NO. COA14-406
NORTH CAROLINA COURT OF APPEALS

Filed: 2 December 2014

STATE OF NORTH CAROLINA

v.

Guilford County
Nos. 11 CRS 24163-64, 68756

ROBERT TEON INGRAM

Appeal by defendant from judgments entered 30 August 2013 by Judge Ronald E. Spivey in Guilford County Superior Court. Heard in the Court of Appeals 8 September 2014.

Attorney General Roy Cooper, by Assistant Attorney General Jess D. Mekeel, for the State.

The Law Office of Bruce T. Cunningham, Jr., by Bruce T. Cunningham, Jr., for Defendant.

ERVIN, Judge.

Defendant Robert Teon Ingram appeals from judgments entered based upon his convictions for first degree murder and possession of a firearm by a felon. On appeal, Defendant argues that his trial counsel's admission during the charge conference that he did not know of any legal basis for the delivery of a jury instruction concerning the law of self-defense deprived him of constitutionally adequate representation, that the trial

court erred by failing to instruct the jury concerning the issue of Defendant's guilt of the lesser included offenses of voluntary and involuntary manslaughter, that the trial court erred by failing to instruct the jury concerning the law of self-defense, that the use of discharging a firearm into occupied property as the predicate felony underlying Defendant's conviction for first degree murder on the basis of the felony murder rule violated Defendant's right not to be put in jeopardy twice for the same offense, and that a sentence of life imprisonment without the possibility of parole is grossly disproportionate given the facts of this case, including the fact that Defendant's conviction rests solely on the felony murder rule with shooting into occupied property as the predicate felony. After careful consideration of Defendant's challenges to the trial court's judgments in light of the record and the applicable law, we conclude that the trial court's judgments should remain undisturbed.

I. Factual Background

A. Substantive Facts

1. State's Evidence

At approximately 2:00 a.m. on 18 February 2011, an automobile was parked in front of the main entrance to the Player's Club, an adult entertainment establishment located in

Greensboro. After Defendant and his sister emerged from the car, they entered the Player's Club after being patted down by a security guard. Although Defendant briefly went into the interior of the Player's Club, he subsequently returned to the lobby area, where Keisha Hicks was working the front desk. At that point, Defendant began leaning over the counter, an action that made Ms. Hicks uncomfortable given that she was handling money that had been received from other patrons when they entered the Club.

In light of her lack of comfort with Defendant's conduct, Ms. Hicks asked Defendant to step back from the counter. Although Defendant initially complied with Ms. Hicks' request, he began leaning over the counter again a few minutes later. At that point, Antonio King, a security guard at the Player's Club, approached Defendant and asked him not to stand in the vicinity of the cash register. In response, Defendant became frustrated and asked Mr. King, "do you know who I am? I'll do this to you. I'll shoot you."

After Defendant made this remark, Mr. King attempted to escort Defendant through the lobby into the interior of the Player's Club. As this occurred, Defendant walked so close to Mr. King that his mouth was touching Mr. King's face as he talked. As a result, Mr. King pushed Defendant away and punched

him in the face, causing Defendant to fall to the ground. Desney Dildy, an entertainer at the Player's Club, observed the altercation between Defendant and Mr. King and testified that Defendant attempted to strike Mr. King before Mr. King hit Defendant. At that point, Defendant was helped up off the floor and escorted outside of the Player's Club by another security guard.

Nina McGregor, the manager of the Player's Club, went outside of the building to help deal with the altercation. As she did so, Ms. McGregor encountered Defendant, whom she had known as a business acquaintance prior to the night in question. At that point, Defendant was very upset and had a knot on his head and blood around his nose and mouth. Anthony Jenkins, a security guard who was working at the front entrance of the Player's Club, heard Defendant ask his sister where his gun was located and heard Defendant's sister repeatedly stating that Defendant "should shoot all of them."

After sitting in his vehicle for some period of time, Defendant exited his automobile, walked to the front door of the Player's Club while carrying a firearm, and fired two shots into the door of the Player's Club building from a distance of about three feet. Mr. Jenkins testified that, before firing the two

shots, Defendant struck the front door, which had been locked from the interior to prevent him from entering.

A few seconds after the two shots were fired, Winfred Hunt, a security guard at the club, stated "I've been hit" and collapsed near the VIP room. Mr. Hunt died as a result of a gunshot wound to the left abdomen. After shooting into the Player's Club building door, Defendant got into his car with his sister and left the scene.

After reviewing the club's surveillance videos, Ms. McGregor "knew it was [Defendant]." On the following day, Ms. McGregor spoke to Defendant by phone and told him that he had gotten into an altercation with a security guard, that she had never seen him act in that manner before, and that "he shot back at the door twice and [] killed my security guard." Upon arriving at the Player's Club at approximately 3:15 a.m., Detective T.E. Vaughn of the Greensboro Police Department noticed two bullet holes in the front door of the building and spoke with Ms. McGregor, who identified Defendant as the individual who had shot Mr. Hunt.

2. Defendant's Evidence

Defendant testified that he and his sister went to the Player's Club on 18 February 2011 for the purpose of passing out flyers that promoted his business. Prior to arriving at the

Player's Club, the two of them had been to two bars in downtown Greensboro, at which Defendant had had several drinks. After parking at the front of the Player's Club and going inside, Defendant returned to his vehicle in order to use his phone. Upon returning to the interior of the Player's Club, Defendant was standing near the register when Ms. Hicks asked him to back away. At that point, a security guard approached him and acted in such a manner as to cause Defendant to request to speak with Ms. McGregor.

As Defendant was following the security guard to the manager's office, which was located in the interior of the Player's Club building, the security guard turned and punched Defendant several times in the face, causing him to fall to the ground. At that point, other security guards hit and kicked Defendant while he was on the floor before throwing him out into the foyer area and "rough[ing him] up some more in front of the front door." Patrick Wall, a patron of the Player's Club, was smoking a blunt in his car when he saw security guards bring Defendant out of the club building and beat him up.

As a result of the fact that Defendant was "in a daze" and "had a bunch of head injuries," he almost walked out into the middle of the street as he attempted to reach his car. Although Defendant told Ms. McGregor that he wanted to talk to the

police, she asked him not to do that because the Player's Club was already under investigation. After a security guard helped him find his car, Defendant sat in his car until he heard his sister asking the security guards why they were going to get their guns. At that point, Defendant saw several security guards with weapons in their hands.

As he was looking through his car for his phone, Defendant "came across" a handgun, grabbed it, and got out of the car. Defendant stated that he picked up the handgun in order to protect his sister and that he did not simply leave the area because he was unable to find his car keys. As he was standing at the rear of his vehicle a few feet from the front door of the Player's Club, a security guard approached Defendant and fired at him using a handgun from a distance of six to eight feet.

The shot or shots fired by the security guard missed Defendant, who pulled his handgun from his pocket and fired at the security guard "out of instinct." Defendant stated that he was not facing the building when he discharged his weapon and denied having fired his gun into the Player's Club door. Mr. Wall testified that, although he saw a security guard armed with a handgun and heard two gunshots, he did not see who fired them. After firing these shots, Defendant found his car keys in his

pocket, entered his vehicle, left the scene, and threw his gun out of the window on the way home.

At about the time that investigating officers arrived at the Player's Club, Torrey Mays, a club patron, was exiting the club building through a side door. As he left the building, Mr. Mays saw two men, both of whom were wearing security uniforms, transfer a gun between themselves.

B. Procedural History

On 18 February 2011, a warrant for arrest was issued charging Defendant with first degree murder. On 7 March 2011, the Guilford County grand jury returned bills of indictment charging Defendant with first degree murder, discharging a firearm into occupied property, and possession of a firearm by a felon. The charges against Defendant came on for trial before the trial court and a jury at the 26 August 2013 criminal session of the Guilford County Superior Court. On 30 August 2013, the jury returned a verdict convicting Defendant of first degree murder on the basis of the felony murder rule with discharging a firearm into occupied property as the predicate felony, discharging a firearm into occupied property, and possession of a firearm by a convicted felon. At the conclusion of the ensuing sentencing hearing, the trial court arrested judgment in the case in which Defendant had been convicted of

discharging a firearm into occupied property and entered judgments sentencing Defendant to a term of life imprisonment without the possibility of parole based upon Defendant's conviction for first degree murder and to a consecutive term of 14 to 17 months imprisonment based upon Defendant's conviction for possession of a firearm by a felon. Defendant noted an appeal to this Court from the trial court's judgments.

II. Substantive Legal Analysis

A. Ineffective Assistance of Counsel

In his initial challenge to the trial court's judgments, Defendant argues that he should receive relief from the trial court's judgments on ineffective assistance of counsel grounds. More specifically, Defendant argues that his trial counsel's admission during the jury instruction conference that he did not know of any legal basis for the delivery of an instruction concerning the law of self-defense deprived him of adequate representation even in the absence of a showing of prejudice. Defendant's argument lacks merit.

In reviewing allegations of ineffective assistance of counsel, this Court customarily employs the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984), and adopted for state constitutional purposes in *State v. Braswell*, 312 N.C.

553, 562-63, 324 S.E.2d 241, 248 (1985). In order to prevail on an ineffective assistance of counsel claim on the basis of the customary approach, "a defendant must first show that his counsel's performance was deficient" and, second, "that counsel's deficient performance prejudiced his defense." *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (citing *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693), *cert. denied*, 549 U.S. 867, 127 S. Ct. 164, 166 L. Ed. 2d 116 (2006). "Counsel's performance is deficient when it falls 'below an objective standard of reasonableness.'" *State v. Waring*, 364 N.C. 443, 502, 701 S.E.2d 615, 652 (2010) (quoting *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693), *cert. denied*, __ U.S. __, 132 S. Ct. 132, 181 L. Ed. 2d 53 (2011). A counsel's "[d]eficient performance prejudices a defendant when there is 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* (quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698). An ineffective assistance of counsel claim asserted on direct appeal, such as the claim at issue here, may "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." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001), *cert. denied*, 535 U.S. 1114, 122 S. Ct. 2332, 153 L. Ed. 2d 162 (2002).

During the jury instruction conference held at Defendant's trial, the trial court and Defendant's trial counsel engaged in the following colloquy:

> [DEFENSE]: [Defendant] is requesting an instruction on self defense.
>
> THE COURT: The Court will find – well, do you want to be heard about that?
>
> [DEFENSE]: No.
>
> THE COURT: Well, do you know of any legal basis for which the Court could give [an instruction on self-defense] given the evidence in the case?
>
> [DEFENSE]: No.
>
> THE COURT: The Court will deny the request for self defense.

According to Defendant, his trial counsel's concession that, despite Defendant's request for a self-defense instruction, he did not know of any basis for the delivery of such an instruction entitles him to relief from the trial court's judgments without the necessity for the making of a showing of prejudice.[1] We do not find Defendant's argument persuasive.

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[1]As a result of the fact that Defendant has not advanced any argument in an attempt to show that he is able to establish prejudice as that term is utilized in *Strickland* and the fact

In support of his contention that he is not required to establish prejudice in order to obtain relief from the trial court's judgments, Defendant places principal reliance on the decision in *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), in which the United States Supreme Court held that certain developments "are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified" and that, in such circumstances, prejudice may be presumed "without inquiry into the actual conduct of the trial." *Cronic*, 466 U.S. at 658-60, 104 S. Ct. at 2046-47, 80 L. Ed. 2d at 668. According to the United States Supreme Court, such a presumption of prejudice would be appropriate "where there is 'complete denial of counsel,' no 'meaningful adversarial testing,' or where 'the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.'" *State v. Moore*, 167 N.C. App. 495, 499, 606 S.E.2d 127, 130 (2004) (quoting *Cronic*, 466 U.S. at 659-60, 104

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that Defendant was not, for the reasons discussed in more detail below, entitled to a perfect or imperfect self-defense instruction given the record developed at trial, he is not entitled to relief from the trial court's judgments in the event that he is, contrary to the argument advanced in his brief, required to make a showing of prejudice in order to obtain such a result.

S. Ct. at 2047, 80 L. Ed. 2d at 668). A careful review of the record compels the conclusion that none of the circumstances outlined in *Cronic* as sufficient to obviate the necessity for a showing of prejudice exist in this case. More specifically, the record contains no indication that Defendant was actually or effectively denied counsel, that a breakdown in the adversarial process occurred,[2] or that anything else occurred that would have prevented a competent member of the bar from providing Defendant with effective representation.[3] As a result, given that we see

[2]In an attempt to persuade us that the statements made by Defendant's trial counsel constituted a breakdown in the adversarial process, Defendant appears to contend that his trial counsel failed to zealously represent him by conceding that the record did not support his client's request for the delivery of a self-defense instruction and distancing himself from his client's request. We are unable to conclude that a correct statement by a defendant's trial counsel to the effect that the record did not support the delivery of a particular instruction that was favorable to the defendant, standing alone, constitutes a breakdown in the adversarial process or the abandonment of the client to his or her fate and Defendant has not cited any authority tending to indicate that our conclusion to this effect is in any way erroneous.

[3]In his brief, Defendant contends that the colloquy between the trial court and Defendant's trial counsel demonstrates the existence of an adversarial relationship between the two men that constituted a conflict of interest and an impasse between Defendant's trial counsel and his client concerning a strategic or tactical issue and suggests that Defendant's trial counsel was required to both accede to his client's wishes with respect to the proposed self-defense instruction and to "make a record of the circumstances," his "advice to the defendant, the reasons for the advice, the defendant's decision, and the conclusion reached." *State v. Ali*, 329 N.C. 394, 404, 407 S.E.2d 183, 189 (1991). Aside from the fact that we are unable to identify any

no obstacle to our ability to evaluate the validity of the argument that Defendant has actually made on direct appeal, that Defendant is not entitled to relief from his judgments on ineffective assistance of counsel grounds in the absence of a showing of prejudice, and that Defendant has made no attempt to make the required showing of prejudice, we hold that Defendant is not entitled to relief from the trial court's judgments on the basis of his ineffective assistance of counsel claim.

B. Lesser Included Offenses

Secondly, Defendant contends that the trial court committed plain error by failing to allow the jury to consider the issue of his guilt of the lesser included offenses of voluntary and involuntary manslaughter. We do not find Defendant's argument persuasive.

1. Standard of Review

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conflicting interest under which Defendant's trial counsel operated and the fact that the principle enunciated in *Cronic* involves a breakdown in the adversarial process rather than the existence of an adversarial relationship between a criminal defendant and his or her counsel, we do not believe that the principle enunciated in *Ali* has any application to this case given that Defendant's trial counsel made the request that Defendant wished him to make and given that the inability of Defendant's trial counsel to cite any evidentiary support for Defendant's position with respect to the self-defense issue did not constitute a refusal to accede to Defendant's wishes with respect to the resolution of any sort of strategic or tactical issue.

As he candidly concedes in his brief, Defendant did not object to the trial court's failure to submit the lesser included offenses of voluntary and involuntary manslaughter to the jury in the manner required by N.C.R. App. P. 10(a)(2), which states that "[a] party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict[.]"[4] As a result, our evaluation of the validity of Defendant's contention is limited to determining whether the trial court's failure to instruct the jury to consider the issue of Defendant's guilt of voluntary and involuntary manslaughter constituted plain error. *State v. Goforth*, 170 N.C. App. 584, 587, 614 S.E.2d 313, 315 (stating that, "[b]ecause defendant failed to object to the jury instructions at trial, the standard of review therefore is plain

[4]The State argues that, since Defendant explicitly agreed at trial that the only verdicts that the jury should be permitted to consider were either guilty of first degree murder based on the felony murder rule or not guilty, Defendant invited the alleged error of which he now complains and has, for that reason, waived the right to any appellate review of this particular contention. *State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001), (stating that "a defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review"), *disc. review denied*, 355 N.C. 216, 560 S.E.2d 141, *disc. review dismissed*, 355 N.C. 216, 560 S.E.2d 142 (2002). In view of our decision concerning the merits of this aspect of Defendant's challenge to the trial court's judgments as set forth in the text of this opinion, we need not determine whether Defendant invited the error of which he now attempts to complain.

error"), *cert. denied*, 359 N.C. 854, 619 S.E.2d 854 (2005). A plain error is an error that is "so fundamental that it undermines the fairness of the trial, or [has] a probable impact on the guilty verdict." *State v. Floyd*, 148 N.C. App. 290, 295, 558 S.E.2d 237, 240 (2002). In order to obtain relief on plain error grounds, "[D]efendant 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). "A reversal for plain error is only appropriate in the most exceptional cases." *State v. Duke*, 360 N.C. 110, 138, 623 S.E.2d 11, 29 (2005), *cert. denied*, 549 U.S. 855, 127 S. Ct. 130, 166 L. Ed. 2d 96 (2006).

2. Relevant Legal Principles

In the event that the State seeks to convict a defendant based solely on the felony murder rule, "the trial court must instruct on all lesser-included offenses '[i]f the evidence of the underlying felony supporting felony murder is in conflict and the evidence would support a lesser-included offense of first-degree murder.'" *State v. Gwynn*, 362 N.C. 334, 336, 661 S.E.2d 706, 707 (2008) (quoting *State v. Millsaps*, 356 N.C. 556, 565, 572 S.E.2d 767, 773 (2002)). "Conversely, when the state proceeds on a theory of felony murder only, the trial court

should not instruct on lesser-included offenses '[i]f the evidence as to the underlying felony supporting felony murder is not in conflict and all the evidence supports felony murder.'" *Id.* At 336-37, 661 S.E.2d at 707 (quoting *Millsaps*, 356 N.C. at 565, 572 S.E.2d at 774). In the instant case, the State sought to convict Defendant of first degree murder based solely on the felony murder rule, with the offense of discharging a weapon into occupied property being utilized as the predicate felony. As a result, the initial issue that we must resolve in order to evaluate the validity of this aspect of Defendant's challenge to the trial court's judgments is whether the evidence concerning the issue of Defendant's guilt of discharging a weapon into occupied property was in conflict.

3. Plain Error Analysis

A defendant is guilty of discharging a firearm into occupied property in the event that he or she "(1) willfully and wantonly discharge[es] (2) a firearm (3) into property (4) while it is occupied." *State v. Rambert*, 341 N.C. 173, 175, 459 S.E.2d 510, 512 (1995); N.C. Gen. Stat. § 14-34.1. At trial, the State presented the testimony of a number of witnesses who saw Defendant fire two shots into the door of the Player's Club at close range. In addition, the State presented uncontradicted evidence tending to show that there were two bullet holes in the

front door of the Player's Club building. Although Defendant concedes that he willfully discharged his firearm, he asserts that the record contains conflicting evidence concerning whether he did or did not shoot into the Player's Club building. More specifically, Defendant testified that he was not facing the building at the time that he fired his gun and that he did not fire his gun into the front door of the Player's Club building. Assuming, without in any way deciding, that Defendant's testimony sufficed to establish the existence of a contradiction in the evidence concerning the issue of Defendant's guilt of the underlying offense of discharging a weapon into occupied property, we are still forced to conclude that Defendant has not convinced this Court that, "absent the error [in failing to instruct the jury on the lesser included offenses of voluntary and involuntary manslaughter], the jury probably would have reached a different result." *Jordan*, 333 N.C. at 440, 426 S.E.2d at 697. In view of the fact that the overwhelming evidence in this case demonstrates that Defendant discharged a firearm into the front door of the Player's Club and the complete absence of any support for Defendant's contention that he fired in another direction other than his own testimony, we are unable to conclude that the trial court committed plain error by failing to instruct the jury concerning the issue of

Defendant's guilt of the lesser included offenses of voluntary and involuntary manslaughter. As a result, Defendant is not entitled to relief from the trial court's judgments on the basis of this argument.

C. Self-Defense Instruction

Thirdly, Defendant contends that the trial court erred by rejecting his request that the jury be instructed concerning the law of self-defense. More specifically, Defendant contends that the record contains evidence tending to show that Defendant acted in perfect or imperfect self-defense, so that the trial court was required to instruct the jury in accordance with Defendant's request for a self-defense instruction. We do not find Defendant's argument persuasive.

1. 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). "'Under a *de novo* review, the 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, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)). "In determining whether an instruction on . . . self-defense

must be given, the evidence is to be viewed in the light most favorable to the defendant." *State v. Moore*, 363 N.C. 793, 796, 688 S.E.2d 447, 449 (2010). We will now review Defendant's challenge to the trial court's failure to instruct the jury concerning perfect and imperfect self-defense utilizing the applicable standard of review.

2. Relevant Legal Principles

As this Court has previously stated, "neither perfect nor imperfect self-defense is available to defend against first-degree murder under the felony murder theory." *State v. Martin*, 131 N.C. App. 38, 45, 506 S.E.2d 260, 265 (1998) (citing *State v. Richardson*, 341 N.C. 658, 668, 462 S.E.2d 492, 499 (1995)), *disc. review denied*, 349 N.C. 532, 526 S.E.2d 473-74 (1998). The appellate courts in this jurisdiction have reached this conclusion based upon the purpose of the felony murder rule, which is "to deter even accidental killings from occurring during the commission of a dangerous felony," *Richardson*, 341 N.C. at 668, 462 S.E.2d at 498, and the fact that, "[t]o allow self-defense, perfect or imperfect, to apply to felony murder would defeat that purpose." *Id.* Thus, "[i]n felony murder cases, self-defense is available only to the extent that *perfect* self-defense applies to the relevant underlying felonies," while imperfect self-defense is simply not available as a defense to

the predicate felony on which the felony murder charge rests. *Martin*, 131 N.C. App. at 45, 506 S.E.2d at 265 (alteration in original) (citing *Richardson*, 341 N.C. at 668-69, 462 S.E.2d at 499). As a result, the ultimate issue raised by this aspect of Defendant's challenge to the trial court's judgments is whether Defendant was entitled to the delivery of a perfect self-defense instruction relating to the issue of his guilt of shooting into occupied property.

3. Evidentiary Analysis

As we have already noted, the predicate felony upon which Defendant's felony murder conviction rested was discharging a weapon into occupied property. In his brief, Defendant argues that he was defending himself from a security guard, who, Defendant contends, fired at him first. According to Defendant, he returned fire "out of instinct" after the security guard fired at him. In his testimony, however, Defendant claimed that he was not facing the Player's Club building when he fired his weapon and that he did not, for that reason, shoot into the Player's Club door. This evidence does not, when taken in the light most favorable to Defendant, tend to show that Defendant fired into the Player's Club building in an attempt to defend himself. Thus, given that Defendant denied having faced the Player's Club building, much less having fired into the Player's

Club building door, we cannot conclude that the record, when taken in the light most favorable to Defendant, tended to show that Defendant fired into the Player's Club door in self-defense. As a result, the trial court did not err by denying Defendant's request for a jury instruction concerning the law of perfect or imperfect self-defense.

D. Double Jeopardy

Fourthly, Defendant contends that the trial court's decision to allow the jury to consider the issue of his guilt of the offense of discharging a weapon into occupied property and to consider whether Defendant was guilty of first degree murder on the basis of the felony murder rule using discharging a weapon into occupied property as the predicate felony had the effect of putting him in jeopardy twice for the same offense. More specifically, Defendant argues that using the intent needed to establish his guilt of the underlying felony to supply the intent needed to support a first degree murder conviction on the basis of the felony murder rule had a "bootstrapping effect" that contravenes the double jeopardy provisions of the state and federal constitutions. Defendant is not entitled to relief from the trial court's judgments on the basis of this contention.

As the record clearly reflects, Defendant did not advance the double jeopardy argument set out in his brief before the

trial court. "It is well settled that constitutional matters that are not 'raised and passed upon' at trial will not be reviewed for the first time on appeal." *State v. Garcia*, 358 N.C. 382, 410, 597 S.E.2d 724, 745 (2004) (quoting *State v. Watts*, 357 N.C. 366, 372, 584 S.E.2d 740, 745 (2003), *cert. denied*, 541 U.S. 944, 124 S. Ct. 1673, 158 L. Ed. 2d 370, (2004)), *cert. denied*, 543 U.S. 1156, 125 S. Ct. 1301, 161 L. Ed. 2d 122 (2005). As the Supreme Court has previously indicated, the rule requiring that federal and state constitutional claims be asserted in the trial courts before they can be advanced on appeal applies to double jeopardy claims such as the one that Defendant has advanced in his brief in this case. *State v. Davis*, 364 N.C. 297, 301, 698 S.E.2d 65, 67 (2010) (stating that, "[t]o the extent defendant relies on constitutional double jeopardy principles, we agree that his argument is not preserved because [c]onstitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal") (citations omitted)); *State v. Madric*, 328 N.C. 223, 231, 400 S.E.2d 31, 36 (1991) (holding that the defendant waived his right to advance a double jeopardy claim on appeal given his failure to raise that claim before the trial court). As a result of the fact that Defendant did not advance the double jeopardy argument that he has attempted to assert in

his brief before the trial court, he has failed to properly preserve that claim for appellate review.

In seeking to persuade us to reach the merits of his double jeopardy argument, Defendant argues that we should overlook his failure to present this argument for the trial court's consideration on the theory that this claim should be deemed to have been properly preserved for appellate review pursuant to N.C. Gen. Stat. § 15A-1446(d)(18), which provides that the appellate courts are authorized to consider claims to the effect that "[t]he sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law" "even though no objection, exception or motion has been made in the trial division." We have recently rejected a similar claim in *State v. Kirkwood*, __ N.C. App. __, __, 747 S.E.2d 730, 736, *appeal dismissed*, 752 S.E.2d 487 (2013), in which we stated that the "[d]efendant's argument [that his double jeopardy argument was preserved for appeal pursuant to N.C. Gen. Stat. § 15A-1446(d)(18)] is inconsistent with our Supreme Court's decisions holding that a double jeopardy issue cannot be raised for the first time on appeal." Thus, given that we are bound by prior rulings of our Supreme Court, Defendant's argument to the effect that his double jeopardy claim has been properly preserved for

appellate review pursuant to N.C. Gen. Stat. § 15A-1446(d)(18) must be rejected. As a result, Defendant is not entitled to relief from the trial court's judgments on the basis of this contention.

E. Cruel and Unusual Punishment

Finally, Defendant argues that, given the particular circumstances present in this case, his sentence of life imprisonment without the possibility of parole is grossly disproportionate to the seriousness of the offense that he was convicted of committing in violation of the Eighth Amendment to the United States Constitution. However, our review of the record reveals that Defendant did not present this argument at trial. On the contrary, Defendant's trial counsel acknowledged at the sentencing hearing that "there's not any argument that I can make . . . which would stop this Court from doing what it must do by law, and that is sentence [Defendant] to the term of life in prison." As we have previously demonstrated, "constitutional matters that are not 'raised and passed upon' at trial will not be reviewed for the first time on appeal." *Garcia*, 358 N.C. at 410, 597 S.E.2d at 745. As a result, Defendant has not properly preserved this argument for appellate review.

Even if Defendant had properly preserved this claim for purposes of appellate review, "'North Carolina courts have consistently held that[,] when a punishment does not exceed the limits fixed by the statute, the punishment cannot be classified as cruel and unusual in a constitutional sense.'" *State v. Perry*, __ N.C. App. __, __, 750 S.E.2d 521, 535 (quoting *State v. Evans*, 162 N.C. App. 540, 544, 591 S.E.2d 564, 567 (2004)), *disc. review denied*, 367 N.C. 262, 749 S.E.2d 852 (2013). According to N.C. Gen. Stat. § 14-17(a), a murder committed during the commission of certain felonies, including felonies committed with the use of a deadly weapon such as discharging a firearm into occupied property, is first degree murder, which is punishable as a Class A offense. N.C. Gen. Stat. § 15A-1340.17(c) provides that, in the event that he or she is convicted of committing a Class A offense, the defendant shall be sentenced to "life imprisonment without parole or death[.]" *Perry*, __ N.C. App. at __, 750 S.E.2d at 535. As a result, the sentence imposed upon Defendant in this case was authorized by statute and "cannot be [categorically] classified as cruel and unusual in a constitutional sense." *Id.*

In his brief, Defendant argues that a sentence of life imprisonment without the possibility of parole is grossly disproportionate to the conduct that led to his conviction for

first degree murder given the facts of his specific case, including the fact that his first degree murder conviction rested entirely on the felony murder rule. "The concept of proportionality is central to the Eighth Amendment. Embodied in the Constitution's ban on cruel and unusual punishments is the 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'" *Graham v. Florida*, 560 U.S. 48, 59, 130 S. Ct. 2011, 2021, 176 L. Ed. 2d 825, 835 (2010) (quoting *Weems v. United States*, 217 U.S. 349, 367, 30 S. Ct. 544, 549, 54 L. Ed. 793, 798 (1910)). "The Eighth Amendment does not[, however,] require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are grossly disproportionate to the crime." *Harmelin v. Michigan*, 501 U.S. 957, 1001, 111 S. Ct. 2680, 2705, 115 L. Ed. 2d 836, 869 (1991) (Justice Kennedy, joined by Justices O'Connor and Souter, concurring) (quotations and citations omitted). As a result, "'[o]nly in exceedingly unusual non-capital cases will the sentences imposed be so grossly disproportionate as to violate the Eighth Amendment's proscription of cruel and unusual punishment.'" *State v. Clifton*, 158 N.C. App. 88, 94, 580 S.E.2d 40, 45 (quoting *State v. Ysaguire*, 309 N.C. 780, 786, 309 S.E.2d 436, 441 (1983)), *cert. denied*, 357 N.C. 463, 586 S.E.2d 266-67 (2003). In a case

in which a defendant makes a proportionality challenge to a term-of-years sentence, this Court "considers all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive, with that determination beginning with a comparison of the gravity of the offense and the severity of the sentence." *State v. Wilkerson*, __ N.C. App. __, __, 753 S.E.2d 829, 837 (2014) (quotations and citations omitted).

In this case, multiple witnesses testified, and the jury determined, that, after being escorted out of the Player's Club, Defendant retrieved a firearm from his car and fired two shots at close range into the door of the Player's Club building, striking and killing Mr. Hunt. As described in the State's evidence, the crime that Defendant was convicted of committing involved the intentional commission of a violent act without immediate provocation or excuse that resulted in the death of an apparently innocent bystander. In light of that set of circumstances, we see no basis for concluding that this case is one of the "exceedingly unusual non-capital cases" in which the sentence imposed is so grossly disproportionate to the crime for which Defendant has been convicted as to violate the Eighth Amendment's prohibition against the imposition of cruel and unusual punishment. As a result, we conclude that Defendant's final challenge to the trial court's judgments has no merit.

III. Conclusion

Thus, for the reasons set forth above, we conclude that none of Defendant's challenges to the trial court's judgments have merit. As a result, the trial court's judgments should, and hereby do, remain undisturbed.

NO ERROR.

Judges McCULLOUGH and BELL concur.

Report per Rule 30(e).