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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-963

Filed 15 August 2023

Wilkes County, Nos. 20 CRS 51076 -51077

STATE OF NORTH CAROLINA

v.

DANIEL FRANKLIN MARTIN

Appeal by Defendant from judgments entered 2 March 2022 by Judge Michael D. Duncan in Wilkes County Superior Court. Heard in the Court of Appeals 24 May 2023.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Marc Bernstein, for the State.*

*Sandra Payne Hagood, for Defendant.*

WOOD, Judge.

This is an appeal from a second-degree murder conviction. Defendant challenges the trial court's jury instruction and a matter concerning attorney's fees. For the reasons outlined below, we hold the trial court did not err when it did not give a defense of habitation instruction after each alternative crime on which the jury was instructed. However, we remand the issue of attorney's fees to the trial court.

## **I. Background**

The souring of a lifelong friendship culminated in a son's death. Daniel Martin ("Defendant") and Larry Watson ("Larry") were friends on good terms on 9 May 2020. Larry, with his seventeen-year-old son Jonathan Watson ("Jonathan") in tow, helped Defendant with his yard work that day. As Larry and Jonathan sowed grass seed, Defendant installed siding on his shed. The work was not finished that day, and Larry promised to return the next day to assist with the removal of several rocks from Defendant's yard.

The next morning, Larry drove his motorcycle to Defendant's house, parked by the side of the house, and began working. Soon after, Defendant stepped outside and approached Larry with a large stick, questioning why Larry was there and accusing him of stealing. Unappeased by his answer, Defendant swung the stick at Larry, hitting him in the back. Larry left Defendant's house and returned home. Once home, Larry parked his motorcycle in the driveway and began to dismount, before falling unconscious. Upon finding his father in the driveway, Jonathan lifted him up and asked what had happened. Larry responded, "Danny." Jonathan saw a large, red bruise on his father's torso. After assisting his father, Jonathan sped off on Larry's motorcycle toward Defendant's house.

Jonathan parked the motorcycle in Defendant's front yard, near and parallel to the street curb, over forty feet away from the home. Dismounting the motorcycle and approaching the house, Jonathan called out to Defendant. Defendant grabbed

his stick and plodded outside, telling law enforcement later that he “was going out there to knock him out.” Jonathan picked up a stick of his own. Exchanging words, they did battle and exchanged strikes. Jonathan finally struck Defendant in the head, leaving Defendant fazed, but conscious and able to stand back up and go inside his home. As Defendant crawled away, Jonathan dropped his stick and returned to the motorcycle. From inside, Defendant retrieved a pistol from his bedroom, and emerged from his home armed. Jonathan, at this point, had mounted the motorcycle near the curb and had started the engine. As Defendant approached Jonathan’s motorcycle, gun in hand, Jonathan began driving forward. Defendant took aim and shot at Jonathan six times. Jonathan collapsed. Larry arrived minutes later to find his son “facedown beside the bike.” Jonathan died from his gunshot wounds.

Defendant was indicted with first-degree murder and possession of a firearm by a felon on 8 September 2020. His trial took place from 22 February 2022 to 2 March 2022. At the conclusion of the trial, the trial court directed the jury to return one of four verdicts: (1) guilty of first-degree murder, (2) guilty of second-degree murder, (3) guilty of voluntary manslaughter, or (4) not guilty, followed by an instruction on each crime. The trial court then instructed the jury the “defendant would not be guilty of any murder or manslaughter if the defendant acted in defense of habitation” and detailed the meaning of defense of habitation. The trial court then instructed the jury on the State’s burden of proof.

[I]n order for you to find the defendant guilty of first-degree

murder or second-degree murder, the State must prove beyond a reasonable doubt, among other things, that the defendant did not act in defense of habitation or self-defense. If the State fails to prove that the defendant did not act in defense of habitation or self-defense you may not convict the defendant with either first or second-degree murder. However, you may convict the defendant of voluntary manslaughter if the State proves that the defendant used excessive force.

The trial court instructed that if the State proved beyond a reasonable doubt the elements of first-degree murder, including that Defendant did not act in “defense of habitation,” it was the jury’s duty to return a guilty verdict of murder in the first-degree. If there was reasonable doubt, the jury was to instead determine whether the defendant was guilty of second-degree murder. Likewise, the trial court delivered a similar instruction regarding second-degree murder and voluntary manslaughter and included a “defense of habitation” instruction in both alternatives.

The trial court concluded by instructing the jury that, even if it found “beyond a reasonable doubt that the defendant killed the victim,” it could “return a verdict of guilty . . . only if the State has satisfied [it] beyond a reasonable doubt that the defendant did not act in the lawful defense of the defendant’s home or place of residence[.]” The trial court then stated the elements necessary to rebut the defense of habitation and instructed the jury that, if there was reasonable doubt with respect to any of the elements, “then the defendant would be justified in defending the home,” and the jury must return a verdict of not guilty.

The jury found Defendant guilty of second-degree murder on 2 March 2022, and the trial court sentenced him to 273-340 months imprisonment. The jury also found Defendant guilty of possession of a firearm as a felon for which the trial court sentenced Defendant to 22-36 months imprisonment, to run consecutively with the murder sentence. Defendant filed a written notice of appeal on 4 March 2022.

After the trial court rendered judgment, it inquired of Defendant's attorney as to the extent of his work in Defendant's case for the purposes of calculating attorney's fees pursuant to N.C. Gen. Stat. § 7A-455 and § 7A-455.1. The trial court did not engage in a colloquy with Defendant to explain this separate civil judgment for attorney's fees or inform Defendant of his rights to contest a judgment as to attorney's fees taxed against Defendant. On 16 September 2022, following defense counsel's submission of a fee application, the trial court entered a civil judgment against Defendant in the amount of \$18,040.56 for attorney's fees.

## **II. Standard of Review**

We review properly preserved challenges to a "trial court's decisions regarding jury instructions de novo." *State v. Richardson*, 270 N.C. App. 149, 152, 838 S.E.2d 470, 473 (2020) (citing *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) (citations and internal quotation marks omitted). Even if the trial court erred in its charge to the jury, such error must be

prejudicial in that “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) (2022).

This Court reviews unpreserved challenges to a trial court’s decision on jury instructions for plain error. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). “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.” *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (citing *State v. Faison*, 330 N.C. 347, 411 S.E.2d 143 (1991)).

### **III. Discussion**

Defendant appeals from his murder conviction alleging that the trial court erred in using the State’s proposed jury instruction, which did not include a self-defense presumption, and that it erred by failing to give a defense of habitation instruction after each alternative crime. Defendant also appeals the entry of a civil judgment against him for attorney’s fees related to his representation. We review each of these challenges in turn.

#### **A. Jury Instruction on Self-Defense Rebuttal**

First, Defendant challenges the trial court’s use of the State’s proposed special instruction on the evidence necessary to rebut a presumption of self-defense. Defendant asserts that sufficient evidence did not support such an instruction. We disagree.

Generally, a defendant must assert the justification of self-defense when tried for murder. N.C. Gen. Stat. § 14-51.3(a) (2022). However, by statute, a defendant is afforded the presumption of self-defense when the defendant used force in the belief that someone unlawfully and forcibly entered a defined premise.

The lawful occupant of a home, motor vehicle, or workplace is *presumed* to have held a reasonable fear of imminent death or serious bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or serious bodily harm to another if both of the following apply:

(1) The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a home, motor vehicle, or workplace, or if that person had removed or was attempting to remove another against that person's will from the home, motor vehicle, or workplace.

(2) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.

N.C. Gen. Stat. § 14-51.2(b) (2022) (emphasis added). This presumption is rebutted, however, when “[t]he person against whom the defensive force is used (i) has discontinued all efforts to unlawfully and forcefully enter the home, motor vehicle, or workplace and (ii) has exited the home, motor vehicle, or workplace.” § 14-51.2(c)(5). In the instant case, the trial court instructed the jury on these rules.

Defendant specifically argues here that no evidence supported this rebuttal instruction in that no evidence suggested Jonathan had (1) “discontinued all efforts to unlawfully and forcefully enter the home” or (2) had “exited the home.”

The term “home,” in this context, includes not only a “building” that “is designed as a . . . residence” but also the building’s “curtilage.” § 14-51.2(a)(1). Curtilage is “the area immediately surrounding and associated with the home” which may include “the yard around the dwelling house[.]” *State v. Grice*, 367 N.C. 753, 759, 767 S.E.2d 312, 317 (2015) (internal quotations omitted).

This Court has considered several factors when identifying the bounds of a property’s curtilage:

“[(1)] the proximity of the area claimed to be curtilage to the home, [(2)] whether the area is included within an enclosure surrounding the home, [(3)] the nature of the uses to which the area is put, and [(4)] the steps taken by the resident to protect the area from observation by people passing by.”

*State v. Dulin*, 247 N.C. App. 799, 808, 786 S.E.2d 803, 810 (2016) (quoting *State v. Smith*, 246 N.C. App. 170, 180 n.2, 783 S.E.2d 504, 511 (2016)). Thus, the statutory “home,” as Defendant argues here, may include an area surrounding his dwelling.

Defendant’s first argument is without merit. Testimony presented at trial tended to show Jonathan ceased beating Defendant with a stick and returned to the motorcycle while Defendant retreated to his dwelling. Witnesses testified that, by the time Defendant retrieved a firearm from inside his home and returned to the front yard, Jonathan had already mounted the motorcycle and started the engine. Further,



Jonathan was driving forward when Defendant shot him. This evidence was sufficient for the court to infer that Jonathan had “discontinued all efforts to unlawfully and forcefully enter the home.”

The second of Defendant’s contentions is a more difficult matter. For the trial court to have properly instructed on N.C. Gen. Stat. § 14-51.2(c)(5), at least some evidence presented at trial must have supported an inference that Jonathan had “exited the home.” Because “home” includes the curtilage of the dwelling, we consider the four factors laid out in *Dulin*, 247 N.C. App. at 808, 786 S.E.2d at 810.

Defendant shot Jonathan while Defendant was on the motorcycle at the curb, over forty feet from Defendant’s house. As our Supreme Court held in *State v. Grice*, a distance of more than forty feet is sufficient to hold that an area rests outside of a home’s curtilage. 367 N.C. at 760, 767 S.E.2d at 318 (area forty-five feet from home not within curtilage); *State v. Fields*, 315 N.C. 191, 194, 337 S.E.2d 518, 520 (1985) (building forty-five feet from a dwelling not within curtilage). Testimonial evidence and photographic exhibits show the area in question is neither within any type of enclosure, such as a fence or wall, nor has any particular use other than as a driveway to Defendant’s house. There were no identifiable markings or personal aesthetic features associated with the house in this area. Finally, other evidence, including “hundreds of photographs,” shows the property lacked any visible obstructions to the home that would protect the area from observation. Thus, when considering the totality of this evidence, a jury could infer that Jonathan had “exited the home” and

was no longer within Defendant's curtilage.

Having determined the evidence supported an inference that Jonathan had "discontinued all efforts to unlawfully and forcefully enter the home" and had "exited the home," the trial court did not err when it instructed the jury on how the self-defense presumption of N.C. Gen. Stat. § 14-51.2(b) could be rebutted.

### **B. Jury Instruction on Defense of Habitation**

Defendant next challenges the trial court's failure to give the defense of habitation instruction after giving an instruction on each alternative crime. Defendant concedes the trial court gave a special jury instruction on defense of habitation, but Defendant argues the trial court erred by failing to repeat this instruction after each instruction on the crimes alleged. We disagree and hold the trial court properly instructed the jury on the defense of habitation.

The defense of habitation instruction informs a jury of the self-defense presumption as mentioned above and codified at N.C. Gen. Stat. § 14-51.2(b). If applied, a juror would presume that a defendant acted in self-defense if the decedent "was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a home[.]" § 14-51.2(b)(1).

Neither this Court nor our Supreme Court has ever held a trial court is required to repeat the defense of habitation instruction after each instruction on alternative crimes. Defendant raises the case of *State v. Dooley* in support of his argument. There, our Supreme Court held a trial court ought to reiterate in its final

mandate to members of the jury, before they deliberate, that they should return a not-guilty verdict if they “are satisfied that the defendant acted in self-defense.” 285 N.C. 158, 165, 203 S.E.2d 815, 820 (1974). Having failed to do so, the trial court in that case erred though it had delivered a self-defense instruction earlier after instructing on murder and manslaughter. *Id.* at 165, 203 S.E.2d at 820. This case is distinguishable in that, here, the trial court instructed the jury on the defense of habitation multiple times throughout its charge and gave a thorough definition of the defense after instructing on first-degree murder, second-degree murder, and voluntary manslaughter. Defendant does not allege the trial court erred in failing to remind the jury of its duty to return a not-guilty verdict if it found that Defendant acted in self-defense.

Before informing the jury of the various degrees of homicide, the trial court instructed, “The defendant would not be guilty of any murder or manslaughter if the defendant acted in defense of habitation,” and, “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 the defendant’s home or place of residence.” The trial court also stated that “a person who unlawfully and by force enters or attempts to enter a person’s home or place of residence is presumed to be doing so with the intent to commit an unlawful act involving force or violence.” Again, it instructed that “in order for you to find the defendant guilty of first-degree murder or second-degree murder, the State must prove beyond a reasonable doubt, among other things, that

the defendant did not act in defense of habitation or self-defense,” before ever addressing what first- or second-degree murder meant. In its sixth instructed element of first-degree murder, the trial court said, “Sixth, that the defendant did not act in defense of habitation . . . .” Likewise, in its instruction on second-degree murder, the trial court said, “And fourth, that the defendant did not act in defense of habitation . . . .” Finally, in its instruction on the elements necessary to find Defendant guilty of voluntarily manslaughter, the trial court included, “Third, that the defendant did not act in defense of habitation . . . .” The trial court reminded the jury after these instructions that “[t]he burden is on the State to prove beyond a reasonable doubt that the defendant did not act in defense of habitation.” The trial court mentions the defense several more times before expounding further:

If you find beyond a reasonable doubt that the defendant killed the victim you may return a verdict of guilty if the State has satisfied you—only if the State has satisfied you beyond a reasonable doubt that the defendant did not act in the lawful defense of the defendant’s home or place of residence, that is,

That the defendant did not use such force to prevent a forcible entry or terminate the intruder’s unlawful entry into the defendant’s home or place of residence.

That the defendant did not reasonably believe that the intruder would kill or inflict serious bodily harm to the defendant or others in the home or place of residence or intended to commit a felony in the home or place of residence; and

That the defendant did not reasonably believe that the degree of force the defendant used was necessary to

prevent a forcible entry or terminate the intruder's unlawful entry into the defendant's home or place of residence.

If you do not so find or if you have a reasonable doubt that the State has proved any one or more of these things, then the defendant would be justified in defending the home or place of residence under defense of habitation, and it would be your duty to return a verdict of not guilty.

These instructions on the defense of habitation were more than sufficient to ensure the jury was properly instructed. We therefore that the trial court did not err when it delivered one jury instruction on the defense of habitation after instructing the jury on alternative crimes.

### **C. Attorney's Fees**

Finally, Defendant challenges the trial court's entry of a civil judgment for attorney's fees. Defendant argues he was not given an opportunity to properly understand or refute attorney's fees through a colloquy with the trial court after sentencing. We agree.

We note, first, that Defendant's notice of appeal from this civil judgment was untimely and, thus, defective.

Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties within the time prescribed . . . .

N.C. R. App. P. Rule 3(a). A party must notice an appeal from a civil judgment, as

with an award for attorney's fees, separately from a criminal judgment. *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 697 (2008). Though Defendant timely noticed an appeal from his criminal judgment, he did not timely notice an appeal from this attorney's fees award, and his appeal on this issue is thus defective.

Defendant, however, petitions this court to issue a *writ of certiorari*. Under our rules of appellate procedure, this Court may issue a *writ of certiorari* to permit review of a judgment or order "when the right to prosecute an appeal has been lost by the failure to take timely action." N.C. R. App. P. Rule 21(a)(1). In our discretion, we issue the writ and take up Defendant's appeal from an award of attorney's fees.

The trial court may enter a civil judgment against an indigent defendant following his conviction in the amount of fees incurred by the defendant's appointed trial counsel. N.C. Gen. Stat. § 7A-455(b) (2022). However, before entering monetary judgments against indigent defendants for fees imposed by their court-appointed counsel,

trial courts should ask defendants—personally, not through counsel—whether they wish to be heard on the issue. Absent a colloquy directly with the defendant on this issue, the requirements of notice and opportunity to be heard will be satisfied only if there is other evidence in the record demonstrating that the defendant received notice, was aware of the opportunity to be heard on the issue, and chose not to be heard.

*State v. Mayo*, 263 N.C. App. 546, 549, 823 S.E.2d 656, 659 (2019) (quoting *State v. Friend*, 257 N.C. App. 516, 523, 809 S.E.2d 902, 907 (2018)). This open exchange in

court not only allows the trial court to inform the defendant, on the record, of the purpose and extent of the civil judgment that will be entered against him, but also provides Defendant with his sole opportunity to comment on the court's award of attorney's fees. *See State v. Jacobs*, 172 N.C. App. 220, 236, 616 S.E.2d 306, 317 (2005). This process is also necessary to prevent injustice toward the defendant, as "the interests of the defendant and trial counsel are not necessarily aligned" and "a defendant may believe that the amount of fees requested is unreasonable given the time, effort or responsibility involved in defending the case." *Friend*, 257 N.C. App. at 522-23, 809 S.E.2d at 907.

The trial court did not perform a colloquy with Defendant to ensure that he understood his rights surrounding a determination of attorney's fees to be awarded to his appointed counsel. In fact, the trial court did not discuss attorney's fees in any way. The trial court failed to give Defendant an opportunity to be heard at sentencing regarding the fees Defendant was to pay and provided no notice for Defendant to contest the amount at any time before entering its judgment approximately six months after sentencing.

#### **IV. Conclusion**

The trial court did not err when it instructed the jury on the elements of rebuttal to the presumption of self-defense. It also did not err when it delivered the defense of habitation instruction after instructing the jury on first-degree murder, second-degree murder, and voluntary manslaughter. Thus, Defendant received a fair

STATE V. MARTIN

*Opinion of the Court*

trial free from error. However, we hold that Defendant was not given a proper opportunity to discuss the imposition of attorney's fees with the trial court and remand this issue to the trial court.

NO ERROR; REMANDED ON ATTORNEY FEES.

Judges ARROWOOD and GORE concur.

Report per Rule 30(e).