No. COA 21-724 DISTRICT FIVE

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA )

 )

v. ) From Pender County

 )

ALBERTO PEREZ )

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# DEFENDANT-APPELLANT’S BRIEF

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# DEFENDANT-APPELLANT’S BRIEF

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## ISSUE PRESENTED

1. DID THE TRIAL COURT ERR OR PLAINLY ERR IN ITS INSTRUCTIONS TO THE JURY WHERE IT OMITTED THE DEFINITION OF DEFENSE OF A FAMILY MEMBER?

**STATEMENT OF THE CASE**

This case came on for trial at the 26 April 2021 criminal session of Pender County Superior Court, before the Honorable R. Kent Harrell, on an indictment charging Mr. Perez with attempted first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and assault and battery. (R pp 1, 4-5) On 29 April 2021, the jury found Mr. Perez not guilty of attempted first-degree murder but guilty of assault with a deadly weapon inflicting serious injury. The assault and battery charge was dismissed. (R pp 40, 45; T p 394) Mr. Perez was sentenced to 28 to 46 months’ imprisonment. (R pp 43-44; T p 448) Mr. Perez gave oral notice of appeal. (R pp 47-48; T pp 448-49)

**STATEMENT OF GROUNDS FOR APPELLATE REVIEW**

Mr. Perez appeals pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) from a final judgment entered in Pender County Superior Court.

**STATEMENT OF FACTS**

The Evidence at Trial

On July 3, 2017, Alberto Perez and his younger brother Bobby went to Johnson’s Corner Grill with some friends. (T pp 250, 253-55) After they arrived in the parking lot, Artez Robinson approached their truck to greet the other occupants. As he walked away, Mr. Robinson made a comment Bobby believed was intended to disparage himself or his brother. (T pp 256-57) Bobby got out of the truck and followed Mr. Robinson into Johnson’s Corner to confront him. (T pp 258-59)

Once inside, Bobby ran towards Mr. Robinson. Mr. Robinson responded, “F\*ck you.” Bobby hit Mr. Robinson and the fight began. (T pp 258-59) Mr. Robinson, who was 6’5” tall, quickly gained the advantage over Bobby, who was 5’5” tall[[1]](#footnote-1). By this point, Mr. Perez had entered the store. (T pp 259-60) Mr. Perez originally intended to stop his brother from confronting Mr. Robinson, but by the time he arrived, it was too late. (T pp 326-29) Mr. Perez saw Mr. Robinson holding his brother in a headlock and punching him repeatedly. Believing that his brother was in trouble, Mr. Perez intervened “to help him, to stop it.” (T pp 329-30)

At this point. Mr. Perez saw a box cutter in Mr. Robinson’s hand[[2]](#footnote-2). (T pp 330-31) Knowing that his brother was unarmed (T p 328) and believing that he was in danger, Mr. Perez pulled his own pocketknife and stabbed Mr. Robinson. (T pp 331, 333-35) Mr. Perez did not intend to kill Mr. Robinson, only to prevent him from harming either of the Perez brothers. (T p 338) At this point, a third party intervened, and all parties disengaged. (T pp 339-40)

Artez Robinson testified that he had a previous disagreement with the Perez brothers. (T pp 25-26) He denied insulting either Bobby or Mr. Perez when he saw them outside Johnson’s Corner Grill. (T pp 28-31) Mr. Robinson stated that when Bobby came into the restaurant to confront him, he replied, “F\*ck you and your brother,” and they “started fighting.” (T pp 32-33) Mr. Robinson admitted that he was carrying a box cutter but denied taking it out of his pocket at any time. (T pp 28, 33-34) Mr. Robinson later admitted that he did pull his weapon but said he did so only after the fight was over. (T pp 36-37) Mr. Robinson testified that the item seen in his hand on the store surveillance video was not a box cutter, but instead the receipt he received after placing his order at the grill. (T pp 49-52)

Based on the surveillance video, the fight lasted approximately 20 seconds. (*See* T pp 97-98) As he left the store, Bobby told onlookers to “be quiet” about what they had seen. (T p 110) A store employee rendered first aid To Mr. Robinson until authorities arrived. (T p 109) Dr. Sarah Fox later determined that Mr. Robinson had five abdominal stab wounds, three of which were superficial. A portion of his small intestine was protruding from one of the wounds. Such an injury can be fatal if untreated, so Mr. Robinson was taken into surgery. He was in the hospital for five days but ultimately recovered well. (T pp 165-71)

Witnesses identified the Perez brothers to police. (T p 133) Police also reviewed the surveillance video from the store. (T pp 145-46) Warrants were obtained for the Perez brothers, who then made arrangements through counsel to turn themselves in. (T p 186)

The Jury Instructions

The jury was instructed on attempted first-degree murder, as well as assault with a deadly weapon with intent to kill inflicting serious injury (“alphabet assault”) and assault with a deadly weapon inflicting serious injury. (T pp 414-23) Mr. Perez was convicted of only the third offense. (R p 40)

 In relevant part, the jury was instructed:

For you to find the defendant guilty of assault with a deadly weapon inflicting serious injury, the State need not prove that the assault was committed with the specific intent to kill. The State must prove three things beyond a reasonable doubt.

First, that the defendant assaulted the victim by intentionally and without justification or excuse stabbing Artez Deshawn Robinson.

Second, that the defendant used a deadly weapon. A knife is a deadly weapon.

And third, that the defendant inflicted serious injury upon the victim. I previously defined serious injury and that definition applies equally here.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant intentionally stabbed Artez Robinson with a knife thereby inflicting serious injury upon the victim, it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

However, I instruct you even if you are satisfied beyond a reasonable doubt that the defendant committed assault with a deadly weapon with intent to kill inflicting serious injury or assault with a deadly weapon inflicting serious injury, you may return a verdict of guilty only if the State has satisfied you beyond a reasonable doubt that the defendant’s action was not in defense of a family member: that is, the defendant did not reasonably believe that the assault was necessary or appeared to be necessary to protect a family member from death or serious bodily injury or that the defendant used excessive force or his family member was the aggressor.

If you do not so find or have a reasonable doubt that the State has proved any of these things, then the defendant’s action would be justified by defense of a family member, and it would be your duty to return a verdict of not guilty.

(T pp 422-23; *see also* R pp 18-19)

Mr. Perez was subsequently found guilty of assault with a deadly weapon inflicting serious injury and sentenced to 28 to 46 months’ imprisonment. (R pp 40, 43)

**ARGUMENT**

**I. THE TRIAL COURT ERRED OR PLAINLY ERRED IN ITS INSTRUCTIONS TO THE JURY WHERE IT OMITTED THE DEFINITION OF DEFENSE OF A FAMILY MEMBER.**

A trial court must instruct the jury on all substantial features of a case, and the instructions the court gives must be correct statements of the law. *See e.g., State v. Snider*, 168 N.C. App. 701, 703 (2005). The trial court’s defense of a family member instruction in this case was erroneous because it omitted the definition of defense of a family member, including key terms such as “excessive force” and “aggressor,” and ultimately left the jury with the incorrect impression that under the law, an aggressor can never regain the right to defense of another.

1. **Standard of Review and Preservation**

A trial court’s decisions regarding jury instructions are reviewed *de novo. State v. Osorio*, 196 N.C. App. 458, 466 (2009).In *de novo* review, the appellate 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 (2008) (citation and quotation omitted).

Where the trial court agrees to give the pattern instruction but omits a significant provision, the error is preserved for full appellate review without objection. *State v. Lee*, 370 N.C. 671, 674 (2018) (new trial where instructions omitted the stand-your-ground portion of the self-defense instruction). Prejudice is established if there is a reasonable possibility of a different result at trial had the proper instruction been given. *Id*. at 676.

In the alternative, Mr. Perez asks this Court to review the issue for plain error. Trial counsel did not object to the jury instructions, either during the charge conference or after the jury was instructed. (T pp 399-400, 426-27) *See* N.C. R. App. P. 10(a)(4). Under the plain error standard of review, “a defendant must demonstrate that a fundamental error has occurred at trial. To show that an error was fundamental, a defendant must establish prejudice – that, after examination of the entire record, the error had a probable impact on the jury’s finding that the defendant was guilty.” *State v. Lawrence*, 365 N.C. 506, 518 (2012) (cleaned up).

1. **Legal Analysis**

It was apparent from the earliest stages that Mr. Perez’ case would turn on self-defense and/or defense of a family member. (*See* R p 7; T pp 6-10 (*Harbison* inquiry and statement from the prosecutor that he discussed this with defense counsel “many times over” prior to trial) Mr. Perez was entitled to an instruction on defense of another based on his testimony that he only stabbed Mr. Robinson because he believed that Mr. Robinson had a box cutter, and that attacking Mr. Robinson was the only way to stop him from gravely injuring Mr. Perez’ brother Bobby. (T pp 333-39) The trial court’s failure to give a complete instruction on the central feature of the case was reversible error requiring a new trial.

At the charge conference, the trial court distributed copies of its proposed instructions. (T p 393, *see* R pp 9-20) As he read the proposed instructions, defense counsel inquired, “Judge, these are strictly from the pattern instructions? The court didn’t make any changes?” (T p 395) The trial court explained that in crafting its instructions on the murder charge, the court took the pattern instruction for self-defense in cases of attempted first-degree murder involving a deadly weapon, N.C.P.I. Crim. 206.17A, and substituted the defense of a family member language from N.C.P.I. Crim. 308.50. (T pp 395, 398) The trial court also forecast that it would also insert language pertaining to defense of a family member in the instructions for the lesser included offenses of assault with a deadly weapon with intent to kill inflicting serious injury and assault with a deadly weapon inflicting serious injury. (T pp 398-99) There were no objections to this portion of the proposed charge.

* + - 1. **Core Principles**

“The jury charge is one of the most critical parts of a criminal trial. Where competent evidence of self-defense [or defense of another] is presented at trial, the defendant is entitled to an instruction on this defense, as it is a substantial and essential feature of the case.” *Lee*, 370 N.C. at 674, (cleaned up). An instruction on an affirmative defense is required where there is some evidence to support it, “even though there is contradictory evidence by the State or discrepancies in [the] defendant’s evidence.” *State v. Dooley*, 285 N.C. 158, 163 (1974).

In *State v. Bass*, 371 N.C. 535, 542 (2018) (emphasis in original), the Supreme Court observed that “a defendant entitled to *any* instruction on self-defense is entitled to a *complete* self-defense instruction.” The same applies to defense of another. *See generally State v. Corbett*, 269 N.C. App. 509, 565-76 (2020) (discussing instructional error in a case involving both self-defense and defense of another without distinguishing between the two), *aff’d* 376 N.C. 799 (2021).

* + - 1. **The Trial Court’s Instruction on Assault with a Deadly Weapon Inflicting Serious Injury Omitted the Definition of Defense of Another.**

As to the assault charge, the jury was instructed using the mandate from the pattern instruction on defense of a family member. N.C.P.I. Crim. 308.50 provides that when the jury is instructed on assault with a deadly weapon inflicting serious injury in accordance with N.C.P.I. Crim. 208.15, the trial court “must” proceed in the following manner: “(1) the jury should be instructed on the elements of the charged offense, (2) the jury should then be instructed on the definition of defense of a family member or third party as set out in the instruction below; (3) the jury should then be charged on the mandate of the charged offense; and (4) the jury should be instructed on the mandate for defense of a family member or third person as set out below in this instruction. **THE FAILURE TO CHARGE ON ALL OF THESE MATTERS CONSTITUTES REVERSIBLE ERROR**” (emphasis in original)[[3]](#footnote-3).

In this case, when instructing the jury on assault with a deadly weapon inflicting serious injury, the trial court gave the elements of the offense, entirely skipped over the definition of defense of a family member, and then gave both mandates. The portions of 308.50 omitted from the jury instructions in this case are underlined in the complete instruction below:

If the State has satisfied you beyond a reasonable doubt that the defendant assaulted the victim with deadly force, then you would consider whether the defendant’s actions are excused, and the defendant is not guilty because the defendant acted in defense of a family member. The State has the burden of proving beyond a reasonable doubt that the defendant’s action was not in defense of a family member.

If the circumstances would have created a reasonable belief in the mind of a person of ordinary firmness that the assault was necessary or appeared to be necessary to protect a family member from imminent death or great bodily harm, and the circumstances did create such a belief in the defendant’s mind at the time the defendant acted, such assault would be justified by defense of a family member. You, the jury, determine the reasonableness of the defendant’s belief from the circumstances appearing to the defendant at the time. Furthermore, the defendant has no duty to retreat in a place where the defendant has a lawful right to be.

A defendant does not have the right to use excessive force. The defendant had the right to use only such force as reasonably appeared necessary to the defendant under the circumstances to protect a family member from death or great bodily harm. In making this determination, you should consider the circumstances as you find them to have existed from the evidence, including the size, age, and strength of the defendant and the family member as compared to the victim, the fierceness of the assault, if any, upon the family member, whether the victim had a weapon in the victim’s possession, and the reputation, if any, of the victim for danger and violence. You, the jury, determine the reasonableness of the defendant’s belief from the circumstances appearing to the defendant at the time.

Furthermore, defense of a family member is justified only if the defendant or family member was not the aggressor. Justification for defensive force is not present if the person who used defensive force entered into the fight, or, in other words, initially provoked the use of force. However, if the defendant or family member was the aggressor, the defendant would be justified in using defensive force only if the defendant or family member thereafter attempted to abandon the fight and gave notice to the opponent that the defendant or family member was doing so. In other words, a person who uses defensive force is justified if the person withdraws, in good faith, from physical contact with the person who was provoked, and indicates clearly that he desires to withdraw and terminate the use of force, but the person who was provoked continues or resumes the use of force. A person is also justified in using defensive force when the force used by the person who was provoked is so serious that the person using defensive force reasonably believes that he was in imminent danger of death or great bodily harm, the person using defensive force had no reasonable means to retreat, and the use of force likely to cause death or serious bodily harm was the only way to escape danger. If one uses abusive language towards one’s opponent which, considering all of the circumstances, is calculated and intended to bring on a fight, one enters a fight voluntarily.

Therefore, I instruct you, if you are satisfied beyond a reasonable doubt that the defendant committed assault with a deadly weapon inflicting serious injury, you may return a verdict of guilty only if the State has satisfied you beyond a reasonable doubt that the defendant’s action was not in defense of a family member; that is, that the defendant did not reasonably believe that the assault was necessary or appeared to be necessary to protect a family member from death or serious bodily injury, or that the defendant used excessive force, or that the defendant was the aggressor.

If you do not so find or have a reasonable doubt that the State has proved any of these things, then the defendant’s action would be justified by self-defense [sic] and it would be your duty to return a verdict of not guilty.

It is plain that the instruction given in this case does not properly define defense of a family member and other terms essential to the jury’s determination of guilt, such as “excessive force” and “aggressor.” Courts have repeatedly held that where the trial court gives the definition but not the mandate, a new trial is required. *See e.g.*, *State v. Withers*, 179 N.C. App. 249 (2006). This is so because “the jury *could* have assumed that a verdict of not guilty by reason of self-defense [or defense of another] was not a permissible verdict in the case.” *Dooley*, 285 N.C. at 166 (emphasis added). Here, where the trial court has given the mandate but not the definition, this Court must similarly order a new trial. As discussed below, the instruction as given was could have given the jury the mistaken impression that if Mr. Perez or Bobby was the initial aggressor, Mr. Perez was not permitted to act in defense of Bobby if Mr. Robinson escalated the level of force to a potentially lethal level.

* + - 1. **Mr. Perez was Prejudiced by the Omission of the Definition of Defense of Another.**

Although this Court must review the jury instructions contextually and in their entirety, *State v. Boykin*, 275 N.C. App. 187, 196 (2020), it does not cure the error that the jury was properly instructed as to other offenses. Indeed, Mr. Perez was acquitted of both offenses on which the jury was properly instructed. This case can therefore be readily distinguished from others like *State v. Allen*, 233 N.C. App. 507, 515 (2014), where this Court found no prejudice from the omission of a self-defense instruction on a charge of discharging a firearm into an occupied vehicle where the defendant was also convicted of related charges of attempted murder and assault, as to which the jury was properly instructed on self-defense.

While the jury was instructed on definitions related to defense of a family member as it pertains to attempted first-degree murder (T pp 416-17) and alphabet assault (T pp 420-21), they received no such guidance during the instruction on assault with a deadly weapon inflicting serious injury. (*See* T pp 422-23) The omission of these definitions was likely to confuse the jury or lead them to believe that the definitions previously stated did not apply to this charge. When the trial court reached the “serious injury” prong of assault with a deadly weapon inflicting serious injury, which it defined during the alphabet assault instruction, the trial court stated, “I previously defined serious injury and that definition applies equally here.” (T p 422) That the trial court gave such an instruction here but not regarding the definition of key terms related defense of a family member signaled to the jury that those definitions did not apply equally.

The instruction actually given as to assault with a deadly weapon inflicting serious injury informed the jury in no uncertain terms that defense of another is not available to the defendant if “the defendant or his family member was the aggressor.” (T p 423) This part of the mandate omits critical language from the body of the instruction explaining that in some situations, the aggressor can regain the right to defense of another. It was undisputed that Bobby charged at Mr. Robinson and threw the first punch. (T pp 33, 259) As instructed, the jury was duty-bound to convict Mr. Perez because Bobby was the aggressor, regardless of whether they believed Mr. Robinson escalated the confrontation to a potentially lethal level by drawing his box cutter.

A defendant who is the initial aggressor is nonetheless entitled to a complete instruction on self-defense (or defense of another) if “his provocative conduct involved non-deadly, rather than deadly, force,” but the victim then responds with deadly force. *State v. Holloman*, 369 N.C. 615, 629 (2017). Bobby striking Mr. Robinson with his fists did not amount to deadly force. However, a box cutter is a deadly weapon. *See State v. Parks*, 264 N.C. App. 112, 116 (2019). Under the facts of this case, the jury could have concluded that by pulling his blade, Mr. Robinson escalated the level of violence, making it possible for Mr. Perez to justifiably act in defense of Bobby even though Bobby was the initial aggressor. *See Lee*, 370 N.C. at 679-81, Martin, C.J. concurring (where the defendant’s cousin punched the decedent, the decedent responded by shooting the cousin, and the defendant then shot the decedent, this amounted to perfect defense of another). The trial court’s instructions impermissibly prevented the jury from finding Mr. Perez not guilty in this scenario.

Had the trial court properly instructed the jury, the jury would have been instructed that, “A person is also justified in using defensive force when the force used by the person who was provoked is so serious that the person using defensive force reasonably believes that he was in imminent danger of death or great bodily harm, the person using defensive force had no reasonable means to retreat, and the use of force likely to cause death or serious bodily harm was the only way to escape danger.” *See* N.C.P.I. Crim. 308.50; N.C. Gen. Stat. § 14-51.4(a).

This Court should “view[] the evidence in the light most favorable to the defendant [to determine whether] a jury could conclude” that he acted in defense of a family member. *State v. Irabor*, 262 N.C. App. 490, 495 (2018). Mr. Perez testified that when he saw the box cutter in Mr. Robinson’s hand, he believed his brother’s life was “in danger.” (T p 331) Mr. Robinson was a foot taller than both Mr. Perez and his brother, and he was armed with a deadly weapon. (T pp 331-32) Mr. Perez testified that he only drew his weapon after Mr. Robinson escalated the level of violence. (T p 333) The fight progressed so quickly that Mr. Perez did not have an opportunity to retreat. (T pp 335-36) Striking Mr. Robinson with his fists failed to dissuade him from striking Bobby, so Mr. Perez felt he had no choice but to use his knife. (T p 339)

If even one juror believed Mr. Perez’ testimony that he did not draw his weapon until after Mr. Robinson drew his, that would have impacted the jury’s findings as to both excessive force and who was the aggressor. The trial court’s instruction failed to define either of these key terms and ultimately left the jury with the mistaken impression that it is not possible for an aggressor to regain the right to self-defense or defense of another. Had the jury been properly instructed that it is possible for an initial aggressor to regain the right to self-defense or defense of another, it is reasonably possible that they would have acquitted Mr. Perez. In the alternative, this outcome was reasonably probable.

**CONCLUSION**

For the foregoing reasons and authorities, Mr. Perez respectfully requests that his conviction be reversed and remanded for a new trial.

Respectfully submitted, this the 5th day of January 2022.

By Electronic Submission:

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**CERTIFICATE OF COMPLIANCE WITH N.C. R. APP. P. 28(J)(2)**

 I hereby certify that Defendant-Appellant’s Brief is in compliance with Rule 28(j)(2) of the North Carolina Rules of Appellate Procedure as it is printed in fourteen-point Century font and the body of the brief, including footnotes and citations, contains no more than 8750 words as indicated by the word-processing program used to prepare the brief.

This the 5th day of January 2022.

By Electronic Submission:

 Sarah Holladay

North Carolina State Bar Number 33987

**CERTIFICATE OF FILING AND SERVICE**

 I hereby certify that the original Defendant-Appellant’s Brief has been filed, pursuant to Rule 26 of the North Carolina Rules of Appellate Procedure, by electronic means with the Clerk of the North Carolina Court of Appeals.

I further certify that a copy of the above and foregoing Defendant-Appellant’s Brief has been duly served upon Daniel O’Brien, Special Deputy Attorney General, North Carolina Department of Justice, by electronic means by emailing it to dobrien@ncdoj.gov.

This the 5th day of January 2022.

By Electronic Submission:

 Sarah Holladay

North Carolina State Bar Number 33987

1. Mr. Perez is roughly 5’6”. (T p 331) [↑](#footnote-ref-1)
2. When Detective Steve Clinard first reviewed the surveillance video, he also believed Mr. Robinson had a weapon in his hand. He changed his opinion a week before trial during a meeting with the prosecutor. (T pp 152-53, 223-26) [↑](#footnote-ref-2)
3. N.C.P.I. Crim. 206.17A contains a similar requirement. [↑](#footnote-ref-3)