IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-337

Filed: 5 November 2019

Bladen County, No. 15CRS050392

STATE OF NORTH CAROLINA

v.

MARQUAIL DASHAWN McKOY, Defendant.

Appeal by Defendant from judgment entered 12 May 2016 by Judge Beecher R. Gray in Bladen County Superior Court. Heard in the Court of Appeals 3 October 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Phyllis A. Turner, for the State.

William D. Spence for the Defendant.

BROOK, Judge.

Marquail Dashawn McKoy ("Defendant") appeals from judgment entered upon a jury verdict finding him guilty of discharging a firearm into an occupied property. We hold that the trial court committed prejudicial error, and Defendant is entitled to a new trial.

I. Background

In the late afternoon on 4 March 2015, Defendant visited the home of Crystal Banks to speak with her brother, Jason Banks, about fixing Defendant's tattoo. Also present in the home were Mr. Banks's twin infant sons, Mr. Banks's girlfriend Lashondra McKoy (no relation to Defendant), Crystal Banks and her three sons, Terrence Montgomery (a friend and guest of the Banks siblings), and Mr. Montgomery's two-year-old son. Mr. Montgomery's girlfriend, Shaquanda Woods, and their infant son were waiting in a car outside the house.

An argument broke out between Defendant and Mr. Montgomery. The two argued for approximately two minutes before Mr. Montgomery left the house with his son through the front door. Ms. Banks followed behind them. When Mr. Montgomery and his son passed through the front door, he saw Defendant outside the home, having exited through a side door, pointing a silver revolver at Mr. Montgomery. Mr. Montgomery turned around and attempted to push his son and Ms. Banks back into the house. As Mr. Montgomery was trying to get back into the house, he heard a gunshot and "felt the shot." Defendant ran from the house.

Once inside the house, Mr. Montgomery realized that the bullet had not injured him but had passed through his shirt, leaving a bullet hole in the fabric. The bullet also left a hole in the screen door of the house and then struck the siding of the house. Because Defendant was wearing a GPS-tracking ankle device, police were able to locate him at a recreational department gym. Elizabethtown Police Department

Lieutenant Lonnie Dewayne Cheshire placed Defendant under arrest around 9 p.m. on 4 March 2015 for attempted first-degree murder.

On 6 April 2015, a Bladen County grand jury indicted Defendant on one charge of attempted first-degree murder and one charge of discharging a weapon into an occupied property. On 9 May 2015, the matter came on for trial in Bladen County Superior Court before the Honorable Beecher R. Gray. Judge Gray presided over a three-day trial.

Defendant testified in his own defense. He testified that he had been in a relationship with Ms. Woods that ended some weeks prior to the shooting on 4 March 2015. He also testified to an incident that occurred approximately one week before the shooting. When he was walking down Martin Luther King Drive in Elizabethtown, he passed Ms. Woods driving her car. Mr. Montgomery was in the passenger seat. Ms. Woods made a U-turn and pulled up beside Defendant, and Mr. Montgomery got out of the car. Defendant testified that Mr. Montgomery said, "Are you Marquail McKoy? I don't need to see you around here. You better lay low" before getting back into the car and leaving. Defendant felt threatened by these words.

Defendant further testified that Mr. Montgomery repeated this threat to him in the kitchen of Ms. Banks's home immediately preceding the shooting. According to Defendant, Mr. Montgomery told him on 4 March 2015, "Didn't I tell you you better lay low? Didn't I tell you I better not see you again?" and that Mr. Montgomery was

"aggressive[,] "loud[,]" and "crazy." Defendant also stated that when he left the house through the side door and encountered Mr. Montgomery by the front door outside the house, Mr. Montgomery "lifted up his shirt; was going for the handle of—reached for a gun. Reached for his shirt. Grabbed it. Handle of the gun."

On the charge of attempted first-degree murder, the jury returned a verdict of not guilty. On the charge of discharging a weapon into an occupied property, the jury returned a verdict of guilty. The trial court sentenced Defendant to 64 to 89 months in prison. Defendant did not timely notice appeal but filed a petition for writ of certiorari, which this Court granted on 12 June 2018.

II. Analysis

Defendant raises two issues on appeal. First, Defendant asserts that the trial court erred in failing to instruct the jury that it could find Defendant not guilty by reason of self-defense in its final mandate on the charge of discharging a firearm into occupied property. The State concedes this argument, and we agree. Finding that Defendant is entitled to a new trial on the charge of discharging a firearm into occupied property, we decline to address Defendant's second claim, that the trial court erred in failing to sentence defendant in the mitigated range, as moot.

A. Standard of Review

In reviewing an improper jury instruction claim, the "proper standard of review depends upon the nature of a defendant's request for a jury instruction." *State*

v. Edwards, 239 N.C. App. 391, 392, 768 S.E.2d 619, 620 (2015). When a defendant makes a specific request for a particular jury instruction, and "where the request for a specific instruction raises a question of law, the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *Id.* at 393, 768 S.E.2d at 621 (internal marks and citations omitted). Whether an instruction on self-defense is warranted is a question of law, and the applicable standard of review is therefore *de novo*. *See id.*

B. Jury Instructions

"Where there is evidence that defendant acted in self-defense, the court must charge on this aspect even though there is contradictory evidence by the State or discrepancies in defendant's evidence." *State v. Dooley*, 285 N.C. 158, 163, 203 S.E.2d 815, 818 (1974); *see also State v. Ball*, 324 N.C. 233, 238, 377 S.E.2d 70, 73 (1989) ("[W]hen the request is correct in law and supported by the evidence, the court must give the instruction in substance."). Such an instruction must be included in the trial court's final mandate to the jury, and a failure to do so constitutes prejudicial error. *Dooley*, 285 N.C. at 166, 203 S.E.2d at 820.

Dooley is instructive here. Charged with first-degree murder, the defendant presented evidence that he acted in self-defense. *Id.* at 158-61, 203 S.E.2d at 816-17. The defendant testified in his own defense, presenting evidence that he knew the alleged victim to have a reputation for violence, and he testified to an incident nine

years prior in which the victim cut the defendant's throat with a bottle opener. *Id.* at 160-61, 203 S.E.2d at 817. The defendant presented further evidence that the alleged victim was under the influence of both alcohol and cocaine when the victim ran "toward defendant with a three-inch blade pocketknife in his hand crying, 'You goddam son-of-a-bitch, I'm going to kill you, or you're going to kill me.'" *Id.* at 161, 203 S.E.2d at 817. The defendant also testified that he fired three shots, one into the ground and two into the air, as the victim continued to run toward him, and that his third shot hit the victim in the head. *Id.*

Based on these facts alleged by the defendant and the evidence put forth by the State, the *Dooley* trial court instructed the jury regarding the law of self-defense generally but did not in its final mandate instruct that the jury must return a verdict of not guilty if it determined that the defendant acted in self-defense. *Id.* at 165, 203 S.E.2d at 819-20. Our Supreme Court determined that "[t]he trial court's failure to include such an instruction in its final mandate to the jury was prejudicial error and entitle[d] defendant to a new trial." *Id.* at 166, 203 S.E.2d at 820. The *Dooley* Court held the trial court's "general statement as to the law of self-defense and as to what the defendant must satisfy the jury in order to . . . excuse it altogether on the ground of self-defense[,]" and its instruction that the jury must find "the defendant [shot the victim] intentionally and with malice and without justification or excuse" in order to find the defendant guilty, were insufficient. *Id.* at 163-64, 203 S.E.2d at 819. The

Court "agree[d] with defendant that a specific instruction on self-defense should have been given by the trial judge in his final mandate to the jury." *Id.* at 165, 203 S.E.2d at 820. "Although the court prior to the final mandate explained the law relating to self-defense, in his final instruction he omitted any reference to self-defense other than" the language quoted above. *Id.* The Court reasoned that absent such a charge, "the jury could have assumed that a verdict of not guilty by reason of self-defense was not a permissible verdict in the case." *Id.* at 166, 203 S.E.2d at 820. This omission constituted prejudicial error and entitled the defendant to a new trial. *Id.*

This Court reached a similar conclusion in *State v. Davis*, 177 N.C. App. 98, 627 S.E.2d 474 (2006). *Davis* arose out of a fatal shooting related to a drug transaction, and the State alleged the defendant was one of several shooters. *Id.* at 99, 627 S.E.2d at 475. The defendant presented evidence that he shot in self-defense after the alleged victim shot at him from a car while driving away, and that he did not intend to kill the victim but shot because he was afraid. *Id.* at 100-01, 627 S.E.2d at 476. After one of the shots that the defendant fired struck and killed a passenger in the car, he was charged with first-degree murder and discharging a weapon into occupied property. *Id.* at 98, 627 S.E.2d at 475. In the final mandate to the jury on the charge of first-degree murder, "[t]he trial court included not guilty by reason of self-defense in this instruction[.]" *Id.* at 101, 627 S.E.2d at 477. "However, when giving the final mandate with respect to the charge of discharging a firearm into

occupied property, the trial court did not instruct the jury that it could return a verdict of not guilty as to that charge if it found defendant had acted in self-defense." *Id.* at 101-02, 627 S.E.2d at 477. This "failure to include not guilty by reason of self-defense in the final mandate [was] prejudicial error," and the defendant was entitled to "a new trial on the charge of discharging a firearm into occupied property." *Id.* at 102, 627 S.E.2d at 477.

Davis and *Dooley* are indistinguishable from the case at hand. Here, Defendant presented evidence that he fired at Mr. Montgomery in self-defense after Mr. Montgomery told him to "lay low" and lifted his shirt as if to display and reach for a weapon. This evidence is sufficient, under *Dooley*, to submit the question of whether Defendant acted in self-defense to the jury. *See* 285 N.C. at 163, 203 S.E.2d at 818. At the conclusion of the evidence, Defendant requested that the trial court instruct the jury on self-defense in the court's instruction regarding the charge of discharging a firearm into an occupied property. Because this request was "correct in law and supported by the evidence," the trial court should have granted Defendant's request and given a self-defense instruction in the final mandate to the jury on the charge of discharging a firearm into an occupied property. *Ball*, 324 N.C. at 238, 377 S.E.2d at 73. Instead, the following colloquy occurred at trial regarding that request:

> [DEFENSE COUNSEL]: Your Honor . . . can the self-defense also be added behind 208.90, discharging a firearm

into occupied property? I understand it says, "First, defendant willfully or wantonly discharged a firearm into a building without justification or excuse," but I would also like the language that was used behind the attempted murder. 'Cause the way I read it . . . [the jury] would not understand that self-defense would also apply to discharging a weapon. Do you understand that? I don't believe the State has any objection to that, Your Honor.

[PROSECUTOR]: I understand. I didn't say I agree.

[DEFENSE COUNSEL]: Okay. Sure.

[PROSECUTOR]: State would oppose that, Judge.

. . . .

THE COURT: The phrase "without justification or excuse," that phrase, is only to be used where there is evidence of justification or excuse, such as self-defense. That's the only time that parenthetical should be put in. And I already put it in.

[DEFENSE COUNSEL]: Okay. But the language itself about self-defense cannot be added?

THE COURT: At that point, this is what the pattern jury instructions instruct. . . ."Without justification or excuse" is in parentheticals. You only leave that in if there is a self-defense asserted. Where there's evidence of self-defense. Otherwise, I would take it out. So there's some self-defense asserted in this case, and that's why I included the parenthetical. I'm going to go back and look at the defense itself, the instruction, just to make sure. . . . [D]oes the State have any objection if I add to the end of that "without justification or excuse, such as self-defense"?

[PROSECUTOR]: No objection.

[DEFENSE COUNSEL]: Thank you, Your Honor.

> THE COURT: I think that's about as far as I want to push that.

Following this colloquy, the trial court instructed the jury regarding the charge of attempted first-degree murder as follows:

> THE COURT: . . . The defendant would not be guilty of attempted first-degree murder on the ground of self-defense if:
>
> First, it appeared to the defendant and he believed it to be necessary to use potentially deadly force against the victim in order to save himself from death or great bodily harm.
>
> And second, the circumstances as they appeared to the defendant at the time were sufficient to create such a belief in the mind of a person of ordinary firmness. It is for you, the jury, to determine the reasonableness of the defendant's belief from the circumstances as they appeared to him at the time. In making this determination, you should consider the circumstances as you find them to have existed from the evidence, including the size, age, and strength of the defendant as compared to the victim; the fierceness of the assault, if any, upon the defendant; whether or not the victim had a weapon in his possession; and the reputation, if any, of the victim for danger and violence.
>
> Therefore, in order for you to find the defendant guilty of attempted first-degree murder, the State must prove beyond a reasonable doubt, among other things, that the defendant did not act in self-defense. If the State fails to prove that the defendant did not act in self-defense, you must find the defendant not guilty.
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant intentionally, and not in self-defense, attempted to kill the

> victim with a deadly weapon and perform an act designed to bring this about, but which fell short of the completed crime, and that in performing this act, the defendant acted with malice, with premeditation, and with deliberation, it would be your duty to return a verdict of guilty of attempted first-degree murder. If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

(Emphasis added.) This instruction includes a directive that the jury must return a verdict of not guilty "[i]f the State fails to prove that the defendant did not act in self-defense" in addition to articulating a general self-defense instruction, and is therefore sufficient under *Dooley* and *Davis*. *See Dooley*, 285 N.C. at 165, 203 S.E.2d at 820; *Davis*, 177 N.C. App. at 101-02, 627 S.E.2d at 477.

The trial court then instructed the jury on the charge of discharging a firearm into an occupied property as follows:

> [THE COURT]: . . . For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt:
>
> First, that the defendant willfully or wantonly discharged a firearm into a building without justification or excuse, such as self-defense. An act is willful or wanton when it is done intentionally with knowledge or a reasonable ground to believe that the act would endanger the rights or safety of others.
>
> Second, that the building was occupied by one or more persons at the time the firearm was discharged.
>
> And third, that the defendant knew that the building was occupied by one or more persons, or that the defendant had reasonable grounds to believe that the building was occupied by one or more persons. If you find

> from the evidence beyond a reasonable doubt that on or about the alleged date the defendant willfully or wantonly discharged a firearm into the building while it was occupied by one or more persons, and that the defendant knew or had reasonable grounds to believe that it was occupied by one or more persons, it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

(Emphasis added.) In this instruction, the court did not, as it did for the charge of attempted first-degree murder, explain to the jury the factors it must consider to determine whether Defendant acted in self-defense with regard to this particular charge. It also did not, as it had for the charge of attempted first-degree murder, tell the jury that if the jury found that Defendant acted in self-defense, it must find Defendant not guilty. A trial court's "failure to include not guilty by reason of self-defense in the final mandate is prejudicial error," and Defendant is entitled to "a new trial on the charge of discharging a firearm into occupied property." *Davis*, 177 N.C. App. at 102, 627 S.E.2d at 477.

III. Conclusion

The trial court committed prejudicial error in failing to give a self-defense instruction in its final mandate on the charge of discharging a firearm into an occupied property. The trial court failed to inform the jury that if it found that Defendant acted in self-defense when he discharged a weapon into an occupied property, it must find Defendant not guilty by reason of self-defense. As such, "the jury could have assumed that a verdict of not guilty by reason of self-defense was not

a permissible verdict in the case[]" on the charge of discharging a firearm into an occupied property. *Dooley*, 285 N.C. at 166, 203 S.E.2d at 820. Defendant is entitled to a new trial on this charge.

NEW TRIAL.

Judges DIETZ and INMAN concur.

Report per Rule 30(e).