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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-533

Filed: 7 November 2017

Vance County, No. 14 CRS 053602

STATE OF NORTH CAROLINA,

v.

STEVEN LEVERN BATTLE, Defendant.

Appeal by Defendant from judgment entered 16 October 2015 by Judge Edwin G. Wilson, Jr., in Vance County Superior Court. Heard in the Court of Appeals 15 November 2016.

*Attorney General Joshua H. Stein, by Assistant Attorney General Torrey D. Dixon, for the State.*

*Mark L. Hayes for Defendant-Appellant.*

INMAN, Judge.

Steven Levern Battle (“Defendant”) appeals from a judgment entered against him following a jury verdict finding him guilty of voluntary manslaughter and assault with a deadly weapon inflicting serious injury (“AWDWISI”). Defendant argues the trial court erred by instructing the jury that it could convict Defendant of voluntary manslaughter based on a theory unsupported by the evidence, and by failing to

instruct the jury on self-defense for the assault charge. After careful review, we hold the trial court committed no prejudicial error.

### **Factual and Procedural History**

The evidence at trial tended to show the following:

On the evening of 13 December 2014 and into the early morning hours of 14 December 2014, Leon and Markeithia Perry (“Leon” and “Markeithia,” respectively) were hosting a party for friends and family at their home. Among those attending were Defendant and his wife and children. Defendant was Leon’s and Markeithia’s brother-in-law (by marriage to Markeithia’s sister) and was also Leon’s nephew.

During the evening, Defendant argued with another person at the party who went by the name “G.A.,” or “Georgia.” Following the argument, Anthony Reed (“Anthony”), who is also Defendant’s brother-in-law, drove Defendant home in Defendant’s vehicle, with Leon driving behind them.

At Defendant’s house, Defendant told Leon and Anthony that he was going to go back to Leon’s to pick up his wife and children. Leon told Defendant not to bring a gun with him because Leon did not want a gun at his house. Defendant got into his car and headed back to the party. Anthony then got in Leon’s truck and the two made their way to Leon’s house. During the ride, Leon told Anthony that he had a knife in case Defendant began to act “crazy.”

STATE V. BATTLE

*Opinion of the Court*

Defendant arrived at the party first, armed with two guns. Anthony and Leon arrived shortly thereafter, and, upon seeing Defendant with guns, Leon confronted him.

Leon approached Defendant in an agitated manner. Leon stated, “I told you, don’t bring those guns down here,” to which Defendant responded, “I’m just trying to protect myself.” A tussle ensued. Within a minute, Defendant had been cut in the neck, and Leon and Markeithia had been shot. Defendant then drove himself to the hospital and called authorities, informing them he had shot Leon and that he had been cut. Leon was shot five times and died at the scene. Markeithia was shot two times and suffered injuries to her liver and gallbladder.

Defendant was indicted on 20 January 2015 for first-degree murder and assault with a deadly weapon with the intent to kill, inflicting serious injury (“AWDWIKISI”). The State proceeded to trial on charges of second-degree murder and AWDWIKISI.

At trial, the State presented witness testimony from various guests at the party who witnessed the encounter, including Markeithia. Markeithia testified that Defendant returned to her house with two guns, waving them in the air and asking, “where the MF at, where he at?” Anthony testified that as Leon approached Defendant, Defendant raised his hands and guns in the air, stating, “I’m just trying to protect myself.” Defendant then testified on his own behalf. He stated that Leon

had slashed his throat and, in an attempt to save himself, he shot Leon. Defendant only learned that he had shot Markeithia the next day.

During the charge conference, the State requested Pattern Jury Instruction 104.13, on transferred intent,<sup>1</sup> and the trial court agreed to give the instruction. For the first charge—second-degree murder—the trial court stated, “I’m inclined to give the self-defense instruction” and welcomed the parties’ arguments. Subsequently, the trial court announced it would give the jury the self-defense instruction included in N.C.P.I. 206.30. The State requested a parenthetical instruction contained in N.C.P.I. 206.30, and, over defense counsel’s objection, the trial court agreed to include the parenthetical in its instructions. The parenthesis reads:

One enters a fight voluntarily if one uses toward one’s opponent abusive language, which, considering all of the circumstances, is calculated and intended to provoke a fight. If the defendant voluntarily and without provocation entered the fight, the defendant would be considered the aggressor unless the defendant thereafter attempted to abandon the fight and gave notice to the deceased that the defendant was doing so. In other words, a person who uses defensive force is justified if the person withdraws, in good faith, from physical contact with the person who was provoked, and indicates clearly that [he] [she] desires to withdraw and terminate the use of force, but the person who was provoked continues or resumes the use of force. 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] [she] was in imminent danger of death or serious

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<sup>1</sup> The instruction reads: “If the defendant intended to harm one person but instead harmed a different person, the legal effect would be the same as if the defendant had harmed the intended victim.” N.C.P.I. 104.13

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 the danger. The defendant is not entitled to the benefit of self-defense if the defendant was the aggressor with the intent to kill or inflict serious bodily harm upon the deceased.

N.C.P.I. 206.30.

After hearing arguments regarding instructing the jury on self-defense for the assault charge, the trial court declined to give the request because “I feel like it probably would be too complicated to try to explain the self-defense instruction on the assault charges as well.”

Following the charge conference, the trial court instructed the jury on three possible verdicts regarding the first charge: not guilty, guilty of voluntary manslaughter, or guilty of second-degree murder. The trial court instructed the jury on self-defense. For the assault charge, the trial court instructed on three possible verdicts: not guilty, guilty of AWDWISI, or guilty of AWDWIKISI. The trial court did not instruct the jury on self-defense with respect to the assault charge.

The jury returned its verdict on 16 October 2015, finding Defendant guilty of voluntary manslaughter and AWDWISI. The trial court entered judgment and sentenced Defendant to a term of 44 months to 65 months. Defendant gave timely notice of appeal.

### **Analysis**

Defendant argues that the trial court erred by instructing the jury on the aggressor theory of voluntary manslaughter when that theory was unsupported by the evidence, and declining to give a self-defense instruction on the assault charge when there was evidence to support a finding of self-defense. We disagree with both arguments.

### **I. Aggressor Theory**

Defendant argues that the trial court erred by instructing the jury that Defendant could be guilty of voluntary manslaughter if it found that Defendant was the aggressor.

Generally, “[a]ssignments of error 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) (citations omitted). The State argues that Defendant failed to preserve his challenge to the trial court’s references in the jury instruction to Defendant’s being the aggressor, so that we must review this issue only for plain error. “Under the plain error standard, [a] defendant must establish the error had a probable impact on the jury’s finding that the defendant was guilty.” *State v. Hole*, \_\_ N.C. App. \_\_, \_\_, 770 S.E.2d 760, 762 (2015) (citation and internal quotation marks omitted). However, we need not address the extent to which Defendant’s objection preserved his argument because we hold that the trial court did not err, let alone commit plain error, by giving the aggressor instruction.

STATE V. BATTLE

*Opinion of the Court*

A defendant may be found guilty of voluntary manslaughter if the State proves beyond a reasonable doubt that the defendant engaged in “the unlawful killing of a human being without malice, either express or implied[.]” *State v. Barden*, 356 N.C. 316, 360, 572 S.E.2d 108, 136 (2002) (citing *State v. McNeil*, 350 N.C. 657, 690, 518 S.E.2d 486, 506 (1999)). Voluntary manslaughter generally arises under one of two theories: “when one kills intentionally but does so in the heat of passion suddenly aroused by adequate provocation[.]” or when one kills “in the exercise of self-defense where excessive force is utilized or the defendant is the aggressor.” *McNeil*, 350 N.C. at 690, 518 S.E.2d at 506 (internal quotation marks and citation omitted). The latter of these theories, known as imperfect self-defense, is established “if the first two elements [of a perfect self-defense]<sup>2</sup> existed at the time of the killing, but [the]

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<sup>2</sup> The elements of perfect self-defense, which if met require a finding of not guilty on first and second-degree murder and all lesser-included offenses, are:

- (1) It appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and
- (2) defendant’s belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; and
- (3) defendant was not the aggressor in bringing on the affray, i.e., he did not aggressively and willingly enter into the fight without legal excuse or provocation; and
- (4) defendant did not use excessive force, i.e., did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

*State v. Norris*, 303 N.C. 526, 530, 279 S.E.2d 570, 572-73 (1981).

STATE V. BATTLE

*Opinion of the Court*

defendant, although without murderous intent, was the aggressor in bringing on the affray or used excessive force[.]” *State v. McAvoy*, 331 N.C. 583, 596, 417 S.E.2d 489, 497 (1992). “An individual is the aggressor if he aggressively and willingly enters into a fight without legal excuse or provocation” or “when he has provoked a present difficulty by language or conduct towards another that is calculated and intended to bring it about.” *State v. Effler*, 207 N.C. App. 91, 97, 698 S.E.2d 547, 551-52 (2010) (quoting *State v. Potter*, 295 N.C. 126, 144, 244 S.E.2d 397, 409 (1978)).

In charging the jury, a trial court may only instruct upon theories that are supported by the evidence. *State v. Lynch*, 327 N.C. 210, 219, 393 S.E.2d 811, 816 (1990) (citing *State v. Pakulski*, 319 N.C. 562, 574, 356 S.E.2d 319, 326 (1987)). A trial court does not err by instructing on a theory of imperfect self-defense when competent evidence supports a finding that the defendant was the aggressor. “When there is conflicting evidence as to which party was the aggressor, the jury, as the finders of fact, are [sic] entitled to determine which of the parties, if either, is the aggressor.” *State v. Lee*, \_\_ N.C. App. \_\_, \_\_, 789 S.E.2d 679, 688 (2016), *review allowed*, \_\_ N.C. \_\_, 796 S.E.2d 790 (2017) (quotation marks and citation omitted).

Here, the State presented evidence that Defendant returned to the party with two guns, despite the host’s warning not to bring guns, walked around verbalizing his intent to kill another partygoer, and, when approached by the host, raised both guns in the air. A jury could reasonably find, based upon that conduct, that

Defendant willingly and aggressively sought to provoke a fight with Leon, and therefore acted as the aggressor. Such a determination was within the purview of the jury. *See Lee*, \_\_ N.C. App. at \_\_, 789 S.E.2d at 688. Accordingly, we hold that the trial court did not err by instructing the jury on the aggressor theory.

## **II. Self-Defense on the Assault Charge**

Defendant also argues that the trial court erred by declining to instruct the jury on self-defense regarding the assault charge. Defendant specifically contends that because evidence supports the theory that Defendant only intended to shoot Leon, under the theory of transferred intent, the jury should have been instructed on self-defense regarding the assault charge. We disagree.

We note that “an error in jury instructions is prejudicial and requires a new trial only 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.’ ” *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) (quoting N.C. Gen. Stat. § 15A-1443(a) (2007)). “The defendant has the burden of demonstrating prejudice.” *Id.* at 116, 674 S.E.2d at 712.

Regarding the instruction on self-defense, the North Carolina Supreme Court has held that “when there is evidence from which it may be inferred that a defendant acted in self-defense, he is entitled to have this evidence considered by the jury under proper instruction from the court.” *State v. Marsh*, 293 N.C. 353, 354, 237 S.E.2d

STATE V. BATTLE

*Opinion of the Court*

745, 747 (1977). Here, the trial court instructed the jury on the doctrine of transferred intent, which this Court has described as follows:

[W]here one is engaged in an affray with another and unintentionally kills a bystander or a third person, his act shall be interpreted with reference to his intent and conduct towards his adversary. Criminal liability, if any, and the degree of homicide must be thereby determined. Such a person is guilty or innocent exactly as though the fatal act had caused the death of his adversary. It has been aptly stated that “The malice or intent follows the bullet.”

*State v. Wynn*, 278 N.C. 513, 519, 180 S.E.2d 135, 139 (1971) (quoting *State v. Rogers*, 273 N.C. 330, 333, 159 S.E.2d 900, 902 (1968), *overruled on other grounds by State v. Hickey*, 317 N.C. 457, 346 S.E.2d 646 (1986)).

Defendant argues that with respect to the doctrine of transferred intent, “[t]he pertinent question then becomes whether or not, had the bullet found its intended mark, [Defendant] would have been guilty of assaulting Leon. If he acted in self-defense toward Leon, then [Defendant] would be innocent of such a charge.” Assuming, without deciding, that it was error for the trial court to fail to instruct the jury on self-defense for the assault charge, Defendant has failed to show that he was prejudiced by the error.

The trial court instructed the jury that it could find Defendant guilty of voluntary manslaughter based on three alternative theories: (1) that Defendant acted in self-defense but was the aggressor; (2) that Defendant acted in self-defense but used excessive force; or (3) that Defendant did not act in self-defense but acted in the

heat of passion. The jury was instructed on self-defense for the homicide charge, but by its verdict found that Defendant had not acted in self-defense *or* found that he acted in imperfect self-defense, *i.e.*, that he was the aggressor or used excessive force.

Pattern Jury Instruction 308.45—the pattern jury instruction for all assaults involving deadly force—provides in pertinent part:

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 a belief in the defendant's mind at the time the defendant acted, such assault would be justified by self-defense.

N.C.P.I. 308.45. The pattern instruction defines self-defense that supports a not-guilty verdict, also known as “perfect self-defense.” Imperfect self-defense, by contrast, is not a defense to assault. By returning a verdict that Defendant was guilty of voluntary manslaughter, the jury rejected Defendant's perfect self-defense argument.

Because the jury did not find perfect self-defense for voluntary manslaughter, and, as Defendant argues, “[u]nder the doctrine of transferred intent, [Markeithia] constructively became her husband Leon for the purpose of the assault charge,” it is inconceivable that the jury would have found that Defendant acted in perfect self-defense by committing the assault. Thus, Defendant cannot show he was prejudiced

by the trial court's failure to instruct the jury on self-defense in regard to the assault charge.

**Conclusion**

For the aforementioned reasons, we hold that Defendant received a fair trial, free from prejudicial error.

NO PREJUDICIAL ERROR.

Judges CALABRIA and ZACHARY concur.

Report per Rule 30(e).