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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-1081

Filed: 18 August 2020

Robeson County, No. 16 CRS 50969

STATE OF NORTH CAROLINA

v.

ARCHIE LYNN MCNEILL

Appeal by defendant from amended judgment entered 3 May 2019 by Judge Tanya T. Wallace in Robeson County Superior Court. Heard in the Court of Appeals 12 May 2020.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Katherine A. Murphy, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Candace M. Washington, for defendant-appellant.*

ZACHARY, Judge.

Defendant Archie Lynn McNeill appeals from an amended judgment entered upon a jury's verdict finding him guilty of assault with a deadly weapon inflicting serious injury. On appeal, Defendant contends that the trial court committed plain error in instructing the jury, because the court's instructions on the affirmative defense of lawful defense of a family member erroneously shifted the burden of proof

to Defendant. For the reasons that follow, we conclude that Defendant received a fair trial, free from error.

### **Background**

On 1 May 2019, Defendant's case on the charge of assault with a deadly weapon inflicting serious injury came on for jury trial in Robeson County Superior Court, the Honorable Tanya T. Wallace presiding. The State's evidence tended to show that on 4 February 2016, Miranda Chavis, Defendant's cousin and neighbor, returned home and found that Defendant had dug a ditch that she believed had removed "the dirt off [her] waterlines," which ran through property allegedly owned by Defendant's mother. Having been given permission "to put [her] home there and do the waterlines[.]" Miranda and her son, Zakaya, began to cover the waterlines with dirt. Defendant came outside and started removing the dirt that Miranda and Zakaya had thrown into the ditch, and the parties argued.

As Defendant and Miranda's interaction became increasingly hostile, their uncle, June McNeill, arrived and began arguing with Zakaya, who was still covering the waterlines. According to Miranda, "when . . . June trie[d] to grab the shovel from my son, [Defendant] approache[d] with a shovel and hit me in my face[.]" Miranda suffered a laceration over the bridge of her nose extending to her right lower eyelid, as well as "underlying facial fractures." She required surgery and was unable to work for approximately one month.

At trial, Defendant testified on his own behalf. He explained that after June appeared and began to argue with Zakaya,

[June] took the shovel from the young boy, so when -- when Miranda seen him take the shovel, [Miranda] -- [Miranda] walked over there where they was at with the shovel. And what they done, they had their shovels against one another. So what I done, I didn't really mean to hit nobody. What I done, I took -- I tried to knock the shovel out of their hands, because [Miranda] was fixing to -- she was going on [June] because he had took the shovel from [Zakaya]. And then I'd've -- after I knocked the shovels out of their hand - - what it done, when I hit them shovels, when them fiberglass handles hit, we don't know which shovel hit [Miranda]. I was just trying to knock the shovels out of their hand.

June similarly testified that Miranda “hit the shovel that [he] w[as] holding up.”

At the conclusion of all evidence, the trial court instructed the jury on, *inter alia*, the charge of assault with a deadly weapon inflicting serious injury, the lesser-included offense of assault inflicting serious injury, and the affirmative defense of defense of a family member. The jury returned a verdict finding Defendant guilty of assault with a deadly weapon inflicting serious injury. The trial court entered judgment sentencing Defendant to 25-39 months in the custody of the North Carolina Division of Adult Correction. Defendant timely appealed.

### **Discussion**

Defendant's sole issue on appeal is whether the trial court committed plain error by “instructing the jury that it had to find the elements of defense of a family

member beyond a reasonable doubt, thereby impermissibly shifting the burden of proof to” Defendant.

In the present case, Defendant neither objected to the trial court’s use of the pattern jury instruction for assault in lawful defense of a family member, nor requested a modified instruction. Thus, this Court will review for plain error.

1. Standard of Review

“Under the plain error standard, [the] defendant must show that the instructions were erroneous and that absent the erroneous instructions, a jury probably would have returned a different verdict.” *State v. Haire*, 205 N.C. App. 436, 440, 697 S.E.2d 396, 399 (2010). “The error in the instructions must be so fundamental that it denied the defendant a fair trial and quite probably tilted the scales against him.” *Id.* (citation and internal quotation marks omitted). Therefore, “[t]he plain error rule is always to be applied cautiously and only in the exceptional case[.]” *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012) (citation omitted).

Our Supreme Court has made clear that “[a] charge [to the jury] must be construed contextually, and isolated portions of it will not be held prejudicial when the charge as a whole is correct.” *State v. McWilliams*, 277 N.C. 680, 684-85, 178 S.E.2d 476, 479 (1971). “In deciding whether a defect in the jury instruction constitutes ‘plain error,’ the appellate court must examine the entire record and

determine if the instructional error had a probable impact on the jury's finding of guilt." *Haire*, 205 N.C. App. at 440, 697 S.E.2d at 399.

2. Jury Instructions

Defendant challenges the following sentence from the trial court's jury instruction on the affirmative defense of lawful defense of a family member, which the trial court delivered following its instructions on both the charged offense as well as the lesser-included offense:

If you find from the evidence beyond a reasonable doubt that the defendant assaulted Miranda Chavis and that the circumstances would have created a reasonable belief in the mind of a person of ordinary firmness that the assault was necessary or apparently necessary to protect a family member from bodily injury or offensive physical contact, and the circumstances did create such a belief in the defendant's mind at the time the defendant acted, such an assault would be justified by defense of a family member.

Defendant asserts that this instruction "plainly communicated to the jury that [he] bore the burden of proving his defense" beyond a reasonable doubt, and thus, the trial court's use of the relevant pattern jury instruction for defense of a family member "amounted to plain error because it dramatically altered the burden of proof as it related to [Defendant's] sole theory of defense." We disagree.

This Court rejected a similar argument in *State v. Haire*, 205 N.C. App. 436, 697 S.E.2d 396 (2010). There, the defendant was charged with assault with a deadly weapon with intent to kill inflicting serious injury. *Haire*, 205 N.C. App. at 440, 697

S.E.2d at 399. The trial court instructed the jury on this charge, as well as the lesser-included offense of assault with a deadly weapon inflicting serious injury, using “the pattern jury instructions for self-defense that accompany [the instructions for] an assault using deadly force.” *Id.* at 440-41, 697 S.E.2d at 399.

On appeal, the defendant argued that the self-defense portion of the trial court’s instructions “would have been misleading to the jury” because, read literally, the following “language . . . incorrectly shifts the burden of proving self-defense to [the] defendant”:

If you find from the evidence beyond a reasonable doubt that the defendant assaulted the victim, but not with a deadly weapon or other deadly force, and the circumstances would create a reasonable belief in the mind of ordinary firmness that the action was necessary or appeared to be necessary to protect that person from bodily injury or offensive physical contact, and the circumstances did create such a belief in the defendant’s mind at the time the defendant acted, the assault would be justified by self defense even though the defendant was not thereby put in actual danger of death or great bodily harm.

*Id.* at 442, 697 S.E.2d at 400.

After review of the instructions delivered to the jury, we concluded that “the trial court properly edited the pattern instructions by repeatedly expressing to the jury . . . that the State had the burden of proving beyond a reasonable doubt that [the] defendant’s actions were not in self-defense.” *Id.* at 442-43, 697 S.E.2d at 400. The

trial court did not err “when the charge as a whole [wa]s free from objection.” *Id.* at 441, 697 S.E.2d at 400.

Here, the question is whether, after reviewing the instructions in context, “we think the jury clearly understood that the burden was upon the State to satisfy it beyond a reasonable doubt that [D]efendant did not act in [lawful defense of a family member] and clearly understood the circumstances under which it should return a verdict of not guilty by reason of” lawful defense of a family member. *State v. Jones*, 294 N.C. 642, 653, 243 S.E.2d 118, 125 (1978); *see also Haire*, 205 N.C. App. at 441, 697 S.E.2d at 400 (“Long-standing precedent in this Court explains that the charge to the jury will be construed contextually . . .”).

When reviewed in context, the trial court’s instructions clearly and repeatedly emphasized that the State had the burden of proving Defendant’s guilt beyond a reasonable doubt:

If the defendant assaulted Miranda Chavis in lawful defense of another person, the defendant’s actions would be excused, and the defendant would be not guilty. *The State has the burden of proving from the evidence beyond a reasonable doubt that the defendant did not act in the lawful defense of another person.*

If you find from the evidence beyond a reasonable doubt that the defendant assaulted Miranda Chavis and that the circumstances would have created a reasonable belief in the mind of a person of ordinary firmness that the assault was necessary or apparently necessary to protect a family member from bodily injury or offensive physical contact, and the circumstances did create such a belief in

the defendant's mind at the time the defendant acted, such an assault would be justified by defense of a family member. You, the jury, determine the reasonableness of the defendant's belief from the circumstances appearing to the defendant at that time. Furthermore, the defendant has no duty to retreat in a place where the defendant has a lawful right to be. The defendant would have a lawful right to be on the defendant's own premises.

. . . .

Therefore, if you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant intentionally struck Miranda Chavis with a shovel, and that the shovel was a deadly weapon, and thereby inflicted serious injury upon Miranda Chavis, nothing else appearing, it would be your duty to return a verdict of guilty. If 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.

However, again, although you may be satisfied beyond a reasonable doubt that the defendant assaulted the victim, you may return a verdict of guilty *only if the State has satisfied you beyond a reasonable doubt that the defendant did not act in the lawful defense of a family member* -- that is, the defendant did not reasonably believe that the assault of the vic -- of Miranda Chavis was necessary or apparently necessary to protect the defendant's family member from bodily injury or offensive physical contact, or that the defendant used excessive force or was the aggressor. *If you do not so find or have a reasonable doubt that the State has proved one or more of these things, then the defendant would be justified by the defense of family member* and you would not consider -- and you would move on to the charge of assault inflicting serious injury.

(Emphases added).



The instruction on lawful defense of a family member was delivered twice, along with both of the substantive offenses upon which the jury was charged and rendered a verdict. Thus, the trial court instructed the jury on the appropriate burden of proof for lawful defense of a family member a total of six times during its charge.

Defendant cites *State v. Harris*, 289 N.C. 275, 221 S.E.2d 343 (1976); *State v. Hunt*, 192 N.C. App. 268, 664 S.E.2d 662 (2008), *disc. review denied*, 363 N.C. 133, 673 S.E.2d 868 (2009); and *State v. McArthur*, 186 N.C. App. 373, 651 S.E.2d 256 (2007), for the proposition that “[a] trial court’s conflicting instructions on the burden of proof warrant a new trial.” These cases, however, are distinguishable from the case at bar. In *Harris* and *Hunt*, the trial court *explicitly* instructed the jury that the defendant bore the burden of proof on an issue for which the burden of proof was properly borne by the State. *Harris*, 289 N.C. at 279-80, 221 S.E.2d at 346-47; *Hunt*, 192 N.C. App. at 271, 664 S.E.2d at 664. In *McArthur*, the trial court failed “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.” *McArthur*, 186 N.C. App. at 380, 651 S.E.2d at 260. In the instant case, however, the trial court repeatedly explained to the jury that the State had the burden of proving that Defendant did not act in lawful defense of a family member. Furthermore, the specific language Defendant challenges did not explicitly shift the

burden of proof to Defendant, as in *Harris* and *Hunt*. Therefore, the cases on which Defendant relies are inapt.

In sum, “[t]he trial court repeatedly instructed the jury that the State had the burden of proving from the evidence beyond a reasonable doubt that [D]efendant did not act in . . . [lawful] defense of [a family member].” *State v. Perez*, 182 N.C. App. 294, 300, 641 S.E.2d 844, 849 (2007), *disc. review denied*, 362 N.C. 242, 659 S.E.2d 737 (2008). Indeed, the trial court correctly instructed the jury immediately before and after each of the challenged instructions as to the State’s burden of proof with regard to this affirmative defense. *See id.* Accordingly, “we are satisfied that the jury understood that [D]efendant did not bear the burden of proof in this case.” *Id.*

### **Conclusion**

For the reasons stated herein, we hold that the trial court did not commit plain error in its jury instructions regarding lawful defense of a family member.

NO ERROR.

Chief Judge McGEE and Judge HAMPSON concur.

Report per Rule 30(e).