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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-151

No. COA20-733

Filed 1 March 2022

Gaston County, No. 18CRS064229, 19CRS003163

STATE OF NORTH CAROLINA

v.

RYAN KEITH MOORE, Defendant.

Appeal by defendant from judgment entered 17 March 2020 by Judge David A. Phillips in Superior Court, Gaston County. Heard in the Court of Appeals 7 September 2021.

*Attorney General Joshua H. Stein, by Senior Deputy Attorney General Amar Majmundar, for the State.*

*Law Office of Kellie Mannette, PLLC, by Kellie Mannette, for defendant-appellant.*

STROUD, Chief Judge.

¶ 1 Defendant appeals the judgment convicting him of attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury, arguing the trial court erred in instructing the jury and in failing to intervene in the State's closing arguments. Because the jury instructions, considered in context, were

appropriate and the trial court did not err in failing to intervene in the State's argument, we conclude there was no error.

## I. Background

¶ 2 The State's evidence tended to show that in 2018, defendant and his girlfriend, Cheryl[1], were living in a house owned by Mr. Tom Street. Cheryl was also driving a Monte Carlo that belonged to Mr. Street. Mr. Street considered Cheryl to be his daughter due to his close relationship with her mother.

¶ 3 A shooting occurred at the house, and Mr. Street asked Cheryl and defendant to move out of the home. Mr. Street believed defendant owed him $1,000.00 due to the damage to the house. Cheryl paid Mr. Street $500.00, but he believed defendant owed him $500.00. When defendant moved out, he noted some of his personal property was missing from the home.

¶ 4 On 29 November 2018, Mr. Street saw defendant in a store parking lot in his Monte Carlo. Defendant went into the store, and Mr. Street followed, saying he wanted to speak with him. Defendant said he would be out in a minute. Defendant and Mr. Street talked; defendant accused Mr. Street of stealing from him so he did not owe Mr. Street any money.

¶ 5 Upon defendant's accusation of theft, Mr. Street punched defendant in the

[1] Pseudonyms are used.

mouth. Defendant grabbed Mr. Street in a headlock, and Mr. Street fell to the ground. The two men talked for five or ten minutes as defendant held Mr. Street by the neck. An individual from inside the store broke the two up, and Mr. Street said to defendant, "I know you ain't getting no pistol." Defendant said, "You shouldn't have hit me."

¶ 6 Two cars were between defendant and Mr. Street as defendant went toward the Monte Carlo. Defendant grabbed a gun and shot Mr. Street in the wrist. Mr. Street turned to run, and defendant shot him in the stomach, then multiple times in the back. Defendant kept saying, "You shouldn't have hit me."

¶ 7 Defendant was indicted for attempted first degree murder ("attempted murder") and assault with a deadly weapon with intent to kill inflicting serious injury ("AWDWIKISI"). Defendant's defense was based upon self-defense. During his trial, defendant testified he had a gun in his pocket, tried to leave but realized his keys had fallen out of his pocket, went to retrieve his keys but Mr. Street reached for him and threatened to kill him, so he shot him. The State presented Mr. Street's extensive testimony regarding the altercation and shooting and testimony from the man who broke up the fight. The eyewitness testified Mr. Street had made no threats; a fight ensued; the two separated; and then defendant went to a car, grabbed a gun, and shot another man saying, "I got your money." Another eyewitness also saw "the shooter" go to his car, say, "I got your money for you[,]" and begin shooting his gun.

¶ 8 The jury found defendant guilty of both charges against him. The trial court entered judgment. Defendant appeals.

## II. Defendant's Appeal

¶ 9 Defendant makes three arguments on appeal.

### A. Jury Instructions

¶ 10 Defendant's first two arguments on appeal are regarding plain error[2] in jury instructions.

#### *1. Standard of Review*

> For an appellate court to find plain error, it must first be convinced that, absent the error, the jury would have reached a different verdict. The defendant has the burden of showing that the error constituted plain error. Thus, on plain error review, the defendant must first demonstrate that the trial court committed error, and next that absent the error, the jury probably would have reached a different result. So, if defendant has failed to show that the purported error would have led to a different result, we need not consider whether an error was actually made.

*State v. Baldwin*, 240 N.C. App. 413, 418–19, 770 S.E.2d 167, 172 (2015) (citations and quotation marks omitted). Further,

> [t]he instructions given by a trial judge should be supported by evidence produced at trial. If a defendant assigns error to these instructions, but failed to object at

[2] Defendant argues both error and plain error as to his first argument on appeal, but after the trial court instructed the jury on the sentence he now argues is error, he did not object, though given the opportunity after the initial instruction and the reinstruction. Accordingly, we apply only plain error review. *See generally State v. Banks*, 191 N.C. App. 743, 748–49, 664 S.E.2d 355, 359 (2008).

> trial, the alleged error is subject to review for plain error only. Plain error with respect to jury instructions requires the error be so fundamental that (i) absent the error, the jury probably would have reached a different verdict; or (ii) the error would constitute a miscarriage of justice if not corrected.

*State v. Banks*, 191 N.C. App. 743, 748–49, 664 S.E.2d 355, 359 (2008) (citations and quotation marks omitted).

***2. Intent Instruction***

¶ 11 Defendant first contends "[t]he trial court erred or plainly erred by instructing the jury the requisite intent for both crimes was 'intent to cause death or serious bodily injury,' thereby reducing the State's burden to prove the specific intent to kill." (Original in all caps.) According to defendant's own argument the trial court *properly* instructed the jury on attempted murder, AWDWIKISI, and self-defense. After beginning deliberations, the jury asked to be instructed again on attempted murder. The trial court then *again* gave the *correct* instruction on attempted murder and self-defense. But between the instructions of the charges and self-defense, the trial court stated,

> If the State satisfied you beyond a reasonable doubt that the defendant assaulted [Mr. Street] with a deadly weapon with intent to cause death or serious injury bodily injury then you will consider whether the defendant's actions are excused and the defendant is not guilty because the defendant acted in self-defense.

Defendant contends the trial court said something of similar import a total of three

times in both the instruction and re-instruction. In other words, defendant's argument is that the trial court properly instructed the jury *twice* on attempted murder and self-defense, and once on AWDWIKISI, but due to the transitional sentence used between the elements of the crimes and self-defense, the instructions were in error.

¶ 12 Defendant argues this case is similar to *State v. Keel*, 333 N.C. 52, 423 S.E.2d 458 (1992), wherein the Supreme Court granted a new trial, *id.* at 60, 423 S.E.2d at 463, because the trial court diverged from the pattern jury instruction in listing the elements of *first*-degree murder and defined "intentionally killed" per a footnote of the pattern jury instruction for *second*-degree murder; thus, altering the State's burden of proof. *See id.* at 56-60, 423 S.E.2d at 461-63. But here, defendant admits the jury was properly instructed in accord with the pattern jury instructions; defendant challenges only the language used in the transition between each pattern instruction. Accordingly, *Keel* is not applicable as the trial court did not correctly charge the jury on the elements of each charge in that case. *See id.* Again, defendant here acknowledges the jury was properly instructed on attempted murder and self-defense twice and AWDWIKISI once.

¶ 13 We need not address the elements of each crime and self-defense as defendant is not contending those specific instructions were wrong but only that one sentence provided between the specific instructions for each crime and self-defense was

incorrect. But we review the jury instructions as a whole and in context, not read out of context and piecemeal as defendant contends:

> As a whole, the instructions must correctly convey the concept of reasonable doubt to the jury.
>
> > The charge of the court must be read as a whole, in the same connected way that the judge is supposed to have intended it and the jury to have considered it. It will be construed contextually, and isolated portions will not be held prejudicial when the charge as a whole is correct. If the charge presents the law fairly and clearly to the jury, the fact that some expressions, standing alone, might be considered erroneous will afford no ground for reversal.
>
> If, when so construed, it is sufficiently clear that no reasonable cause exists to believe that the jury was misled or misinformed, any exception to it will not be sustained even though the instruction could have been more aptly worded.

*State v. Turner*, 237 N.C. App. 388, 393, 765 S.E.2d 77, 82 (2014) (citations, quotation marks, ellipses, and brackets omitted). Thus, even if we were to presume the trial court misspoke in the challenged statement, the jury instructions as a whole are "sufficiently clear that no reasonable cause exists to believe that the jury was misled or misinformed" in light of the twice repeated proper instruction on attempted murder and self-defense and the proper instruction on AWDWIKISI. *Id.* We conclude there was no plain error.

***3. Lesser Included Offense Instruction***

Defendant next contends "the trial court plainly erred by failing to instruct on the lesser included offense of attempted voluntary manslaughter." (Original in all caps.) Specifically, as to plain error and lesser-included offenses:

> Plain error occurs when the error is so fundamental that it undermines the fairness of the trial, or where it had a probable impact on the guilty verdict.
>
> > It is well-established that the trial court must submit and instruct the jury on a lesser included offense when, and only when, there is evidence from which the jury could find that the defendant committed the lesser included offense. However, when the State's evidence is positive as to every element of the crime charged and there is no conflicting evidence relating to any element of the crime charged, the trial court is not required to submit and instruct the jury on any lesser included offense. The determining factor is the presence of evidence to support a conviction of the lesser included offense.
>
> Failure to so instruct the jury constitutes reversible error not cured by a verdict of guilty of the offense charged.

*State v. Boozer*, 210 N.C. App. 371, 377, 707 S.E.2d 756, 762 (2011) (citations and brackets omitted).

¶ 14 In *Baldwin*, this Court explained that attempted voluntary manslaughter as a lesser-included offense of attempted first-degree murder stems from imperfect self-defense:

> If defendant believed it was necessary to kill the deceased in order to save herself from death or great bodily harm, and if defendant's

> belief was reasonable in that the circumstances as they appeared to her at the time were sufficient to create such a belief in the mind of a person of ordinary firmness, but defendant, although without murderous intent, was the aggressor in bringing on the difficulty, or defendant used excessive force, the defendant under those circumstances has only the imperfect right of self-defense, having lost the benefit of perfect self-defense, and is guilty at least of voluntary manslaughter.

An imperfect right of self-defense is thus available to a defendant who reasonably believes it necessary to kill the deceased to save himself from death or great bodily harm even if defendant (1) might have brought on the difficulty, provided he did so without murderous intent, and (2) might have used excessive force. *Imperfect self-defense therefore incorporates the first two requirements of perfect self-defense, but not the last two.* Murderous intent means the intent to kill or inflict serious bodily harm.

> If one brings about an affray with the intent to take life or inflict serious bodily harm, he is not entitled even to the doctrine of imperfect self-defense; and if he kills during the affray he is guilty of murder. If one takes life, though in defense of his own life, in a quarrel which he himself has commenced with intent to take life or inflict serious bodily harm, the jeopardy into which he has been placed by the act of his adversary constitutes no defense whatever, but he is guilty of murder. But, if he commenced the quarrel with no intent to take life or inflict grievous bodily harm, then he is not acquitted of all responsibility for the affray which arose from his own act, but his offense is reduced from murder to manslaughter.

*Baldwin*, 240 N.C. App. at 419-420, 770 S.E.2d at 172 (emphasis added) (alterations omitted). "[T]he first two requirements" of self-defense, *id.* at 419, 770 S.E.2d at 172, required for imperfect self-defense include:

> (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[.]

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

¶ 15 Defendant makes an argument for imperfect self-defense contending "[t]here was ample evidence from which the jury could have believed [defendant] used excessive force," and then defendant highlights facts such as the multiple shots and Mr. Street's attempt to run away. In defendant's reply brief he again notes, "The question before this Court is whether there was evidence from which a juror could have found that [defendant] employed excessive force." What defendant seems to miss is that the use of excessive force for an imperfect self-defense instruction is only relevant to the extent the first two elements of perfect self-defense are present, *i.e.*, that the defendant reasonably believed it was necessary to use deadly force to preserve his own life. Defendant has directed us to no evidence regarding reasonable belief. Defendant implies that because a self-defense instruction was provided, the

evidence of those elements was already established, but that is not consistent with our view of the facts of this case or the law, as indeed the jury did not actually find self-defense but rather disregarded defendant's claims and found him guilty of attempted first-degree murder. *See generally Baldwin*, 240 N.C. App. at 413, 770 S.E.2d 167

¶ 16 The State's evidence indicates that Mr. Street was at least a vehicle or more removed from defendant and without a weapon when defendant went to his vehicle, returned with a weapon, shot Mr. Street several times, and made comments such as "I got your money." Two eyewitnesses, along with Mr. Street, verify this account. While we agree with defendant that his actions were "excessive," there is no evidence of his reasonable belief to protect himself, and therefore an instruction on imperfect self-defense or attempted voluntary manslaughter was not warranted. *Compare id.* at 420, 770 S.E.2d 167, 172–73 ("Here, the State introduced abundant testimony supporting a finding of defendant's murderous intent in his final confrontation with Richardson. Three witnesses testified that after the fistfight, defendant stated that he was going to kill Richardson. Five witnesses testified that, in their final confrontation, Richardson did not threaten or move toward defendant, but defendant walked up to Richardson and shot him. We hold that this evidence of defendant's murderous intent strongly weighs against the application of imperfect self-defense. Considering this evidence, we hold that defendant has failed to demonstrate that,

had the trial court instructed the jury on imperfect self-defense, the jury probably would have acquitted defendant on the attempted first-degree murder charge. Accordingly, we hold that the trial court committed no plain error on this issue." (citations omitted)). We conclude there was no plain error.

**B. State's Closing Argument**

¶ 17 Finally, defendant contends that "the trial court erred by failing to intervene *ex mero motu* in the improper argument of the State." (Original in all caps.)

> The standard of review when a defendant fails to object at trial is whether the closing argument complained of was so grossly improper that the trial court erred in failing to intervene *ex mero motu*. In determining whether the prosecutor's argument was grossly improper, this Court must examine the argument in the context in which it was given and in light of the overall factual circumstances to which it refers. The impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it.

*State v. McCollum*, 177 N.C. App. 681, 685, 629 S.E.2d 859, 861–62 (2006) (citations, quotation marks, ellipses, brackets, and emphasis omitted).

¶ 18 Defendant contends the trial court should have intervened in the State's closing argument because the State stated 14 times that the defense was trying to manipulate the jury or made comments of similar import. Defendant compares his case to *State v. Hembree*, 368 N.C. 2, 770 S.E.2d 77 (2015), wherein the State made

several comments regarding the defendant and his counsel manipulating the jury, with the Supreme Court summarizing the statements as such: "In context, the import of these arguments is clear: The State argued to the jury, not only that defendant had confessed truly and recanted falsely, but that he had lied on the stand in cooperation with defense counsel." *Id.* at 19-20, 770 S.E.2d at 89. Thus, it is clear in *Hembree*, the Supreme Court's primary concern was with the implication that defendant had committed perjury, perhaps at the suggestion of his attorneys. Here, the State's statements were not specifically regarding the evidence but rather general statements of strategy that defendant quotes as:

- "It is an attempt to manipulate you . . . "
- "This is an attempt to manipulate you."
- "Don't be manipulated."
- "It is manipulation."

¶ 19 None of the State's comments as noted by defendant are directly about the evidence as was the case in *Hembree*, and thus it is inapposite. *See id.* Read in context, we cannot say the State's argument "was so grossly improper that the trial court erred in failing to intervene *ex mero motu*." *McCollum*, 177 N.C. App. at 685, 629 S.E.2d at 862. This argument is overruled.

## III. Conclusion

¶ 20 In summary, we conclude there was no error.

NO ERROR.

Judges DILLON and TYSON concur.

Report per Rule 30(e).