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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 25-117

Filed 19 August 2026

Wake County, No. 21CR207063-910

STATE OF NORTH CAROLINA

v.

WENDY SUE WISHART

Appeal by defendant from judgment entered 17 June 2024 by Judge Rebecca W. Holt in Wake County Superior Court. Heard in the Court of Appeals 20 November 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General Teresa M. Postell, for the State.

Center for Death Penalty Litigation, by Janine Fodor, for defendant-appellant.

FREEMAN, Judge.

Wendy Wishart (defendant) appeals from judgment entered upon a jury verdict of first-degree murder. On appeal, defendant argues (1) the trial court erred by instructing the jury on the aggressor doctrine, (2) the trial court erred by instructing the jury on lying in wait, (3) defendant received ineffective assistance of counsel, and (4) the trial court abused its discretion by permitting two police officers to give opinion

testimony about defendant's mental health. After careful review, we conclude that defendant received a fair trial free from error.

I. Factual and Procedural Background

On 5 May 2021, Wendy Wishart (defendant) invited her ex-husband (Victim) to her house. Two children of the Victim and defendant were present at defendant's house that night. One of the children (Child) testified at trial to the events that occurred. Defendant told the Child to get the Victim to come inside her house and retrieve a computer server. While the Victim was picking up the computer server, the Child saw defendant retrieve a gun from a kitchen cabinet. The Child then heard the Victim say defendant's name, heard a loud noise, and heard the Victim fall to the ground.

After the shooting, defendant called 911 and followed the dispatcher's instruction to put the gun on the table. When police arrived, they discovered defendant's .40 caliber firearm with one used casing on the dining room table. The holster was in defendant's kitchen, and the gun box was in defendant's closet upstairs. The officers did not see any signs of struggle or evidence of forced entry. Defendant's right thumbprint was later discovered on her firearm.

Two officers who responded to the scene testified independently that, when they communicated with defendant following the incident, she had no difficulty following the officers' instructions. The officers further testified that defendant did not appear to be under the influence or suffering from any type of mental health

crisis.

At trial, defense counsel stated, “If the State can’t rule out that premeditation and deliberation did not exist, then where you would be is second-degree murder. . . . Under the law, second-degree murder is sort of the default. You can only get to first-degree murder if you can provide the planning and deliberation necessary under the elements that are going to be set out in the law.” Defense counsel then asserted the defenses that defendant is mentally ill, and did not plan to kill the Victim. In addition, defense counsel stated in the closing argument that “[defendant] did this in self-defense” and stated that defendant feared the Victim and the Victim had threatened defendant. Defense counsel also argued: “Obviously, [defendant] shot her ex-husband. Something happened. But it wasn’t a plan, and certainly the State can’t rule out the reasonable possibility that it wasn’t a plan, which is the only question.”

On 17 June 2024, defendant was found guilty of first-degree murder, and the trial court imposed a sentence of life imprisonment without the possibility of parole. Defendant gave oral notice of appeal in court.

II. Jurisdiction

This Court has jurisdiction to hear this appeal from a final judgment of a superior court, pursuant to N.C.G.S. §§ 7A-27(b)(1) and 15A-1444(a) (2025).

III. Discussion

Defendant contends that: (1) the trial court erred by instructing the jury on the aggressor doctrine, (2) the trial court erred by instructing the jury on lying in wait,

(3) defendant received ineffective assistance of counsel, and (4) the trial court abused its discretion by permitting two police officers to give opinion testimony about defendant's mental health. We review each argument in turn.

A. AGGRESSOR DOCTRINE JURY INSTRUCTION

Defendant argues she is entitled to a new trial because the trial court erred in instructing the jury on the aggressor doctrine. Specifically, defendant contends the jury instruction was error because there was no evidence that she was the aggressor.

We review challenges to the trial court's jury instructions de novo. *State v. Austin*, 279 N.C. App. 377, 386 (2021). "When a request for instructions is correct in law and supported by the evidence in the case, the court must give the instruction in substance." *State v. Thompson*, 328 N.C. 477, 489 (1991).

"When asked to give an aggressor instruction, a trial court must consider whether a jury could reasonably infer from the evidence that the defendant acted as an aggressor." *State v. Hicks*, 385 N.C. 52, 61 (2023). "In answering that question, the court must view the record in the light most favorable to the State, drawing all reasonable inferences in its favor." *Id.* (quoting *State v. Bell*, 338 N.C. 363, 388 (1994)). "Where . . . there is conflicting evidence on whether the defendant acted as an aggressor and the jury could reasonably draw the inference either way, the State gets the benefit of the doubt." *Id.*

A person is justified in the use of deadly force in her own home if she reasonably believes that such force is necessary to prevent imminent death or great bodily harm

to herself or another or under the circumstances permitted pursuant to N.C.G.S. § 14-51.2. See N.C.G.S. § 14-51.3(a).

The lawful occupant of a home . . . is presumed to have held a reasonable fear of imminent death or serious bodily harm to . . . 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 . . . or if that person had removed or was attempting to remove another against that person's will from the home. . . .

(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.G.S. § 14-51.2(b) (2025). These justifications are not available to one who initially provokes the use of force against herself. N.C.G.S. § 14-51.4(2)(a) (2025).

Here, defendant contends that the jury instruction was error because there was no evidence that she was the aggressor. However, the evidence viewed in the light most favorable to the State, permitted a reasonable inference that defendant acted as the initial aggressor: the Victim entered defendant's home upon invitation from defendant; defendant told the Victim that he could get a computer server from inside the house and pointed the Victim to where the server was; there was no physical evidence of forcible entry to defendant's home; the Child testified that she saw defendant go into the kitchen, saw defendant get a gun, heard the Victim say

defendant's name, and then heard a loud noise; and defendant's gun had one used casing.

In the absence of evidence establishing an unlawful and forcible entry or signs of struggle inside of the house, the jury could reasonably infer from these facts that defendant was the initial and only aggressor. Accordingly, the trial court did not err in submitting the aggressor doctrine to the jury.

B. LYING IN WAIT JURY INSTRUCTION

Defendant argues that she is entitled to a new trial because the trial court erred by instructing the jury on lying in wait. Specifically, defendant claims that the lying in wait instruction was unsupported by the evidence and that its inclusion as a jury instruction prejudiced her by undermining her self-defense claim.

We review the trial court's decisions regarding jury instructions de novo. *State v. Grullon*, 240 N.C. App. 55, 58 (2015). "A trial court must give the substance of a requested jury instruction if it is 'correct in itself and supported by the evidence.'" *State v. Mercer*, 373 N.C. 459, 462 (2020) (quoting *State v. Locklear*, 363 N.C. 438, 464 (2009)). "In examining the sufficiency of the evidence supporting a jury instruction on appellate review, '[a]ll evidence . . . favorable to the State must be considered.'" *Grullon*, 240 N.C. App. at 58 (quoting *State v. Woodard*, 324 N.C. 227, 230 (1989)). "The evidence must be considered by the court in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn from the evidence." *Id.* (cleaned up).

Murder perpetrated by lying in wait is murder in the first degree. N.C.G.S § 14-17(a) (2025). Lying in wait means the defendant “waits and watches for the victim in ambush for a private attack on him, [and] intentionally assaults the victim, proximately causing the victim’s death.” *State v. Aikens*, 342 N.C. 567, 573 (1996) (quoting *State v. Camacho*, 337 N.C. 224, 231 (1994)).

[I]t is not necessary that [an assailant] be actually concealed in order to lie in wait. If one places himself in a position to make a private attack upon his victim and assails him at a time when the victim does not know of the assassin’s presence or, if he does know, is not aware of his purpose to kill him, the killing would constitute a murder perpetrated by lying in wait. Certainly[,] one who has lain in wait would not lose his status because he was not concealed at the time he shot his victim. The fact that he reveals himself or the victim discovers his presence will not prevent the murder from being perpetrated by lying in wait.

State v. Allison, 298 N.C. 135, 148 (1979). “Even a moment’s deliberate pause before killing one unaware of the impending assault and consequently ‘without opportunity to defend himself’ satisfies the definition of murder perpetrated by lying in wait.” *State v. Brown*, 320 N.C. 179, 190 (1987) (citation omitted).

Here, viewing the evidence in the light most favorable to the State, the evidence permitted a reasonable inference that defendant positioned herself to make a private attack upon the Victim by luring him into her home, concealing her intent by letting the Victim believe he could pick up the server, and shooting the Victim at a time when he was unaware of the impending danger and lacked a meaningful

opportunity to defend himself. This evidence is sufficient for a reasonable juror to conclude that substantial evidence supports the theory of lying in wait.

Accordingly, the trial court did not err by submitting the lying in wait instruction to the jury.

C. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant further argues her trial counsel was ineffective for two reasons: her attorney failed to argue that she acted in self-defense and implicitly conceded that she had committed second degree murder.

We review “whether a defendant was denied effective assistance of counsel de novo.” *State v. Wilson*, 236 N.C. App. 472, 475 (2014).

“A defendant’s right to counsel includes the right to the effective assistance of counsel.” *State v. Braswell*, 312 N.C. 553, 561 (1985). “There exists a strong presumption that counsel’s conduct falls within the wide range of professional assistance, but this presumption is rebuttable.” *State v. Gillard*, 386 N.C. 797, 803 (2024) (cleaned up). To show ineffective counsel, a defendant “must show that his counsel’s conduct fell below an objective standard of reasonableness.” *Braswell*, 312 N.C. at 553–55. To meet this burden, a defendant must satisfy a two-part test:

First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to

deprive the defendant of a fair trial, a trial whose result is reliable.

Gillard, 386 N.C. at 867 (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). “Prejudice is established by showing ‘that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.’” *State v. Campbell*, 359 N.C. 644, 690 (2005) (quoting *Strickland*, 466 U.S. at 694).

1. *Harbison* Error

Defendant first argues that her counsel “implicitly conceded she had committed second degree murder.”

In *State v. Harbison*, our Supreme Court held that ineffective assistance of counsel occurs where defense counsel admits a defendant’s guilt to the jury without consent, because such an admission violates the “right to have the issue of guilt or innocence decided by a jury.” 315 N.C. 175, 180 (1985). *Harbison* error exists where “defense counsel’s statements to the jury cannot logically be interpreted as anything other than an implied concession of guilt to a charged offense” *State v. McAllister*, 375 N.C. 455, 475 (2020). When reviewing an allegation of *Harbison* error, the defense counsel’s challenged statements “must be viewed in context to determine whether the statement was, in fact, a concession of the defendant’s guilt of a crime.” *State v. Moore*, 286 N.C. App. 341, 345 (2022) (cleaned up); see e.g., *State*

v. Mahatha, 289 N.C. App. 52, 65–66 (2023) (holding no *Harbison* error because counsel did not omit mention of the charge; instead, he asked the jury to “return a verdict of not guilty” shortly after discussing the charge in the closing argument). *But see e.g., McAllister*, 375 N.C. at 463–67 (concluding that *Harbison* error existed when the defendant’s counsel failed to ask for a not guilty verdict for one of the defendant’s charges).

Here, defendant argues that two statements made by defense counsel were implied concessions of guilt. The two statements defendant points to are “second degree murder is sort of the default” and “it wasn’t a plan, which is the only question.” Taking the statements in their entirety, the “default” comment was made while transitioning between description of the elements of first-degree murder and second-degree murder, to emphasize that first-degree murder required additional elements. The “only question” phrase was first used to stress that the burden was on the State to rule out all reasonable doubt. The phrase was then used to argue that defendant acted impulsively. Later, counsel argued that defendant feared the Victim, the fear was real for defendant, the Victim threatened defendant previously, and that defendant viewed the Victim as a threat. Counsel’s main point was that the State carried a high burden of proof and that the State had not met it. These facts indicate that defense counsel did not concede defendant’s guilt, either expressly or impliedly, but instead pursued the defense strategy consistent with defendant’s interests and the evidence presented at trial. Accordingly, we hold there was no *Harbinson* error.

2. Trial Strategy

Defendant next argues that counsel failed to assert that she acted in self-defense by focusing on the defense of diminished capacity and downplaying the self-defense claim.

“Decisions concerning which defenses to pursue are matters of trial strategy and are not generally second-guessed by this Court.” *State v. Prevatte*, 356 N.C. 178, 236 (2002). Additionally, “[d]isagreement over trial tactics and communication problems generally do not make the assistance of counsel ineffective.” *State v. Callahan*, 93 N.C. App. 579, 582 (1989).

Here, defendant’s counsel told the jury in closing argument that “she did this in self-defense,” and stated that defendant feared the Victim. Thus, defense counsel asserted self-defense. Even if counsel downplayed the self-defense claim while emphasizing another, decisions concerning defenses are a matter of trial strategy that this Court generally will not second guess. *See Prevatte*, 356 N.C. at 236. Accordingly, defendant’s claim of ineffective assistance is without merit.

D. LAY TESTIMONY

Defendant argues that “two police officers were erroneously permitted to proffer opinion testimony that the defendant was not experiencing a mental health crisis on the evening of the incident,” which “prejudiced the outcome of trial by undermining the defendant’s diminished capacity defense.”

We review a “trial court’s decision to admit [lay opinion testimony] evidence

for abuse of discretion, looking to whether the court’s ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *State v. Heyne*, 293 N.C. App. 724, 733 (2024) (alteration in original) (quoting *State v. Delau*, 381 N.C. 226, 236–37 (2022)).

Under Rule 701 of the North Carolina Rules of Evidence, non-expert witness “testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.” N.C.G.S. § 8C-1, R. 701 (2025); accord *State v. Bond*, 345 N.C. 1, 31 (1996). The weight given to witness testimony is for the jury to determine. *State v. Davis*, 321 N.C. 52, 57–58 (1987).

A lay witness may testify to “instantaneous conclusions” regarding a person’s mental state derived from the lay witness’s personal observations. *State v. Wade*, 155 N.C. App. 1, 14 (2002). Anyone who has observed, conversed, or dealt with a person and has had the reasonable opportunity to form an opinion about the person’s mental condition, is permitted to testify to such opinion. *State v. Hammonds*, 290 N.C. 1, 5–6 (1976).

Here, during trial, when the first officer was asked if defendant had any difficulty following his instructions, the officer answered, “No.” The first officer was then asked if defendant looked like she was suffering some mental health crisis when the officer had communicated with defendant, to which the officer answered, “No.”

Later on in the trial, a second officer was also asked if defendant was able to follow his instructions, to which the officer answered, “She was. She did as I asked the dispatchers to instruct her to do. She did that.” Additionally, when this second officer was asked if defendant appeared to be suffering from a mental health crisis on the scene, the second officer answered, “It did not.” Thus, both officers testified only to what they personally observed—that defendant complied with law enforcement’s instructions and that she did not appear to be experiencing a mental health crisis—without offering expert opinions or medical conclusions.

Accordingly, we conclude that the trial court did not abuse its discretion by admitting the testimonies of both officers.

IV. Conclusion

We conclude that defendant has failed to show that she is entitled to a new trial. The trial court did not err in instructing the jury on the aggressor doctrine or lying in wait, defendant has not established ineffective assistance of counsel, and the trial court did not abuse its discretion when admitting the non-expert opinion by the officers. Accordingly, defendant received a fair trial free from error.

NO ERROR.

Judges GRIFFIN and MURRY concur.

Report per Rule 30(e).