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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA20-134

Filed: 15 December 2020

Wake County, Nos. 16 CRS 219065, 219207, 4952, 5069

STATE OF NORTH CAROLINA

v.

ANTHONY DARIUS NEAL

Appeal by defendant from judgments entered 29 May 2019 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 20 October 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General L. Michael Dodd, for the State.

Rudolf Widenhouse, by M. Gordon Widenhouse, Jr., for defendant-appellant.

BRYANT, Judge.

Where the trial court properly instructed the jury as to the State's burden of proof necessary to convict defendant, there was no error. Where defendant was not entitled to receive jury instructions on self-defense to felony murder based on the underlying felony of attempted sale of a controlled substance with the use or possession of a firearm, the trial court did not err in denying defendant's request.

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Defendant Anthony Darius Neal was indicted for first-degree murder, possession of a firearm by a felon, discharging a firearm into occupied property, and attaining the status of a violent habitual felon. On 20 May 2019, defendant was tried before the Honorable Paul C. Ridgeway, Judge presiding.

The evidence at trial tended to show in the early morning of 23 September 2016, a shooting occurred in the parking lot of an apartment complex. Nearby surveillance footage showed a Kia Altima drive into and then leave the parking lot. The Altima was owned by Mary Daniels, the mother of defendant's twin daughters. A few minutes later, a Honda Odyssey minivan drove into the parking lot. The Altima returned. The two vehicles parked alongside each other.

A bystander who was visiting the complex, saw two men—later identified as defendant and Daquon White—sitting in the Altima. According to the bystander, the two men leaned forward and began shooting at the van before driving away. The driver of the van, Kedrick Thomas, exited the vehicle and ran back toward the apartment complex. The passenger of the van, Travis Malloy, was shot in the head at close range—ballistics confirmed the bullet was fired from either a .38 or 9mm firearm. Malloy had a gun in his waistband but police determined it had not been fired.

At the scene of the crime, police discovered shell casings that were linked to several guns—a .38 caliber pistol, .40 caliber Smith and Wesson, and a 9mm Luger.

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Also found were five shell casings from a .40 caliber or 9mm firearm. Police documented bullet holes in the windshield of the van on the driver's side as well as bullet holes on the doors and hood. Police went to Daniels' apartment which she shared with defendant and told her they were investigating an attempted homicide. Daniels told police that defendant had driven the Altima to take the older children to school and then had driven to White's apartment. When defendant returned to their apartment, he woke her up, and asked if she would take White home. Together, defendant and Daniels drove White to his apartment. En route back to their apartment, defendant had Daniels drive a different way home when they saw police activity. Defendant had Daniels stop the car twice, to throw away marijuana and a sweatshirt White had been wearing. The sweatshirt was later recovered by police.

While talking to police, Daniels admitted defendant was very down and depressed when he returned home earlier that day. Defendant told Daniels something stupid had happened and talked about getting out of town. Defendant said to her, "I'm done with the streets. I'm done with the people out there."

In executing a search warrant of Daniels' apartment where defendant lived, police seized a .40 caliber Smith and Wesson gun found under several towels in the bedroom. Police also seized defendant's jeans from the bedroom. The jeans had gunshot residue on them. The Altima was towed to City-County Bureau of Identification for processing. A search of the vehicle revealed a shell casing from a

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9mm firearm found underneath the driver's seat and another shell casing found outside near the windshield wiper.

Police searched Malloy's phone records and reached out to a man—later determined to be defendant—who agreed to meet. At the time, defendant identified himself to police using a false name. Defendant eventually told police his real name and gave a voluntary statement. However, defendant stated only that Malloy called him that morning to buy \$750.00 worth of marijuana. He said he had nothing to do with the shooting involving Thomas and Malloy. The statement was recorded by police and played for the jury at trial. The State also played for the jury the surveillance video footage from the cameras across the street from the apartment complex.

Defendant presented evidence from a witness, Joseph Ferrell, another bystander at the apartment complex, who testified to seeing a man running away from the scene with a pistol before throwing it away and getting in another car. Defendant testified and claimed, contrary to his statement to police, self-defense to the shooting. At trial, defendant admitted shooting first into the van, doing so multiple times even while driving away. Defendant said he shot because the persons in the van pointed a gun at him.

At the close of the evidence, a jury found defendant guilty of first-degree murder (felony murder only), possession of a firearm by a felon, and discharging a

firearm into occupied property. Defendant then pled guilty to attaining violent habitual felon status. The trial court consolidated the convictions for felony murder, possession of a firearm by a felon, and attaining violent habitual felon status and imposed a sentence of life in prison without parole. The judgment for discharging a firearm into occupied property was arrested. Defendant appeals.

On appeal, defendant argues the trial court erred by I) instructing the jury on self-defense and excessive force, and II) failing to instruct the jury on self-defense to felony murder.

I

Defendant first argues the trial court erred in instructing the jury on self-defense. Having not objected at trial to the jury instructions, defendant now contends the trial court committed plain error in allowing the jury to decide if excessive force was used, notwithstanding the State's burden to prove, beyond a reasonable doubt, that the force was excessive. We disagree.

“For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial.” *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). “To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a

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probable impact on the jury's finding that the defendant was guilty." *Id.* (citation and quotation marks omitted).

"It is elementary that the trial court, in its instructions to the jury, is required to declare and explain the law arising on the evidence." *State v. Anderson*, 40 N.C. App. 318, 321, 253 S.E.2d 48, 50 (1979). "Unquestionably, self-defense may become a substantial and essential feature of a criminal case, and when there is evidence from which it may be inferred that a defendant acted in self-defense, he is entitled to have this evidence considered by the jury under proper instruction from the court." *State v. Marsh*, 293 N.C. 353, 354, 237 S.E.2d 745, 747 (1977). While a defendant may only use deadly force to protect himself from great bodily injury or death, the State is required to prove that the defendant may not benefit from a perfect self-defense if excessive force is used. *State v. Whetstone*, 212 N.C. App. 551, 561–62, 711 S.E.2d 778, 786 (2011).

Based on defendant's testimony that he acted in self-defense when he shot at Thomas and Malloy, the trial court instructed the jury on self-defense as applicable to all the charges, except felony murder based on the underlying felony of attempted sale of a controlled substance with the use or possession of a firearm. The trial court instructed the jury specifically that "the State must prove beyond a reasonable doubt, . . . that the defendant did not act in self-defense." The trial court instructed on self-defense and excessive force in first and second-degree murder as follows:

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The defendant would not be guilty of murder on the basis of malice premeditation and deliberation or second-degree murder if the defendant acted in self-defense and if the defendant did not use excessive force under the circumstances.

A defendant does not have the right to use excessive force. A defendant uses excessive force if the defendant uses more force than reasonably appeared to the defendant to be necessary at the time of the killing. It is for you, the jury, to determine the reasonableness of the force used by the defendant under all of the circumstances as they appeared to the defendant at the time.

If the defendant was at a place the defendant had a lawful right to be, the defendant could stand the defendant's ground and repel force with force regardless of the character of the assault made upon the defendant. However, a defendant would not be excused if the defendant used excessive force.

Therefore, in order for you to find the defendant guilty of first-degree murder on the basis of malice, premeditation, and deliberation or second-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 may not convict the defendant of either first-degree murder on the basis of malice, premeditation, and deliberation or second-degree murder. However, you may convict the defendant of voluntary manslaughter if the State proves that the defendant used excessive force.

Defendant argues in his brief that “the trial court did not tell the jury the [S]tate bore the burden of proving [defendant] used excessive force . . . [and left the jury] to decide if the force was excessive.” Specifically, defendant takes issue with the following language: “*It is for you, the jury, to determine the reasonableness of the*

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force used by the defendant under all of the circumstances as they appeared to the defendant at the time.” (emphasis added). However, a review of the record clearly shows the trial court explained in its jury instructions the State’s burden to prove beyond a reasonable doubt that defendant did not act in self-defense and/or did use excessive force under the circumstances. Given the evidence before the court, it was proper for the jury to be presented with the question—whether defendant’s use of deadly force was reasonable, and therefore not excessive—to determine if self-defense was applicable under the circumstances. *State v. Gaston*, 229 N.C. App. 407, 412, 748 S.E.2d 21, 24–25 (2013) (“If the court finds that the evidence is sufficient to submit the issue to the jury, then *it is for the jury to determine the reasonableness of the defendant’s belief that self-defense was warranted under the circumstances as they appeared to him.*” (emphasis added)). We see no error, much less plain error, in the trial court’s instructions.

The instructions were a correct statement of the law as applied to the facts in the case, including defendant’s allegation of self-defense. We remain unpersuaded by defendant’s argument that the jury was in “hopeless confusion as to which party bore the burden of proof on excessive force.” The record reveals that although the jury had questions regarding the definition of premeditation and the exhibits used at trial, the jury never asked for clarification on the trial court’s instruction on self-defense or excessive force. The record does not support defendant’s contention that the jury was

confused about the burden of proof as to excessive force. Here, defendant shoots into a car, then claims self-defense for a shooting he initiated. Further, defendant says he did not intend to shoot anyone, he just shot “at” the other car. Under these circumstances, defendant was not entitled to a self-defense instruction, but due to an abundance of caution exhibited by the trial court, he received the instruction. Defendant’s argument is overruled.

II

Defendant argues the trial court erred by denying his request for jury instructions on self-defense to felony murder based on the underlying felony of attempted sale of a controlled substance with the use or possession of a firearm. Specifically, defendant argues it was erroneous to not instruct the jury on self-defense to felony murder because the attempted drug crime ended before he fired his pistol into the victim’s vehicle. We disagree.

“Assignments of error challenging the trial court’s decisions regarding jury instructions are reviewed *de novo* by this Court.” *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). “Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (citation and quotation marks omitted). “[I]n determining whether a defendant is entitled to a self-defense instruction, the evidence must be viewed in the light most favorable to the

defendant, and the determination shall be based on evidence offered by the defendant and the State.” *State v. Cook*, 254 N.C. App. 150, 152, 802 S.E.2d 575, 577 (2017) (internal citation and quotation marks omitted).

In North Carolina, “[t]here 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 (2009) (citation and quotation marks omitted). A defendant may be criminally excused from killing another in a perfect self-defense if the evidence at trial shows that, at the time of the killing,

(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. Harvey, 372 N.C. 304, 307–08, 828 S.E.2d 481, 483 (2019). In felony murder cases, an instruction on self-defense is available to the extent that a perfect self-

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defense applies to the applicable underlying felonies. *State v. Richardson*, 341 N.C. 658, 668, 462 S.E.2d 492, 499 (1995). Additionally, self-defense “is not available to a person who used defensive force and who . . . [w]as attempting to commit, committing, or escaping after the commission of a felony.” N.C. Gen. Stat. § 14-51.4(1) (2019).

Here, the predicate offenses supporting defendant’s felony murder were the attempted sale of a controlled substance with a firearm and discharging a firearm into an occupied vehicle. The State’s evidence established that defendant had met with police and gave a statement. Defendant told police he was meeting Malloy to sell him drugs. Defendant, himself, testified at trial stating that his intent in meeting with Malloy and Thomas that morning was to sell them drugs, and he had marijuana with him when he arrived at the apartment complex. Defendant admitted shooting at the other car. In fact, defendant admitted at trial that he grabbed a gun from the console of the Altima and started shooting at the other vehicle. Thus, by defendant’s own admission at trial, he was attempting to commit a felony—the sale of drugs—at the time of the altercation, such that he was not entitled to the defense of self-defense. *See id.* (“The justification . . . is not available to a person who used defensive force and who . . . [w]as attempting to commit, committing, or escaping after the commission of a felony.”).

Further, even assuming *arguendo* the trial court erred, the State’s evidence establishing the underlying felony and the use of excessive force was significant.

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Defendant admitted to attempting to sell drugs to the victim, Malloy, just before the shooting began. There were three firearms—excluding the unfired firearm found on the victim—connected to the scene of the crime and the victim’s murder. The shell casings found on the Altima and underneath the driver’s seat matched the bullet removed from the victim’s head and linked to a 9mm Lugar. Eyewitnesses testified that defendant and the other occupant in the Altima leaned forward and began shooting at the other vehicle before driving away. In fact, defendant, who was also a convicted felon prior this incident, admitted at trial that he grabbed a gun from the console of the Altima and started shooting at the other vehicle. Additionally, defendant’s clothing seized by police from Daniel’s apartment also had gun residue on them.

The overwhelming evidence, even when considered in the light most favorable to defendant, demonstrates defendant possessed and discharged a firearm while attempting to conduct a sale of controlled substances. The evidence does not show the attempted drug sale ended before defendant fired his gun. Thus, the trial court did not err in denying defendant’s request for jury instructions on self-defense to felony murder relating to the felony of attempted sale of a controlled substance with the use or possession of a firearm as it is clear defendant was not entitled to receive such instruction.

NO ERROR.

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Judges DIETZ and HAMPSON concur.

Report per Rule 30(e).