IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1238

Filed: 21 August 2018

Nash County, No. 16-CRS-52858

STATE OF NORTH CAROLINA

v.

JEFFREY MICHAEL CHARETTE, Defendant.

Appeal by Defendant from judgment entered 13 April 2017 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 3 May 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Michael E. Bulleri, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Daniel Shatz, for defendant-appellant.

MURPHY, Judge.

Jeffrey Michael Charette ("Defendant") was convicted of assault with a deadly weapon with intent to kill inflicting serious injury after firing a shotgun and hitting his daughter's boyfriend in the head, neck, and back. On appeal, Defendant contends the trial court improperly refused to instruct the jury on self-defense because there

was evidence from which a jury could reasonably conclude that he acted in perfect self-defense. After careful review, we conclude the trial court did not err in declining to instruct on self-defense.

BACKGROUND

On 25 June 2016, Defendant hosted a cookout at his home in Battleboro. His girlfriend, Sherry Murray, daughter, Bryanna Charette, daughter's boyfriend, Jarod Vinson, granddaughter, Skylar Vinson, and a friend, Dave Chelton, were all present. All of the adults, except for Bryanna, were drinking throughout the day. At some point in the evening, Defendant decided to go to bed. Defendant then came back out and tried to get Sherry to come to bed, but was unsuccessful. While Defendant tried to forcefully bring her inside, Defendant and Jarod had their first physical confrontation of the night.

Defendant testified that after being unable to get Sherry to join him, he laid back down and placed his handgun on his Bible next to the bed. At that point, Bryanna came in after him "cussing and fussing" and they "had [a] scuffle over the gun." Defendant testified that "[Bryanna] was afraid I was going to go out there and shoot Jarod." According to Defendant, he made up with Bryanna and let her take the handgun from him. Later, once he had gotten Sherry into bed, Defendant testified that he went to the kitchen to get sweet tea. Jarod then "jumped from behind and hit me in the head with the pistol several times. And in my forehead, telling me if I call

him the N word again, he'll kill me. And if I put my hands on my daughter again, I'll F'ng kill you." After this altercation, Defendant testified:

> I grabbed my shotgun. I opened the bottom drawer and pulled the boxes that had birdshot, put one in there. I opened the back door and aimed the gun up in the air in the position -- not directly at Jarod, up like this and fired a round and simultaneously told him to drop by [sic] F'ng gun.

Defendant agreed at trial that the firing of his gun could be characterized as a "warning shot."

Jarod testified that when Defendant tried to get Sherry in the house, Jarod "grabbed him by the shoulder and I was just like hey, man you got to chill." Eventually, Defendant and Jarod both fell, and according to Jarod:

> When we fell, he jumped up. He jumps up, turns around and I'm still on the ground getting up like I just scarred my arm. I'm getting up off the ground, he looked back at me and he like I'm going to put a cap in this mother fucker's ass and he takes off running towards the house.

Bryanna followed Defendant into the house and Jarod heard "a bunch of bumping, a bunch of screaming, and yelling between him and [Bryanna]." Finally, after hearing his name, Jarod entered the house just as Bryanna was running out. He saw the handgun on the floor and as Defendant was picking it up, Jarod pushed him into the door and "I recall grabbing the gun, twisting the gun trying to get it out of his hand." After getting the gun from Defendant, Jarod confirmed, "I hit him with the pistol." Jarod then ran out the back door, threw the gun down, and started walking toward

the end of the road. He then heard a "boom" and a "second boom" and realized that he had been shot, so he began running. Jarod was hit by seven pellets in his back, neck, and head.

During the charge conference, Defendant asked for a jury instruction on self-defense, arguing that he was in a place he was lawfully allowed to be and was not required to retreat. N.C.P.I.–Crim. 308.10 (stand your ground instruction). The trial judge declined to provide the instruction.

The jury found Defendant guilty of one count of assault with a deadly weapon with intent to kill inflicting serious injury and not guilty of two counts of assault with a deadly weapon with intent to kill. Defendant timely appealed.

ANALYSIS

When reviewing an appeal based on the propriety of a jury instruction on self-defense, "our Supreme Court has repeatedly held that a defendant who fires a gun in the face of a perceived attack is *not* entitled to a self-defense instruction *if he testifies* that he did not intend to shoot the attacker when he fired the gun." *State v. Cook*, ___ N.C. App. ___, ___, 802 S.E.2d 575, 577 (2017), *aff'd*, 370 N.C. 506, 809 S.E.2d 566 (2018). We note that, even though the refusal to instruct the jury on self-defense was correct, the trial judge should have refused to instruct the jury on self-defense based specifically on Defendant's testimony disproving his intent to kill Jarod

when he fired the shotgun, rather than analyzing whether Defendant was in imminent danger. *Id.*

"Whether evidence is sufficient to warrant an instruction on self-defense is a question of law; therefore, the applicable standard of review is *de novo*." *State v. Cruz*, 203 N.C. App. 230, 242, 691 S.E.2d 47, 54 (2010) (citation omitted), *aff'd*, 364 N.C. 417, 700 S.E.2d 222. In determining whether an instruction on perfect self-defense must be given, the evidence is to be viewed "*in the light most favorable to the defendant*." *Cook*, ___ N.C. App. at ___, 802 S.E.2d at 577 (quoting *State v. Bush*, 307 N.C. 152, 159, 297 S.E.2d 563, 568 (1982)). Further, "the determination shall be based on evidence offered by the defendant and the State." *Id.*

"Our statutes provide two circumstances in which individuals are justified in using deadly force, thus excusing them from criminal culpability." *State v. Lee*, 370 N.C. 671, 674, 811 S.E.2d 563, 566 (2018); N.C.G.S § 14-51.3 (2017) (stating that a person who is in a place they lawfully have a right to be is justified in using deadly force if they reasonably believe such force is necessary to prevent imminent death or great bodily harm to themselves or another); N.C.G.S. § 14-51.2(f) ("A lawful occupant within his or her home, motor vehicle, or workplace does not have a duty to retreat from an intruder . . . ."). In addition, a defendant must answer the following two questions in the affirmative before being entitled to an instruction on self-defense:

> (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? If both queries are answered in the affirmative, then an instruction on self-defense must be given. If, however, the evidence requires a negative response to either question, a self-defense instruction should not be given.

Bush, 307 N.C. at 160-61, 297 S.E.2d at 569.

At common law, killing in self-defense is justified when:

> (1) it appeared to 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) defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; and
>
> (3) defendant was not the aggressor in bringing on the affray, i.e., he did not aggressively and willingly enter into the fight without legal excuse or provocation; and
>
> (4) defendant did not use excessive force, i.e., did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

State v. Williams, 342 N.C. 869, 873, 467 S.E.2d 392, 394 (1996) (citation omitted).

However, a defendant cannot establish that he formed a belief that it was necessary to kill to protect himself from death or great bodily harm if he testifies that he did not intend to shoot the victim. *See id.*, 467 S.E.2d at 393-94; *Cook*, ___ N.C. App. at ___, 802 S.E.2d at 577.

> [T]he use of a firearm that a defendant describes as something other than an aimed, deliberate attempt to kill the victim cannot support a finding of perfect self-defense, and a defendant's testimony that he did not shoot to kill will prevent the jury from hearing a self-defense instruction "even if there is, in fact, other evidence from which a jury could have determined that the defendant did intend to kill the attacker."

State v. Fitts, ___ N.C. App. ___, ___, 803 S.E.2d 654, 657 (2017) (quoting *Cook*, ___ N.C. App. at ___, 802 S.E.2d at 577), *cert. denied*, ___ N.C. ___, 814 S.E.2d 101 (2018). "If what defendant contended was true, that he never aimed his gun at anyone, then 'the first requirement of self-defense, that defendant believed it necessary to kill the victim[,] would not be met.'" *State v. Reid*, 335 N.C. 647, 671, 440 S.E.2d 776, 789 (1994) (alteration in original) (quoting *State v. Mize*, 316 N.C. 48, 54, 340 S.E.2d 439, 443 (1986)).

In *Williams*, our Supreme Court held that because the defendant did not intend to shoot the victim, he was not entitled to a self-defense instruction. *Williams*, 342 N.C. at 873, 467 S.E.2d at 394. "[Williams] testified that he then pointed his pistol in the air and fired three shots to scare Staton and the others and make them back off." *Id.*, 467 S.E.2d at 393. Our Supreme Court determined that "[c]learly, a reasonable person believing that the use of deadly force was necessary to save his or her life would have pointed the pistol at the perceived threat and fired at the perceived threat. [William's] own testimony, therefore, disproves the first element of self-defense." *Id.* at 873, 467 S.E.2d at 394.

In *Cook*, we held that a similarly situated defendant convicted of felonious assault with a firearm against a law enforcement officer was not entitled to a jury instruction on self-defense. *Cook*, ___ N.C. App. at ___, 802 S.E.2d at 578. There, the defendant testified that when he reached for the firearm, "I really didn't have no specific intention. I was just scared." *Id.* at ___, 802 S.E.2d at 577. When asked if he was trying to kill someone when he fired the gun, he responded, "No sir." *Id.* Relying on *Williams*, we determined that the trial court did not err by refusing to instruct the jury on self-defense because the defendant testified he did not intend to kill or shoot the victim at the moment he shot the gun. *Id.*

Here, Defendant argues that the altercation he and Jarod had in the house, and the fact that Jarod left with Defendant's handgun, entitled him to a self-defense instruction. He felt he needed to fire the shotgun because "I didn't know what [Jarod] was going to do." However, like the defendant in *Cook*, Defendant here was not entitled to an instruction on self-defense due to his own testimony. Defendant testified at multiple points in regards to his intention at the moment he discharged the shotgun:

> *Defendant*: I grabbed my shotgun. I opened the bottom drawer and pulled the boxes that had birdshot, put one in there. I opened the back door and aimed the gun up in the air in the position -- not directly at Jarod, up like this and fired a round and simultaneously told him to drop by [sic] F'ng gun. At that point, I go like that and I said I think I just hit him with a pellet. And he ran down the road and that's where they found my firearm down the road.

. . . .

Defense Counsel: Why did you shoot the shotgun?

Defendant: To keep him from leaving with my firearm. I fired one shot in the air and told him to drop my gun.

. . . .

Defense Counsel: When you shot the shotgun, what were your intentions?

Defendant: I just fired one shot in the air and hollered to him to drop my gun.

. . . .

Defense Counsel: Now, Jarod was in the front yard, so he was leaving. What did you think was going on there?

Defendant: He wasn't going nowhere. He was standing out there with the gun -- my gun in his hand and assuming I guess it was Dave's phone at the time. He wasn't running. He was standing sideways right there with -- looking at the phone, gun in one hand, looking at the phone with the other.

Defense Counsel: Did you have any concerns at the time?

Defendant: Yes, I did.

Defense Counsel: What were your concerns?

Defendant: That he still had my firearm and I know his history and what he's done to my daughter before and I mean, I didn't know what he was going to do. I mean, he was drunk. On a rare day he just came busting up in my house and pistol-whipped me, threatened to kill me, put a gun to my head. I mean, I -- I had - you know, I had no clue what -- what he was going to do next.

While there are some inconsistencies between other witness testimonies,[1] Defendant's own testimony as to whether he intended to kill Jarod is consistent. Defendant stated that he shot the gun up in the air and did not aim the gun directly at Jarod. We note that, had Defendant testified that he shot Jarod with the intent to kill, he may have been entitled to a self-defense instruction. "[N]evertheless, we are bound by precedent to rule that Defendant was not entitled to an instruction on self-defense." *Fitts*, ___ N.C. App. at ___, 803 S.E.2d at 658.

CONCLUSION

Defendant's own testimony refutes the claim that he formed a belief that it was necessary to kill Jarod in order to protect himself from death or great bodily harm. Accordingly, we conclude the trial court did not err by refusing to instruct the jury on self-defense.

NO ERROR.

Judges DAVIS and INMAN concur.

Report per Rule 30(e).

[1] For example, Defendant's friend, Dave, testified that there was no altercation between Defendant and Jarod prior to the shooting. Defendant testified he tried to grab Sherry by the arm, but after having no luck in getting her to come to bed, he went inside on his own. Finally, Jarod testified that he tried to calm Defendant down after Defendant tried to grab Sherry, and, in doing so, they both fell to the ground. After the fall, Defendant went inside to grab his gun.