IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-569

Filed 7 May 2024

Randolph County, No. 21 CRS 50076

STATE OF NORTH CAROLINA

v.

STEWART DEVON WHITAKER

Appeal by Defendant from judgment entered 5 October 2022 by Judge Claire V. Hill in Randolph County Superior Court. Heard in the Court of Appeals 7 February 2024.

*Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly S. Murrell, for the State.*

*Mary McCullers Reece, for Defendant.*

WOOD, Judge.

Stewart Whitaker ("Defendant") was convicted of assault with a deadly weapon inflicting serious injury after shooting a man he testified was lingering in front of his home. On appeal, he argues the trial court plainly erred in failing to instruct the jury on the Castle Doctrine. Because the trial court properly instructed the jury on self-

defense given the testimony provided at trial, we hold the trial court did not plainly err. We hold Defendant received a fair trial.

## I. Factual and Procedural History

Chris Tompkins ("Tompkins") had been living with his parents in Liberty, North Carolina, for two years at the time of the incident on 7 January 2021. He had spent the day at his friend's house, which was approximately two blocks away from Tompkins' home. At approximately 9:00 p.m., Tompkins was getting ready to leave his friend's house when he discovered his car would not start. He called his father, obtained permission to use his jump box to get his car started, and began walking home along the sidewalk. Tompkins retrieved the jump box from his parents' house and began walking back to his friend's house. He held the jump box in one hand and had a jacket slung over his other arm. He did not have anything else in his hands. As he was passing Defendant's home, he could easily see into a window of Defendant's home, which was lit from within. He heard what he thought was arguing between Defendant and a female from within the home and saw Defendant roll off his bed. Tompkins only glanced at what was happening and did not stop to look but continued walking down the sidewalk toward his friend's house. Tompkins never stepped off the sidewalk into Defendant's yard.

Tompkins had walked past Defendant's property when he heard someone from behind him ask what he was doing in his yard. Tompkins told Defendant he was not in his yard, and the pair argued back and forth for three or four minutes about

whether Tompkins had stepped into Defendant's yard as he walked past. Tompkins told Defendant his name and explained he was walking his jump box back to his car to get his car started. During the conversation, Defendant got "in [Tompkins'] face," but Tompkins never made any contact with Defendant nor drew anything out of his pockets. Defendant said, "Fuck you," and Tompkins remembers feeling a pain that he later determined was a gunshot wound, but he did not see Defendant raise a gun. Defendant then turned around, ran to his car, and drove toward Greensboro. Tompkins put his hand to his neck, saw blood on his hand, and said, "He shot me."

Tompkins walked back to his parents' house and asked his mother and grandmother to call the police. Emergency medical personnel arrived and treated Tompkins at his parents' home. He was then transported to the hospital at Chapel Hill by helicopter, and during the ride, he lost and regained consciousness. He received treatment in the hospital for three days. Tompkins has an entrance wound from the gunshot on his neck and an exit wound on the top of his shoulder, and he has a permanent scar and possible nerve damage from the gunshot.

Detective Will Summers ("Detective Summers") of the Liberty Police Department responded to the emergency call at the Tompkins' home. Tompkins explained what happened and described to Detective Summers where Defendant's home was located. When Detective Summers visited Defendant's home, nobody answered the door. Detective Summers did not observe any torn-up portions of the yard in front of the home or any other signs of a struggle there. He obtained and

served a search warrant for Defendant's home, but never encountered Defendant. Defendant turned himself into police a few days later.

According to Defendant, on the day of the incident, he left work at 3:30 p.m., went home, picked up his wife to go grocery shopping, and returned home at approximately 8:00 p.m. or 8:30 p.m. As Defendant pulled into his driveway, he noticed three individuals standing near his neighbor's home. Approximately ten minutes later, Defendant noticed the three individuals were still standing outside. Two of them "separated" but did not fully leave, and one individual remained in front of Defendant's house.

Defendant decided to go outside to make sure his car was locked. He put on his jacket which had a gun in one of the pockets. Outside, he said to the person standing "in front of [his] yard[,] . . . '[H]ey, do I know you?' " By this time, two of the individuals were standing approximately fifteen feet away. Defendant approached the person standing in front of his home to see if he could recognize him. According to Defendant, he walked within approximately four feet of Tompkins and asked, "[C]an I help you? . . . I don't know what you got going on, but me and my kids and my family live here. This is my home."

According to Defendant, Tompkins got very close to Defendant's face and said he lived around the corner. Defendant believed the individual was slurring his speech. Tompkins pointed behind Defendant, and as Defendant looked to see where he was pointing, he punched Defendant in the face. Defendant fell to the ground, and

Tompkins grabbed him by the coat and attempted to lift him. Tompkins had one hand in his coat pocket, and Defendant believed he was trying to say, "[Y]ou shouldn't have come out here." According to Defendant, he believed Tompkins was going to "end [his] life." As Tompkins was reaching into his coat pocket, Defendant fired one shot because he thought Tompkins was going to kill him.

Tompkins swayed and then walked away, taking off his coat as he went. According to Defendant, he did not intend to shoot or hurt anyone. Defendant drove to a friend's house, spent the night there, and went to work the next morning. After his wife told him there was a warrant for his arrest, he turned himself in.

On 8 February 2021, a grand jury indicted Defendant for attempted murder and assault with a deadly weapon with the intent to kill inflicting serious injury. Defendant's trial was held during the 3 October 2022 session of Randolph County Superior Court. On 5 October 2022, the jury found Defendant guilty of assault with a deadly weapon inflicting serious injury, a class E felony. The trial court sentenced Defendant as a prior record level I to an active sentence of 20-36 months of imprisonment. Defendant gave oral notice of appeal in open court.

## II. Analysis

Defendant argues the trial court plainly erred in failing to instruct the jury on the presumption available under the Castle Doctrine pursuant to N.C. Gen. Stat. § 14-51.2.

"[A]n issue that was not preserved by objection noted at trial . . . 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." N.C. R. App. P. 10(a)(4). The plain error standard requires that "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." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation and quotation marks omitted).

"It is elementary that the trial court, in its instructions to the jury, is required to declare and explain the law arising on the evidence." *State v. Anderson*, 40 N.C. App. 318, 321, 253 S.E.2d 48, 50 (1979). "The trial court must instruct the jury on all essential features of a case, and where there exists evidence that the defendant acted in self-defense, he is entitled to have this evidence considered by the jury under proper instruction from the court." *State v. Owen*, 111 N.C. App. 300, 307, 432 S.E.2d 378, 383 (1993) (quotation marks omitted). This is true even when "there is contradictory evidence by the State or discrepancies in defendant's evidence." *Anderson*, 40 N.C. App. at 321, 253 S.E.2d at 50. "The evidence is to be viewed in the light most favorable to the defendant." *State v. Whetstone*, 212 N.C. App. 551, 555, 711 S.E.2d 778, 782 (2011) (brackets omitted).

North Carolina law provides relief from criminal liability for using deadly force and does not require a person to retreat from where one has a 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 [N.C. Gen. Stat. §] 14-51.2." N.C. Gen. Stat. § 14-51.3(a). This is colloquially known as the Stand Your Ground doctrine.

Relatedly, N.C. Gen. Stat. § 14-51.2 creates a *presumption* that the lawful occupant of a home "held a reasonable fear of imminent death or serious bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or serious bodily harm." N.C. Gen. Stat. § 14-51.2(b). It is applicable only if both of the following apply:

> (1) The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a home, motor vehicle, or workplace, or if that person had removed or was attempting to remove another against that person's will from the home, motor vehicle, or workplace.
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> (2) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.

*Id.* This is colloquially known as the Castle Doctrine. Under this doctrine, it is presumed, although a rebuttable presumption, that the lawful occupant of a home

reasonably feared imminent death or serious bodily harm to himself or another if both requirements apply.

This Court recently examined both doctrines and explained, "Under the Castle Doctrine, excessive force is impossible unless the State rebuts the Castle Doctrine presumption, but under the Stand Your Ground Doctrine, excessive force is possible if the defendant acts disproportionately." *State v. Phillips*, 290 N.C. App. 660, 664, 893 S.E.2d 256, 260 (2023).

Under the Castle Doctrine, *home* is defined to include its *curtilage*: "Home.--A building or conveyance of any kind, to include its curtilage, whether the building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it, including a tent, and is designed as a temporary or permanent residence." N.C. Gen. Stat. § 14-51.2(a)(1). "[D]efense of the person within one's premises includes not only the dwelling, but also the curtilage and buildings within the curtilage. The curtilage includes the yard around the dwelling and the area occupied by barns, cribs, and other outbuildings." *State v. Blue*, 356 N.C. 79, 86, 565 S.E.2d 133, 138 (2002) (citation omitted).

Notwithstanding the prior doctrines, any person who is the aggressor is not entitled to a self-defense instruction:

> The right of self-defense is only available to a person who is without fault, and if a person voluntarily, that is aggressively and willingly, enters into a fight, he cannot invoke the doctrine of self-defense unless he abandons the

> fight, withdraws from it and gives notice to his adversary that he has done so.

*State v. Thomas*, 259 N.C. App. 198, 209, 814 S.E.2d 835, 842 (2018) (brackets omitted); *see also State v. Hicks*, 385 N.C. 52, 60, 891 S.E.2d 235, 241 (2023).

Here, at the jury charge conference, Defendant's counsel did not request a jury instruction on the Castle Doctrine and did not object when the trial court stated it would not instruct the jury "that the Defendant would have a lawful right to be in [his] home because this occurred outside of his home and *there was no evidence or testimony even from the Defendant that he was protecting his home*. He felt his life was in danger, his own personal life." (Emphasis added). The trial court further informed counsel it would instruct the jury that an aggressor is not entitled to self-defense and would instruct the jury on the Stand Your Ground Doctrine.

Although the trial court did not instruct the jury on the use of force under the Castle Doctrine, the trial court properly instructed the jury on the use of defensive force under the Stand Your Ground Doctrine:

> The State has the burden of proving from the evidence beyond a reasonable doubt that the Defendant's action was not in self-defense. If the circumstances would have created a reasonable belief in the mind of a person of ordinary firmness that the assault was necessary or appeared to be necessary to protect that person from imminent death or great bodily harm and the circumstances did create such belief in the Defendant's mind at the time the Defendant acted, such assault would be justified by self-defense.
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> . . .

> A person is also justified in using defensive force when the force used by the person who was provoked is so serious that the person using defensive force reasonably believes that he was in imminent danger of death or serious bodily harm, the person using defensive force had no reasonable means to retreat, and the use of force likely to cause death or serious bodily harm was the only way to escape danger.
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> . . .
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> Furthermore, the Defendant has no duty to retreat in a place where the Defendant has a lawful right to be. A Defendant does not have the right to use excessive force. The Defendant had the right to use only such force as reasonably appeared necessary to the Defendant under the circumstances to protect the Defendant from death or great bodily harm.

In the case *sub judice*, there was no evidence that Tompkins "was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a home." N.C. Gen. Stat. § 14-51.2(b). Defendant's testimony, at best, was unclear regarding where Tompkins was standing at the moment Defendant approached him:

> [A]ctually they was like kind of in the front because right where my yard where the sidewalk is I have -- you know, I have a front like yard or whatever in the front before it dips down into like my yard has like a little dip and then it goes in -- into a lot closer to my home. And then I have where my mailbox is on the outer part of the sidewalk is where I'm responsible for cutting grass, I have my mailbox there and stuff like that. But we were actually -- they were actually, you know, *inward of the -- of the sidewalk*.

(Emphasis added). This is the only testimony, from Defendant or anyone else, that could possibly be construed as evidence that Tompkins stepped onto Defendant's property. Defendant further testified the two other individuals had "separated" by

the time he approached the remaining individual, who was presumably Tompkins, so it is unclear where exactly Tompkins was standing at the time the altercation began. Defendant testified the person standing in front of his house knocked him "to the ground," but he did not testify that Tompkins was in his yard, and Detective Summers testified there was no torn-up patch of grass indicating a fight in the yard. The trial court properly instructed the jury on the Stand Your Ground Doctrine, stating Defendant had no duty to retreat from a place where he had the lawful right to be, and properly instructed the jury that an aggressor is not entitled to self-defense.

Therefore, the trial court's instructions to the jury matched the evidence. *Anderson*, 40 N.C. App. at 321, 253 S.E.2d at 50. Because there was scant to no evidence Tompkins trespassed on Defendant's lawn and entered his curtilage, we hold the trial court did not err, much less plainly err, in failing to instruct the jury on the Castle Doctrine presumption.

## III. Conclusion

For the foregoing reasons, we hold the trial court did not plainly err in failing to instruct the jury on the Castle Doctrine where there was no evidence Tompkins entered Defendant's home or curtilage.

NO PLAIN ERROR.

Judges COLLINS and GORE concur.

Report per Rule 30(e).