IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-817

Filed 16 January 2024

Martin County, Nos. 18 CRS 50600, 50691

STATE OF NORTH CAROLINA

v.

DAVID ADAM HOLLIS, Defendant.

Appeal by defendant from judgment entered 2 November 2021 by Judge Marvin K. Blount, III, in Martin County Superior Court. Heard in the Court of Appeals 8 March 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Thomas H. Moore, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jillian C. Franke, for the defendant-appellant.

STADING, Judge.

Defendant David Adam Hollis appeals from a jury verdict finding him guilty of discharging a firearm into occupied property and possession of a firearm by a felon. On appeal, defendant argues the trial court erred by denying his request for an accident jury instruction where his version of events described a struggle over a gun. After careful review, we conclude defendant received a fair trial free from error.

I. Background

Evidence tended to show that late in the evening on 24 June 2018, defendant contacted Josie through an escort ad. Defendant asked Josie to visit his home in Martin County for an hour. After defendant and Josie agreed on a price, she made arrangements for Corby Moses ("Moses") to drive her to defendant's house. They arrived around 2:00 a.m. and parked in defendant's driveway. Josie went inside while Moses remained in the car. Once inside, Josie talked briefly with defendant, who she noticed smelled strongly of alcohol. Defendant then took Josie to his bedroom, where they engaged in a sex act. Afterwards, Josie went to the master bathroom and defendant went to the back porch to smoke a cigarette. Josie then took cash lying on the kitchen table as payment and exited the house.

When Josie got to the car, she found Moses asleep with the doors locked. Josie woke up Moses so he could unlock the car door for her. Although Moses started the ignition, he did not drive off right away. At this point, Josie testified that she observed defendant exit the house with a gun in his hand "[l]ike he was angry about something" and shouted "[w]hat'd you take?" Then, she claims defendant approached the car and fired several shots. As Moses attempted to leave, he drove into a ditch that was in front of defendant's home. Josie realized Moses was shot upon seeing blood coming from his mouth. Unable to open the front passenger door, Josie exited the car through a rear door and called 9-1-1. Defendant went to his truck, drove up

and down the driveway, then exited the vehicle and fled the scene on foot. Subsequently, Josie alleges that she heard another gunshot.

A passing motorist stopped at the scene and also called 9-1-1. The motorist remained with Josie until law enforcement arrived. Multiple law enforcement officers from various agencies, including the Martin County Sheriff's Department and the State Bureau of Investigation ("SBI"), responded to the 9-1-1 calls. Medical providers pronounced Moses dead at the scene after unsuccessfully attempting to revive him. Officers searched the area for several hours trying to locate defendant. At approximately 6:30 a.m., defendant voluntarily surrendered to officers on the highway near his home who observed that defendant sustained a gunshot wound to his left arm.

Before medical providers transported him to the hospital for treatment, defendant provided a statement and voluntarily submitted to a gunshot residue test. In his account, defendant maintained that he confronted Moses and Josie outside after discovering a gun and other items missing from the home. According to defendant, upon seeing the missing gun in the car, he attempted to retrieve the gun from Moses and it fired. Defendant's gunshot residue test was not analyzed since the North Carolina State Crime Lab's policy precludes testing on a subject who was shot, as there is no way to distinguish between gunshot residue from shooting and residue from being shot.

On 25 June 2018, defendant met with an agent from the SBI and provided a more detailed statement. Defendant told the agent that he was "pretty doped up" the morning of 18 June 2018, but recalled going to the bathroom after having sex with Josie. Defendant reported that when he exited the bathroom, he noticed several drawers had been opened on a jewelry armoire in a bedroom. He also discovered that a cellphone, handgun, and $300 in cash were missing. And so, he went outside to confront Josie and saw her and Moses, whom he did not know, sitting in a car. Defendant stated that when he approached the car, he saw the driver's side window open and told Moses and Josie he wanted the missing items. He reached inside the car, opened the door, and grabbed Moses. Attempting to escape, Moses put the car in reverse, dragging defendant along before the car landed in a ditch. Defendant said that he heard popping sounds and saw flashes when he confronted Moses and Josie, but he did not actually see the gun. According to defendant, after the car landed in the ditch, he ran to his truck so he could drive to a nearby police department. However, defendant realized he did not have his keys and went inside of his house to retrieve them. Contrary to his original plan, defendant exited his house and decided to run off into the woods—where he noticed that he had been shot in the arm. Eventually, defendant exited the woods and walked down the highway. According to his version of events, after unsuccessfully attempting to wave down one or two cars, defendant approached a parked police car and surrendered to the officers.

Based on the foregoing events, defendant was charged with first-degree murder, discharging a firearm into occupied property, and possession of a firearm by a felon. At trial, defendant filed a written request for jury instructions, including: "307.10 Accident (Defense to Homicide Charge, Except Homicide Committed During Perpetration of a Felony)." After hearing arguments regarding the instruction, the trial court denied defendant's request and defendant objected for the record. The trial court instructed the jury on first-degree murder under the theories of premeditation and deliberation, as well as the felony murder rule. The trial court also instructed the jury on second-degree murder, discharging a firearm into occupied property inflicting serious bodily injury, and possession of a firearm by a felon. The jury acquitted defendant of murder, but convicted him of discharging a firearm into occupied property and possession of a firearm by a felon. Defendant timely appeals.

II. **Jurisdiction**

This Court has jurisdiction pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2023).

III. Analysis

Defendant's sole argument on appeal is that the trial court erred by denying his request to give the jury the requested accident instructions. A careful review of the record reveals that defendant only requested an accident instruction for the homicide charges. Therefore, we hold that the trial court did not err in omitting the

instruction and that, even if the trial court had instructed the jury regarding the defense of accident, it is not probable that jurors would have reached a different verdict.

A. Requested Instruction

As an initial matter, we must address defendant's contention that he requested the trial court to instruct the jury on the theory of accident regarding the charge of discharging a firearm into an occupied vehicle. Here, the record shows that defendant submitted a written request for the trial court to instruct the jury on North Carolina Criminal Pattern Jury Instruction 307.10, entitled ACCIDENT (DEFENSE TO HOMICIDE COMMITTED DURING PERPETRATION OF A FELONY), which states, in part:

> Where evidence is offered that tends to show that the decedent's death was accidental and you find that the killing was in fact accidental, the defendant would not be guilty of any crime, even though his acts were responsible for the decedent's death.

N.C.P.I. CRIM. 307.10 (2023). However, North Carolina Pattern Jury Instruction 307.11, entitled ACCIDENT (DEFENSE IN CASES OTHER THAN HOMICIDE), was absent from defendant's written request.

Similarly, the charge conference colloquy between the trial court and defendant's trial counsel supports that defendant failed to request this instruction. The discussion focused upon homicide-related instructions. Additionally, when asked

to argue on his request for an accident instruction, defendant's trial counsel referenced footnotes contained within North Carolina Pattern Jury Instruction 307.10 (*State v. Cherry*, 51 N.C. App. 118, 275 S.E.2d 266 (1981)) and North Carolina Pattern Jury Instruction 206.14 (*State v. Reynolds*, 307 N.C. 184, 297 S.E.2d 532 (1982)). These footnotes are not contained in North Carolina Pattern Jury Instruction 307.11 or North Carolina Pattern Jury Instruction 208.90F (Discharging a Firearm into Occupied Property Inflicting Serious Bodily Injury). Moreover, when the discussion shifted to North Carolina Pattern Jury Instruction 208.90F, defendant neither made an objection nor offered an argument.

Indeed, nothing contained in the record supports that defendant requested the trial court instruct the jury on accident regarding the discharging of a firearm into an occupied vehicle. Accordingly, the trial court did not commit error in declining to provide the accident instruction for crimes other than homicide. However, the record supports that he did request an instruction on accident with respect to homicide. And since the jury acquitted defendant of both charges relevant to the requested instruction—first-degree and second-degree murder—the trial court's denial of his request for an accident instruction pursuant to North Carolina Pattern Jury Instruction 307.10 is immaterial.

B. Plain Error Review

As explained above, the record illustrates that defendant did not request accident instructions for the non-homicide charges. As a result, defendant failed to preserve any argument relating to such instruction for appellate review. *See* N.C. R. App. P. 10(a)(2). Therefore, we review the trial court's decision for plain error. *State v. Robinson*, 251 N.C. App. 326, 331, 795 S.E.2d 136, 140 (2016) (citation omitted); *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996); *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993). "To show plain error, Defendant must establish not only that there was error, but that absent the error, the jury probably would have reached a different result." *Robinson*, 251 N.C. App. at 331, 795 S.E.2d at 140 (citation omitted). "To prevail on appeal from the trial court's failure to instruct jurors on a defense, a defendant must show that the requested instruction was not given in substance, and that substantial evidence supported the omitted instruction." *Id.* "When determining whether the evidence is sufficient to entitle a defendant to jury instructions on a defense or mitigating factor, courts must consider the evidence in the light most favorable to defendant." *Id.* (citation omitted).

Contrary to defendant's contention that he was entitled to an instruction on the defense of accident, "[t]he law is clear that evidence does not raise the defense of accident where the defendant was not engaged in lawful conduct when a shooting occurred." *Id.* (internal quotation marks and citation omitted). Defendant's conduct

can hardly be categorized as lawful—the shooting occurred while defendant was (1) engaged in a transactional dispute with a prostitute, and (2) while in possession of a firearm as a convicted felon. Nonetheless, defendant contends that his transaction with the prostitute was complete, and an extrapolation of the logic employed in *State v. McLymore*, 380 N.C. 185, 868 S.E.2d 67 (2022), permitted him to use the firearm, despite his status as a felon. However, defendant's argument fails even when considering the evidence in a light most favorable to him. Defendant's own version of events given to law enforcement provides the wrongdoing was ongoing. According to defendant, the prostitute he solicited took more money than the amount he claims they agreed upon. The prostitute's alleged theft this extra money and his illegally possessed firearm caused the dispute which was ongoing when multiple gunshots were fired into the occupied vehicle.

Even assuming *arguendo* that defendant's unlawful conduct did not preclude him from asserting the defense of accident and the trial court erred in failing to instruct the jury on its own accord, defendant cannot show plain error in view of the evidence presented at trial. Defendant's account provides that he approached the car, opened the driver's side door, and grabbed Moses. Then, multiple gunshots were fired from defendant's gun. Several of the bullets made entry wounds into the body of Moses traveling in a left to right direction. Additionally, a bullet shattered the passenger side window. Thereafter, it is undisputed that defendant fled the scene,

went into the woods, and disappeared for hours with a gunshot wound to his arm. His firearm and cellphone, alleged to have been stolen by the occupants of the vehicle—who never left the scene—were never located. Considering the evidence before the jury, we cannot conclude that absent the error, the jury probably would have reached a different result. *See Robinson*, 251 N.C. App. at 331, 795 S.E.2d at 140 (citation omitted). Our review does not show that the trial court committed plain error.

IV. Conclusion

For the foregoing reasons, we hold that the trial court did not err in omitting the instruction and that, even if the trial court had instructed the jury regarding the defense of accident, it is not probable that jurors would have reached a different verdict.

NO ERROR.

Judges COLLINS and GRIFFIN concur.

Report per Rule 30(e).