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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-772

Filed: 6 February 2018

Swain County, Nos. 15 CRS 459, 50650-51

STATE OF NORTH CAROLINA

v.

STEPHEN KWAME GATES

Appeal by defendant from judgments entered 15 August 2016 by Judge William H. Coward in Swain County Superior Court. Heard in the Court of Appeals 10 January 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General David P. Brenskelle, for the State.

Appellate Defendant Glenn Gerding, by Assistant Appellate Defender Daniel Shatz, for defendant-appellant.

ARROWOOD, Judge.

Stephen Kwame Gates ("defendant") appeals from judgments entered upon his convictions for second degree kidnapping, assault by strangulation, assault on a female, and assault in the presence of a minor. For the following reasons, we find no prejudicial error.

I. Background

Defendant was arrested for assaulting his ex-girlfriend (the "victim") on 19 October 2015. On 26 October 2015, a Swain County Grand Jury indicted defendant on charges of second degree kidnapping, assault by strangulation, assault on a female, and assault in the presence of a minor. Defendant's case was tried in Swain County Superior Court before the Honorable William H. Coward beginning on 9 August 2016.

The evidence presented at the trial tended to show that defendant and victim had two children together during their on and off relationship. During a break in their relationship, victim had a third child with another man. Defendant and the victim often got into arguments regarding the third child's father. After the victim got off work on 19 October 2015, she drove to Asheville to pick up her third child from the child's father and then, at the request of defendant, stopped by the residence where defendant was living on her way home. While victim's third child slept on defendant's bed, a conversation between victim and defendant in defendant's bedroom escalated into an argument and a physical confrontation.

The victim testified that, unprovoked, defendant grabbed her around her neck, choked her, and punched her in the side of her face. The victim recalled that the choking continued as they struggled on the bed and on the floor. The victim's son woke up during the altercation. The victim testified that defendant repeatedly threatened to kill her and her son before he loosened his grip around her neck so she

could speak. Defendant eventually let go of the victim, got a knife out of the closet, and, while standing at the door with the knife to the center of his abdomen, threatened to kill himself. The victim testified that she felt that she was unable to leave, but that she was ultimately able to convince defendant to take her to the hospital. Defendant did not deny choking the victim, but claimed he was defending himself from the victim's attack.

On 15 August 2016, the jury returned guilty verdicts on all four charges. The trial court entered a judgment sentencing defendant for second degree kidnapping to a term of 24 to 41 months (the "first term"). The court consolidated the assault by strangulation, assault on a female, and assault in the presence of a minor offenses and entered judgment sentencing defendant to a term of 6 to 17 months to run at the expiration of the first term, suspended on condition that defendant be placed on supervised probation for 36 months to begin at the expiration of the first term. Defendant gave notice of appeal in open court.

II. Discussion

Defendant raises the following four issues on appeal: whether the trial court (1) erred by denying his motion to dismiss the kidnapping charge; (2) plainly erred by instructing the jury that defendant was not entitled to self-defense if he was committing a felony; (3) erred by issuing a jury instruction on flight; and (4) erred in

allowing the state to cross-examine defendant about his post-arrest silence and request for counsel. We review the issues in order.

1. Motion to Dismiss

At the close of the State's evidence, the defense moved to dismiss all charges for insufficiency of the evidence. The trial court denied the motion. The defense renewed the motion to dismiss all charges at the close of all of the evidence and the trial court again denied the motion. Defendant now challenges the denial of his motion to dismiss as it relates to the kidnapping charge.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). " 'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

"In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State,

giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

> Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.

Fritsch, 351 N.C. at 379, 526 S.E.2d at 455 (citation, quotation marks, and emphasis omitted).

The offense of kidnapping is defined in N.C. Gen. Stat. § 14-39. Relevant to this case, the statute provides:

> Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> . . . .
>
> (3) . . . terrorizing the person so confined, restrained or removed or any other person . . . .

N.C. Gen. Stat. § 14-39(a) (2015). The statute further specifies that there are two degrees of kidnapping. "If the person kidnapped was released in a safe place by the

defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree . . . ." N.C. Gen. Stat. § 14-39(b).

Here, defendant only challenges the evidence of restraint. Specifically, defendant argues the trial court erred in denying his motion to dismiss the kidnapping charge because there was insufficient evidence to prove any restraint beyond that inherent in the assault charges.

Our courts have long recognized that "a defendant is not guilty of kidnapping if the only evidence of restraint is that restraint which is an inherent, inevitable feature of another felony. The defendant is guilty of kidnapping if the defendant takes acts that cause additional restraint of the victim or increase the victim's helplessness and vulnerability." *State v. Smith*, 359 N.C. 199, 213, 607 S.E.2d 607, 618 (2005) (internal citations omitted); *see also State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978) ("We are of the opinion, and so hold, that [N.C. Gen. Stat. §] 14-39 was not intended by the Legislature to make a restraint, which is an inherent, inevitable feature of such other felony, also kidnapping so as to permit the conviction and punishment of the defendant for both crimes. To hold otherwise would violate the constitutional prohibition against double jeopardy. . . .").

Defendant asserts that "[i]n this case, even taking the evidence in the light most favorable to the State, the only restraint of [the victim] was the restraint inherent in the assault against her." Defendant points specifically to the evidence

that he choked the victim and that he landed on top of or grabbed the victim as they struggled as the only evidence of restraint. Defendant distinguishes this case from cases in which the Supreme Court concluded there was sufficient evidence of restraint beyond that inherent in sexual assaults, s*ee Fulcher*, 294 N.C. at 524, 243 S.E.2d at 352, or an armed robbery, *see State v. Beatty*, 347 N.C. 555, 559, 495 S.E.2d 367, 370 (1998), where there was evidence that the defendants bound the victims either prior to or during the perpetration of the other felonies. Defendant contends "in this case [he] did nothing remotely comparable to binding [the victim] or physically restraining her apart from the assault itself."

Defendant instead compares his case to *State v. Simmons*, 191 N.C. App. 224, 662 S.E.2d 559 (2008), and *State v. Ackerman*, 144 N.C. App. 452, 551 S.E.2d 139 (2001). In both *Simmons* and *Ackerman*, this Court held there was insufficient evidence to sustain a kidnapping charge where the confinement or restraint of the victims to the areas where the sexual offenses occurred was inherent in the sexual offenses. *Simmons*, 191 N.C. App. at 231-32, 662 S.E.2d at 563-64; *Ackerman*, 144 N.C. App. at 456-59, 551 S.E.2d at 142-44. In *Simmons*, this Court explained that "[i]n this case, defendant raped [the victim] wholly in the guest bedroom. There was no evidence of confinement, restraint, or removal, other than that which is inherent to the offense of rape itself. Accordingly, we vacate defendant's kidnapping

conviction." *Simmons*, 191 N.C. App. at 232, 662 S.E.2d at 564. In *Ackerman*, this Court explained that

> there was no restraint "separate and apart" from [the victim's] confinement in the vehicle, and that required for defendant to commit the sexual offense. There was no asportation of [the victim], all events having taken place in the front seat of [the victim's] vehicle, and across the street from the Comet Grill. [The victim] voluntarily entered her vehicle. Defendant entered the vehicle by jumping through the open window while [the victim] was seated in the vehicle. The evidence does not show confinement beyond defendant's preventing [the victim] from escaping the vehicle. [The victim's] restraint in the vehicle was necessary for defendant to commit the sexual offense. The restraint was an inherent part of the commission of the sexual offense, and cannot be used to convict defendant of kidnapping.

Ackerman, 144 N.C. App. at 458, 551 S.E.2d at 143.

Upon careful review of the record in this case, we disagree with defendant's characterization of the evidence and his comparison to *Simmons* and *Ackerman*.

Separate and apart from the evidence of physical restraint inherent in defendant's assault of the victim, evidence was introduced showing that defendant repeatedly threatened to kill the victim and her son during the assault, telling the victim that she "wasn't leaving the room that night[.]" At the time the threats were made, the victim was unaware that defendant had a weapon in the room, but did not feel that she was free to leave. Then, after the assault had ended and defendant had removed his hands from the victim's neck, defendant retrieved a "big knife" from the closet and stood near the doorway, obstructing the victim's exit. The victim testified

that "[defendant] said that he was going to kill himself and he stuck [the knife] to the center of his abdomen and acted like he was going to stab himself. [Defendant] was standing there with his eyes closed, breathing deeply, like preparing himself to stab himself." The victim further testified that defendant moved the knife from his stomach to his throat and acted like he was going to cut his throat. Because of the threats and defendant's position near the closed bedroom door, the victim felt she was not able to leave. Defendant did not allow the victim to leave until the victim convinced defendant that she needed to go to the hospital. The victim was able to persuade defendant by telling him that she would give a false story about how she was injured so that defendant would not get in trouble. The victim believed that agreeing to tell a false story was the only way she was going to get out of the bedroom.

This Court has explained that, "[a]s used in [N.C. Gen. Stat. §] 14-39(a), the term 'confine' means 'some form of imprisonment within a given area, such as a room, a house or a vehicle.' The term 'restraint' includes confinement, but also means 'restriction, by force, threat or fraud, without a confinement.' " *State v. Knight*, __ N.C. App. __, __, 785 S.E.2d 324, 339 (2016) (quoting *Fulcher*, 294 N.C. at 523, 243 S.E.2d at 351).

We hold the threats by defendant to harm the victim, her son, or himself, along with the confinement in the bedroom, are sufficient evidence of restraint, separate and apart from the physical restraint inherent in defendant's assault of the victim,

to support the kidnapping charge. Although the events giving rise to the kidnapping and assault charges all occurred in the bedroom, the threats that forced the victim to remain in the bedroom after the assault concluded extended the restraint beyond that inherent in the assault and increased the victim's helplessness and vulnerability. Thus, the trial court did not err in denying defendant's motion to dismiss the kidnapping charge.

2. Self-Defense

Defendant also argues that the court erred in issuing the self-defense instructions to the jury. "The prime purpose of a court's charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973), *cert. denied*, 418 U.S. 905, 41 L. Ed. 2d 1153 (1974). "[A] trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial." *Id.* "[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).

In this case, the trial court instructed the jury similarly on self-defense for each of the three assault charges. The court instructed the jury that defendant would be justified in committing the assault:

> One, if the circumstances, at the time the defendant acted, would cause a person of ordinary firmness to reasonably

> believe that his actions were necessary or apparently necessary to protect himself from bodily injury or offensive physical contact, and,
>
> Two, if the circumstances created such belief in the defendant's mind.

The court then instructed the jury that defendant had no duty to retreat, that defendant was entitled to use reasonable, but not excessive force, that a person who is the initial-aggressor is not entitled to self-defense, that "self-defense is not available to a person who used defensive force and who was committing a felony[,]" and that it's the State's burden to prove defendant was not acting in self-defense.

Defendant did not object to the instructions below. Nevertheless, defendant now contends that the instruction that "self-defense is not available to a person who used defensive force and who was committing a felony[]" amounts to plain error.

"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 . . . ." N.C. R. App. P. 10(a)(2); *see also State v. McNeil*, 350 N.C. 657, 691, 518 S.E.2d 486, 507 (1999), *cert. denied*, 529 U.S. 1024, 146 L. Ed. 2d 321 (2000). "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." N.C. R. App. P. 10(a)(4); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007), *cert.*

denied, 555 U.S. 835, 172 L. Ed. 2d 58 (2008). The North Carolina Supreme Court "has elected to review unpreserved issues for plain error when they involve . . . errors in the judge's instructions to the jury . . . ." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996).

> For error to constitute plain error, 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. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations and quotation marks omitted).

In this case, defendant specifically contends "[t]he trial court's self-defense instruction in this case was erroneous because the statement that 'self-defense is not available to a person who used defensive force and who was committing a felony' is not legally correct and because the instruction was not supported by the evidence." Defendant further contends that "[b]ecause the erroneous instruction probably caused the jury to deprive [defendant] of the benefit of his only defense to the assault charge, it was plain error . . . ."

The challenged portion of the self-defense jury instruction was based on N.C. Gen. Stat. § 14-51.4, which provides when justification for defensive force is not

available. Pertinent to this case, the statute provides that "[t]he justification described in [N.C. Gen. Stat. §] 14-51.2 and [N.C. Gen. Stat. §] 14-51.3 is not available to a person who used defensive force and who . . . [w]as attempting to commit, committing, or escaping after the commission of a felony." N.C. Gen. Stat. § 14-51.4(1) (2017).

Defendant contends the instruction in accordance with N.C. Gen. Stat. § 14-51.4(1) was not a correct statement of the law in this case because his assertion of self-defense "arises both under the common law and under [N.C. Gen. Stat.] § 14-51.3[]" and the instruction only defeats the statutory justification in N.C. Gen. Stat. § 14-51.3. Regardless of whether the defensive force was used during the commission of a felony, defendant contends he was still entitled to common law self-defense, which has no direct equivalent to N.C. Gen. Stat. § 14-51.4(1). Citing N.C. Gen. Stat. § 14-51.2(g), defendant contends the self-defense statutes were only designed to "supplement and expand the common law." We disagree and hold the instruction was a correct statement of the law.

In *State v. Rawlings*, 236 N.C. App. 437, 441, 762 S.E.2d 909, 913 (2014), this Court addressed whether the same instruction challenged in this case was issued in error. In *Rawlings*, however, the issue was whether N.C. Gen. Stat. § 14-51.4 "should only be read to apply to the commission of violent offenses or where the defendant is the aggressor." *Id.* Without addressing the underlying issue, this Court noted that

the self-defense statutes were improperly applied retroactively in the case, invoked Rule 2 to review the jury instructions for plain error, and ultimately held the defendant failed to prove plain error. *Id.* at 442-43, 762 S.E.2d at 913-14.

Furthermore, the statute cited by defendant to show that N.C. Gen. Stat. § 14-51.4 was not intended to replace the common law is not applicable here. That statute, N.C. Gen. Stat. § 14-51.2(g), provides that "[t]his section is not intended to repeal or limit any other defense that may exist under the common law." N.C. Gen. Stat. § 14-51.2(g) (2017). By its terms, it only applies to N.C. Gen. Stat. § 14-51.2, which defendant has acknowledged does not apply in this case. Had the legislature intended such a provision in N.C. Gen. Stat. §§ 14-51.3 or -51.4, it could have provided it.

In this case, the trial court instructed pursuant to N.C. Gen. Stat. §§ 14-51.3 and -51.4(1) in accordance with North Carolina's statutory law on self-defense. Doing so was not a misstatement of the law.

Defendant also contends the challenged instruction was error because it was not supported by the evidence. Specifically, defendant argues there was no evidence that defendant was committing a felony at the time the assault took place. We agree.

There is conflicting evidence in this case about the assault. The victim testified that defendant's attack was unprovoked. Defendant testified that the victim was the aggressor and his use of force was in response to the victim's attack. Under either set of facts, there is no indication that defendant was committing a felony at the time

of the assault. The only evidence of a felony, besides the assault, was the evidence of restraint, beyond that inherent in the assault, supporting the kidnapping charge. It appears from the charge conference transcript that the trial court decided to include the challenged portion of the self-defense instruction with the kidnapping felony in mind. However, as detailed above, the restraint constituting kidnapping was the result of threats made during and after the assault. Thus, the kidnapping cannot serve as the felony referenced in the instructions.

The State does not argue the kidnapping charge supports the challenged instruction, but instead claims the evidence of the attack itself was sufficient evidence of a felony, stating that "evidence was presented that [defendant] had engaged in he [sic] commission of a felony by strangling [the victim] . . . ." We find this argument unpersuasive. It seems common sense that the felony to which self-defense is asserted as a justification cannot also be the felony rendering self-defense unavailable to defendant. To hold otherwise would render the self-defense justification futile. It appears that even the trial court recognized that the assault could not be the basis of the challenged self-defense instruction when it stated during the charge conference that "[kidnapping] is not the only felony but I think this is the only felony that could be, to coin a phrase, the predicate felony for the unavailability of the self-defense instruction . . . ."

Nevertheless, given the evidence in this case, the improper self-defense instruction does not amount to plain error. The victim gave a detailed account of defendant's attack which left her bleeding, hurting badly, and struggling to catch her breath. Testimony from the treating emergency room physician, who was tendered as an expert, was consistent with the victim's testimony that she was hit in the face and choked. The physician described the victim's injuries, which included the following: headache, neck pain, dizziness, nausea, weakness, significant swelling to the victim's left eye and left side of her face, a hematoma and laceration to the victim's face which the physician opined could have been caused by a trauma such as a punch or some type of striking, bruising and tenderness of the victim's neck with abrasions consistent with finger marks on both sides of the victim's neck, and pain and tenderness to the victim's chest.

Although defendant presented evidence to refute the victim's account of the attack, the evidence was that defendant did not suffer injuries besides a superficial injury to his thumb that was the result of a Taser deployed by police when apprehending him. Based on the evidence, we are not convinced that the result probably would have been different had the trial court omitted the challenged portion of the self-defense instruction. *See State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) ("Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have

reached a different result."). Thus, although the evidence does not support the challenged instruction, we hold the trial court's error does not amount to plain error in this case.

3. Flight

Defendant also argues the trial court erred in instructing the jury on flight. Defendant objected to the inclusion of a flight instruction during the charge conference. The trial court overruled defendant's objection and instructed the jury on flight as follows:

> The State contends, and the defendant denies, that the defendant fled, by hiding in a closet when law enforcement officers came to his residence. Evidence of flight may be considered by you together with all other facts and circumstances in this case in determining whether the combined circumstances amount to an admission or show a consciousness of guilt. However, proof of this circumstance is not sufficient in itself to establish defendant's guilt.

Defendant asserts this instruction was error because there was no evidence of flight.

The law on flight is well settled. "[F]light from a crime shortly after its commission is admissible as evidence of guilt, and a trial court may properly instruct on flight [s]o long as there is some evidence in the record reasonably supporting the theory that defendant fled after the commission of the crime charged[.]" *State v. Tucker*, 329 N.C. 709, 722, 407 S.E.2d 805, 813 (1991) (internal quotation marks and citations omitted). "Mere evidence that defendant left the scene of the crime is not enough to support an instruction on flight. There must also be some evidence that

defendant took steps to avoid apprehension." *State v. Thompson*, 328 N.C. 477, 490, 402 S.E.2d 386, 392 (1991). "The fact that there may be other reasonable explanations for defendant's conduct does not render the instruction improper." *State v. Norwood*, 344 N.C. 511, 534, 476 S.E.2d 349, 359 (1996).

Defendant contends the evidence in this case does not support an inference that defendant took steps to avoid apprehension. In making the argument, defendant distinguishes this case from *State v. Abraham*, 338 N.C. 315, 361, 451 S.E.2d 131, 156 (1994), the case cited by the trial court when it overruled defendant's objection to the flight instruction.

In *Abraham*, evidence was presented that the defendants were seen walking away from a murder scene shortly after the shooting occurred, the defendants detoured across a parking lot when approached by an officer, the defendants denied hearing gun shots and kept walking when questioned by the officer, and one of the defendants was found by police three weeks later hiding in a closet underneath a pile of clothes. *Abraham*, 338 N.C. at 362, 451 S.E.2d at 156-57. The Court held this evidence sufficient to support a flight instruction. *Id.* at 362, 451 S.E.2d at 157. Defendant correctly asserts that it was the totality of the evidence in *Abraham* – leaving the scene, avoiding police, and hiding in a closet underneath clothes – that supported the flight instruction.

In the present case, testimony was elicited that police obtained a warrant for defendant's arrest and went to the address the victim provided to arrest defendant. The police first attempted to call defendant out of the residence using a P.A. system on the patrol car. Police called out to defendant several times. Defendant did not respond, but another man came to the door and motioned for the police to come in. The police detained the man who came to the door and then entered the residence. Police found defendant lying on the ground inside of the long, narrow closet. Defendant was lying completely silent on his back with his feet facing the door. Because defendant would not respond to commands, police used a Taser and forcibly removed him from the closet.

We agree with defendant that there was considerably more evidence of flight in *Abraham* than in the present case. Nevertheless, it is reasonable from the evidence in this case to conclude defendant took steps to hide in the closet to avoid apprehension, revealing a consciousness of guilt. Thus, we hold the evidence in this case sufficient to allow the question of flight to be determined by the jury. The flight instruction was not error.

Even assuming *arguendo* the instruction was error because defendant was hiding in the house where the altercation occurred, the error was harmless in light of the other evidence of defendant's guilt. *See State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) ("[A]n 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.") (quotation marks omitted).

4. Defendant's Rights

In defendant's final argument on appeal, he contends the trial court violated his constitutional rights by allowing the State to question him about his post-arrest silence and right to counsel. "The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009), *appeal dismissed*, 363 N.C. 857, 694 S.E.2d 766 (2010).

The challenged testimony was elicited during the State's cross-examination and recross-examination of defendant. First, during cross-examination, the State asked defendant whom he had told what happened. Defendant indicated he only spoke to the Hoovers, the people who lived in the residence with him. The State then inquired whether it was defendant's testimony that he retaliated against the victim. Defendant responded, "I did out of defense for myself after she had hit me." The following exchange then took place:

> Q. For the last time we've been talking including today with [defense counsel], including yesterday, that is the first time that you said you were in defense of yourself; would you agree with that?
>
> [Defense Counsel]: Objection.
>
> The Court: Overruled. You may answer.

> . . . .
>
> A. I stated also that I was trying to stop her from hitting me, which would also state in defense from being hit and putting her in the naked choke to stop her, to stop the fight, to stop the hit.

During recross-examination, the State further questioned defendant about his counsel. Defendant indicated defense counsel had been his attorney the entire time. When the State inquired whether defendant and his attorney went to the law enforcement office to explain what happened, the court sustained the defense's objection. The State then asked, "[a]t no point in time have you given a statement to law enforcement on your own free will, have you?" Defendant responded negatively. The State then asked several more questions about whether defendant ever gave a statement of his own free will. Defendant's responses indicated that he had not.

Defendant contends this line of questioning concerning his right post-arrest silence and right to counsel violated his constitutional rights. Defendant relies on the United States Supreme Court's decision in *Doyle v. Ohio*, in which the Court held a defendant's post-arrest silence could not be used to impeach an exculpatory story told by the defendant for the first time at trial. 426 U.S. 610, 611, 49 L. Ed. 2d 91, 94 (1976). In *Doyle*, the Court explained the State's argument as follows:

> The State pleads necessity as justification for the prosecutor's action in these cases. It argues that the discrepancy between an exculpatory story at trial and silence at time of arrest gives rise to an inference that the story was fabricated somewhere along the way, perhaps to

> fit within the seams of the State's case as it was developed at pretrial hearings. Noting that the prosecution usually has little else with which to counter such an exculpatory story, the State seeks only the right to cross-examine a defendant as to post-arrest silence for the limited purpose of impeachment.

Id. at 616, 49 L. Ed. 2d at 97. The Court, however, concluded that "[d]espite the importance of cross-examination, . . . *Miranda* . . . compels rejection of the State's position[]" because "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." *Id*. at 617-18, 49 L. Ed. 2d at 97-98 (footnotes omitted). Similarly, our state courts have held the State may not introduce evidence that a defendant has invoked his right to remain silent or right to counsel. *See State v. Ladd*, 308 N.C. 272, 282-84, 302 S.E.2d 164, 171-72 (1983).

In response to defendant's argument, the State contends defendant opened the door and invited the testimony. The State argues that,

> [o]nce a defendant testifies, . . . he assumes the status of any other witness and is subject to impeachment by the questions and arguments of opposing counsel. These arguments may include comments on the witness's failure to explain or deny incriminating evidence for, if an innocent explanation exists or a denial can properly be made, the witness may reasonably be expected to provide it.

State v. Smith, 294 N.C. 365, 378, 241 S.E.2d 674, 682 (1978). The State's reliance on *Smith*, however, is misplaced. In *Smith*, the issue concerned the propriety of the prosecution's summation of the evidence and argument to the jury, neither of which

involved defendant's right to remain silent or right to counsel. *Id.* at 377-78, 241 S.E.2d at 681-82.

Under *Doyle* and state law, we are compelled to hold the trial court erred in allowing the State to question defendant on his post-arrest silence and right to counsel. However, not all violations of constitutional rights are prejudicial.

"A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." N.C. Gen. Stat. § 15A-1443(b) (2017). Defendant contends he was prejudiced in this case because the questioning "injected a wholly improper factor into the jury's assessment of [defendant's] credibility." We disagree.

Upon review of the transcript, it is evident that the questioning by the State did not have an impact on the result. First, in response to the first question relating to defendant's post-arrest silence, defendant indicated that he had previously claimed he was acting in self-defense. In response to the State's questions concerning further statements to police while he had counsel, defendant's responses indicate that he was unaware he could give a voluntary statement and that he believed he had to go through his attorney. Viewing the State's questions and defendant's answers in context, they do not appear to have had an impact in the trial. We, therefore, hold the error was harmless beyond reasonable doubt.

III. Conclusion

For the reasons discussed, we hold defendant received a fair trial free of prejudicial error.

NO PREJUDICIAL ERROR.

Judges CALABRIA and ZACHARY concur.

Report per Rule 30(e).