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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-363

Filed: 7 April 2020

Edgecombe County, No. 16 CRS 52962

STATE OF NORTH CAROLINA

v.

DARIUS JUWAN COUNCIL

Appeal by Defendant from Judgment entered 13 July 2018 by Judge Stanley L. Allen in Edgecombe County Superior Court. Heard in the Court of Appeals 4 December 2019.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Tamara S. Zmuda, for the State.*

*Appellate Defender Glenn Gerding and Assistant Appellate Defender Candace Washington for defendant-appellant.*

HAMPSON, Judge.

**Factual and Procedural Background**

Darius Juwan Council (Defendant) appeals from Judgment entered on 13 July 2018 upon his conviction for Voluntary Manslaughter. The Record before us, including evidence presented at trial, tends to show the following:

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On 23 October 2016, Defendant was visiting his girlfriend at her apartment in Pender Square. That afternoon, Defendant testified his brother Rasheen Council, along with Demetry Milbourne (Milbourne) and Daquan McGuire (McGuire), came over to Pender Square to watch football at another friend's apartment. After watching football, Defendant, Defendant's brother, Milbourne, and McGuire were walking back to Defendant's girlfriend's apartment when Reggie Alston (Alston) approached Milbourne about talking to his girlfriend. A fight ensued between Milbourne, McGuire, Alston, and Alston's brother. Defendant broke up the fight. As Alston walked away, he told Defendant, his brother, McGuire, and Milbourne it's "on sight."<sup>1</sup>

Defendant returned to his girlfriend's apartment with his brother, Milbourne, and McGuire. Shortly after, Defendant walked to a friend's home, where he stayed for approximately fifteen minutes. As Defendant returned to his girlfriend's apartment, he ran into McGuire. McGuire and Defendant saw Alston and Milbourne exchanging words, and Alston once again told Milbourne it was "on sight." Defendant approached Alston and Milbourne from the side. Alston turned to Defendant and asked why he was approaching. Defendant testified that he told Alston, "I'm going to shoot you if you approach[.]" Alston informed Defendant he was not "scared of no guns." Alston approached Defendant in an "aggressive manner." Defendant then

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<sup>1</sup> Defendant testified "on sight" meant Alston was going to fight them the next time he saw them.

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pulled out his gun and started shooting. Defendant “shot [Alston] like three or four times” before he took off running. Defendant testified that as he was running, he heard bullets flying past his head. Defendant got in a car and fled the scene.

On 3 November 2016, Defendant was arrested and charged with First-Degree Murder and Going Armed to the Terror of the People. On 22 March 2017, the State dismissed the charge of Going Armed to the Terror of the People. On 3 April 2017, a grand jury in Edgecombe County indicted Defendant for First-Degree Murder. Defendant’s trial came on for hearing on 9 July 2018. The State presented its case, and Defendant testified in his defense. Defendant admitted he knew Alston was unarmed at the time of their altercation but testified he feared Alston was going to harm him with his fists. Defendant stated when he shot Alston, “[he] just blacked out[,]” and he was just “trying to defend [himself].”

The evidence presented at trial reflected Defendant fired three shots, two of which struck Alston. Alston’s ultimate cause of death was from a gunshot to the head. At the close of Defendant’s trial, the trial court held a charge conference with counsel. The trial court agreed to instruct the jury according to North Carolina Pattern Jury Instruction 206.10 for first-degree murder, second-degree murder, voluntary manslaughter, and self-defense. In the portion of the jury charge on voluntary manslaughter, the trial court instructed:

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For you to find the defendant guilty of voluntary manslaughter, the state must prove three things beyond a reasonable doubt,

. . . .

[T]hird, that the defendant did not act in self-defense, although acting in self-defense was not adequately provoked. . . . However, if the state proves beyond a reasonable doubt that the defendant, though, otherwise, acting in self-defense was adequately provoked, the defendant would be guilty of voluntary manslaughter.

. . . .

If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant intentionally and not in self-defense wounded the victim with a deadly weapon and thereby proximately caused the victim's death, but the state has failed to satisfy you beyond a reasonable doubt that the defendant did not act in the heat of passion upon adequate provocation, it would be your duty to return a verdict of guilty of voluntary manslaughter.

And, finally, if the state has failed to satisfy you beyond a reasonable doubt that the defendant did not act in self-defense, that the defendant was adequately provoked and that the defendant's action would be justified by self-defense, it would be your duty to return a verdict of not guilty.

The next morning, before deliberations began, the trial court informed the jury it needed "to add some things that [it] omitted from the charge[.]"<sup>2</sup> The trial court continued and repeated the same self-defense instruction as above. The jury returned a verdict finding Defendant guilty of Voluntary Manslaughter. The trial court

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<sup>2</sup> The trial court's omission is unrelated to the issues on appeal.

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sentenced Defendant within the presumptive range to 80 to 108 months active sentence and recommended work release. Defendant gave Notice of Appeal in open court.

**Issues**

There are two issues before this Court: (I) whether the trial court erred when it failed to provide the jury with a not guilty mandate to the charge of Voluntary Manslaughter and (II) whether the trial court erred when it provided the jury with conflicting instructions as to Defendant's defense of self-defense.

**Analysis**

**I. Not Guilty Mandate**

Defendant contends the trial court erred when it failed to provide the jury a not guilty mandate to the charge of Voluntary Manslaughter. Defendant's argument is a question of law we review de novo. *See State v. Edwards*, 239 N.C. App. 391, 393, 768 S.E.2d 619, 621 (2015) ("We hold that where the request for a specific instruction raises a question of law, the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." (citation and quotation marks omitted)); *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009) ("[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court.").

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At Defendant's request during the charge conference, the trial court agreed to instruct the jury according to North Carolina Pattern Jury Instruction 206.10 on the charge of first-degree murder and the two lesser included offenses of second-degree murder and voluntary manslaughter. N.C.P.I–Crim 206.10 (June 2014). However, when charging the jury, the trial court deviated from the pattern instructions and omitted the portion providing "[i]f you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty." Instead, the trial court instructed:

If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant intentionally and not in self-defense wounded the victim with a deadly weapon and thereby proximately caused the victim's death, but the state has failed to satisfy you beyond a reasonable doubt that the defendant did not act in the heat of passion upon adequate provocation, it would be your duty to return a verdict of guilty of voluntary manslaughter.

And, finally, if the state has failed to satisfy you beyond a reasonable doubt that the defendant did not act in self-defense, that the defendant was adequately provoked and that the defendant's action would be justified by self-defense, it would be your duty to return a verdict of not guilty.

Thus, the trial court did not provide the jury with an instruction that it could find Defendant *not guilty* of Voluntary Manslaughter if the jury was not satisfied that the State met its burden of proof as to each element of the charge of Voluntary Manslaughter.

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Defendant argues this omission prejudiced Defendant. Specifically, Defendant asserts the “trial court effectively instructed the jury that [Defendant] was only entitled to a not guilty verdict by reason of self-defense[ ]” and “the trial court’s instructions did not hold the State to its burden of proving every element of manslaughter beyond a reasonable doubt.” Defendant relies on *State v. Ramey* and *State v. McArthur* to support his argument. In *McArthur*, this Court, following our Supreme Court in *Ramey*, awarded the defendant a new trial “because of the trial court’s failure to include a specific instruction directing the jury to enter a verdict of not guilty if it found that the State had failed to prove any of the elements of the charged crimes beyond a reasonable doubt.” 186 N.C. App. 373, 380, 651 S.E.2d 256, 260 (2007) (citing *State v. Ramey*, 273 N.C. 325, 328, 160 S.E.2d 56, 58 (1968)).

The State contends the error was not prejudicial and that Defendant’s argument is controlled by our Supreme Court’s opinion in *State v. Winford*. 279 N.C. 58, 71-72, 181 S.E.2d 423, 431 (1971). In *Winford*, “the judicial stipulations and defendant’s own testimony establish[ed] that defendant intentionally shot [the victim] . . . proximately caus[ing] his death.” *Id.* at 66, 181 S.E.2d at 428. On appeal, the defendant, citing *Ramey*, argued the trial court “should have stated that if the State had failed to satisfy the jury beyond a reasonable doubt that defendant was either guilty of second degree murder or of manslaughter, that it should return a verdict of not guilty.” *Id.* at 72, 181 S.E.2d at 431. The *Winford* Court concluded

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“neither of [the defendant’s] contentions concerning the trial judge’s final mandate to the jury would, *standing alone*, constitute prejudicial error.” *Id.* at 72, 181 S.E.2d 432 (emphasis added).

The Court emphasized “it would have been the better practice to clearly charge in the final mandate as to all possible verdicts” yet distinguished *Ramey* because “in *Ramey* there was no judicial admission that the deceased’s death was proximately caused . . . by the defendant.” *Id.* at 72, 181 S.E.2d at 431. The State attempts to distinguish the case at hand from *McArthur* because in *McArthur*, the defendant’s “intent to kill” was at issue in addition to self-defense; whereas in the present case, like in *Winford*, Defendant’s testimony established Defendant’s gunshot to Alston’s head was the proximate cause of Alston’s death. Nevertheless, although the trial court’s omission in the present case may not constitute prejudicial error *standing alone*, this was not the trial court’s only error in instructing the jury. Accordingly, we turn to Defendant’s additional argument.

II. Self-Defense

Defendant next argues the trial court erred when it provided the jury with conflicting instructions on whether Defendant may be found not guilty by reason of self-defense. The trial court charged the jury twice, on two separate days: “if the state proves beyond a reasonable doubt that the defendant, though, otherwise, acting in



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self-defense was adequately provoked, the defendant would be guilty of voluntary manslaughter.”

Defendant argues this portion of the instruction was erroneous because it communicates to the jury Defendant may be found guilty of Voluntary Manslaughter even if Defendant acted in self-defense. Defendant contends this instruction conflicts with the earlier portion of the instruction where the trial court charged: “The defendant would not be guilty of any murder or manslaughter if the defendant acted in self-defense.” The State agrees the trial court’s instruction was incorrect, contending it should have read: “if the state proves beyond a reasonable doubt that the defendant, though, otherwise, acting in self-defense was [*not*] adequately provoked, the defendant would be guilty of voluntary manslaughter.” However, the State contends Defendant was not prejudiced by the error because the self-defense instruction was gratuitous and, in the alternative, argues this omission was a *lapsus linguae* and was not prejudicial to Defendant.

*A. Gratuitous Instruction*

Before addressing Defendant’s argument, we necessarily must address the State’s contention that Defendant was not entitled to an instruction on self-defense at all and, therefore, the trial court’s erroneous instruction was gratuitous. *See State v. Reid*, 335 N.C. 647, 672, 440 S.E.2d 776, 790 (1994) (“When a trial court undertakes to instruct the jury on self-defense in a case in which no instruction in this regard is

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required, the gratuitous instructions on self-defense are error favorable to defendant.”). The State argues Defendant was not entitled to self-defense on two grounds. First, because Defendant committed a felony by possessing a weapon while on probation, which the State argues invokes N.C. Gen. Stat. § 51.4(1). N.C. Gen. Stat. § 51.4(1) (2019) (“The [self-defense] 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: (1) Was attempting to commit, committing, or escaping after the commission of a felony.”). Second, the State contends the evidence presented at trial, even taken in the light most favorable to Defendant, did not support a self-defense instruction.

The State first argues Defendant was automatically precluded from an instruction on self-defense under Section 14-51.4(1) because Defendant was engaged in the commission of a felony by possessing a firearm.<sup>3</sup> The State cites this Court’s opinion in *State v. Crump* in support of its argument. 259 N.C. App. 144, 151, 815 S.E.2d 415, 419, *disc. rev. granted*, 371 N.C. 786, 820 S.E.2d 811 (2018). In *Crump*, “before trial, defendant requested in writing that the self-defense instruction include the language from [N.C. Gen. Stat.] § 14-51.4(1) and that the jury be instructed on the felonies of possession of a firearm by a felon and possession of stolen goods.” *Id.* at 149 n.1, 815 S.E.2d at 419 n.1. Further, the defendant “stipulated to a

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<sup>3</sup> Possession of a firearm by a felon is a class G felony. N.C. Gen. Stat. § 14-415.1 (2019).

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disqualifying felony before the charge conference[.]” *Id.* at 145, 815 S.E.2d at 417. As such, the trial court “instructed the jury in the words of [N.C. Gen. Stat.] § 14-51.4(1) that self-defense was not available to one engaged in felonious conduct[.]” *Id.* at 148, 815 S.E.2d at 419.

In the case *sub judice*, although Defendant knew it was illegal for him to possess a firearm in violation of his probation, neither Defendant nor the State requested the trial court incorporate Section 14-51.4 into its self-defense instruction to the jury, and the trial court did not do so.<sup>4</sup> Accordingly, *Crump* presents a case factually distinguishable from the case at hand. The trial court did not instruct the jury according to Section 14-51.4 as did the trial court in *Crump*; therefore, there was no factual determination made that Defendant was *not* entitled to an instruction on self-defense under Section 14-51.4. Thus, Section 14-51.4 did not automatically serve to bar Defendant from an instruction on self-defense.

The State also argues Defendant’s self-defense instruction was gratuitous because the evidence presented at trial was insufficient to support the instruction under the common law. “[T]his Court has stated that, ‘[w]here there is evidence that [a] defendant acted in self-defense, the court must charge on this aspect even though there is contradictory evidence by the State or discrepancies in [the] defendant’s evidence.’” *State v. Lee*, 370 N.C. 671, 677, 811 S.E.2d 563, 568 (2018) (Martin, C.J.,

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<sup>4</sup> We also note Defendant did not stipulate to a disqualifying felony at the charge conference.

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concurring) (quoting *State v. Dooley*, 285 N.C. 158, 163, 203 S.E.2d 815, 818 (1974)); see *State v. Moore*, 363 N.C. 793, 796 688 S.E.2d 447, 449 (2010) (“[I]f the defendant’s evidence, taken as true, is sufficient to support an instruction for self-defense, it must be given even though the State’s evidence is contradictory.”).

Here, the State contends Defendant’s testimony he was scared and he intended to scare Alston disqualifies him from an instruction on self-defense. In addition, however, evidence in the Record and presented at trial established on 23 October 2016, Defendant broke up a fight between Alston and McGuire. Thereafter, Alston told Defendant it was “on sight,” which Defendant took to mean Alston intended to fight him the next time he saw him. Later that afternoon, Defendant saw Alston and Milbourne exchanging words, testifying “[Alston] was still trying to fight[ ]” and describing Milbourne as scared. As Defendant continued toward Alston, Alston asked Defendant why he was approaching his blind side. Defendant testified Alston approached him in an aggressive manner, prompting Defendant to tell Alston: “I’m going to shoot you if you approach[.]” Alston responded “I ain’t scared of no guns[.]” Alston continued to approach Defendant, and Defendant began shooting. Defendant testified that he believed Alston was going to harm him with his hands; indeed, he witnessed Alston punch McGuire earlier that day and perceived Alston to threaten him with future violence. Defendant knew people could die or be seriously injured from a fight.

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We accept this case presents a close call as to whether Defendant was entitled to an instruction on self-defense on these facts. However, we also recognize “where there is evidence that a defendant acted in self-defense, the court must charge on this aspect even though there is contradictory evidence by the State or discrepancies in the defendant’s evidence.” *Lee*, 370 N.C. at 677, 811 S.E.2d at 568 (Martin, C.J. concurring) (citations and quotation marks omitted). Accordingly, even considering discrepancies in Defendant’s testimony, there is evidence to support the trial court’s determination Defendant was entitled to a jury instruction on self-defense.

*B. Conflicting Instructions*

“It has been uniformly held that where the court charges correctly at one point and incorrectly at another, a new trial is necessary because the jury may have acted upon the incorrect part.” *State v. Harris*, 289 N.C. 275, 280, 221 S.E.2d 343, 347 (1976) (citation and quotation marks omitted). “Moreover, an erroneous instruction on the burden of proof is not ordinarily corrected by subsequent correct instructions upon the point.” *Id.* Therefore, “[b]ecause we cannot tell which version of the instructions guided the jury, we must assume that it was influenced by any portions of either instruction that were erroneous.” *State v. Maske*, 358 N.C. 40, 54, 591 S.E.2d 521, 530 (2004).

Here, the trial court in the charge conference agreed to instruct the jury according to N.C. Pattern Jury Instruction 206.10. However, the trial court’s

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instruction “if the state proves beyond a reasonable doubt that the defendant, though, otherwise, acting in self-defense was adequately provoked, the defendant would be guilty of voluntary manslaughter[ ]” conflicts with the portion stating “[t]he defendant would not be guilty of any murder or manslaughter if the defendant acted in self-defense.” The State concedes this statement is erroneous; however, the State contends the trial court inadvertently omitted the word “*not*” such that the instruction should have been “if the state proves beyond a reasonable doubt that the defendant, though, otherwise, acting in self-defense was [*not*] adequately provoked, the defendant would be guilty of voluntary manslaughter.”

“We have held that error arises where a court’s oral instructions are correct at one point and incorrect at another.” *Id.*, 358 N.C. at 54, 591 S.E.2d at 530 (citation omitted). We conclude, as Defendant argues and the State concedes, that the trial court’s instruction “if the state proves beyond a reasonable doubt that the defendant, though, otherwise, acting in self-defense was adequately provoked, the defendant would be guilty of voluntary manslaughter” was erroneous. Further, the statement conflicts with another portion of the trial court’s instruction and, as Defendant argues, conveys to the jury it may find Defendant guilty of Voluntary Manslaughter and still find he acted in self-defense. The trial court’s omission of the word “not” changed the meaning of the entire sentence and is not simply, as the State argues, a

*lapsus linguae*. Thus, we conclude the trial court's contradictory instructions to the jury constitute error.

### III. Prejudice

Ultimately, our analysis hinges on whether the trial court's failure to provide a not guilty mandate as to the charge of Voluntary Manslaughter coupled with its erroneous and contradictory instruction on self-defense prejudiced Defendant. Specifically, Defendant contends the errors communicated to the jury it could find Defendant guilty of Voluntary Manslaughter even if he was acting in self-defense, thereby reducing the State's burden of proof for the charge of Voluntary Manslaughter. A defendant is prejudiced when, for a non-constitutional error, "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." N.C. Gen. Stat. § 15A-1443(a) (2019). We conclude, when analyzing the totality of the impact of the trial court's errors in the case *sub judice*, Defendant has demonstrated prejudicial error.

We recognize our Supreme Court's decision in *Winford*, which concluded the trial court's failure to provide a final mandate to the jury did not, "standing alone, constitute prejudicial error."<sup>5</sup> *Winford*, 279 N.C. at 72, 181 S.E.2d 432. However, we

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<sup>5</sup> Indeed, in *Winford* our Supreme Court granted the defendant a new trial after holding the trial court's "total charge did not aid the jury in understanding the precise material issues necessary for determination of their verdict." *Winford*, 279 N.C. at 73, 181 S.E.2d at 432.

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consider Defendant's argument in combination with the trial court's additional error on Defendant's self-defense instruction. "It has been uniformly held that where the court charges correctly at one point and incorrectly at another, a new trial is necessary because the jury may have acted upon the incorrect part." *Harris*, 289 N.C. at 280, 221 S.E.2d at 347 (citations and quotation marks omitted). Here, the trial court's erroneous instruction informed the jury that they could find Defendant guilty of Voluntary Manslaughter even if he was acting in self-defense. The trial court further did not provide the jury with a not guilty mandate to the charge of Voluntary Manslaughter. Both of the trial court's errors in the present case relate to the charge of which the jury found Defendant guilty—Voluntary Manslaughter. The Record does not indicate whether the jury found Defendant acted in self-defense or not. However, the trial court determined there was sufficient evidence to submit the question of self-defense to the jury. Thus, assuming, as we must, that the jury acted upon the incorrect portion of the trial court's self-defense instruction, there is a reasonable probability the jury found Defendant was acting in self-defense and yet found Defendant guilty of Voluntary Manslaughter. As such, we conclude the trial court's compounded errors in the jury instructions considered together amount to prejudicial error.

**Conclusion**



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Accordingly, based on the foregoing reasons, we conclude the trial court committed prejudicial error. Defendant is entitled to a new trial.

NEW TRIAL.

Judges BRYANT and COLLINS concur.

Report per Rule 30(e).