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NO. COA12-332
NORTH CAROLINA COURT OF APPEALS

Filed: 16 October 2012

STATE OF NORTH CAROLINA,

v.

Wilson County
10 CRS 54299

GREGORY ANDERSON

Appeal by defendant from judgment entered 17 November 2011 by Judge Walter H. Godwin, Jr. in Wilson County Superior Court. Heard in the Court of Appeals 12 September 2012.

Attorney General Roy Cooper, by Assistant Attorney General Melissa H. Taylor for the State.

Sue Genrich Berry for defendant-appellant.

STEELMAN, Judge.

Defendant failed to show that he was prejudiced by the trial court's refusal to give a jury instruction on the defense of others. Defendant failed to show that the failure of the trial court to exclude testimony concerning defendant's invocation of his right to remain silent was plain error.

I. Factual and Procedural History

On 6 October 2010, Isaiah Bryant ("Bryant") was riding his bicycle on Elvie Street in Wilson. Bryant had a confrontation with Gregory Anderson ("defendant"). During the confrontation, Bryant was alleged to have made threats to Tiffany Dean ("Dean"), who was present with defendant. Bryant rode away from defendant and Dean. Defendant shot him in the back. Bryant fell off of his bicycle, was helped up by Dean, and rode away. Bryant returned to his residence, and remained there until police arrived.

Defendant was indicted on 7 March 2011 for assault with a deadly weapon with intent to kill inflicting serious injury, attempted first-degree murder, and possession with intent to sell and deliver cocaine. The State dismissed the cocaine charge. On 4 November 2011, defendant gave notice of his intent to assert self-defense and/or defense of others at trial.

On 16 November 2011, the jury found defendant not guilty of attempted first-degree murder, but found him guilty of the lesser charge of assault with a deadly weapon inflicting serious injury. Defendant was sentenced to an active term of imprisonment of 25 to 39 months.

Defendant appeals.

II. Instructions on Defense of Others

In his first argument, defendant contends that the trial court erred when it denied defendant's request to instruct the jury on the defense of others. We disagree.

A. Standard of Review

"It is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence." *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988). "Failure to instruct upon all substantive or material features of the crime charged is error." *State v. Bogle*, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989). "Whether a jury instruction correctly explains the law is a question of law, reviewable by this Court *de novo*." *State v. Barron*, 202 N.C. App. 686, 694, 690 S.E.2d 22, 29, *disc. review denied*, 364 N.C. 327, 700 S.E.2d 926 (2010).

B. Analysis

"The general rules of self-defense allow a defendant to use the amount of force 'necessary or apparently necessary to save himself from death or great bodily harm.'" *State v. Allen*, 141 N.C. App. 610, 618, 541 S.E.2d 490, 497 (2000) (citing *State v.*

Pearson, 288 N.C. 34, 39, 215 S.E.2d 598, 602 (1975)).

The elements of self-defense are applicable to the defense of others. In general, one may use defensive force to protect another if that person "believes it to be necessary to prevent death or great bodily harm to the other and has a reasonable ground for such belief, the reasonableness of this belief or apprehension to be judged by the jury in light of the facts and circumstances as they appeared to the defender at the time of the [use of defensive force]."

State v. Phifer, 165 N.C. App. 123, 129, 598 S.E.2d 172, 176 (2004) (citations and quotations omitted).

In the instant case, defendant testified that he heard Bryant threaten Dean, and that he believed Bryant was taking a gun to Dean's house to kill her and her children. He further testified that Bryant approached him on Elvie Street brandishing a pistol, and that the gun was in Bryant's waistband. Defendant asserts that, as a result of this, he shot Bryant in an attempt to protect Dean. The trial court instructed the jury on self-defense, but declined to instruct the jury on defense of a third person. Defendant contends that this was error.

Even assuming *arguendo* that defendant was entitled to a jury instruction on the defense of others, and that the trial court erred in declining to issue such instruction, that error was not prejudicial. In *State v. Anderson*, 26 N.C. App. 422,

216 S.E.2d 166, *cert. denied*, 288 N.C. 243, 217 S.E.2d 667 (1975), the jury was instructed on self-defense but not defense of others. We held that:

By their verdict the jury found from all the evidence that it was not actually necessary or apparently necessary for defendant to kill in order to save *himself* from death or great bodily harm. The evidence showed that decedent confronted defendant behind the automobile while the others remained inside with the right front door locked. It follows that the jury could not have found that defendant was justified in killing to protect *others* who were less immediately threatened.

Id. at 426, 216 S.E.2d at 169. As in *Anderson*, the trial court in the instant case charged the jury upon self-defense, but not the defense of another. The jury's rejection of defendant's assertion of self-defense was necessarily a rejection of the notion that it was reasonably necessary to use deadly force to save himself from death or great bodily harm. Without the existence of such a reasonable belief, the failure of the trial court to charge upon defense of others could not be prejudicial.

This argument is without merit.

III. Defendant's Assertion of Right to Remain Silent

In his second argument, defendant contends that the trial court committed error or plain error when it failed, *sua sponte*, to exclude questions by the prosecutor about defendant's

exercise of his right to remain silent. We disagree.

A. Standard of Review

"In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C.R. App. P. 10(a)(4); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007), *cert. denied*, 555 U.S. 835, 172 L. Ed. 2d 58 (2008).

Plain error arises when the error is "so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d. 513 (1982)). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

B. Analysis

While defendant attempts to argue constitutional error and *de novo* review, we note that constitutional arguments are required to be raised at trial to obtain review pursuant to N.C. Gen. Stat. § 15A-1443(b). We review defendant's arguments for plain error.

A criminal defendant is entitled to remain silent under both the United States and North Carolina Constitutions. *State v. Ward*, 354 N.C. 231, 250, 555 S.E.2d 251, 264 (2001), *cert. denied*, 359 N.C. 197, 605 S.E.2d 472 (2004). When a defendant exercises his right to silence, it "shall not create any presumption against him[.]" N.C. Gen. Stat. § 8-54 (2011). Once a person under arrest has been advised of his rights pursuant to *Miranda*, which includes the right to remain silent, there is an implicit promise that his silence will not be used against him. *Doyle v. Ohio*, 426 U.S. 610, 618, 49 L.Ed.2d 91, 98 (1976); *State v. Hoyle*, 325 N.C. 232, 236, 382 S.E.2d 752, 754 (1989).

In the instant case, the State examined the investigating officer concerning defendant's failure to assert that his actions were in defense of Dean. Defendant did not object, and the court did not, *sua sponte*, exclude these questions.

Our Supreme Court held in *State v. Moore*, ___ N.C. ___, 726

S.E.2d 168 (2012), that the introduction of testimony regarding a defendant's exercise of his right to remain silent, if not preserved, did not rise to the level of plain error. At trial, the prosecutor solicited testimony from the interrogating officer, Officer Murphy, that defendant, once arrested and advised of his *Miranda* rights, exercised his right to remain silent. *Id.* at ___, 726 S.E.2d at 171. The Court determined that the fact "[t]hat the prosecutor did not emphasize, capitalize on, or directly elicit Officer Murphy's prohibited responses militates against a finding of plain error." *Id.* at ___, 726 S.E.2d at 173 (citations omitted). Further, the Court noted the presence of other evidence of defendant's guilt, and held that "[s]ubstantial evidence of a defendant's guilt is a factor to be considered in determining whether the error was a fundamental error rising to plain error." *Id.* at ___, 726 S.E.2d at 174 (citations omitted). The Supreme Court concluded that "the admission of Officer Murphy's statements regarding defendant's post-*Miranda* exercise of his right to remain silent was not plain error." *Id.* at ___, 726 S.E.2d at 173.

In the instant case, defendant was taken to the police station and read his *Miranda* rights. He then declined to make a statement. The investigating officer testified that defendant

never mentioned self-defense or defense of Dean, or that Bryant had a gun. The record does not show that the prosecutor made any further comment on or use of that testimony. The admission of this testimony does not rise to the level of plain error.

This argument is without merit.

IV. Conclusion

The trial court did not err in refusing to give a jury instruction on defense of others. Defendant has failed to show that the failure of the trial court to exclude testimony concerning defendant's invocation of his right to remain silent was plain error.

NO ERROR.

Judges HUNTER, Robert C., and BRYANT concur.

Report per Rule 30(e).