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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-957

Filed: 3 May 2016

Mecklenburg County, No. 13 CRS 246309

STATE OF NORTH CAROLINA

v.

QUACEY JAMAR MCFADDEN

Appeal by defendant from judgment entered 14 November 2014 by Judge Richard L. Doughton in Mecklenburg County Superior Court. Heard in the Court of Appeals 25 January 2016.

Attorney General Roy Cooper, by Assistant Attorney General Thomas H. Moore, for the State.

Charlotte Gail Blake for defendant-appellant.

McCULLOUGH, Judge.

Quacey Jamar McFadden (“defendant”) appeals from judgment entered upon his conviction for possession of a firearm by a felon in violation of N.C. Gen. Stat. § 14-415.1. For the reasons stated herein, we hold no error.

I. Background

On 2 December 2013, defendant was indicted for possession of a firearm by a felon in violation of N.C. Gen. Stat. § 14-415.1.

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Defendant's trial commenced at the 11 November 2014 criminal session of Mecklenburg County Superior Court, the Honorable Richard Doughton, presiding.

Defendant was convicted of the felony of assault with a deadly weapon inflicting serious injury in violation of N.C. Gen. Stat. § 14-32(a) in July 2008. The evidence at trial tended to show that on the morning of 17 November 2013, defendant was in the parking lot of a gas station and convenience store located at 6065 Clanton Road in Charlotte, North Carolina. Surveillance video captured from the scene demonstrated that a man named "Mr. Alvarez" approached defendant and attacked defendant. Carl Albanese ("Albanese"), with the Charlotte-Mecklenburg Police Department ("CMPD"), testified that from the video footage, Mr. Alvarez "was clearly there for [defendant]." Albanese testified that the scene "[l]ooked like a drug deal gone wrong[.]"

Defendant testified that he did not have a gun in his possession when he arrived at the gas station. However, Mr. Alvarez had a gun in his possession when he approached and attacked defendant. Defendant testified that "the tussle for the firearm began inside of my vehicle. He struck me inside of my vehicle. He proceeded to fight us for the firearm outside of my vehicle when he struck me again. That is when I grabbed him and defended myself." Defendant believed he was threatened and that there was a risk of serious bodily injury or death. Defendant testified that it was a "do-or-die situation" and that he was attempting to "get away from it there

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at the gas pump, and I shot him with it -- his own firearm.” Thereafter, Mr. Alvarez moved away from defendant and defendant entered the convenience store. Defendant informed the clerk “that I had just been a victim of an attempted armed robbery and for them to call the police to let them know that this situation just took place.” Defendant exited the convenience store and observed Mr. Alvarez leaving the scene. Subsequently, defendant left the scene in his vehicle with Mr. Alvarez’s gun in his possession. As he was driving down Independence Boulevard “towards the Bojangles Arena, I tossed it out of the car.”

Christopher Hall (“Hall”), with the CMPD, responded to a call that a shooting had taken place at a gas station and convenience store located at 6065 Clanton Road in Charlotte, North Carolina. After arriving on the scene, Hall observed a tennis shoe that “had been knocked over[,]” “a couple of droplets of blood on the ground,” and a spent shell casing on the ground.

Eric Herron (“Herron”), an officer with the CMPD, testified that he served a warrant on defendant on 18 November 2013. Heron drove defendant out to Independence Boulevard, “looking for a gun that had been thrown out of the vehicle[.]” The gun was not found.

Albanese testified that he assisted in serving a warrant on defendant at defendant’s residence. Defendant’s mother was also at defendant’s residence. Albanese observed a vehicle in the rear of the residence and defendant’s mother gave

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consent to search the vehicle. Inside the vehicle, Albanese observed “[b]lood drops, the door well when we opened it. Dry blood around the door frame.”

Defense counsel requested a special jury instruction on justification as a defense to the charge of possession of a firearm by a felon. The trial court denied the request for this special instruction.

On 14 November 2014, a jury found defendant guilty of possession of a firearm by a felon. Defendant was sentenced at a prior record level III to 17 to 30 months imprisonment. Defendant appeals.

II. Standard of Review

In North Carolina, requests for special jury instructions are allowable under N.C.G.S. § 1-181 and 1A-1, Rule 51(b) of the North Carolina General Statutes. It is well settled that the trial court must give the instructions requested, at least in substance, if they are proper and supported by the evidence. The proffered instruction must . . . contain a correct legal request and be pertinent to the evidence and the issues of the case.

State v. Edwards, __ N.C. App. __, __, 768 S.E.2d 619, 620 (2015) (citations and quotation marks omitted).

III. Discussion

Defendant’s sole argument on appeal is that the trial court erred by denying his request for a special jury instruction on justification as a defense to the charge of possession of a firearm by a felon.

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The North Carolina courts “have not recognized justification as a defense to a charge of possession of a firearm by a felon.” *State v. Napier*, 149 N.C. App. 462, 464, 560 S.E.2d 867, 869 (2002). Nonetheless, defendant requests that we review his case under the factors set out in *United States v. Deleveaux*, 205 F.3d 1292 (11th Cir.), *cert denied*, 530 U.S. 1264, 147 L. Ed. 2d 988 (2000), for determining the applicability of the justification defense to possession of a firearm by a felon. The *Deleveaux* court set out four factors that must be shown:

- (1) that the defendant was under unlawful and present, imminent, and impending threat of death or serious bodily injury;
- (2) that the defendant did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct;
- (3) that the defendant had no reasonable legal alternative to violating the law;
- and (4) that there was a direct causal relationship between the criminal action and the avoidance of the threatened harm.

Id. at 1297. However, the *Deleveaux* court specifically limited this defense to 18 U.S.C. § 922(g)(1) (the federal statute for possession of a firearm by a felon) cases in “only extraordinary circumstances.” *Id.*

Without deciding whether the justification defense was available in North Carolina, in *State v. Napier*, 149 N.C. App. 462, 560 S.E.2d 867 (2002), our Court held that the evidence did not support a conclusion that the defendant was entitled to a justification instruction. *Id.* at 465, 560 S.E.2d at 869. In *Napier*, the defendant was involved in an on-going feud with his neighbor and neighbor’s son. *Id.* at 462, 560

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S.E.2d at 868. The neighbor's son continued to shoot a shotgun in the air over the defendant's property for a span of a few days. *Id.* at 462-63, 560 S.E.2d at 868. The defendant, with a 9 millimeter handgun attached to his hip, walked over to his neighbor's house and an altercation ensued. *Id.* at 463, 560 S.E.2d at 868. Police were called to the scene. *Id.* After officers restored order and left the scene, the defendant fired a gun and hit the neighbor in the arm. *Id.* Our Court held that the evidence demonstrated that the defendant "while armed, voluntarily walked across the street and onto [the neighbor's] premises; defendant asked [the neighbor and neighbor's son] if they wanted him to take the gun home; and defendant, while armed, stayed on [the neighbor's premises] for several hours talking to [the neighbor] before the fight ensued." *Id.* at 465, 560 S.E.2d at 869. Accordingly, our Court held that the evidence did not support a conclusion that the defendant was under a present or imminent threat of death or injury. *Id.*

In addition, without ruling on the availability of the defense of justification in North Carolina, our Court held in *State v. Craig*, 167 N.C. App. 793, 606 S.E.2d 387 (2005), that the evidence did not support giving a special instruction on justification. In *Craig*, the defendant was involved in an altercation at an auto garage where he fired a pistol. *Id.* at 794, 606 S.E.2d at 388. After leaving the scene of the altercation, the defendant kept the gun and took it with him to a friend's house. *Id.* at 796-97, 606 S.E.2d at 389. Our Court held that the evidence did not support a special

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instruction on justification “because there was a time period where Defendant was under no imminent threat while possessing the gun.” *Id.* at 797, 606 S.E.2d at 389.

In *State v. McNeil*, 196 N.C. App. 394, 674 S.E.2d 813 (2009), our Court held that, as in *Napier* and *Craig*, the evidence did not support giving a special instruction on justification. *Id.* at 406-407, 674 S.E.2d at 821. In *McNeil*, the evidence tended to show that the defendant exited his house and approached the victim outside. The two parties got into an oral argument. *Id.* at 396-97, 674 S.E.2d at 815. The defendant then walked into his house, and returned, carrying a shotgun. *Id.* at 397, 674 S.E.2d at 815. The defendant approached the victim and shot him. Thereafter, the defendant walked back toward his house, then turned and walked into the street, stood over the victim, and shot the victim a second time. *Id.* at 397, 674 S.E.2d at 815-16. The defendant then walked toward his house again, got into his vehicle, and left the scene. *Id.* at 397, 674 S.E.2d at 816. The defendant testified that he was afraid of the victim and believed that the victim had a weapon. Our Court held that because the evidence indicated that the defendant possessed the shotgun inside his home and away from the victim “at which time there was no imminent threat of death or serious bodily injury,” the evidence did not support an instruction on justification. *Id.* at 406-407, 674 S.E.2d at 821.

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Defendant argues that unlike the circumstances found in *Craig* and *McNeil*, defendant “remained under the threat of death or serious bodily injury for some period of time after [Mr.] Alvarez left the convenience store parking lot.” We disagree.

Assuming, without deciding, that for purposes of defendant’s appeal that the justification defense to possession of a firearm by a felon is available in North Carolina and that the *Deleveaux* rationale applies, the evidence in the present case demonstrates that there was a time period where defendant was under no present or imminent threat of death or injury while in possession of the gun. Once defendant had taken possession of the gun, he observed Mr. Alvarez leave the gas station, driving away in his vehicle. At this point, defendant was no longer under imminent threat but still maintained possession of the gun. Furthermore, defendant left the scene in his vehicle with the gun in his possession. As such, we hold that the trial court did not err by denying defendant’s request for a special jury instruction on justification.

IV. Conclusion

The trial court did not err by denying defendant’s request for a special jury instruction on justification as a defense to possession of a firearm by a felon.

NO ERROR.

Chief Judge McGEE and Judge GEER concur.

Report per Rule 30(e).