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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-485

Filed: 19 January 2016

Cleveland County, Nos. 13 CRS 2085-86, 53300

STATE OF NORTH CAROLINA

v.

DEANDRE MOMTA BENJAMIN

Appeal by Defendant from judgments entered 10 October 2014 by Judge Susan E. Bray in Cleveland County Superior Court. Heard in the Court of Appeals 7 October 2015.

*Attorney General Roy Cooper, by Special Deputy Attorney General Ryan F. Haigh, for the State.*

*Gilda C. Rodriguez for Defendant.*

STEPHENS, Judge.

Defendant Deandre Momta Benjamin was convicted in Cleveland County Superior Court on one count of attempted first-degree murder and two counts of assault with a deadly weapon with intent to kill inflicting serious injury. Benjamin appeals from the judgments entered upon these convictions, arguing that the trial court committed plain error by not instructing the jury regarding imperfect self-defense and the lesser included offense of attempted voluntary manslaughter. After

careful consideration, we hold that the trial court did not err, let alone commit plain error.

*Factual Background*

On the evening of 18 June 2013, officers from the Shelby Police Department ("SPD") responded to a reported shooting on Orange Street in Shelby. At the scene, SPD officers found Daniel,[1] who had been shot in his left knee, and Rondrekous Stroud, who had been shot in both legs, one of which was bleeding uncontrollably, and who also had a graze wound to his left temple. SPD officers learned from several eyewitnesses that the suspected shooter was wearing a baseball hat and a do-rag when he confronted Stroud, that the shooter left the scene in a white Honda, and that additional shots were fired from the Honda as it drove away. This information was radioed to all responding units and, a short time later, SPD officers stopped a white Honda matching the description.

The vehicle had four occupants: Aaliyah Smith was driving, Willie Early, Jr. was the front passenger, and Antonio Brooks and Defendant Deandre Benjamin, who "had a ball cap on with a do-rag underneath that ball cap," were the rear passengers. SPD officers searched the vehicle and found two 9mm handguns, one under the front passenger seat and one in between the driver's side door and the driver's seat. After the vehicle's occupants were taken into custody for questioning and informed of their

[1] For the purpose of protecting his privacy, in accordance with Rule 3.1 of our Rules of Appellate Procedure, we refer to the juvenile victim by a pseudonym throughout this opinion.

*Miranda* rights, Smith explained that she was giving Benjamin a ride home and that she had been following his directions to Orange Street when Benjamin saw Stroud and told Smith to stop the vehicle. Although she initially denied any knowledge of the shooting during this interview, Smith eventually admitted that she saw Benjamin shoot Stroud on Orange Street and that he fired additional shots from the backseat of her Honda as she drove away.

For his part, Benjamin initially denied having been involved with the shooting and told SPD investigators during his interview that he had gone to Orange Street to see a friend, whom he refused to name. However, Benjamin acknowledged that when he got out of the car, he saw Stroud, who he claimed had recently assaulted him, and decided to confront him so they could talk "man to man." According to Benjamin, during the ensuing confrontation he became concerned that Stroud might be armed with a gun because he was "playing with his pocket," which ultimately prompted Benjamin to start shooting even though he also admitted that he never got a clear look to see what type of object Stroud was grasping at, and SPD officers did not recover any firearms from the scene of the shooting or from Stroud's or Daniel's persons. Eventually, Benjamin admitted to having fired four or five shots, claimed that he was the only person who fired any shots, and stated that while he had not intended for the confrontation to "go down that way," his hope and intention when he shot Stroud was that Stroud would be unable to "pull out his gun and shoot me."

### *Procedural History*

Benjamin was indicted on 15 July 2013 on two counts of assault with a deadly weapon with intent to kill inflicting serious injury, one count each for both Stroud and Daniel, and one count for the attempted first-degree murder of Stroud. Prior to trial, the State filed a motion for voluntary disclosure which included, *inter alia*, a specific request for notice as to whether Benjamin intended to rely on self-defense during the trial. Benjamin did not provide any such notice, and a jury trial began in Cleveland County Superior Court on 6 October 2014.

At trial, the State presented testimony from several SPD officers about their investigation, as well as testimony from the paramedics who treated Daniel and Stroud and who explained that one of the leg wounds Stroud suffered was life-threatening. In addition, both victims testified that they did not know who shot them, while Smith and Early, Jr., both acknowledged having been in the white Honda with Benjamin but denied having any information as to who fired the shots that night on Orange Street. However, the court allowed tapes of the SPD interviews with Benjamin and Smith to be played for the jury, and the State also presented testimony from Sydney McCraw, who had been visiting friends on Orange Street on 18 June 2013 when the shooting started. McCraw testified that around 10:30 p.m., she was hanging out by her car when she saw a white Honda drive up and park. Several men exited the vehicle and approached Stroud, at which point McCraw overheard them

talking about fighting and heard someone ask Stroud if he had a gun. McCraw testified that she heard Stroud reply that he did not have a gun, and that gunshots rang out shortly thereafter.

During the charge conference, the trial court stated:

> Let's talk about jury instructions. . . .
>
> Substantive instructions. I have the 206.17, attempted first[-]degree murder, including self-defense, but of course, I'm not including the self-defense. I just didn't see—And I may have missed it, but I didn't see a pattern instruction for attempt standing alone. But I'm not including the language on self-defense because that was not proffered as an affirmative defense. . . .
>
> . . . .
>
> . . . I'll hear from [the prosecutor] first about those proposed instructions, what you like, don't like or think should also be included or . . .
>
> [Prosecutor]: Your Honor, I tend to agree about the leaving out the self-defense. I don't think there's been any substantial evidence of that.
>
> The State would also—
>
> THE COURT: Well, it would have to be affirmatively pled, right, anyway?
>
> [Defense counsel]: Yes.
>
> [Prosecutor]: Yes. Yeah. . . .

After the charge conference, the trial court submitted the case to the jury without providing any instruction on self-defense. On 10 October 2014, the jury returned its

verdict convicting Benjamin on all three charges. The trial court consolidated the attempted murder conviction with one of the assault convictions and sentenced Benjamin to 125 to 162 months imprisonment, followed by a consecutive sentence of 58 to 82 months imprisonment for the remaining assault conviction. Benjamin gave notice of appeal to this Court on 20 October 2014.

*Analysis*

Benjamin argues the trial court committed plain error when it failed to instruct the jury on imperfect self-defense and the lesser included offense of attempted voluntary manslaughter.[2] We disagree.

The North Carolina Supreme Court has explained that

> for error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To

[2] The State contends that by failing to give pretrial notice of any intent to raise a claim of self-defense and agreeing with the trial court's statement during the charge conference that a self-defense instruction "would have to be affirmatively pled," Benjamin has waived his right to appellate review of this issue due to invited error, based on our prior decision in *State v. Goodwin*, 190 N.C. App. 570, 574-75, 661 S.E.2d 46, 48-50 (2008), *disc. review denied*, 363 N.C. 133, 675 S.E.2d 664 (2009), *cert. denied*, 364 N.C. 437, 702 S.E.2d 499 (2010). In *Goodwin*, we held that the defendant had waived his right to all appellate review, including plain error review, of the trial court's failure to instruct the jury on imperfect self-defense after his trial counsel filed notice of self-defense before trial but then withdrew that notice prior to jury selection, explicitly rejected any instruction on self-defense during the charge conference, and then failed to retract his request that the jury not be instructed on self-defense after the jury interrupted its deliberations to send the trial court a note that raised self-defense related questions. *Id.* at 574-75, 661 S.E.2d at 48-50. In the present case, the State argues that, just as in *Goodwin*, the trial court "gave defense counsel an opportunity to be heard on self-defense instructions and defendant stated his wish with regard to those instructions and the court issued instructions consistent with [the] defendant's wishes." However, despite certain similarities between *Goodwin* and the procedural history of the present case, we are not inclined to accept the State's suggestion that Benjamin's counsel's statement during the charge conference here—which did not include any specific references to either imperfect self-defense or the lesser included offense of attempted voluntary manslaughter—was tantamount to an affirmative statement to the trial court that Benjamin was not seeking an instruction on self-defense. Accordingly, we address the merits of Benjamin's appellate argument.

> 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, 723 S.E.2d 326, 334 (2012) (citations and internal quotation marks omitted). "Further, the plain error rule is to be applied cautiously and only in exceptional cases, and the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings." *State v. Gurkin*, __ N.C. App. __, __, 758 S.E.2d 450, 455 (citations, internal quotation marks, and brackets omitted), *disc. review denied*, 367 N.C. 527, 762 S.E.2d 212 (2014).

"There are two types of self-defense: perfect and imperfect. Perfect self-defense excuses a killing altogether, while imperfect self-defense may reduce a charge of murder to voluntary manslaughter." *State v. Revels*, 195 N.C. App. 546, 550, 673 S.E.2d 677, 681 (citation and internal quotation marks omitted), *disc. review denied*, 363 N.C. 379, 680 S.E.2d 204 (2009). A criminal defendant is entitled to an instruction on imperfect self-defense when the first two elements of perfect self-defense are shown to exist but the evidence also shows that the defendant "either was the aggressor in bringing on the affray or used excessive force." *Id.* at 551, 673 S.E.2d at 681 (citation omitted). The first two elements of perfect self-defense are:

> (1) it appeared to [the] defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and
>
> (2) [the] defendant's belief was reasonable in that the

> circumstances as they appeared to him at that time were sufficient to create such a belief in the mind of a person of ordinary firmness[.]

*Id.* at 550, 673 S.E.2d at 681 (citation omitted). Thus, to warrant an instruction on imperfect self-defense, "two questions must be answered in the affirmative: (1) Is there evidence that the defendant in fact formed a belief that it was necessary to kill his adversary in order to protect himself from death or great bodily harm, and (2) if so, was that belief reasonable?" *Id.* at 551, 673 S.E.2d at 681 (citation omitted). "If the evidence requires a negative answer to either question, a self-defense instruction should not be given." *Id.* (citation omitted). We conduct this inquiry by viewing the evidence in the light most favorable to the defendant to determine whether "there is *any evidence in the record* from which it can be determined that it was necessary or reasonably appeared to be necessary for [the defendant] to kill his adversary in order to protect himself from death or great bodily harm." *Id.* (citation omitted; emphasis in original). However, "evidence which merely shows it possible for the fact in issue to be as alleged, or which raises a mere conjecture that it was so, is an insufficient foundation for a verdict, and should not be left to the jury." *Id.* at 552, 673 S.E.2d at 682 (citation, internal quotation marks, and brackets omitted). Moreover, our Supreme Court has cautioned that a defendant's "self-serving statements do no more than indicate merely some vague and unspecified nervousness or fear; they do not amount to evidence that the defendant had formed any subjective belief that it was

necessary to kill the deceased in order to save himself from death or great bodily harm." *State v. Bush*, 307 N.C. 152, 159-60, 297 S.E.2d 563, 568 (1982) (emphasis omitted).

In the present case, our review of the record does not support Benjamin's argument that he believed it was necessary to kill Stroud in order to protect himself from death or great bodily harm and that this belief was reasonable. The evidence here tends to show that Benjamin was carrying a firearm when he initiated a confrontation with Stroud; that Benjamin wanted to speak to Stroud "man to man" about Stroud's recent purported assault on Benjamin but did not initially intend to shoot Stroud; that Stroud was fidgeting with his pocket when Benjamin confronted him; that Stroud was asked if he had a gun and clearly stated he was unarmed; that Benjamin opened fire shortly thereafter; and that no firearms were found at the scene of the shooting or on the persons of the victims. Thus, the gravamen of Benjamin's argument that his decision to shoot Stroud was both necessary and reasonable is that he believed Stroud might have been armed because, according to Benjamin, Stroud was fidgeting with his pocket in the way someone might if they were preparing to draw a concealed weapon. This argument fails, however, because our case law makes clear that a victim's actual or anticipated possession of a weapon, standing alone, is insufficient to demonstrate that a defendant honestly or reasonably believed it necessary to utilize deadly force in a confrontation. *See, e.g.*, *Revels*, 195 N.C. App. at

552, 673 S.E.2d at 681 (rejecting the defendant's argument that the trial court erred in failing to instruct the jury on self-defense and imperfect self-defense based on the defendant's unsubstantiated claim that the victim could have possibly drawn a knife on him before he attacked her); *see also State v. Wilson*, 304 N.C. 689, 695, 285 S.E.2d 804, 808 (1982) (holding that the trial court did not err in failing to instruct the jury on perfect or imperfect self-defense because "the circumstances shown to exist at the time [the] defendant shot [the victim] were not sufficient to create a reasonable belief in the mind of a person of ordinary firmness that killing [the victim] was necessary to save [the] defendant from death or great bodily harm" where the evidence tended to show that the victim started a fight with the defendant, who left the scene, returned with a gun and then shot the victim in the back as he reached into a nearby car).

We view Benjamin's argument as the same sort of "self-serving statement[ which does] no more than indicate merely some vague and unspecified nervousness or fear" that our Supreme Court has rejected as insufficient to require an instruction on imperfect self-defense. *Bush*, 307 N.C. at 159-60, 297 S.E.2d at 568. Indeed, even assuming *arguendo* that Benjamin believed that it was necessary to kill Stroud in order to save himself from death or great bodily harm, our review of the record demonstrates that such a belief was not reasonable under the circumstances. We therefore conclude that, because the evidence in the record "requires a negative

answer to [the second] question" of the two-part inquiry articulated in *Revels*, 195 N.C. App. at 551, 673 S.E.2d at 681, no instruction on imperfect self-defense was warranted here. We conclude further that, as in *Revels*, because Benjamin was not entitled to an instruction on imperfect self-defense, his argument that the trial court committed plain error by failing to instruct the jury on the lesser included offense of attempted voluntary manslaughter is without merit. *See id.* at 553, 673 S.E.2d at 683; *see also State v. Lea*, 126 N.C. App. 440, 448, 485 S.E.2d 874, 879 (1997) (holding that where the evidence did not support instructing the jury on a theory of imperfect self-defense, the trial court properly refused to instruct the jury on attempted voluntary manslaughter). Accordingly, we hold that the trial court did not err, let alone commit plain error, in failing to instruct the jury on imperfect self-defense or the lesser included offense of attempted voluntary manslaughter.

NO ERROR.

Judges STROUD and DAVIS concur.

Report per Rule 30(e).