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NO. COA 13-370

NORTH CAROLINA COURT OF APPEALS

Filed: 17 December 2013

STATE OF NORTH CAROLINA

v.

Nash County
No. 11 CRS 54048

KIMBERLY SHONTAY WHITAKER

Upon writ of *certiorari* from judgment entered 1 November 2012 by Judge Walter H. Godwin, Jr. in Nash County Superior Court. Heard in the Court of Appeals 11 September 2013.

Attorney General Roy Cooper, by Assistant Attorney General Daphne D. Edwards, for the State.

Gilda C. Rodriguez, Attorney for defendant-appellant.

STEELMAN, Judge.

Where there was evidence of self-defense, the trial court erred in refusing defendant's request to instruct the jury on self-defense.

I. Factual and Procedural Background:

Demaris Manning (Manning) and Kimberly Whitaker (defendant) knew each other from work. The defendant, her four children, and her cousin Shana Evans (Evans) went to live with Manning in August of 2011, after being evicted from their home. On 8 August 2011, Manning told defendant that Evans would have to leave. Evans and the defendant left the residence. They returned several hours later to retrieve their belongings. A fight ensued between defendant and Manning. On 10 October 2011, defendant was indicted for the felony of assault with a deadly weapon inflicting serious injury. On 8 December 2011, defendant gave notice of her intent to assert self-defense at trial.

The case was tried before the trial court and a jury on 29 October 2012. Manning testified that defendant struck her in the left eye with a baseball bat. Defendant called three witnesses at trial: defendant, Evans, and Rosheena White. All three testified that after defendant retrieved some of her belongings from the house, Manning followed her outside and struck her in the back of the head with her fist. Defendant then dropped the items she was carrying, turned around, and struck Manning in her left eye with her right fist. Defendant and Manning engaged in a fight, with both women ending up on the ground until White broke up the fight. The witnesses for the defense stated that a baseball bat was not involved in the fight.

At the jury charge conference, defendant requested that the jury be instructed on self-defense. The trial court denied the defendant's request. The jury found defendant guilty of assault with a deadly weapon inflicting serious injury. Defendant was sentenced to 29-35 months imprisonment. This sentence was suspended and defendant was placed on probation for 60 months, with a 10 day term of special probation. Defendant was also ordered to pay Manning restitution of \$4,029.85 and attorney's fees of \$2,036.50.

We have granted defendant's petition for writ of *certiorari*.

II. Trial Court's Refusal to Instruct on Self Defense

A. Standard of review

"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). "Failure to instruct upon all substantive or material features of the crime charged is error." *State v. Bogle*, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989). "[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "

B. Analysis

In her first argument, defendant contends that the trial court erred in refusing to instruct the jury on self-defense. We agree.

A trial court must give an instruction on self-defense if there is any competent evidence to support a finding that the defendant acted in self-defense. *State v. Marsh*, 293 N.C. 353, 354, 237 S.E.2d 745, 747 (1977). A defendant's right to self-defense is limited to situations where she is "without fault in provoking, engaging or continuing a difficulty with another." *State v. Hunter* 315 N.C. 371, 374, 338 S.E.2d 99, 102 (1986) (citing *State v. Anderson*, 230 N.C. 54, 51 S.E.2d 895, 897 (1949)). An individual acts in self-defense when she responds with such force as is reasonable and necessary under the circumstances. In order for a defendant to avail herself of the protections of self-defense she must meet an attacking force with comparable force, not excessive to that needed to repel the attacker. *State v. Pearson*, 288 N.C. 34, 39-40, 215 S.E.2d 598, 602-603 (1975). When determining whether to give a self-defense instruction, the court views the evidence in the light most favorable to the defendant. *State v. Moore*, 111 N.C. App. 649, 654, 432 S.E.2d 887, 889 (1993). Once the defendant raises self-defense, the state must prove beyond a reasonable doubt that the defendant did not act in self-defense. *State v. Moore*, 363 N.C. 793, 797, 688 S.E.2d 447, 450 (2010).

The evidence at trial was conflicting as to whether the defendant or Manning struck the first blow. However, we are required to view the evidence in the light most favorable to the defendant. Taken in this light the evidence was that Manning struck defendant in the back of the head, without provocation. Defendant responded by striking Manning in the eye with her fist.

The State argues that the trial court properly refused to give a self-defense instruction because the defendant struck Manning with a baseball bat, and that this constituted excessive force. However, it is not for the trial court to resolve disputed factual issues. *Marsh* 293 N.C. at 354, 237 S.E.2d at 747. The question of whether defendant struck Manning with a baseball bat should have been left to the jury.

A person has the right to use force that is reasonably necessary to protect herself. Reasonableness and necessity are questions of fact, properly resolved by the jury. *Marsh* at 354, 237 S.E.2d at 747. In order for a jury to properly consider if defendant acted in self-defense the trial court must properly instruct on the law. In this case the trial court erred in refusing to give the requested self-defense instruction.

This error was prejudicial and requires that we order a new trial. Since we are ordering a new trial, we do not address defendant's other argument.

NEW TRIAL

Judges HUNTER, Robert C. and BRYANT concur.

Report per Rule 30(e)