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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 19-237

Filed: 15 October 2019

Durham County, No. 11 CRS 55538-55539, 5821-5829

STATE OF NORTH CAROLINA

v.

GABRIEL JAMES GAMEZ, Defendant.

Appeal by defendant from judgment entered 2 May 2013 by Judge Paul Gessner in Durham County Superior Court. Heard in the Court of Appeals 17 September 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Daniel P. Mosteller, for the State.

Marilyn G. Ozer for defendant-appellant.

YOUNG, Judge.

This appeal arises from a conviction of first degree murder, assault inflicting serious injury, and four counts of assault with a deadly weapon. The defendant argues that the trial court committed plain error by failing to instruct the jury that there were multiple potential assailants. However, even if the jury had been given

the instruction it is not probable they would have reached a different result. Therefore, the trial court did not commit plain error.

I. Factual and Procedural History

On 23 June 2011, 16-year-old Darrell Turner (“Turner”) was in Durham for one night with members of his Pennsylvania youth football team, while on the way to a competition in Florida. Around 10:00 p.m., Turner and six other teammates—Jaylen Coleman (“Coleman”); Dustin Creel (“Creel”); Isaiah Faulk (“Faulk”); Robert Foster (“Foster”); Jaymar Parrish (“Parrish”); and Thomas Woodson (“Woodson”)—ate dinner at a Five Guys restaurant in a strip mall adjacent to the intersection of U.S. Highway 15-501 and Mt. Moriah Road.

Defendant Gabriel James Gamez (“Gamez”), from Texas, was visiting Durham for his aunt’s funeral. Gamez and his family ate dinner at Outback Steakhouse on Mt. Moriah Road across from the Five Guys. While at Outback Steakhouse, Gamez asked two of the hostesses if they wanted to meet him at his hotel after work, used racial slurs to refer to people in North Carolina, and indicated he would shoot anyone who “said anything to him the wrong way.” Around 10:00 p.m., Gamez walked across Mt. Moriah Road toward his hotel.

After crossing Mt. Moriah Road, Gamez crossed paths with Turner and his six teammates. Gamez testified that as he passed the group, he was hit in the back of the head with a chunk of ice. Gamez asked the group why they had thrown the ice

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at him. Multiple members of the group testified that they were unaware of anything being thrown at Gamez as he came near them, but they heard Gamez accuse them of throwing something at him. After the accusation, Gamez began shouting and using racial slurs. The teammates, all except one were African American, became agitated by Gamez's slurs, and several teammates took one or two steps towards Gamez while remaining "[n]ot that close" to him. Turner threw down the cup he was carrying, and it appeared to the teammates that a fight might occur.

Gamez then pulled out a gun and the teammates began to run away. Gamez testified he was provoked to pull out his gun, because he saw one of the teammates with a gun and thought the teammate was going to pull it out. No evidence at trial corroborated Gamez's testimony that a teammate had a gun, and multiple teammates testified that none of them were carrying any kind of weapon. Gamez testified that he "pulled [his] firearm and started firing while running backwards." Gamez acknowledged that he "wasn't looking in the direction [he] was firing." Gamez testified that "when I started looking at the direction that I was firing in, I saw that they were all running, so I ceased fire." Gamez claimed he was unaware that he had hit anyone until he was arrested.

Gamez shot Turner and Woodson. Turner was hit in the back and in the back of the leg. He collapsed and died before paramedics arrived. Woodson was shot in his right leg. Gamez ran back to his hotel room where he called several family

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members but not the police. Durham Police Department learned of Gamez's whereabouts and he was apprehended. Gamez told an officer "I don't know if I should be flattered or appalled that the SWAT Team had to come after me."

At trial, the jury found Gamez guilty of first degree murder for Turner's death, assault inflicting serious injury for shooting Woodson, and four counts of assault with a deadly weapon against Coleman, Creel, Faulk, and Foster. The trial court sentenced Gamez to life without parole for first degree murder, 75 days for the consolidated charges of two counts of assault with a deadly weapon and one count of assault inflicting serious injury, and two consecutive sentences of 75 days each for two separate counts of assault with a deadly weapon. Gamez gave oral notice of appeal immediately after sentencing. On 10 February 2014, this Court granted Gamez's motion to withdraw his appeal. On 15 June 2018, this Court granted Gamez's petition for writ of certiorari for the purpose of reviewing the judgments.

II. Standard of Review

"In criminal cases, an issue that was not preserved by objection noted at trial. . . may be made the basis of an issue on appeal when [it]. . . amount[s] to plain error." N.C. R. App. P. 10(a)(4). Plain error arises when the error is "so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). "Under the plain error rule, a defendant must convince this Court not only that there was error, but that absent the error, the

jury probably would have reached a different result.” *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

III. Analysis

Gamez contends that the trial court committed plain error when it did not instruct the jury, in its self-defense instruction, that Gamez was faced by multiple assailants, or potential assailants, who reasonably appeared to Gamez to have been acting in concert. We disagree.

The jury heard testimony from employees at the Outback Steakhouse at which Gamez, prior to coming in contact with Turner and his teammates, was using racial slurs and bragging about his willingness to use the semiautomatic pistol in his possession. Multiple teammates testified that they heard Gamez using a racial slur to refer to the teammates. The jury heard from Faulk that Gamez “was trying to lure us in to the confrontation.” And the teammates told the jury that they immediately fled when Gamez displayed a gun. These accounts are consistent with evidence that Turner was killed by a bullet that entered through his back, and that Turner and Woodson were both shot in the back of the leg.

The jury further heard Gamez’s testimony admitting to shooting toward the teammates while looking and running in the opposite direction. Gamez testified that he was unaware that he had hit anyone until after he was arrested. Furthermore, Gamez failed to call the police upon returning to the hotel, despite having allegedly

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felt his life was in danger. Although Gamez testified to seeing a teammate with a gun, there was no evidence of such gun. Based on this evidence, Gamez could not have “reasonabl[y] . . . believ[ed] that the use of deadly force was necessary to save his . . . life.” *State v. Williams*, 342 N.C. 869, 873, 467 S.E.2d 392, 394 (1996).

The jury was presented with overwhelming evidence that Gamez took disproportionate action by firing gunshots in a situation that did not give rise to such force. Even if the jury had been instructed on the presence of multiple assailants as part of the trial court’s self-defense instruction, it is not probable that the jury would have reached a different verdict. Since it is not probable that the jury would have reached a different result with the instruction, there was no plain error.

Even though Gamez received a self-defense instruction, he was not entitled to the inclusion of additional language in that instruction regarding multiple assailants. Any error in the trial court’s self-defense instruction was not plain error. *Id.* at 672, 440 S.E.2d at 790.

NO PLAIN ERROR.

Judges BRYANT and COLLINS concur.

Report per Rule 30(e).