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NO. COA13-163  
NORTH CAROLINA COURT OF APPEALS

Filed: 5 November 2013

STATE OF NORTH CAROLINA

v.

Guilford County  
No. 11 CRS 78597

DANIEL FRED LARSON

Appeal by defendant from judgment entered 9 August 2012 by Judge Anderson D. Cromer in Guilford County Superior Court. Heard in the Court of Appeals 27 August 2013.

*Attorney General Roy Cooper, by Special Deputy Attorney General Kimberly D. Potter, for the State.*

*Law Office of Glen Gerding, by Glen Gerding for defendant-appellant.*

STEELMAN, Judge.

Where defendant failed to request or object to jury instructions and failed to show prejudice, the trial court did not commit plain error in its instructions concerning self-defense. Where defendant was found guilty of first-degree murder based upon the felony murder rule, the trial court erred in failing to arrest judgment on the underlying felony.

### I. Factual and Procedural History

On 11 June 2011, following a failed drug deal, Daniel Larson (defendant) shot and killed William Kennedy, as the latter was driving away in defendant's motor vehicle.<sup>1</sup> The following evening, defendant turned himself in to law enforcement.

Defendant was charged with non-capital first-degree murder, and the felony of discharging a firearm into a vehicle while occupied and in operation, inflicting serious bodily injury. On 9 August 2012, the jury found defendant guilty of discharging a firearm into a vehicle, and of first-degree murder based upon the felony murder rule. The jury did not find defendant guilty of first-degree murder based upon malice, premeditation and deliberation. The trial court consolidated the convictions for judgment and sentenced defendant to life imprisonment without parole.

Defendant appeals.

### II. Jury Instructions

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<sup>1</sup> There was conflicting testimony as to whether Kennedy was attempting to escape from defendant in the vehicle, or was attempting to run over defendant.

In his first and second arguments, defendant contends that the trial court erred by failing to instruct the jury on self-defense, including failing to give a final mandate concerning self-defense, and committed plain error by instructing the jury that defendant could not avail himself of self-defense if he was the aggressor. We disagree.

A. Standard of Review

"[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "The prime purpose of a court's charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973), *cert. denied*, 418 U.S. 905, 41 L. Ed. 2d 1153 (1974). "[A] trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial." *Id.* "Where jury instructions are given without supporting evidence, a new trial is required." *State v. Porter*, 340 N.C. 320, 331, 457 S.E.2d 716, 721 (1995).

Where a jury instruction is not requested and no objection is given to its omission, we review the omission on appeal for

plain error. *State v. Davis*, 177 N.C. App. 98, 102, 627 S.E.2d 474, 477 (2006).

For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. See *Odom*, 307 N.C. at 660, 300 S.E.2d at 378. 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.” See *id.* (citations and quotation marks omitted); see also *Walker*, 316 N.C. at 39, 340 S.E.2d at 83 (stating “that absent the error the jury probably would have reached a different verdict” and concluding that although the evidentiary error affected a fundamental right, viewed in light of the entire record, the error was not plain error).

*State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012).

#### B. Self-Defense Instruction

Defendant concedes in his brief that the trial court instructed the jury on first-degree murder based upon premeditation and deliberation and upon felony murder, for which the underlying felony was the discharge of a firearm into a vehicle; that the trial court instructed the jury on the lesser-included offenses of second-degree murder, voluntary manslaughter, and involuntary manslaughter; that the trial court instructed the jury on perfect self-defense as to the first- and

second-degree murder charges, and imperfect self-defense as to the voluntary manslaughter charge; and that the trial court instructed the jury on the elements of discharging a firearm into an occupied vehicle. Defendant contends, however, that the trial court did not give a complete instruction concerning self-defense, as set out in the North Carolina Criminal Pattern Jury Instructions, with regard to the discharging a firearm charge.

Defendant failed to object to the trial court's instructions during the charge conference. Accordingly, we only review these arguments for plain error. The burden rests upon defendant to show that, absent this alleged error, the jury probably would have reached a different verdict.

In reviewing the record as a whole, including the testimony of witnesses and defendant's own confession, we are not convinced that the jury probably would have reached a different verdict had this instruction been included. While the trial court did not give the recommended instruction with regard to the discharging a firearm charge, it did give a complete self-defense instruction with regard to the homicide charge. The trial court also instructed the jury that a lack of self-defense was an element that the State was required to prove as to the charge of discharging a firearm. The trial court's instructions

were clear and unambiguous. Defendant has offered no argument to suggest that the trial court's refusal to repeat the identical self-defense instruction given in connection with the homicide charge somehow prejudiced the outcome of the discharging a firearm case. We hold that the trial court did not commit plain error in omitting an instruction that was not requested by defendant and to the omission of which defendant did not object.

This argument is without merit.

#### C. Aggressor Exception

Defendant further contends that the trial court erred in instructing the jury that defendant would not be excused by reason of self-defense if he was the "aggressor in provoking a fight[.]" Defendant contends that there was no evidence in the record to support the notion that defendant was the aggressor, and that it was therefore inappropriate for the trial court to instruct the jury concerning this subject.

We review this instruction for plain error. In examining the record, the facts of the case show that defendant and Kennedy were involved in a drug deal, that Kennedy did not pay defendant, that when defendant discovered that he had not been paid, he pursued Kennedy with a gun, and that when Kennedy

sought to flee in defendant's vehicle, defendant shot Kennedy. There was sufficient evidence that defendant was the aggressor to support the instruction of which defendant complains, in that he (1) pursued Kennedy, (2) with a gun, (3) while Kennedy was attempting to flee. This evidence supports the trial court's instruction on the aggressor exception. Further, defendant has failed to convince us that, absent the trial court's instructions on the aggressor exception, the jury probably would have reached a different verdict. We hold that the trial court did not commit plain error by instructing the jury on the aggressor exception to self-defense.

### III. Underlying Felony

In his third argument, defendant contends that the trial court erred by failing to arrest judgment on the charge of discharging a firearm into an occupied vehicle. We agree.

Our law is clear that "if the State secures an indictment for the underlying felony and a defendant is convicted of both the underlying felony and felony murder, the defendant will only be sentenced for the murder." *State v. Dudley*, 151 N.C. App. 711, 716, 566 S.E.2d 843, 847 (2002), disc. review denied, 356 N.C. 684, 578 S.E.2d 314 (2003). Thus, "the underlying felony must be arrested under the merger rule." *Id.*

*State v. Young*, 186 N.C. App. 343, 353, 651 S.E.2d 576, 583 (2007). In *Young*, we held that where judgment on the underlying

felony was not arrested, the case must be remanded to arrest judgment on the underlying felony. In the instant case, even though the convictions were consolidated for judgment, judgment on the underlying felony conviction must be arrested. We remand this case to the trial court, with instructions to arrest judgment on the underlying felony of discharging a firearm into a vehicle while occupied and in operation, inflicting serious bodily injury.

#### IV. Conclusion

The trial court did not commit plain error in its self-defense instructions to the jury. The trial court erred in failing to arrest judgment on the underlying felony. We remand this matter to the trial court for entry of an order arresting judgment on the charge of discharging a firearm into a vehicle while occupied and in operation, inflicting serious bodily injury.

NO ERROR IN PART, REMANDED IN PART.

Judges McGEE and ERVIN concur.

Report per Rule 30(e).