IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1000

Filed: 6 August 2019

Dare County, Nos. 17 CRS 268, 50085

STATE OF NORTH CAROLINA

v.

PATRICK LYNN GRIGGS

Appeal by defendant from judgments entered 22 March 2018 by Judge Wayland J. Sermons, Jr., in Dare County Superior Court. Heard in the Court of Appeals 8 May 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Brian D. Rabinovitz, for the State.

Dylan J.C. Buffum Attorney at Law, PLLC, by Dylan J.C. Buffum, for defendant-appellant.

ZACHARY, Judge.

Defendant Patrick Lynn Griggs appeals from judgments entered upon jury verdicts finding him guilty of attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury. Defendant argues that he is entitled to a new trial because (1) the trial court committed plain error in failing to

instruct the jury on the lesser-included offense of attempted voluntary manslaughter on the basis of imperfect self-defense, and (2) the cumulative prejudice that resulted from additional trial errors deprived him of his due process right to a fair trial. Defendant also argues that he is entitled to a new sentencing hearing because the trial court erroneously concluded that his prior out-of-state convictions were substantially similar to certain North Carolina offenses, and because the trial court declined to find the existence of mitigating factors. After careful review, we find no error in Defendant's trial, but remand for resentencing.

Background

Defendant was charged with attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury after he stabbed Christopher Whitehead in the neck during an altercation that arose at a restaurant in Nags Head. The evidence at trial revealed the following:

On the evening of 26 January 2017, Jessica and Alex Faracca were working in a restaurant owned by their father, Thomas Castro. Whitehead, a regular patron of the restaurant, was seated at the bar, as were Defendant and his friend Miranda Krawchuk. Alex testified that at some point around 7:30 p.m., Defendant began "raising his voice, shouting at [Whitehead], calling him names and provoking him," by "calling [him] a hippie, a f****t, a Jesus freak, [and] talking about his hair." According to Alex, Defendant's tirade arose "out of nothing." Whitehead initially

ignored Defendant's taunts, but eventually responded by telling Defendant "to shut up and that he doesn't know him." Alex approached Jessica and told her "to keep an eye on [Whitehead]," explaining that "the other gentleman across the bar was giving him a hard time" and that Alex "didn't think that anything good was going to come from that conversation."

About five minutes later, Whitehead proceeded to the front of the restaurant to pay his bill, and Jessica noticed that he was "pacing back and forth and . . . seemed worried and troubled." At that point, Jessica told Thomas that "he needed to come up front" because she "didn't really know what was about to happen." According to Jessica, Defendant then approached Whitehead "[i]n a threatening manner" and "got in his face." Thomas separated the men and instructed Defendant that he needed to leave. Defendant exited the restaurant, as directed, but announced that he would "be waiting for [Whitehead] outside."

After paying his bill, Whitehead waited in the restaurant for another five to eight minutes to ensure that Defendant had left the premises before exiting the building and walking to his car. Thomas and Jessica followed Whitehead outside into the parking lot, where they saw that Defendant was still standing next to his truck. Whitehead walked toward his vehicle, which was parked next to Defendant's truck, and Thomas followed directly behind him. As the two men approached, Defendant pulled a knife out of his pocket.

Jessica testified that as Whitehead "was passing by," Defendant "step[ped] forward" toward him, at which point Whitehead "stepped right after" Defendant, and they proceeded to fight. When asked whether she saw who struck the first blow, Jessica responded that "I believe [Defendant] threw the first punch," but that it was "kind of like wishy-washy." Jessica "saw maybe one or two hits" before Defendant and Whitehead disappeared behind the vehicle. Defendant cut Whitehead's throat with the knife, ending the fight. Thomas rushed Whitehead to the hospital, where he remained in intensive care for the next two and a half months.

Defendant testified to the following regarding his version of the altercation:

> [DEFENSE COUNSEL:] Now when Mr. Whitehead came out of the restaurant do you recall seeing where he was looking?
>
> [DEFENDANT:] He was looking straight at me.
>
> Q. How about the man behind him?
>
> A. He was pretty well looking at me also.
>
> Q. And if you recall, how close together were—
>
> A. Thomas was about one step behind Mr. Whitehead.
>
> Q. Okay. What direction were they headed?
>
> A. They were coming straight at me.
>
> Q. How slowly or quickly were they moving?
>
> A. They were coming at a dead run.

Q. Okay. Now at this point in time when they are coming at you at a dead run where exactly are you standing?

A. I'm standing by the front tire of my truck.

Q. When you saw them running what did you think their intentions were?

A. To stomp me into the ground. There was no doubt in my mind about that.

Q. Okay. At this point in time what did you think would happen if they carried out these intentions?

A. My next step would be the hospital.

. . . .

Q. So at this time how do you feel about the prospect of these gentlemen coming at you?

A. I'm scared.

Q. What were your options at that point in time?

A. I looked at it as I had two options, either get beat into the ground or do what I could to defend myself.

Q. Okay. Could you run?

A. No, sir, I couldn't.

Q. Why not?

A. I'm all crinkled up and there was nowhere to really go to.

Q. What about get in your car?

A. That wouldn't have worked very well because my truck is old, doors don't lock.

Q. What about talking?

A. They had no speech plan for it.

Q. So at that point what did you decide to do?

A. At that point I had about two seconds, maybe three seconds tops between when they come out after me and doing what I could. So the only thing I had an option to do as far as I can see was to pull my knife.

Q. Did you believe you had any chance whatsoever without your knife?

A. None.

Q. To defend yourself?

A. Absolutely not.

. . . .

Q. Okay. And do you believe they had a weapon at this time?

A. Not really. I would say just the size, that both of them were coming at me at a dead run, both of them were way larger than me. And I just did what I felt was necessary to protect myself.

Q. Okay. So you pulled the knife out? Describe how you got it out and got it open?

A. I slid it out, brought my hands together in front of me, flipped my blade out and I lifted my arms.

. . . .

Q. Okay. Mr. Griggs, you pulled the knife. What was your intent?

A. I was intending to catch him in his chest, in his arm area.

Q. How though?

A. I just brought my arm up about like so. (Demonstrating) The way he was running at me I—you know, I knew I wouldn't have to do much more than that.

Q. Were you planning on stabbing him?

A. No, I was planning on cutting him.

Q. Why?

A. I was trying to stop him. I wasn't trying to you, you know, do serious damage to the man.

. . . .

Q. So you got your knife out, you are standing, what happens next?

A. Mr. Whitehead runs into me, hits me in the jaw, knocks me to the ground. At that point I'm out.

. . . .

Q. Completely unconscious?

A. Yes.

Q. And at what point did you regain consciousness?

A. The next thing I knew is Mr. Castro had his hands on me.

. . . .

Q. What were you hoping to accomplish with the knife?

A. I was just stopping an attack on me.

. . . .

Q. Okay. Again, you didn't start the fight with him?

A. No, sir.

During the charge conference, Defendant requested that the jury be instructed on self-defense. The State also requested the same "[o]ut of abundance of precaution," in the event that "somebody later on tells us we should have." The trial court agreed, and instructed the jury on the elements of perfect self-defense pursuant to the pattern jury instructions for Defendant's charges of attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury.

The jury found Defendant guilty of both charges, and the trial court entered two consecutive sentences totaling 303 to 389 months in the custody of the North Carolina Division of Adult Correction. Defendant gave oral notice of appeal in open court.

Imperfect Self-Defense

Defendant first argues that the trial court committed plain error by failing to instruct the jury on the lesser-included offense of attempted voluntary manslaughter on the basis of imperfect self-defense, having only instructed the jury on perfect self-

defense. We disagree, and conclude that Defendant was not entitled to an instruction on self-defense, perfect or imperfect.

"Generally, the trial court must give an instruction on any substantial feature of a case, regardless of whether either party has specifically requested an instruction." *State v. Smarr*, 146 N.C. App. 44, 54, 551 S.E.2d 881, 887 (2001), *disc. review denied*, 355 N.C. 291, 561 S.E.2d 500 (2002). A defense will be considered a substantial feature of the case requiring a jury instruction where substantial evidence was presented of each element of the defense. *State v. Hudgins*, 167 N.C. App. 705, 709, 606 S.E.2d 443, 446 (2005). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991). Whether the evidence presented constitutes "substantial evidence" of a defense is a question of law, reviewed *de novo*, under which the evidence must be viewed in the light most favorable to the defendant. *Hudgins*, 167 N.C. App. at 709, 606 S.E.2d at 446.

"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 (quotation marks omitted), *disc. review denied*, 363 N.C. 379, 680 S.E.2d 204 (2009).

The elements of perfect self-defense are that

> (1) it appeared to defendant and he believed it to be necessary to [use deadly force against] the [victim] 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. Norris, 303 N.C. 526, 530, 279 S.E.2d 570, 572-73 (1981).

Imperfect self-defense, on the other hand, arises when the first and second elements above are satisfied, "but the defendant, although without murderous intent, was the aggressor or used excessive force." *State v. Bush*, 307 N.C. 152, 159, 297 S.E.2d 563, 568 (1982). Under those circumstances, the defendant will have "only the *imperfect right of self-defense*, having lost the benefit of perfect self-defense, and is guilty at least of voluntary manslaughter." *Norris*, 303 N.C. at 530, 279 S.E.2d at 573. Still, evidence of the first two elements "must be shown to exist before [a] defendant will be entitled to the benefit" of a self-defense instruction, whether perfect or imperfect. *Bush*, 307 N.C. at 159, 297 S.E.2d at 568. If the evidence at issue "requires a negative response to either question, a self-defense instruction should not be given."

Id. at 160-61, 297 S.E.2d 569; *see also State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002) ("An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find [the] defendant guilty of the lesser offense and to acquit him of the greater.").

In the instant case, the circumstances were not such as to create a reasonable belief in the mind of a person of ordinary firmness that it was necessary for Defendant to use deadly force against Whitehead in order to save himself from death or great bodily harm. The evidence established that after the owner of the restaurant instructed Defendant to leave the premises, Defendant announced that he would be waiting for Whitehead outside. Consistent with his threat, and instead of leaving the scene as directed, Defendant proceeded to wait in the parking lot until Whitehead eventually emerged from the restaurant. When Whitehead emerged, Defendant pulled out his knife, and the physical altercation ensued. Even when viewed in the light most favorable to Defendant, this evidence precludes any rational finding that Defendant held a reasonable belief that it was necessary to use deadly force against Whitehead in order to protect himself from death or great bodily harm. To the contrary, the evidence amply demonstrates that Defendant "at all times had every reasonable opportunity to alleviate the danger to [himself] without resorting to deadly force." *State v. Lea*, 126 N.C. App. 440, 448, 485 S.E.2d 874, 879 (1997).

In that the record is devoid of evidence that would have permitted a rational finding that Defendant reasonably believed it was necessary to use deadly force against Whitehead in order to save himself from death or great bodily harm, Defendant was not entitled to an instruction on self-defense, perfect or imperfect. Accordingly, Defendant cannot establish error—plain or otherwise—in the trial court's failure to instruct on the lesser-included offense of attempted voluntary manslaughter on the basis of imperfect self-defense.

Cumulative Trial Errors

Defendant next argues that the trial court erred in (1) admitting the out-of-court statements of two witnesses who did not testify at trial, (2) admitting into evidence narcotics and narcotics paraphernalia that were found in Defendant's vehicle after it was seized, (3) allowing Thomas to testify to Whitehead's peaceful character, (4) admitting hearsay evidence and lay opinion testimony concerning the nature and severity of Whitehead's injuries, and (5) allowing the jury to deliberate under the belief "that acquittal on one charge might result in acquittal on both charges."[1]

[1] During jury deliberations, the jury submitted a note to the trial court which read: "The jury has reached a unanimous decision on one of the charges. We are split (8/4) on the other charge. If a unanimous decision is not reached on second charge, will that have any impact on the first charge." After consulting with counsel as to the appropriate response, the trial court elected to read the standard *Allen* charge to the jury.

Defendant, however, did not object to the admission of any of this evidence at trial, nor does he assert on appeal that the admissions amounted to plain error. Instead, Defendant contends that the trial court erred in each respect, and that those errors had the cumulative effect of depriving him of his due process right to a fair trial. However, in that Defendant has not argued plain error, he has failed to preserve these alleged errors for appellate review.

In criminal cases, an action by the trial court to which no objection was made at trial may generally serve as the basis for an appeal only "when the judicial action questioned is *specifically and distinctly contended* to amount to plain error." N.C.R. App. P. 10(a)(4) (emphasis added). Plain error review requires that a heightened level of prejudice be shown before a new trial is warranted—specifically, "that absent the error[,] the jury probably would have reached a different verdict." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation omitted). Indeed, a case could arise in which errors that are found on an individual basis to be insufficiently prejudicial to amount to plain error might nevertheless warrant reversal because it is apparent that, when "taken as a whole[,] they deprived the defendant of his due process right to a fair trial free from prejudicial error." *State v. Wilkerson*, 363 N.C. 382, 426, 683 S.E.2d 174, 201 (2009) (quotation marks omitted); *see State v. Waring*, 364 N.C. 443, 512, 520, 701 S.E.2d 615, 658, 663 (2010); *but see State v. Holbrook*, 137 N.C. App. 766, 769, 529 S.E.2d 510, 512 (2000) ("[W]e refuse to apply the plain

error doctrine on a cumulative basis when defendant is assigning error to unrelated admissions of evidence to which he did not object, and the trial court made no affirmative ruling on the admissibility of any of them."); *accord State v. Riley*, 159 N.C. App. 546, 550, 583 S.E.2d 379, 383 (2003). To be sure, however, only those unpreserved errors that the defendant has indeed contended amount to plain error in the first instance would be properly considered under that analysis. *See, e.g.*, *State v. Howard*, 215 N.C. App. 318, 329, 715 S.E.2d 573, 580, *disc. review denied*, 365 N.C. 368, 719 S.E.2d 44 (2011); N.C.R. App. P. 10(a)(4).

In the instant case, Defendant did not object to the trial court's actions that he now contends had the collective effect of depriving him of his due process right to a fair trial, nor has he on appeal "specifically and distinctly contended" that the same amounted to plain error. Consequently, Defendant's individual challenges to each of the trial court's actions have not been properly preserved for appellate review.

Sentencing

Lastly, Defendant argues that he is entitled to a new sentencing hearing because the trial court erred in sentencing him as a Prior Record Level III offender upon its conclusion that three of his prior convictions from Maryland were substantially similar to certain North Carolina offenses.

When sentencing a criminal defendant, the trial court must first determine the offender's prior record level. N.C. Gen. Stat. § 15A-1340.13(b) (2017). "The prior

record level of a felony offender is determined by calculating the sum of the points assigned to each of the offender's prior convictions" in accordance with section 15A-1340.14(b). *Id.* § 15A-1340.14(a). "For example, a prior offense that is classified as a Class G felony is assigned four prior record level points," and a defendant with four points will in turn be classified as a Prior Record Level II offender. *State v. Weldon*, ___ N.C. App. ___, ___, 811 S.E.2d 683, 691 (2018). The defendant's prior record level, together with the class of offense for which he is being sentenced, will subsequently determine the applicable sentencing range. N.C. Gen. Stat. § 15A-1340.13(b).

Section 15A-1340.14(e) explains the proper classification of prior convictions from other jurisdictions by a trial court. "If the State proves by the preponderance of the evidence" that the out-of-state offense "is substantially similar to an offense in North Carolina that is classified as a Class I felony or higher," then the prior out-of-state conviction will be classified as the same class of offense. *Id.* § 15A-1340.14(e). Likewise, "[i]f the State proves by the preponderance of the evidence that an offense classified as a misdemeanor in the other jurisdiction is substantially similar to an offense classified as a Class A1 or Class 1 misdemeanor in North Carolina," then the out-of-state conviction will be classified accordingly. *Id.* In the absence of such evidence of substantial similarity, however, the default is for the trial court to classify a prior felony conviction from another state as a Class I felony, and a prior out-of-state misdemeanor conviction as a Class 3 misdemeanor. *Id.*

"Whether an out-of-state offense is substantially similar to a North Carolina offense is a question of law involving comparison of the elements of the out-of-state offense to those of the North Carolina offense." *State v. Burgess*, 216 N.C. App. 54, 57, 715 S.E.2d 867, 870 (2011). "A party may establish the elements of the out-of-state offense by producing evidence of the applicable statute, including printed copies thereof." *State v. Riley*, ___ N.C. App. ___, ___, 802 S.E.2d 494, 498 (2017).

In the instant case, the State's prior record level worksheet identified Defendant as a Prior Record Level III offender based upon nine prior record level points. Four of those points corresponded to a prior Maryland conviction for felony robbery, which the State classified as a Class G felony. In addition, the State assigned one point each to two prior Maryland convictions for misdemeanor theft, which the State classified as Class 1 misdemeanors. Defendant, however, argues that the State failed to meet its burden of proving that his Maryland offenses were substantially similar to corresponding North Carolina offenses for purposes of sentencing. Accordingly, Defendant maintains that the trial court was required to treat the Maryland robbery conviction as a Class I felony—implicating just two sentencing points—and to treat the theft convictions as Class 3 misdemeanors—implicating no sentencing points. We agree.

As was the case in *State v. Burgess*, "[a]lthough the State presented the trial court with . . . printed copies of [the] out-of-state statutes purportedly serving as the

basis for the . . . convictions the State used in computing [D]efendant's prior record level, the out-of-state crimes on the State's worksheet were not identified by statutes." 216 N.C. App. at 57, 715 S.E.2d at 870 (quotation marks and original alteration omitted). Rather, the State's prior record level worksheet identified Defendant's out-of-state convictions "only by brief and non-specific descriptions," omitting the "source code" for those convictions. *Id.* It is therefore unclear whether the Maryland statutes that the State presented to the trial court were in fact the same statutes under which Defendant was convicted.[2] Accordingly, we must conclude that the State failed to prove by a preponderance of the evidence that Defendant's out-of-state convictions were substantially similar to any North Carolina offenses. *Id.*

In that six of Defendant's nine prior record level points "were based on out-of-state convictions and the State failed to prove by the preponderance of the evidence that the out-of-state offenses were substantially similar to North Carolina offenses," we remand the matter for resentencing. *Id.* at 58, 715 S.E.2d at 870. Because we remand for a new sentencing hearing, we need not address Defendant's remaining argument that the trial court erred in refusing to find the existence of certain mitigating factors, despite Defendant having presented evidence to support the same.

NO ERROR IN PART; REMANDED FOR RESENTENCING.

[2] In fact, it appears that the State did not present the trial court with any copies of Maryland statutes to support its contention that the alleged Maryland misdemeanor offenses were substantially similar to any North Carolina offenses.

Judges DILLON and BERGER concur.

Report per Rule 30(e).