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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-641

Filed 18 April 2023

Caswell County, No. 19CRS50631

STATE OF NORTH CAROLINA

v.

WILLIAM EARL WINGATE, Defendant.

Appeal by defendant from judgment entered 8 December 2021 by Judge Edwin G. Wilson Jr. in Caswell County Superior Court. Heard in the Court of Appeals 8 March 2023.

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

*Attorney General Joshua H. Stein, by Assistant Attorney General Justin Isaac Eason, for the State-appellee.*

GORE, Judge.

William Earl Wingate, defendant, appeals from judgment entered following a jury verdict convicting him of assault with a deadly weapon inflicting serious injury. Defendant presents two issues on appeal: (1) whether the trial court erred in instructing the jury on the aggressor doctrine; and (2) whether the trial court plainly

erred in instructing the jury on excessive force. Upon careful review, we discern no error.

**I.**

**A.**

The State's evidence at trial tended to show the following:

On 7 December 2019, defendant shot Curtis Roland Lewis, III, twice with a shotgun. The shooting occurred after several months of conflict between defendant and the Lewis family due to the Lewis family riding four-wheelers along Green Pastures Lane, a privately maintained road that ran alongside defendant's property.

Defendant and the Lewis family were neighbors who lived about a half of a mile apart. Curtis's son, Micah Lewis, was thirteen or fourteen years old at the time of the shooting. Micah enjoyed riding his four-wheeler around his neighborhood, and defendant did not like a four-wheeler going by his property on the neighborhood roadway. Earlier that year, defendant had fired a gun, detained Micah, and told Micah not to be on defendant's property even though Micah had not been on his property. Micah's mother, Melissa Lewis, testified that Micah had previously told her about defendant shooting at him, and that Micah had been scared and upset by those previous shootings.

On 7 December 2019, the Lewis family attended a funeral for Melissa's grandmother and then hosted a family gathering at their residence later that day. In attendance was Curtis Lewis, Curtis's cousin Barry Cassidy, Melissa Lewis, Micah

Lewis, and some other family members. They built a bonfire and rode the four-wheeler on the Lewis property.

Micah then rode his four-wheeler down Green Pastures Lane when he heard a gunshot. Micah returned home and told his family, “That man just shot at me again.” Micah watched his father, Curtis, get on the four-wheeler to go speak with defendant. Cassidy got into his truck and followed Curtis up Green Pastures Lane to defendant’s residence.

Cassidy testified that when they arrived, Curtis parked the four-wheeler on a home-made driveway at the edge of defendant’s property with woodlands around it, and that he parked his truck next to the four-wheeler. Curtis “went up into the yard and asked [defendant], ‘Why did you shoot at my son?’” Defendant was standing on his porch; Cassidy estimated Curtis was standing approximately sixty feet away from defendant at that time. Cassidy testified defendant responded by going into his house and returning to the porch with a shotgun. Defendant “said ‘I got something for you,’ and fired off a shot.” Cassidy observed Curtis immediately “went to grab for his knees, and he hollers at me, ‘He shot me,’ then [Curtis] goes to take off running and that’s when the second shot rings out.” Cassidy explained that when the second shot occurred, Curtis was facing away from him and “running towards the wood line to the yard next door.” According to Cassidy, defendant fired the first shot while Curtis was facing the porch, but Curtis was not running at the porch.

Cassidy testified that after defendant shot Curtis a second time, Cassidy ran

to Curtis, who had turned around and was moving back towards Cassidy. Curtis was stumbling and having difficulty staying on his feet. Cassidy told the jury that Curtis grabbed him and said, “He shot me. I’m going to die. Please go get my wife.” Defendant then stated, “You’ll learn now,” and told Cassidy to, “Get him off my property.” Cassidy testified he swore at defendant and dragged Curtis back to the four-wheeler, while defendant went back inside the house. Cassidy returned to the Lewis residence and then brought Melissa back to where Curtis was.

When Cassidy returned, he found the key was missing from the four-wheeler. Curtis told Cassidy that defendant had come out and collected the key, moved his truck, and gone back inside of the house. Cassidy observed Curtis was gravely injured, noting, “His intestines were hanging out.” Cassidy pushed Curtis’s intestines back into his body and held pressure there until emergency personnel arrived. Cassidy told the jury that there were no warning shots fired, and that Curtis had nothing in his hands when he was shot. Cassidy also testified that defendant never gave verbal warnings to either himself or Curtis, and that Curtis “never made no acts towards [defendant].”

Curtis was air-lifted to Duke Hospital where he spent the next nine weeks receiving medical care. He suffered grievous injuries and had to have his colon, gallbladder, and large intestines removed, along with portions of a lung and kidney.

Curtis testified on behalf of the State. He recalled previous issues between his family and defendant, where defendant would confront his children for riding the

four-wheeler along Green Pastures Lane. Curtis denied ever threatening defendant, up to and including the night of 7 December 2019. Curtis stated that on the evening of 7 December 2019, he went to defendant's residence with Cassidy after Micah reported that defendant had shot at him again. Curtis stated he brought no weapons with him.

Curtis testified "I stepped off the four-wheeler to ask [defendant] what was going on, and [defendant] shot me in the leg." He described the shot as happening almost instantly after he got off the four-wheeler and striking him in the knee. Curtis turned to flee and was shot again, this time in the side. Curtis stated the next thing he remembered was laying against the four-wheeler and watching defendant take the key from the four-wheeler. Defendant offered no aid at that time. Curtis denied hearing a warning shot and denied that defendant told him to stop or to not come any closer. Emergency services personnel located a closed pocket-knife in Curtis's pocket, but Curtis denied ever brandishing it.

Defendant elected not to testify. Defendant's version of events was introduced into evidence through 911 calls and a video-recorded interview at the Sheriff's Office. Defendant placed a call to 911 after taking the key to the four-wheeler. He told the dispatcher he had shot an individual in his yard. He stated the person he shot "come up in my yard, and I mean he was coming to me, so there it is, I shot his ass, 'cause he's not going to put his hands on me."

When the dispatcher asked defendant to describe what the victim had done,

defendant did not immediately answer. Defendant then spoke about prior altercations. He told the dispatcher that Curtis “had come charged my vehicle—he come charging at me man.” Defendant further stated, “I didn’t have no choice but to shoot him, ‘cause he won’t gonna whup my ass.” Defendant threatened to “lay down again” with the shotgun if he heard someone approach his house and remarked, “I done told the guy not to fucking mess with me, and he walked up in here.” Defendant did not say that the victim had threatened him, made him afraid, or that he had seen the victim with a weapon. He also did not mention any warning shots or verbal warnings given to the victim prior to the shooting.

Defendant’s version of events changed during a subsequent interview with Sergeant Kenneth Mitchell. Defendant stated he shot his shotgun into the ground while Micah was riding the four-wheeler, and then the victim rode up and threatened defendant, telling him, “Imma fuck you up.” Defendant claimed to have fired a warning shot, told the victim to stop, and then fired two additional shots while the victim charged at him from the four-wheeler towards the porch. Defendant moved his truck and took the keys from the four-wheeler because defendant did not want the victim to move the four-wheeler. Defendant estimated the victim was more than fifteen feet away when he fired his shotgun, because the porch was about ten feet and the walkway another ten to fifteen feet long. He claimed the victim was running at full speed towards him and did not stop until he was struck by the second shot. Defendant summarized the events of that evening, stating, “From the time he pulled

in there, I didn't have time to think, all I knew is he was coming after me and I fucking shot him." Defendant did not mention seeing a weapon on the victim.

Sergeant Mitchell testified he could smell the odor of alcohol on defendant nearly five hours after the shooting. He also located several open and empty bottles of beer in various places around defendant's residence. Sergeant Mitchell observed no blood on the porch, or on the cement walkway leading to the porch where defendant claimed to have shot the victim.

**B.**

On 11 May 2020, the Caswell County grand jury indicted defendant on one count of attempted first-degree murder and one count of assault with a deadly weapon with intent to kill inflicting serious injury. The matter came on for trial at the 15 November 2021 session of Caswell County Superior Court, the Honorable Edwin G. Wilson presiding.

Defendant filed a written request for instructions on self-defense and defense of habitation. The State agreed defendant was entitled to both instructions. The State requested the trial court instruct the jury on the aggressor doctrine, an instruction stating self-defense and defense of habitation would not be available if defendant initially provoked the use of force. The State argued defendant provoked the use of force by firing a shotgun at Micah and by waiting on his porch stating, "I've got something for you," and grabbing his shotgun. Defense counsel objected to the provocation language, but the trial court agreed to give the instruction. Defense

counsel objected to the instruction again.

The trial court instructed the jury on attempted first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and assault with a deadly weapon inflicting serious injury. For each substantive offense, the trial court instructed on self-defense and defense of habitation using N.C.P.I—Crim. 308.45 and N.C.P.I—Crim. 308.80. During the charge for self-defense, the trial court instructed the jury:

self-defense is justified only if the defendant was not the aggressor. Justification for defensive force is not present if the person who used defensive force voluntarily entered into the fight or, in other words initially provoked the use of force against himself. If one uses abusive language towards one's opponent, which considering all the circumstances is calculated and intended to bring on a fight, one enters a fight voluntarily.

The trial court instructed the jury on excessive force during the self-defense instructions. Specifically, the trial court stated, “A defendant does not have the right to use excessive force. The defendant had the right to use only such force as reasonably appeared necessary to the defendant under the circumstances to protect the defendant from death or great bodily harm.” During the charge of defense of habitation, the trial court instructed the jury that, “The defendant would not be justified in using deadly force if the defendant initially provoked the use of force against himself.”

On 18 November 2021, the jury found defendant guilty of assault with a deadly



weapon inflicting serious injury. The trial court sentenced defendant to 24 to 41 months' imprisonment.

**C.**

On 19 November 2021, defendant timely filed written notice of appeal. Defendant appeals from the final judgment of a superior court pursuant to N.C. Gen. Stat. §§ 7A-27 and 15A-1444.

**II.**

In this case, the trial court appropriately instructed the jury on the use of defensive force and defense of habitation. N.C. Gen Stat. § 14-51.3 provides:

(a) A person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to be if either of the following applies:

(1) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another.

(2) Under the circumstances permitted pursuant to [N.C. Gen. Stat. §] 14-51.2.

N.C. Gen. Stat. § 14-51.3(a)(1)-(3) (2022).

However, the justification of self-defense described in N.C. Gen. Stat. §§ 14-51.2 and 14-51.3 “is not available to a person who . . . [i]nitially provokes the use of force against himself or herself.” § 14-51.4(2) (2022). This statutory provision is known as the “aggressor doctrine.” An individual is an aggressor “if he aggressively and willingly enters into a fight without legal excuse or provocation.” *State v. Potter*, 295 N.C. 126, 144, 244 S.E.2d 397, 409 (1978) (quotation marks and citation omitted).

“A person is entitled under the law of self-defense to harm another only if he is ‘without fault in provoking, or engaging in, or continuing a difficulty with another.’” *State v. Stone*, 104 N.C. App. 448, 451, 409 S.E.2d 719, 721 (1991) (quoting *State v. Hunter*, 315 N.C. 371, 374, 338 S.E.2d 99, 102 (1986)).

The State requested an instruction on the aggressor doctrine based on two theories of provocation. The State argued that defendant provoked the use of force when he shot at Micah and that defendant either provoked or voluntarily entered the fight by waiting on his porch, telling the victim, “I’ve got something for you,” and then arming himself with a shotgun. Defense counsel raised a timely objection to the requested instruction, contending, “There is nothing illegal about shooting into the ground. There’s nothing illegal about going on your porch when people pull up. The actions that he used maybe it was not good judgment . . . .” The trial court ruled in favor of the State, observing that, “It wasn’t illegal but it was provoking. I will allow the footnote.” On appeal, defendant argues the trial court erred by instructing the jury on the aggressor doctrine.

“A trial court must give a requested instruction that is a correct statement of the law and is supported by the evidence.” *State v. Conner*, 345 N.C. 319, 328, 480 S.E.2d 626, 629 (1997) (citation omitted). We review the trial court’s decisions regarding jury instructions de novo. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). “Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *State v.*

*Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quotation marks and citation omitted).

[W]hen reviewing a trial court's denial of a defendant's request to exclude the aggressor instruction from the jury instruction on self-defense, the appellate court does not consider the evidence in a light favorable to the defendant, as it is the province of the jury to resolve any conflict in the evidence in that regard.

*State v. Lee*, 258 N.C. App. 122, 127, 811 S.E.2d 233, 237 (2018) (citations omitted).

"In determining whether a self-defense instruction should discuss the 'aggressor' doctrine, the relevant issue is simply whether the record contains evidence from which the jury could infer that the defendant was acting as an 'aggressor' at the time that he or she allegedly acted in self-defense." *State v. Mumma*, 372 N.C. 226, 239 n.2, 827 S.E.2d 288, 297 n.2 (2019).

A.

Defendant first argues his act of shooting at Micah was too remote in time from when he shot Curtis to be considered a provocation of force. Defendant relies on *State v. Miller*, 223 N.C. 184, 25 S.E.2d 623 (1943) and *State v. Terry*, 329 N.C. 191, 404 S.E.2d 658 (1991) to support his position.

In *Miller* none of the evidence supported an aggressor instruction. The evidence showed that defendants and the victims traded blows in a fight that ceased a half hour before defendants fatally shot the victims. Defendants testified that after the fist fight they returned to their barn and were working there when the victims approached and began shooting, requiring defendants to return fire in self-defense. Witnesses for the

State testified that the victims were walking through defendants' property when defendants, without provocation, shot them. [Our Supreme] Court held that the trial court erred by instructing jurors that in order to act in self-defense, defendants had to have abandoned the earlier fight and notified the victims of their abandonment. This instruction in *Miller* was erroneous because the testimony of all parties showed that the fist fight was too remote in time from the shooting to impact on the self-defense theory.

*Terry*, 329 N.C. at 199, 404 S.E.2d at 662. In the latter decision, *Terry*, the Court distinguished the facts from those in *Miller*, noting that “the State’s witnesses testified defendant threatened [the victim] just seconds before the shooting—sufficiently close in time to the alleged crime to affect [the] defendant’s self-defense argument.” *Id.*

Defendant argues this case is like *Miller*; his interactions with Micah and Curtis were two separate incidents. Further, he contends this case differs from *Terry* because more than a few seconds elapsed from the time he fired a shot towards Micah and his shooting of Curtis. In contrast, the State asserts defendant provoked a response when he shot at Curtis’s teenage son, waited on his porch with a shotgun, and immediately shot Curtis when Curtis stepped off the four-wheeler. The State argues these events were a continuous chain of events, with the only delay between the initial provocation and the subsequent shooting being the time necessary to transit Green Pastures Lane.

Here, “[t]he rule of law as stated by the [trial] judge relates to an *affray*

*presently existing* and not to prior difficulties.” *Miller*, 223 N.C. at 187, 25 S.E.2d at 625 (emphasis added). The State presented evidence tending to show defendant discharged a firearm in the presence of thirteen-year-old Micah. Micah immediately rode the four-wheeler home and told his family about what had transpired. Curtis and Cassidy then immediately drove to defendant’s home to have words with defendant. There was no evidence that defendant and Curtis had previously and mutually engaged in an altercation before the shooting. There was no evidence that defendant or Curtis proceeded to do unrelated things before the shooting.

The State’s evidence tended to show one continuous chain of events, that is, “an affray presently existing,” rather than two separate and distinct incidents, or a “prior difficulty” that explains subsequent events without bearing “limitation upon the right of self-defense.” *Id.* at 188, 25 S.E.2d at 625. While defendant’s evidence tended to show he acted in self-defense, “because the State’s evidence tended to show that defendant was the aggressor, [the trial court] properly instructed further that self-defense would be an excuse only if defendant was *not* the aggressor.” *State v. Joyner*, 54 N.C. App. 129, 135, 282 S.E.2d 520, 524 (1981).

**B.**

Defendant also contends standing on his own front porch, telling Curtis, “I’ve got something for you,” and arming himself with a shotgun did not support the trial court’s instruction on the aggressor doctrine. Defendant’s argument is without merit.

The State’s evidence tended to show that defendant was aware of Curtis’s

presence on his property, and that Curtis was unarmed. The State's evidence tended to show that defendant demonstrated intent to engage in violence by saying, "I've got something for you," and then retrieving his weapon prior to the shooting. Cassidy estimated defendant was about sixty feet away from Curtis at that time. Cassidy stated defendant went into his house and returned with a shotgun. Defendant then "said 'I got something for you,' and fired off a shot." Cassidy observed Curtis immediately "went to grab for his knees, and he hollers at me, 'He shot me,' then he goes to take off running and that's when the second shot rings out." Cassidy stated that when defendant fired the second shot, Curtis was facing away from him and "running towards the wood line to the yard next door." Cassidy also testified there was no warning shot fired, Curtis had no weapons or anything else in his hands when defendant shot him, defendant never gave verbal warnings, and Curtis "never made a step towards [defendant]." Curtis's testimony is consistent with Cassidy's account of events. Sergeant Mitchell also observed no blood on the porch, or on the cement walkway leading to the porch where defendant claimed to have shot Curtis.

Accordingly, we hold that the trial court did not err in instructing the jury on the aggressor doctrine. "Although defendant's evidence does not support the aggressor instruction, the State's evidence supports it. By instructing jurors on the aggressor qualification, the trial court allowed the triers of fact to determine which testimony to believe." *Terry*, 329 N.C. at 199, 404 S.E.2d at 662-63; *see also Lee*, 258 N.C. App. at 128, 811 S.E.2d at 238 (holding that while "there was conflicting

evidence about the sequence of events leading to [the] [d]efendant shooting [the victim], . . . the evidence was sufficient to support a jury finding that [the] [d]efendant was the aggressor, therefore barring the defense of self-defense.”).

### III.

Defendant next contends the trial court plainly erred in instructing the jury on excessive force because the defensive force disqualifiers provided by N.C. Gen. Stat. § 14-51.4 do not include use of excessive force.

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). Here, plain error is explicitly asserted in defendant’s brief. The plain error standard requires a defendant to “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.’” *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citation omitted) (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)).

In this case, the trial court instructed the jury that, “[a] defendant does not have the right to use excessive force. The defendant had the right to use only such force as reasonably appeared necessary to the defendant under the circumstances to

protect the defendant from death or great bodily harm.” Defendant argues that N.C. Gen. Stat. § 14-51.4 does not list excessive force as a bar to defensive force, and that he was permitted to use deadly force in both circumstances provided by N.C. Gen. Stat. § 14-51.3. Thus, it is defendant’s contention that once deadly force is permitted, it cannot be excessive, and that the trial court plainly erred by instructing the jury on excessive force because it deprived him of the benefit of his defense. We disagree.

Defendant’s argument is foreclosed by our Supreme Court’s recent decision in *State v. Benner*, where a defendant shot and killed a victim in the defendant’s home. That decision makes clear that the use of deadly force cannot be excessive and must still be proportional even when the defendant has no duty to retreat and is entitled to stand his ground[.]

*State v. Walker*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 880 S.E.2d 731, 738 (2022) (internal citation omitted) (citing *State v. Benner*, 380 N.C. 621, 625, 869 S.E.2d 199, 202 (2022)). As stated by our Supreme Court:

in discussing the defendant’s right to defend himself . . . [there is a] well-established legal principle that, even though a defendant attacked in his own home is entitled to stand his ground, to repel force with force, and to increase his force, so as not only to resist, but also to overcome the assault, such an entitlement would not excuse the defendant if he used excessive force in repelling the assault . . . . [T]he proportionality rule inherent in the requirement that the defendant not use excessive force continues to exist even in instances in which a defendant is entitled to stand his or her ground.

*Benner*, 380 N.C. at 635-36, 869 S.E.2d at 209 (internal quotation marks and citations omitted) (quoting *State v. Francis*, 252 N.C. 57, 59, 112 S.E.2d 756, 758 (1960)). “In



other words, the castle doctrine statute does not obviate the proportionality requirement inherent to lethal self-defense; instead, it simply presumes that the proportionality requirement is satisfied under specific circumstances.” *Walker*, \_\_\_\_ N.C. App. at \_\_\_\_, 880 S.E.2d at 739.

Defendant fails to demonstrate error, let alone plain error. Section 14-51.3 incorporates, rather than obviates, the requirement that the use of defensive force be proportional to the perceived threat. “It is the duty of the trial court to correctly charge the jury on the law,” *State v. Kelly*, 221 N.C. App. 643, 648, 727 S.E.2d 912, 915 (2012), and the trial court correctly charged the jury on excessive force in this case.

#### IV.

For the foregoing reasons, we determine that the trial court correctly instructed the jury on the aggressor doctrine and excessive force.

NO ERROR.

Judges TYSON and STADING concur.

Report per Rule 30(e).