury returned a guilty verdict for second degree murder.

II.

Defendant appeals of right pursuant to sections 7A-27(b) and 15A-1444(a). Defendant raises the following issues: (1) whether the trial court erred in removing no duty to retreat language from the self-defense jury instruction; and (2) whether the trial court erred by entering a restitution award without supporting evidence.

These issues are preserved on appeal. *See State v. Irabor*, 262 N.C. App. 490, 496, 822 S.E.2d 421, 425 (2018) ("Here, the trial court agreed to give the pattern jury instructions under N.C.P.I.-Crim. 206.10, which includes the relevant no duty to retreat and stand-your-ground provisions; . . . pursuant to *Lee*, this issue is preserved.") (citing *State v. Lee*, 370 N.C. 671, 676, 811 S.E.2d 563, 567 (2018)); *State v. Mauer*, 202 N.C. App. 546, 551, 688 S.E.2d 774, 777–78 (2010) ("[A] defendant's failure to specifically object to the trial court's entry of an award of restitution does not preclude appellate review.").

Defendant first argues the trial court erred by omitting the "duty to retreat" language from the self-defense instructions along with the stand your ground provision within N.C.P.I.-Crim. 308.10. We agree. We review de novo whether a "trial court erred in instructing the jury." *Irabor*, 262 N.C. App. at 494, 822 S.E.2d at 424.

"The jury charge is one of the most critical parts of a criminal trial." *Lee*, 370 N.C. at 674, 811 S.E.2d at 565 (citation omitted). "It is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence." *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988). Therefore, "where competent evidence of self-defense is presented at trial, the defendant is entitled to an instruction on this defense." *Lee*, 370 N.C. at 674, 811 S.E.2d at 566 (cleaned up).

Our Supreme Court recently addressed the importance of a complete self-defense instruction in *Lee* and *Bass*. *State v. Bass*, 371 N.C. 535, 819 S.E.2d 322

(2018). In *Lee*, the Court considered whether the trial court erred by omitting the "no duty to retreat" language and completely excluding the "stand-your-ground" language within N.C.P.I.-Crim. 308.10 after agreeing to provide the jury with a self-defense instruction. 370 N.C. at 675, 811 S.E.2d at 567.

The Court considered both statutory provisions relating to the justified use of deadly force, and confirmed in either situation, there is no duty to retreat, meaning the person can stand their ground. *Id.* at 675, 811 S.E.2d at 566. The Court went on to state, "when . . . 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." *Id.* Soon after in *Bass*, our Supreme Court explicitly stated, "a defendant entitled to *any* self-defense instruction is entitled to a *complete* self-defense instruction, which includes the relevant stand-your-ground provision." 371 N.C. at 542, 819 S.E.2d at 326.

In the present case, the State appears to concede that the trial court erred by omitting a portion of the instruction, but argues the error was not prejudicial. In *Lee*, the Court applied a "reasonable possibility" standard to determine whether the error was prejudicial. 370 N.C. at 676, 811 S.E.2d at 567. In that case, the State had suggested culpability by the defendant not retreating. *Id.* The Court stated, "the omission of the stand-your-ground instruction permitted the jury to consider defendant's failure to retreat as evidence that his use of force was unnecessary,

excessive, or unreasonable." *Id.* Similarly, in the present case the State emphasized, during its closing argument, defendant's failure to retreat and whether he reasonably could have retreated. Accordingly, applying *Lee* to the present case, the trial court prejudicially erred by omitting portions of the self-defense instruction including the stand-your-ground provision. Therefore, "[d]efendant is entitled to a [new] trial with complete and accurate jury instructions." *Bass*, 371 N.C. at 542, 819 S.E.2d at 326.

III.

For the foregoing reasons, we vacate the judgment and remand for a new trial. Because we vacate the judgment, we do not address defendant's remaining argument.

NEW TRIAL.

Judges CARPENTER and RIGGS concur.

Report per Rule 30(e).