IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-732

Filed: 6 September 2016

Cumberland County, No. 13 CRS 051987

STATE OF NORTH CAROLINA

v.

MARVIN HAKEEM JOHNSON

Appeal by defendant from judgment entered 22 January 2015 by Judge James F. Ammons, Jr., in Cumberland County Superior Court. Heard in the Court of Appeals 13 January 2016.

Attorney General Roy Cooper, by Assistant Attorney General Joseph L. Hyde, for the State.

Appellate Defender Staples Hughes,[1] *by Assistant Appellate Defender Michele Goldman, for defendant-appellant.*

CALABRIA, Judge.

Marvin Hakeem Johnson ("defendant") appeals from a jury verdict finding him guilty of first-degree murder. We find no error.

[1] Defendant's principal brief was filed 12 October 2015. Effective 1 November 2015, Glenn Gerding succeeded Staples Hughes as Appellate Defender. Defendant filed his reply brief on 19 November 2015.

I. Background

Club Upscales is a bar and night club located in Fayetteville. The club has an indoor space as well as a patio that overlooks a parking lot. Between 9:00 and 10:00 p.m. on 17 November 2012, Terry Jefferson ("Jefferson") arrived at the club for a night of drinking with his brothers and his cousin, Divine Alston ("Alston"). Jefferson was a big man who stood at six feet, three inches tall and who weighed approximately 280 pounds. By closing time, Jefferson had consumed almost an entire bottle of brandy, which left him "smash drunk." He "bumped into a lot of people" that night, but no one took the contact personally, as Jefferson was "[i]nebriated to the extreme."

Javon McCoy ("McCoy") sat down on the patio's edge to smoke a cigarette around 2:00 a.m. From his vantage point, McCoy saw defendant, a "skinny guy" no more than five feet, four inches tall, pacing back and forth in the parking lot with a .45 caliber pistol hanging out of his back pocket. At approximately 2:30 a.m., Jefferson stumbled out of the club and accidentally bumped into someone standing in the patio area. This seemingly benign incident created a situation that quickly escalated. After this person moved out of the way, defendant reacted "aggressive[ly]" and said, "What's up[,]" to Jefferson. According to Alston, defendant "c[a]me out of nowhere, . . . and beg[a]n to push [Jefferson]." In response, Jefferson asked, "What's up with you[,]" and he began walking toward defendant, who moved away, drew his pistol, and cocked the hammer back. Defendant then fearfully and angrily

announced, "Somebody better get him before I kill him." The scuffle soon spilled over from the patio area into the parking lot.

After defendant issued his threat, McCoy jumped off the patio and tried to restrain Jefferson; however, Jefferson kept advancing toward defendant. By this time, defendant and Jefferson were in an open area of the parking lot. The pushing and shoving between defendant and Jefferson continued; it then briefly stopped as the two men stood inches from each other. Several seconds later, defendant pushed Jefferson one last time, which prompted Jefferson to further advance toward defendant. Defendant apparently fired a "warning shot"[2] at the ground, but Jefferson was unfazed by it. Jefferson was hunched down with his arms flexed to his sides as he walked slowly and steadily toward defendant, who was back-pedaling with his gun drawn. Less than a foot separated the two men when defendant fired five or six shots in rapid succession. Jefferson stumbled and fell down. After briefly returning to his feet, Jefferson collapsed back onto the ground; he had been shot once in the thigh and three times in the torso. Seconds later, an unidentified individual shot defendant multiple times and then fled the scene.

Shortly after being transported to the hospital, Jefferson died from his injuries; one .45 caliber bullet was recovered from his body. Investigators discovered an assortment of bullets and shell casings outside the club. However, none of the bullets

[2] McCoy observed the shot fired into the ground, but Alston claimed not to have seen any such warning shot.

or casings were matched to a particular gun, and no guns were recovered from the shooting scene.

Defendant suffered eight gunshot wounds but managed to survive. After defendant was released from the hospital, he was arrested on unrelated charges and transported to the Cumberland County Detention Center, where Detective Michael Hardin of the Fayetteville Police Department served defendant with an arrest warrant in the instant case. As Detective Hardin explained details associated with the warrant, defendant, who was "irate" for being charged with murder, made several spontaneous statements about the shooting. Specifically, defendant claimed that the police did not have his face on video or the gun used in the crime.

On 16 September 2013, defendant was indicted for first-degree murder. Before trial, the State moved to preclude defendant from asserting a self-defense claim on the grounds that he had not provided the requisite notice. *See* N.C. Gen. Stat. § 15A-905(c)(1) (2015) (providing that when the State voluntarily provides discovery materials, the trial court must, upon motion of the State, order the defendant to give notice of the intent to offer at trial a defense of, *inter alia*, self-defense). Defendant did not object, and the State's motion was allowed. The matter came on for trial in Cumberland County Superior Court on 20 January 2015. At trial, footage from a security camera which recorded the events that preceded the shooting, the shooting

itself, and its aftermath was admitted into evidence. Defendant offered no evidence at trial.

At the charge conference following the close of evidence, defendant's counsel expressed his belief that the "evidence support[ed] an instruction as to a lesser" form of homicide, such as voluntary manslaughter, but confirmed that he would not argue self-defense; nor did he request a jury instruction on the issue. The jury was instructed on first- and second-degree murder, but not on voluntary manslaughter. On 22 January 2015, the jury returned a verdict finding defendant guilty of first-degree murder. The trial court sentenced defendant to life in prison without parole.

Defendant appeals.

II. Invited Error

On appeal, defendant argues that the trial court committed plain error by failing to instruct the jury on perfect and imperfect self-defense. We disagree.

A. Standard of Review

> "A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct." N.C.G.S. § 15A–1443(c) (2003). A defendant is therefore "precluded from obtaining relief when the error was invited by his own conduct." *Gainey,* 355 N.C. at 108, 558 S.E.2d at 485. "To the extent that defendant agreed with the trial court's manner of instruction, defendant has invited any alleged error, and he may not obtain relief from such error." *Id.* at 110, 558 S.E.2d at 486.

State v. Thompson, 359 N.C. 77, 103, 604 S.E.2d 850, 869 (2004).

B. Analysis

Defendant contends that the trial court's failure to instruct the jury on perfect and imperfect self-defense constituted plain error. However, plain error is not the appropriate standard in this case.

Prior to trial, the State moved, pursuant to N.C. Gen. Stat. § 15A-905(c)(1), to preclude defendant from raising defenses of which he failed to give notice. Specifically, the State asserted that "[w]e've been given no notice of any noticed defenses required under [N.C. Gen. Stat. § 15A-]905[.]" The trial court offered defendant an opportunity to respond. Defendant stated, "Your Honor, we are not objecting to the motion in limine."

Subsequently, at the jury charge conference, the subject of defenses and lesser included offenses was again raised, in the following colloquy:

> [THE COURT:] Now, I may be over thinking this. You didn't put on any evidence. You didn't really say in opening statements that he was guilty of a lesser offense. I guess I just kind of need to know what you intend to do to some extent in your closing in regard to the lesser. And we talked at the bench a little bit. I see first, second and not guilty as possible verdicts.
>
> [THE STATE]: Yes.
>
> THE COURT: Anybody argue anything else?
>
> [THE STATE]: No, sir.
>
> [DEFENSE COUNSEL]: I don't argue anything else.

> THE COURT: Okay. All right.
>
> . . .
>
> THE COURT: Do you intend to argue that he's guilty of a lesser form of homicide?
>
> [DEFENSE COUNSEL]: No, Your Honor.
>
> THE COURT: You do not.
>
> [DEFENSE COUNSEL]: I do want -- I'm not going to argue it but I do think the evidence supports the instruction as to a lesser but I'm just going to be quite blunt, just poking holes at the state's case.
>
> THE COURT: So there's not going to be any admission in your argument that this is not first degree murder, it's second degree murder?
>
> [DEFENSE COUNSEL]: No, Your Honor.

In essence, when asked whether he would raise any affirmative defenses or any lesser included offenses other than those stated, defendant actively said no, agreeing with the trial court. Now, on appeal, defendant contends that the trial court erred in failing to nevertheless give an instruction on self-defense.

"[N]ormally, where a defendant fails to object to an error at trial, we would determine whether the alleged error constituted plain error." *Thompson*, 359 N.C. at 103, 604 S.E.2d at 869 (citing *State v. Wilkinson*, 344 N.C. 198, 213, 474 S.E.2d 375, 383 (1996)). "However, this Court has consistently denied appellate review to defendants who have attempted to assign error to the granting of their own requests.

Because the defendant agreed to the substitution, the Court concluded that the defendant was complaining on appeal about an instruction he had actually requested; therefore, any error was invited by the defendant." *Id*. at 103-04, 604 S.E.2d at 869-70 (citations and quotations omitted). "Where a defendant tells the trial court that he has no objection to an instruction, he will not be heard to complain on appeal." *State v. White*, 349 N.C. 535, 570, 508 S.E.2d 253, 275 (1998) (citing *Wilkinson,* 344 N.C. at 213, 474 S.E.2d at 396).

> North Carolina General Statutes section 15A–1443(c) states that "[a] defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct." N.C. Gen. Stat. § 15A–1443(c) (1999). Thus, a defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review. *See State v. Roseboro,* 344 N.C. 364, 373, 474 S.E.2d 314, 318 (1996).

State v. Barber, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001), *writ denied, review denied,* 355 N.C. 216, 560 S.E.2d 141 (2002).

This is not a matter in which the defendant merely failed to preserve a jury instruction objection, leading to plain error review. This is a matter in which the defendant explicitly stated that he had no objection, and in fact agreed to the proposed instruction. Defendant was not only afforded an opportunity to object; he explicitly and affirmatively declined to do so. We hold, therefore, that defendant's affirmative agreement to the trial court's jury instruction constitutes a waiver of his right to an instruction on self-defense, and we will not, on appeal, hear his complaint about an

instruction to which he agreed at trial. Defendant has waived his right to all appellate review concerning this matter, including plain error review.

NO ERROR.

Judges DAVIS and TYSON concur.

Report per Rule 30(e).