

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA25-886

Filed 7 October 2026

Union County, No. 22CR051353-890

STATE OF NORTH CAROLINA

v.

BILLY RASHAWN BARRINO

Appeal by defendant from judgment entered 8 October 2024 by Judge Jonathan Wade Perry in Union County Superior Court. Heard in the Court of Appeals 3 June 2026.

Attorney General Jeff Jackson, by Assistant Attorney General Benjamin T. Spangler, for the State.

Sandra Payne Hagood for the defendant-appellant.

TYSON, Judge.

Billy Barrino (“Defendant”) appeals from a judgment entered following a jury verdict finding him guilty of first-degree murder. We discern no error on the record before us.

I. Background

On 23 April 2022, a group of young adults was recording or “shooting” a music video for an artist known as “Freeway Vic” or “Rat Dawg” on the 1600 block of Boyte Street in the Monroe Housing Authority apartment complex. The group had gathered

in a parking lot and was preparing for the “shoot” when Jaleel Nivens (“Nivens”), who was sitting on the front steps of one of the apartments, began yelling profanity at them. The group moved further down the block away from Nivens. Nivens followed the group down the sidewalk, while continuing to yell profanities. He also lifted his shirt and flashed a pistol at the group. Evidence was presented tending to show Nivens had been drinking. He was living at the apartment complex with his cousin, Britteny Butler (“Butler”).

Rat Dawg walked across the street to talk with Nivens in an attempt to deescalate the situation. Defendant walked across the street to join the conversation between Nivens and Rat Dawg. Defendant was not aggressive in his approach and his hands were empty. Rat Dawg left the conversation and walked back across the street towards the video producer, Bristol Williams (“Williams”).

The situation then escalated quickly. According to Williams, the only eyewitness, Nivens drew his gun and shot “like towards [Defendant’s] feet, towards his leg.” Defendant quickly responded by pushing Nivens’ gun away, and then fired two shots in quick succession. Nivens collapsed to the ground and everyone, including Defendant, ran away. Butler walked to Nivens as he lay on the sidewalk. She took his gun and carried it away.

On 26 April 2022, an arrest warrant was issued for Defendant for murder. On 5 July 2022, the grand jury indicted Defendant for first-degree murder. The case

came on for trial during the 30 September 2024 session of Union County Superior Court.

The State presented evidence, including testimony from the police officers who responded to the scene, Nivens' mother, the medical examiner, and officers from the department of corrections.

Defendant also presented testimony and evidence supporting his claim of self-defense. Homero Andrade, an investigator for the Union County Public Defender's Office District 30 and Detective Mayer with Monroe Police Department both testified regarding their previous interactions with the eyewitness, Butler. Butler made herself unavailable by refusing to testify despite being under subpoena. However, Defendant was able to introduce previously recorded testimony from her interview with Detective Mayer. Additionally, Defendant introduced testimony from Robert Young, a participant in the video shoot, and Williams, the producer of the video shoot, both of whom were witnesses to the events surrounding the shooting. Defendant did not testify.

On 8 October 2024, the jury found Defendant guilty of first-degree murder. The trial court sentenced Defendant to life without the possibility of parole. Defendant gave oral notice of appeal in open court after sentencing.

II. Issues

Defendant argues the trial court erred by: (1) omitting the stand-your-ground or no-duty-to-retreat instructions, (2) admitting the Monroe Housing Authority security video, and (3) admitting Defendant’s writings.

III. Jurisdiction

Defendant appeals from a final judgment of the trial court pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2025).

IV. Jury Instructions

Defendant argues he presented evidence of self-defense and the trial court had agreed to instruct the jury on self-defense under the pattern jury instructions in N.C.P.I.—Crim. 206.10 during the charge conference. However, when instructing the jury, the trial court omitted the “no duty to retreat” language of N.C.P.I.—Crim. 206.10 without notice to the parties and did not give any of N.C.P.I.—Crim. 308.10, the “stand-your-ground” instruction. Defendant concedes he did not object to the jury instructions at trial but contends this deviation from an agreed-upon instruction is preserved as a matter of law and constitutes reversible error.

A. “No Duty to Retreat” and “Stand Your Ground”

“It is fundamental that a jury must be properly instructed on the law.” *State v. Phillips*, 386 N.C. 513, 525, 905 S.E.2d 23, 32 (2024). Our statutes provide two circumstances in which an individual’s use of deadly force is justified, thereby excusing the individual from criminal liability. N.C. Gen. Stat. § 14-51.3 provides:

(a) A person is justified in using force, except deadly force,

against another when and to the extent that the person reasonably believes that the conduct is necessary to defend himself or herself or another against the other's imminent use of unlawful force. However, *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 G.S. 14-51.2.

N.C. Gen. Stat. § 14-51.3(a) (2025) (emphasis supplied).

Under Section 14-51.2:

- (b) 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) (2025) (emphasis supplied).

“The relevant distinction between the two statutes is that a rebuttable presumption arises that the lawful occupant of a home, motor vehicle, or workplace reasonably fears imminent death or serious bodily harm when using deadly force at those locations under the circumstances in N.C.G.S. § 14-51.2(b). This presumption does not arise in N.C.G.S. § 14-51.3(a)(1).” *State v. Lee*, 370 N.C. 671, 675, 811 S.E.2d 563, 566 (2018).

Evidence was presented tending to show the victim had been consuming alcohol and was yelling obscenities at the crowd, the crowd had moved to a different location to get away from the victim, Rat Dawg and Defendant appeared to be trying to de-escalate the situation, the victim displayed and was armed with a handgun, and the victim drew and fired his weapon first. The trial court specifically asked and the parties agreed no evidence was presented in this case tending to show Defendant was in his home, motor vehicle or workplace during the shooting. The relevant and applicable statute is N.C. Gen. Stat. § 14-51.3(a) (2025).

The trial court and parties agreed the jury would be instructed on the pattern jury instruction N.C.P.I.—Crim. 206.10 (“First Degree Murder Where a Deadly Weapon Is Used, Covering All Lesser Included Homicide Offenses and Self Defense”).

The pattern instruction states in pertinent:

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 in the

defendant's [home] [own premises] [place of residence]
[workplace] [motor vehicle].)

NOTE WELL: The preceding parenthetical should only be given where the place involved was the defendant's [home] [own premises] [place of residence] [workplace] [motor vehicle].

N.C.P.I.—Crim. 206.10 (footnotes omitted). This section of the pattern instruction contains footnote number 7, which states “See N.C.P.I.—Crim. 308.10.”

N.C.P.I.—Crim. 308.10 is entitled “Self-Defense, Retreat – Including Homicide (to Be Used Following Self-Defense Instructions Where Retreat Is in Issue).” The pattern instruction states:

NOTE WELL: This instruction is to be used if the evidence shows that the defendant was at a place where the defendant had a lawful right to be, including the defendant's own home or premises, the defendant's place of residence, the defendant's workplace, or in the defendant's motor vehicle, when the assault on the defendant occurred.

If the defendant was not the aggressor and the defendant was [in the defendant's own home] [on the defendant's own premises] [in the defendant's place of residence] [at the defendant's workplace] [in the defendant's motor vehicle] [at a place the defendant had a lawful right to be], the defendant could stand the defendant's ground and repel force with force regardless of the character of the assault being made upon the defendant. However, the defendant would not be excused if the defendant used excessive force.

N.C.P.I.—Crim. 308.10 (footnotes omitted).

B. Preservation of Error

The unique facts of this case present a challenge where the record is unclear

as to whether the issue was preserved for our review. The parties orally agreed the jury would be instructed on N.C.P.I.—Crim. 206.10. The trial court informed the parties, “I’ve made some edits” to the pattern jury instructions, and stated:

I’m going to get the clerk to print out five copies so I have one and the four of you all can look back through it. I’m going to go back through my list. I’ve already started working on the other non-substantive charges. So if ya’ll don’t mind looking through the proposed substantive and I’ll look through my list and then I’ll read those out.

Defense counsel then informed the trial court he had reviewed the proposed instructions and had no objections. The trial court addressed the other instructions and indicated proposed instructions were being emailed to counsel for their review. Defense counsel objected to the State’s request for a flight instruction, but he did not object to or request additional instructions. The trial court emailed the revised and compiled jury instructions to counsel and provided defense counsel and the State with a printed copy. Defense counsel requested a moment to review the instructions before noting his approval.

The trial court’s instructions actually provided to the jury did not contain the portion of N.C.P.I.—Crim. 206.10, which states “the defendant has no duty to retreat in a place where the defendant has a lawful right to be.” The instructions also did not include N.C.P.I.—Crim. 308.10, the “stand your ground” instruction incorporated by N.C.P.I.—Crim. 206.10. (“if the defendant was not the aggressor and the defendant was . . . [at a place the defendant had a lawful right to be,] the defendant could stand

the defendant's ground and repel force with force.") Following the jury charge, the trial court asked defense counsel whether he had any issues with the instructions the court read. He responded that he did not.

"It is fundamental that a jury must be properly instructed on the law." *State v. Phillips*, 386 N.C. 513, 525, 905 S.E.2d 23, 32 (2024). However, it is also well settled if a defendant fails to object to the trial court's instructions, he has failed to preserve the issue for appellate review. N.C. R. App. P. 10(a)(2); *State v. Crisp*, 281 N.C. App. 127, 129, 867 S.E.2d 399, 401 (2021).

Defendant concedes he failed to object to the jury instructions provided at trial. He also does not argue for plain error review on appeal. "Defendant's failure to object during the charge conference or after the instructions were given to the jury, along with his express agreement during the charge conference and after the instructions were given to the jury, constitutes invited error. His invited error waives any right to appellate review, *including plain error review*." *State v. Hooper*, 279 N.C. App. 451, 455, 864 S.E.2d 376, 378-79 (2021) (emphasis original).

In *State v. White*, our Supreme Court examined defense counsel's involvement in jury instructions provided in a death penalty case. *Id.* 349 N.C. 535, 508 S.E.2d 253 (1998). The Court held:

Counsel . . . did not object when given the opportunity either at the charge conference or after the charge had been given. In fact, defense counsel affirmatively approved the instructions during the charge conference. Where a

defendant tells the trial court that he has no objection to an instruction, he will not be heard to complain on appeal.

Id. at 570, 508 S.E.2d at 275 (citing *State v. Wilkinson*, 344 N.C. 198, 213, 474 S.E.2d 375, 396 (1996)). “A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct.” N.C. Gen. Stat. § 15A-1443(c) (2025).

Defendant argues the purported deviation from a purportedly agreed-upon instruction is preserved as a matter of law and constitutes reversible error to award a new trial. Defendant relies on our Supreme Court’s decisions in *State v. Bass*, 371 N.C. 535, 819 S.E.2d 322 (2018) and *State v. Lee*, 370 N.C. 671, 811 S.E.2d 563 (2018).

When reviewing errors in self-defense jury instructions, our Supreme Court in *Bass* held, “it is clear that a defendant entitled to *any* self-defense instruction is entitled to a *complete* self-defense instruction, which includes the relevant stand-your-ground provision.” *Bass*, 371 N.C. at 542, 819 S.E.2d at 326 (emphasis in original). Furthermore, “[pre]suming defendant was entitled to a self-defense instruction, [and] the trial court erred in omitting the relevant stand-your-ground language . . . [it follows] Defendant is entitled to a trial with complete and accurate jury instructions.” *Id.*

In *Lee*, the trial court, like in this case, agreed to instruct the jury on N.C.P.I.—Crim. 206.10, but “ultimately omitted the ‘no duty to retreat’ language of N.C.P.I.—Crim. 206.10 from its actual instructions *without prior notice to the parties* and did

not give any part of the ‘stand-your-ground’ instruction.” *Lee*, 370 N.C. at 673, 811 S.E.2d at 565 (emphasis supplied); *See also, State v. Irabor*, 262 N.C. App. 490, 493, 822 S.E.2d 421, 423 (2018) (The trial court also agreed to instruct the jury on self-defense under N.C.P.I.—Crim. 206.10, but it “omitted the ‘no duty to retreat’ language . . . *without prior notice to the parties* and also failed to give any part of the ‘stand-your-ground’ instruction.” (emphasis supplied)).

The Court in *Lee* concluded because the trial court had “erroneous[ly] deviat[ed]” from an agreed upon jury instruction, regardless of the defendant’s failure to object, the issue was preserved for full review on appeal. *Lee*, 370 N.C. at 676, 811 S.E.2d at 567. This Court came to the same conclusion in *Irabor*, 262 N.C. App. at 496, 822 S.E.2d at 425.

The facts of this case are distinguished from those present in both *Lee* and *Irabor*. Here, the record shows the parties had ample time to review, in advance and in writing, the instructions the trial court intended to give the jury. *The record does not disclose* whether the reviewed and agreed-upon instructions deviated from the actual instructions given to the jury. The instructions distributed to the parties for review prior to the jury charge are not included in the record. It is Defendant’s burden to ensure the record contains the documents and exhibits “necessary for an understanding of all issues presented on appeal.” N.C. R. App. P. 9(3)(e).

We cannot discern whether Defendant had “prior notice” of the instructions to be given to the jury, or whether those instructions in fact deviated from the pattern

jury instructions. *Lee*, 370 N.C. at 673, 811 S.E.2d at 565; *Irabor*, 262 N.C. App. at 493, 822 S.E.2d at 423. If the record had shown the approved proposed jury instructions the parties reviewed contained the “no-duty to retreat” and “stand-your-ground” provisions, then *Lee* and *Irabor* may have controlled to award Defendant a new trial. *Id.*

The record before us is silent on whether the trial court had excluded the “no-duty to retreat” and “stand your ground” language in its written instructions prior to defense counsel’s review and acceptance during the charge conference. Thus, Defendant must argue plain error to permit this Court’s review of the purported error, which Defendant has not done. If the written and reviewed instructions deviated from the oral instructions to the jury, questions could logically be raised regarding invited error, waiver, and ineffective assistance of counsel (“IAC”).

On the record before us, we cannot presume that no deviations occurred and then hold *Lee* and *Irabor* automatically control to award Defendant a new trial. The record is silent on whether Defendant had prior notice of or had agreed to the erroneous instructions. Defendant has not argued plain error, and we are without jurisdiction to review the purportedly omitted instructions for error. *See State v. Leopard*, 300 N.C. App. 199, 205, 920 S.E.2d 390, 394 (2025) (“In the absence of an objection at trial, jury instructions may be challenged on appeal only for plain error, and the defendant must specifically and distinctly argue plain error on appeal.” (citation and quotation marks omitted)).

Our dissenting colleague cites this Court’s recent decision in *State v. Miller*, COA25-525 (N.C. App. Sept. 16, 2026). In *Miller*, the defendant argued the trial court committed both structural and plain error by instructing the jury the defendant “had the burden to prove ‘beyond a reasonable doubt’ its theory of third-part guilt via recent possession.” *Miller*, slip op. at 40. During the charge conference, the trial court distributed to the parties a copy of the proposed jury instructions. *Id.* at 42. The court noted it had made one change to the proposed instructions. *Id.* Defense counsel had no objection to that change but wished to “mark what [he] had submitted yesterday” to “make the record complete.” *Id.* The court marked the modified jury instruction defense counsel provided to the court as Exhibit 14. *Id.*

The State argued the defendant had waived appellate review of the jury instruction because his counsel had invited the error. *Id.* at 41. Defendant’s modified jury instruction, Exhibit 14, was not included in the Record on Appeal, nor could the clerk of Clerk of Superior Court of Pender County locate a copy. *Id.* at 43. We noted, “[a]lthough it is clear that defense counsel agreed to substitute a word in a different part of the proposed instruction, it remains unclear whether defense counsel’s modified jury instruction or the trial court’s proposed jury instruction placed the burden of proof on Defendant. Consequently, this Court is unable to definitively conclude that Defendant invited this error.” *Id.* at 43.

Because neither party in *Miller*, nor the Clerk of Court, was able to produce Exhibit 14 on appeal and this Court was “unable to definitively conclude that [the

defendant] invited [the] error,” it was discretionarily determined “[i]n the interest of justice, we assume [the defendant] did not invite this error, and we [would] consider [the defendant’s] arguments.” *Id.*

In *Miller*, the defendant distinctly argued for plain error review. *See Leopard*, 300 N.C. App. at 205, 920 S.E.2d at 394. Defense counsel took the appropriate steps to ensure the modified jury instruction was included as an exhibit in the record, but the document was apparently lost. The facts created a scenario where fairness required our requested plain error review of Defendant’s argument. *Id.* Here Defendant did not include the instructions purportedly different from what was provided without objection and did not seek plain error review.

Where the record does not permit us to discern whether Defendant had notice of the erroneous instruction and he did not argue plain error, this issue is unpreserved and properly dismissed. “Where a defendant tells the trial court that he has no objection to an instruction, he will not be heard to complain on appeal.” *White*, 349 N.C. at 570, 508 S.E.2d at 275 (citing *State v. Wilkinson*, 344 N.C. 198, 213, 474 S.E.2d 375, 396 (1996)).

This issue is dismissed without prejudice for Defendant’s opportunity to file a Motion for Appropriate Relief in the trial court. *See, e.g., State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524-25 (2001) (“IAC claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary

procedures as the appointment of investigators or an evidentiary hearing. This rule is consistent with the general principle that, on direct appeal, the reviewing court ordinarily limits its review to material included in the record on appeal and the verbatim transcript of proceedings, if one is designated.” (citations and quotation marks omitted)).

If Defendant chooses to file an MAR, the appropriate procedure is for the lower court to determine whether defense counsel was provided “prior notice” of the instructions the trial court gave the jury, which omitted the “no duty to retreat” and “stand-your-ground” language. If the inquiry reveals defense counsel did have “prior notice” and agreed to the instructions, Defendant is without prejudice to assert an IAC claim, if he so desires. If defense counsel was without “prior notice” these provisions were to be eliminated from the instructions actually given to the jury, the lower court should proceed with the analysis set forth in *Lee* and *Irabor*. Until the instructions provided are reviewed and that factual determination is made, we are merely speculating whether the trial court deviated from the instructions it previously had provided to counsel.

We reiterate “it is clear that a defendant entitled to *any* self-defense instruction is entitled to a *complete* self-defense instruction, which includes the relevant stand-your-ground provision.” *Bass*, 371 N.C. at 542, 819 S.E.2d at 326 (emphasis in original).

V. Admission of Security Camera Footage

Defendant argues the trial court erred by admitting into evidence surveillance camera footage from Monroe Housing Authority (“MHA”) Camera Three, and asserts it was not properly authenticated and was irrelevant and misleading. We disagree.

A. Standard of Review

“A trial court’s determination as to whether a document has been sufficiently authenticated is reviewed *de novo* on appeal as a question of law.” *State v. Hicks*, 243 N.C. App. 628, 638, 777 S.E.2d 341, 348 (2015) (citation omitted). “Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *Id.* at 639, 777 S.E.2d at 348. (citation omitted).

B. Analysis

The State offered four video exhibits from the motion-activated security cameras on the MHA property where the shooting took place. State’s Exhibits 4 and 5 are videos from MHA Camera Three. The video in Exhibit 4 is six minutes and 47 seconds long. The video in Exhibit 5 is a shorter, “zoomed” in, version of Exhibit 4. It begins when the crowd of young people has already moved to the second parking lot, but before Nivens approaches them. It ends after Nivens has been shot, and shows Butler approach his body, remove the gun, and walk away.

The video footage freezes repeatedly. It freezes for the six seconds immediately before the shooting and the six seconds after it. The video skips over portions of recording. It skips throughout the footage of the actual shooting, and only one second

of the thirteen seconds of the shooting is recorded. The portion of the video missing is the part that would have shown who drew their weapon first.

Detective Corey Helms testified during *voir dire* he was familiar with the “security cameras and video surveillance system that are operated by the [MHA] in the area around where the homicide occurred.” The Monroe Police Department has direct access to MHA’s camera footage. Detective Helms described how the security camera system worked and how he had accessed the videos. He further testified the videos cannot be altered. He did not explain or know why the video repeatedly skipped or froze.

Rule 901(a) requires that evidence be authenticated by showing “that the matter in question is what its proponent claims.” N.C. Gen. Stat. § 8C-1, Rule 901(a) (2025). Rule 901(b) lists ten examples of authentication that meet the requirements of subsection (a). N.C. Gen. Stat. § 8C-1, Rule 901(b) (2025). “Recordings such as a tape from an automatic surveillance camera can be authenticated as the accurate product of an automated process’ under Rule 901(b)(9).” *State v. Snead*, 368 N.C. 811, 814, 783 S.E.2d 733, 736 (2016) (quoting 2 Kenneth S. Broun et al., *McCormick on Evidence* § 216, at 39-40 (7th ed. 2013)). “Evidence that the recording process is reliable and that the video introduced at trial is the same video that was produced by the recording process is sufficient to authenticate the video and lay a proper foundation for its admission as substantive evidence.” *Id.* (citations omitted).

“[G]aps in coverage of video surveillance recordings do not necessarily render

the recording process unreliable for the purpose of authentication. A gap in footage does not indicate the video is not ‘what it purports to be.’” *State v. Butler*, 929 S.E.2d 82, 95 (N.C. Ct. App. 2026) (quoting *Snead*, 368 N.C. at 815, 783 S.E.2d at 737). “The video footage which was actually recorded still may constitute relevant, authenticated, and admissible evidence, with any gaps more properly affecting the weight assigned to the video by the finder of fact.” *Id.* Gaps in footage, even at critical moments, more properly impact the weight of the evidence, not its admissibility. *Id.*

The gaps and freezes in video coverage do not render it improperly authenticated, unreliable or misleading. This argument is overruled. *Id.*

VI. Defendant’s Writings

Defendant argues the trial court erred by admitting rap lyrics Defendant wrote in jail awaiting trial because they were irrelevant and unfairly prejudicial. We disagree.

A. Standard of Review

[W]hen analyzing rulings applying Rules 404(b) and 403, we conduct distinct inquiries with different standards of review. We review *de novo* the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.

We then review the trial court’s Rule 403 determination for abuse of discretion. A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision.

State v. Jones, 288 N.C. App. 175, 179-80, 884 S.E.2d 782, 788 (2023) (internal citations and quotation marks omitted). “When the admission of the same evidence is challenged based on both Rules 404(b) and 403, we review the evidence on 404(b) grounds first before turning to Rule 403.” *Id.* at 179, 884 S.E.2d at 788.

B. Analysis

The State’s theory at trial asserted Defendant had killed Nivens as retribution. Defendant’s brother, Jaquavious “Quay” Allen, who had been murdered on 1 August 2021. Robert Ashcraft was arrested for the murder. Nivens and Ashcraft were first cousins and were known to associate together.

Defendant wrote in a composition notebook during his time in jail awaiting trial. In the notebook he wrote a number of passages, which appear to be rap lyrics. The State presented evidence tending to show references to both Quay and Nivens in the lyrics. The State introduced the extensive lyrics as evidence at trial to support its theory.

This Court has held rap lyrics may be “relevant to establish identity, motive, and intent, and their probative value [may] substantially outweigh [] their prejudicial effect to defendant.” *State v. Hayes*, 239 N.C. App. 539, 556, 768 S.E.2d 636, 647 (2015). The lyrics contained in Defendant’s notebook are relevant to support the State’s theory of motive and intent. *Id.*; N.C. Gen. Stat. § 8C-1, Rule 404(b) (2025).

Although the lyrics contain extensive references to violence and shooting,

Defendant has not shown the trial court abused its discretion in determining probative value of the relevant lyrics to support the State's theory was "substantially outweighed by the danger of unfair prejudice." N.C. Gen. Stat. § 8C-1, Rule 403 (2025). This argument is overruled.

VII. Conclusion

The record before us fails to show Defendant preserved his argument regarding the trial court's failure to give the jury a complete and legally sufficient self-defense jury instruction. This argument is dismissed without prejudice for Defendant to file a MAR in the trial court under the standards above.

Defendant has failed to show error or prejudice in the trial court's discretion to admit the security video footage and Defendant's lyrics and writings. *It is so ordered.*

DISMISSED IN PART WITHOUT PREJUDICE; AND NO ERROR IN PART.

Judge Flood concurs.

Judge Wood dissenting with separate opinion.

WOOD, Judge, dissenting.

I respectfully dissent from the majority opinion dismissing without prejudice the self-defense jury instruction issue for the opportunity to file an MAR. I agree with the majority’s recitation of the facts and discussion of the relevant self-defense statutes and corresponding jury instructions. However, I disagree with the majority’s assertion that the record before us does not permit us to determine whether the self-defense issue is preserved for appellate review. The record before us is sufficient for us to determine the trial court erred by omitting portions of the agreed upon jury instruction for self-defense. Accordingly, I would reverse and remand for a new trial.

“It is fundamental that a jury must be properly instructed on the law.” *State v. Phillips*, 386 N.C. 513, 525, 905 S.E.2d 23, 32 (2024). Our Supreme Court has consistently held,

a request for an instruction at the charge conference is sufficient compliance with Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure to warrant our full review on appeal where the requested instruction is subsequently promised but not given, notwithstanding any failure to bring the error to the trial judge’s attention at the end of the instructions.

State v. Withers, 179 N.C. App. 249, 255, 633 S.E.2d 863, 867 (2006) (quoting *State v. Ross*, 322 N.C. 261, 265, 367 S.E.2d 889, 891 (1988)).

In *State v. Lee*, “the trial court agreed to deliver the pattern jury instruction on first-degree murder and self-defense, N.C.P.I.–Crim. 206.10,” the same instruction at issue in this case. *State v. Bass*, 371 N.C. 535, 542, 819 S.E.2d 322, 326 (2018)

(discussing *State v. Lee*, 370 N.C. 671, 673, 811 S.E.2d, 563 565 (2018)). The correct instruction within N.C.P.I.–Crim. 206.10, when a defendant presents evidence of self-defense, states, in pertinent part, “the defendant has no duty to retreat in a place where the defendant has a lawful right to be.” *Lee*, 370 N.C. at 673, 811 S.E.2d at 565. It also incorporates by reference the pattern jury instruction on “Self-Defense, Retreat,” N.C.P.I.–Crim. 308.10, which states that “if the defendant was not the aggressor and the defendant was at a place the defendant had a lawful right to be, the defendant could stand the defendant’s ground and repel force with force.” *Id.* (cleaned up). The trial court failed to include these portions of N.C.P.I.–Crim. 206.10 despite Defendant having raised evidence of self-defense and the stand-your-ground instructions being pertinent to his defense. Our Supreme Court has held failure to instruct as agreed is an “erroneous deviation” and is preserved for review. *Id.* at 676, 811 S.E.2d at 567. This Court addressed this same issue in *State v. Irabor*, 262 N.C. App. 490, 496, 822 S.E.2d 421, 425 (2018).

The case *sub judice* presents the same issue raised in *Lee* and *Irabor*. During the charge conference, the trial court engaged with both parties regarding the jury instructions; Defendant requested, and everybody agreed N.C.P.I.–Crim. 206.10 was the correct pattern jury instruction.

THE COURT: Okay. Mr. Covington, as far as a starting point for the substantive charge?

...

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WOOD, J., dissenting

DEFENSE: So your Honor, we were looking at -- your Honor, we were looking at 206. - - I've lost the place now. First degree murder including all lesser offenses and self defense.

STATE: That's 10.

THE COURT: So we're all three on the same page as far as 206.10 being the correct outline?

DEFENSE: Yes, your Honor.

After confirming everyone's agreement on N.C.P.I.–Crim. 206.10, the trial court went on to ask questions about the substantive instruction.

THE COURT: All right. Let's see. Let me just kind of go through the pattern instruction as it is. Are both sides in agreement that this didn't occur in the Defendant's home, place of residence, workplace or motor vehicle; State?

STATE: That it didn't?

THE COURT: Did not.

STATE: Correct.

THE COURT: Mr. Covington, y'all agree?

DEFENSE: Yes.

The trial court then went on to discuss which of the five lesser included offenses listed in N.C.P.I.–Crim. 206.10 should be included. Both parties agreed the instructions on involuntary manslaughter were unnecessary; however, the State argued voluntary manslaughter also did not apply. Defendant argued it did:

DEFENSE: Yes, your Honor. We believe [voluntary manslaughter] should be included because the jury could find that there was imperfect self defense exercised here.

There is a distinction to be made between being the aggressor with murderous intent and the aggressor without murderous intent. It would be possible for the jury to find that [Defendant] was the initial aggressor in approaching Mr. Nivens from across the street but that he was not the aggressor with murderous intent.

And the belief that [Defendant] felt it necessary to kill Mr. Nivens in order to defend himself, we've put on evidence that the victim was armed with a firearm, he was seen brandishing the firearm and we even had evidence that not only did he draw the firearm but he fired the first shot. And your Honor has seen the video evidence that's been introduced, it's a very, very, quick interaction. And this was a situation where it was either [Defendant] or Mr. Nivens and [Defendant] clearly would have felt the need to defend himself in that situation.

THE COURT: So let me do this, let me just back up one second. It sounds like both sides are - - don't let me speak for you, but both sides are in agreement that at least the first prong of voluntary manslaughter in terms of the heat of passion argument, that's not relevant for this case; is that correct?

STATE: Yes, sir.

THE COURT: All right, Mr. Covington, do y'all agree with that as far as that prong?

DEFENSE: There's no evidence of it.

Our review of the transcript tends to show that the trial court made the discussed edits in real time and indicated it would print copies for counsel to review immediately.

THE COURT: So let me take that one out. Okay. All right. So let me ask both sides this now, I've made some edits. And what I'll do is I'll get the clerk to print out copies here shortly but the State's position on the component of the

instruction for aggressors, let me make sure I understand that, as far as leaving it in or excluding it?

STATE: Your Honor, I think any part of this instruction where there is reference to aggressor needs to be included.

THE COURT: Mr. Covington, y'all have a position on that?

DEFENSE: I mean, I'm not sure exactly which part you're referring to but I think that the jury could find that [Defendant] was the aggressor with murderous intent, they could find that he was aggressor without murderous intent or they could find that he was not the aggressor. So I think the jury needs to be instructed as the same.

THE COURT: That's what I thought, I just wanted to make sure. So I am going to leave those instructions in.

At the end of the discussion on the substantive instruction, the trial court stated:

THE COURT: I'm going to get the clerk to print out five copies so I have one and the four of you all can look back through it. I'm going to go back through my list. I've already started working on the other non-substantive charges. So if y'all don't mind looking through the proposed substantive and I'll look through my list and then I'll read those out.

Do y'all want to approach, I have at least two copies and what I'll do is e-mail y'all a copy, that way y'all can pull it up. If y'all will just let me know when you're ready to be heard on that.

The transcripts do not indicate there was any prolonged break during which the trial court would have made additional changes to the substantive instructions before counsel reviewed them.

DEFENSE: We've reviewed the proposed instructions.

THE COURT: Okay. Mr. Covington, what from the

Defense, if anything, on the proposed instruction?

DEFENSE: Your Honor, we have no objection to the proposed instruction.

THE COURT: Okay. All right.

STATE: I have no objection.

THE COURT: So both the State and the Defense are fine. Again, this is just the substantive charge, both of y'all are fine with that?

DEFENSE: Yes.

The trial court proceeded to discuss the general non-substantive instructions and then stated, “[l]et me combine these two and I’ll e-mail a copy and I’ll have three printed out as well. I e-mailed a copy. Did y’all receive it?” Counsel both received the e-mailed instructions and made one additional edit to the verdict sheet. The trial court asked them to review the instructions over lunch. Neither the transcripts nor the record indicate any changes were made following lunch.

The State contends, and the majority agrees, that Defendant is entitled only to plain error review because he did not object to the instructions at trial. However, they overlook the fact that the trial court specifically agreed to instruct the jury on N.C.P.I.–Crim. 206.10. The State argues this case is distinguishable from *Lee* because in an apparent reference to the e-mailed and printed copies of the instructions discussed during the charge conference, “the trial court gave both sides ample opportunities to review, in writing, the instructions that were to be given.” While the State further asserts “Defendant does not allege that the actual

instructions deviated from the agreed upon instructions, only that they deviated from the pattern jury instructions,” neither the printed copies of the jury instructions nor the e-mails referenced during the charge conference were entered as exhibits, neither were they included in the record on appeal. Although it is clear that edits were made to the pattern jury instructions set forth in N.C.P.I.–Crim. 206.10, nothing in the transcripts demonstrates that the omission of the relevant self-defense instructions was an edit upon which the parties agreed.

Notably, the State contends in its brief that Defendant *is* entitled to plain error review; however, “a defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error.” *State v. Miller*, 289 N.C. App. 429, 433, 889 S.E.2d 231, 234 (2023) (quoting *State v. Crane*, 269 N.C. App. 341, 343, 837 S.E.2d 607, 608 (2020)). However, if Defendant had explicitly accepted erroneous instructions after having had ample opportunity to review the edited instructions as the State suggests, this case may be one of invited error as the majority suggests requiring Defendant to file an MAR for ineffective assistance of counsel in order to allow for appellate review. In my view, absent any record evidence to indicate the instructions at issue were omitted in the reviewed and accepted instructions, we should decline “to apply the invited error doctrine where such specific and affirmative actions are absent.” *Id.* Following this logic, we can presume the instructions provided during the charge conference for review contained the critically relevant portions of N.C.P.I.–Crim. 206.10 that were later erroneously omitted. *See*

Granville Med. Ctr. v. Tipton, 160 N.C. App. 484, 488-89, 586 S.E.2d 791, 795 (2003).

To presume otherwise, would be to presume that the trial court prepared incorrect jury instructions and after having reviewed them, both the State and Defendant agreed for the trial court to deliver incorrect instructions to the jury.

Rather, in accordance with our Supreme Court's precedent, we ought to presume that after everyone had correctly agreed to instruct on N.C.P.I.–Crim. 206.10, the trial court intended to provide the instruction in its entirety, except only the explicitly agreed upon sections recorded in the above referenced transcript excerpts. *See Bass*, 371 N.C. at 542, 819 S.E.2d at 326. Therefore, irrespective of Defendant's failure to object, because the trial court "erroneous[ly] deviat[ed]" from an agreed upon jury instruction the issue is preserved for full review on appeal. *Lee*, 370 N.C. at 676, 811 S.E.2d at 567; *Irabor*, 262 N.C. App. at 496, 822 S.E.2d at 425; *see also Withers*, 179 N.C. App. at 255, 633 S.E.2d at 867.

When reviewing errors in self-defense jury instructions our Supreme Court has held, "it is clear that a defendant entitled to *any* self-defense instruction is entitled to a *complete* self-defense instruction, which includes the relevant stand-your-ground provision." *Bass*, 371 N.C. at 542, 819 S.E.2d at 326. Furthermore, "assuming defendant was entitled to a self-defense instruction, [and] the trial court erred in omitting the relevant stand-your-ground language . . . [it follows] Defendant is entitled to a trial with complete and accurate jury instructions." *Id.* Relying on our Supreme Court's holdings in *Lee* and *Bass*, this Court in *Irabor* held, "[f]ailure to

include the relevant stand-your-ground provision constitutes prejudicial error and warrants a new trial. Defendant is entitled to a new trial with proper jury instructions.” *Irabor*, 262 N.C. App. at 496, 822 S.E.2d at 425.

Defendant presented eyewitness testimony at trial which tended to demonstrate that Nivens instigated the confrontation by first yelling profanities at the music video crowd who then moved away from him. Nivens then followed the crowd, continued yelling profanities, and also “flashed a pistol.” Defendant then approached Nivens calmly with his hands empty and, according to the only eyewitness to the shooting to testify, Defendant did not pull his gun to shoot until after Nivens pulled his own gun and fired the first shot. The State, Defendant, and the trial court agreed the evidence entitled Defendant to the instruction in N.C.P.I.—Crim. 206.10, the instruction on first-degree murder including all lesser offenses and self-defense. Further, this testimony tends to support Defendant’s argument on appeal that “it was critical that the jury understand that [Defendant] had a right to stand his ground and no duty to retreat because they might otherwise assume that [Defendant] should have retreated after Mr. Nivens pulled his weapon.” Thus, “there is a reasonable possibility that, had the jury been informed that, because he was standing on a public sidewalk, [Defendant] had the right to stand his ground and no duty to retreat, a different result would have been reached at trial.”

Defendant presented evidence of self-defense which entitled him to the self-defense instruction, and the parties and the trial court agreed on self-defense

instructions during the charge conference. It is uncontested that the trial court failed to give the entire self-defense instruction as the trial court omitted the “no duty to retreat” language of N.C.P.I.–Crim. 206.10 and did not give any of N.C.P.I.–Crim. 308.10, the “stand-your-ground” instruction. Notably, the majority agrees and reiterated that “it is clear that a defendant entitled to *any* self-defense instruction is entitled to a *complete* self-defense instruction, which includes the relevant stand-your-ground provision.” *Bass*, 371 N.C. at 542, 819 S.E.2d at 326. Failure to provide the entire jury instruction constitutes prejudicial error and warrants reversal and remand for a new trial. *Id.*; *Irabor*, 262 N.C. App. at 496, 822 S.E.2d at 425. Consequently, the proper holding is to reverse the trial court’s judgment and remand for a new trial.

While I do not disagree with the majority that dismissing the issue without prejudice for the opportunity to file an MAR would allow for the potential review of the e-mailed instructions and a definitive determination of “whether Defendant had prior notice of or had agreed to the erroneous instructions,” this avenue creates additional unnecessary hoops through which Defendant must jump and wastes precious judicial resources. The requirement that Defendant first return to the trial court for a factual determination regarding whether defense counsel had prior notice of the instructions creates an unnecessary procedural hurdle and effectively shifts to the trial court a determination that is properly the responsibility of the appellate court. Further, the majority’s instruction that the trial court should engage in a

review under *Lee* and *Iraabor* if it determines defense counsel did not have prior knowledge shifts the responsibility to the trial court to determine whether it erred. The question presented is whether the trial court erred in the instructions it gave to the jury after agreeing to give the proper instruction, and that is ultimately a question for the appellate court to resolve based on the record before it. The transcripts and record are clear that Defendant requested and the trial court agreed to deliver the pattern jury instruction on first-degree murder and self-defense, N.C.P.I.–Crim. 206.10. N.C.P.I.–Crim. 206.10 clearly incorporates by reference the pattern jury instruction on “Self-Defense, Retreat,” N.C.P.I.–Crim. 308.10.

Defendant met his burden to ensure the record on appeal contained all documents and exhibits necessary for our review of this issue by including an entire transcript of the proceedings. Our rules of appellate procedure state that the printed record in a criminal action must contain, in relevant part, the following materials:

e. so much of the litigation, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all issues presented on appeal, or a statement specifying that the *entire transcript of the proceedings* is being filed pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed;

f. where an issue presented on appeal relates to the giving or omission of instructions to the jury, *a transcript of the entire charge given; and identification of the omitted instruction by setting out the requested instruction or its substance in the printed record immediately following the instruction given;*

. . . .

i. copies of all other documents *filed* and statements of all other proceedings had in the trial courts which are necessary for an understanding of all issues presented on appeal unless they appear in another component of the record on appeal.

N.C. R. App. P. 9(a)(3) (emphasis added). If the State believed the record on appeal was insufficient to allow review of Defendant's issue, it could have supplemented the record to include the e-mailed instructions to support its argument that Defendant had ample opportunity to review the instructions and was entitled only to plain error review. N.C. R. App. P. 9(b)(5)(a) (emphasis added) ("If the record on appeal as settled is insufficient to respond to the issues presented in an appellant's brief . . . the responding party may supplement the record on appeal with any items that *could* have been included pursuant to this Rule 9."). While Rule 9 contains numerous items that *could* be included in a record on appeal, here, I would hold Defendant has included all those items *required* to be in the record on appeal to understand his issue presented. *See* N.C. R. App. P. 9(a)(3)(e), (f), (i).

In contrast to this Court's recent case *State v. Miller* where the defense entered the modified jury instructions at issue as an exhibit, here, the e-mailed instructions were not entered as an exhibit or filed with the trial court. *State v. Miller*, No. COA25-525 slip op. at *18, __ N.C. App. __, __, __ S.E.2d __, __ (N.C. App. Sept. 16, 2026). In *Miller*, although the transcripts clearly established the jury instructions were entered as an exhibit, the exhibit was not included in the record on appeal nor was the charge conference included in the transcript, leaving this Court in a similar

predicament where it remained unclear whether the reviewed instructions were the same erroneous instructions as those read to the jury. *Id.* Despite the fact neither party in *Miller* was able to produce the jury instruction exhibit on appeal and this Court was “unable to definitively conclude that [the defendant] invited [the] error,” it was determined that “[i]n the interest of justice, we assume [the defendant] did not invite this error, and we [would] consider [the defendant’s] arguments.” *Id.* The same should be done in the case *sub judice*.

For the reasons stated herein, I conclude the record does not prevent us from determining Defendant’s jury instruction issue is preserved for full appellate review and further that the trial court erroneously omitted essential portions of the agreed upon instructions Defendant was entitled to receive. Therefore, Defendant did not receive a fair trial free from prejudicial error, and I would reverse and remand for a new trial.