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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA20-221

Filed: 31 December 2020

Mecklenburg County, No. 17 CRS 230316

STATE OF NORTH CAROLINA

v.

GEORGE FERNANDEZ

Appeal by defendant from judgment entered 24 October 2019 by Judge Carla Archie in Superior Court, Mecklenburg County. Heard in the Court of Appeals 6 October 2020.

*Attorney General Joshua H. Stein, by Deputy General Counsel Blake W. Thomas, for the State.*

*Meghan Adelle Jones, for defendant.*

STROUD, Judge.

Defendant appeals from his conviction for voluntary manslaughter. Defendant argues the trial court erred by denying a pretrial determination on immunity from criminal liability, that he received ineffective assistance of counsel, and in the alternative that the jury instructions were erroneous. Because Defendant's counsel agreed for immunity from criminal liability to be determined during the trial, we

conclude the trial court did not err by considering Defendant's motion after presentation of the evidence. The trial court's instructions to the jury were correct, and we also conclude Defendant's counsel did not provide ineffective assistance of counsel.

## I. Background

At trial, the State's evidence tended to show that Defendant lived with Angelina Ramirez and her three children in Charlotte. Jamario McNeely was homeless and mowed lawns in the neighborhood. Defendant let Mr. McNeely borrow his lawnmower, and Mr. McNeely sometimes slept on the living room couch and in Defendant's car.

On 9 August 2017 Ms. Ramirez returned home from work, and Mr. McNeely was asleep on the couch. Ms. Ramirez's children let the family dogs out, and Mr. McNeely got upset with Ms. Ramirez for waking him up. When Defendant came home later that day, Ms. Ramirez told him about her interaction with Mr. McNeely and asked him to stop letting Mr. McNeely stay in the home. Mr. McNeely was sleeping in the car, and Defendant woke him up and told him he could not stay in the house or car any longer.

The next day, Defendant and Mr. McNeely had a series of four interactions, with Mr. McNeely making verbal threats each time. Defendant and Mr. McNeely

had a history of play wrestling, and Defendant testified that Mr. McNeely "talked a lot." But Defendant was "always able to calm him down using words."

Defendant testified that at the first encounter Mr. McNeely said, "he was going to beat the hell out of me and anybody else around me." At the end of this encounter Defendant got a shotgun from inside the house and loaded it. Approximately twenty minutes later, Mr. McNeely returned and started talked about burning down the house. In the third encounter, approximately two hours later, Defendant testified that Mr. McNeely said, "Come over here and we'll see what's up" and "I'm going to get Crip." In the fourth and final encounter, Ms. Ramirez testified that Mr. McNeely said, "What are you trying to do, be a man in front of your woman? . . . Oh, you ain't shit."

During the fourth encounter, Defendant and Ms. Ramirez were on the porch when Mr. McNeely walked onto her property. Ms. Ramirez stayed on the porch while she testified that Defendant "stepped off the porch." Ms. Ramirez testified she was "just browsing my phone, probably looking on Facebook," when the shooting began. The evidence presented to the jury showed Defendant shot Mr. McNeely four times. Defendant's neighbor, William Burr, recalled that he heard two initial shots, and then he saw Mr. McNeely running. Mr. Burr explained that Mr. McNeely was "running from [Defendant's] house towards the road." Mr. Burr saw Mr. McNeely fall after

two more shots. Mr. McNeely had six wounds, with some shotgun slugs causing multiple wounds. When police arrived, Mr. McNeely's body was in the road.

Defendant was indicted on one count of murder and tried at the 8 October 2019 Criminal Session of Superior Court, Mecklenburg County. The jury found Defendant guilty of voluntary manslaughter. The trial court sentenced Defendant accordingly, and Defendant gave oral notice of appeal.

## II. Immunity

Defendant argues, "the trial court erred in denying [Defendant's] motion to dismiss, where he was entitled to a pretrial determination of immunity from criminal liability." (Original in all caps.)

Defendant argues the trial court failed to have a pretrial determination on criminal liability in violation of North Carolina General Statutes §§ 14-51.2-3. "Whether a trial court violated a statutory mandate is a question of law, subject to de novo review on appeal." *State v. Hood*, ___ N.C. App. ___, ___, 848 S.E.2d 515, 518 (2020) (citing *State v. Johnson*, 253 N.C. App. 337, 345, 801 S.E.2d 123, 128 (2017)).

### A. Pretrial Determination

On 8 October 2019, Defendant filed a motion labeled "Motion to Dismiss and/or for Determination of Immunity." In this motion, Defendant asked the court to dismiss the case pursuant to North Carolina General Statutes §§ 14-51.2 and 51.3 for the following reasons:

> 1. Defendant is charged with First-Degree Murder arising out events that took place on August 11. 2017.
>
> 2. The evidence will show that on that date the decedent, Jamario McNeely came upon the property occupied by the Defendant and his girlfriend that McNeely did so unlawfully and forcefully, and that, as such, Defendant is entitled to the presumption that he held a reasonable fear of imminent death or serious bodily harm to himself or another.
>
> 3. As. such Defendant is, as a matter of law, justified in using the force he did against Jamario McNeely and is immune from criminal liability for the use of such force.
>
> 4. Defendant is entitled to a pretrial hearing on this Motion, as the claim of immunity if successful would forestall the need for a jury trial.

At the beginning of Defendant's trial on 8 October 2019, the trial court addressed the pretrial motions:

> THE COURT: All right. Let's walk through pretrial motions. All right, before I get to motions, I do note the defendant's notice of affirmative defenses. I see self-defense and defense of others. Is that accurate, Mr. Trobich?
>
> MR. TROBICH: That is, Your Honor, along with -- to the extent it's an affirmative defense, the Castle doctrine motion.
>
> THE COURT: All right, that is not an affirmative defense, but might warrant, and we will visit that at the close of the evidence and any instructions that might go to the jury. . . .
>
> . . . .

> THE COURT: All right, then turning to the defendants, I have a motion to dismiss and/or determination of immunity filed October 8th, 2019.
>
> MR. TROBICH: That's the Castle doctrine motion that I referenced before, Your Honor. As I indicated, I think at this point that was -- when I was first served on the State of -- I actually served on the State about a year ago when we first thought we were going to try this case.[1] *My hope was that there would be in fact a separate pretrial motion on that issue. That didn't happen. Since we are here at trial now in order to not duplicate testimony, I would simply reserve that motion for the conclusion of the State's and/or all the evidence.*
>
> THE COURT: All right. We will visit that at the appropriate time.

(Emphasis added.)

The State contends North Carolina General Statutes §§ 15A-51.2-.3 do not "mandate a pretrial determination" of immunity. The State is correct that "[b]oth statutes are silent about the procedure for raising immunity." *See* N.C. Gen. Stat. §§ 15A-51.2-.3. But since Defendant waived any potential right to a pretrial determination of immunity, we need not address the proper procedure for determining immunity prior to trial.

"[A] defendant may waive the benefit of statutory . . . provisions by express consent, failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it." *State v. King*, 353 N.C. 457, 466, 546 S.E.2d 575, 584 (2002) (quoting

[1] Although Defendant's counsel seems to refer to a prior motion "about a year ago," our record includes only one motion requesting a pretrial determination of immunity, filed on the first day of trial.

*State v. Young*, 291 N.C. 562, 567, 231 S.E.2d 577, 580 (1977)). Defendant's motion was filed with the trial court on the morning of the trial. Defendant's counsel stated, "Since we are here at trial now in order to not duplicate testimony*, I would simply reserve that motion for the conclusion of the State's and/or all the evidence*." (Emphasis added.) We conclude Defendant waived any potential right to have a pretrial determination on criminal liability, and this argument is overruled.

B. Motion to Dismiss

Defendant argues, "[t]he trial court's denials of his motions to dismiss on the basis of statutory immunity at the close of the State's evidence and at the close of all evidence were also error."

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.'" *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "In making its determination, the trial court must consider all

evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

Defendant argues "the State's evidence failed to rebut the statutory presumption that [Defendant] was entitled to use defensive force against McNeely, who had unlawfully entered [Defendant's] home." North Carolina General Statute § 14-51.2 states:

> (b) The lawful occupant of a home, motor vehicle, or workplace is presumed to have held a reasonable fear of imminent death or serious bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or serious bodily harm to another if both of the following apply:
>
> > (1) The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a home, motor vehicle, or workplace, or if that person had removed or was attempting to remove another against that person's will from the home, motor vehicle, or workplace.
> >
> > (2) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.

N.C. Gen. Stat. § 14-51.2(b)(1)-(2) (2019). However, the presumption is rebuttable and does not apply in several instances set out in subsection (c) of the statute. *See*

N.C. Gen. Stat. § 14-51.2(c). In this case, the State contends the presumption does not apply based upon subsection (c)(5):

> (5) The person against whom the defensive force is used (i) has discontinued all efforts to unlawfully and forcefully enter the home, motor vehicle, or workplace and (ii) has exited the home, motor vehicle, or workplace.

N.C. Gen. Stat. § 14-51.2(c)(5).

The State argues the following evidence was presented to the jury which tended to show that Mr. McNeely had "discontinued all efforts to unlawfully and forcefully enter the home," and had "exited the home." *Id.* Defendant told detectives after the shooting that Mr. McNeely was running away. Defendant's neighbor, Mr. Burr, testified that there was a pause after the first two shots, in which he saw Mr. McNeely "running from [Defendant's] house towards the road." Mr. Burr also testified that after hearing two more shots, "[Mr. McNeely] just fell down in the road[.]" The State's expert in forensic pathology testified that Mr. McNeely's fatal wound "would very likely have put him almost instantly unconscious, just from the shock and the location of the injury." And the State's expert testified that Mr. McNeely would have been unable to run after sustaining that injury.

In the light most favorable to the State, *Rose*, 339 N.C. at 192, 451 S.E.2d at 223, there is substantial evidence to rebut the presumption that Defendant was entitled to use defensive force. The trial court did not err by denying Defendant's motions to dismiss.

## III. Ineffective Assistance of Counsel

Defendant "argues that he was denied his right to effective assistance of counsel when his attorney reserved the immunity motion, after the trial court had announced its decision not to make a pretrial determination as to [Defendant's] right to immunity from criminal prosecution."

To show ineffective assistance of counsel,

> the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial whose result was reliable. Unless a defendant makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process which renders the result unreliable.

*Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984); *see also State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985). "The merits of an ineffective assistance of counsel claim will be decided on direct appeal only 'when the cold record reveals that no further investigation is required.'" *State v. Friend*, 257 N.C. App. 516, 521, 809 S.E.2d 902, 906 (2018) (quoting *State v. Thompson*, 359 N.C. 77, 122-23, 604 S.E.2d 850, 881 (2004)).

Here, where the State presented evidence which rebutted the presumption that Defendant was entitled to use defensive force, this issue was for the jury to

resolve. *See State v. Barrett*, 20 N.C. App. 419, 422-23, 201 S.E.2d 553, 555 (1974) ("The presumption of malice is rebuttable. The thrust of defendant's argument is that the evidence demanded a finding that, as a matter of law, defendant acted in self-defense and thus the shooting was both justified and without malice. Whether the evidence rebuts the presumption of malice in a homicide with a deadly weapon is a jury question."). Defendant has failed to show that he received ineffective assistance of counsel.

## IV. Jury Instructions

Defendant argues, "[w]here the applicable statutes providing immunity for use of defensive force do not limit that immunity, the trial court committed reversible error in instructing the jury on requirements which are unsupported by the statute."

### A. Standard of Review

"This Court reviews a challenge to a trial court's decision regarding jury instructions de novo, and we review 'the jury instructions in their entirety when determining if there was error.'" *State v. Cruz*, ___ N.C. App. ___, ___, 845 S.E.2d 199, 203 (2020) (quoting *State v. Wirt*, 263 N.C. App. 370, 822 S.E.2d 668, 673 (2018)).

### B. Reasonableness

During the charge conference, Defendant's counsel objected to the inclusion of reasonableness in instructions on the use of defensive force:

> [I]f Your Honor would turn to the bottom of page 7 and the top of page 8, the State requests language that is included

> in 308.80, beginning, 'the defendant was justified in using deadly force if', and then goes through three enumerated paragraphs. Those speak to a reasonableness standard that the defense would contend is contained nowhere in the statute.
>
> Respectfully, where the drafters of the instruction got this language is a mystery to me, but these three enumerated paragraphs are not contained in 14-51.2 and articulate a reasonableness standard . . . that I don't believe that statute encompasses, or even intends, or even implies.

The trial court declined to make Defendant's requested changes. Defendant's counsel renewed his objection after the jury charge.

The trial court instructed the jury as follows:

> You, the jury, determine whether the defendant's belief was reasonable from the circumstances as they appeared to the defendant at the time. If the defendant killed the victim to prevent a forcible entry into the defendant's place of residence, or to terminate the intruder's unlawful entry, the defendant's actions are excused, and the defendant is not guilty.
>
> The State has the burden of proving from the evidence beyond a reasonable doubt that the defendant did not act in the lawful defense of the defendant's place of residence. A place of residence includes the full premises of the property, including the yard and the driveway. The defendant was justified in using deadly force if, one, such force was being used to prevent a forcible entry or to terminate the intruder's unlawful entry into the defendant's place of residence. Two, the defendant reasonably believed that the intruder would kill or inflict serious bodily harm on the defendant, or to the defendant or others, in the place of residence. And three, the defendant reasonably believed that the degree of force the defendant used was necessary to prevent a forcible entry

> or terminate the intruder's unlawful entry into the defendant's place of residence.
>
> A lawful occupant within a place of residence does not have a duty to retreat from an intruder in these circumstances. Furthermore, a person who unlawfully, and by force, enters, or attempts to enter a person's place of residence is presumed to be doing so with the intent to commit an unlawful act involving force or violence. *In addition, absent evidence to the contrary, the lawful occupant of the place of residence is presumed to have held a reasonable fear of imminent death or serious bodily harm to himself or another when using defensive force that is intended or likely to cause death or serious bodily harm to another if both of the following apply: one, the person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered a place of residence, or if that person had removed, or was attempting to remove another against that person's will from the place of residence; and two, the person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.*
>
> This presumption shall be rebuttable and does not apply if the person against whom defensive force is used, one, had discontinued all efforts to unlawfully and forcefully enter the premises, and two, has exited the premises.
>
> It is for you, the jury, to determine the reasonableness of the defendant's belief from the circumstances as they appeared to the defendant at the time.

(Emphasis added.)

Defendant argues the trial court abrogated his statutory right to defend his home by instructing the jury "that [Defendant] need have a reasonable belief that the degree of force used was necessary to terminate the unlawful entry. But, there is no

such requirement under Section 14-51.2 that [Defendant] need have believed that the degree of force used was necessary to terminate McNeely's unlawful entry."

North Carolina General Statute § 14-51.3(a) states that "use of deadly force" is justified only if the person using deadly force "reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another." N.C. Gen. Stat. § 14-51.3(a). This also applies "[u]nder the circumstances permitted pursuant to G.S. 14-51.2." *Id.* North Carolina General Statute 14-51.2 provides a rebuttable presumption that "[t]he lawful occupant of a home. . . is presumed to have held a reasonable fear of imminent death or serious bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or serious bodily harm to another if" "[t]he person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered [the home]," and "[t]he person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred." N.C. Gen. Stat. § 14-51.2 (b).

In context, the challenged portion of the trial court's instruction informed the jury that "defendant was justified in using deadly force if . . . the defendant reasonably believed that [the use of deadly force] was necessary to prevent a forcible entry or terminate the intruder's unlawful entry into the defendant's place of residence." This language is similar to language contained earlier in the jury charge and the pattern

jury instruction, "If the defendant killed the victim to prevent a forcible entry into the defendant's place of residence, or to terminate the intruder's unlawful entry, the defendant's actions are excused, and the defendant is not guilty." N.C.P.I.—Criminal 308.80. "The reasonableness of defendant's action and of his belief that force was necessary presents a jury question to be resolved on the basis of the facts and circumstances surrounding the homicide." *State v. Barrett*, 20 N.C. App. 419, 423, 201 S.E.2d 553, 555-56 (1974) (citing *State v. Gladden*, 279 N.C. 566, 184 S.E.2d 249 (1971)). In addition, the trial court instructed the jury regarding the defense of habitation and rebuttable presumption of a reasonable fear of imminent death or serious bodily harm. *State v. Coley*, 375 N.C. 156, 160-61, 846 S.E.2d 455, 458 (2020) ("In North Carolina, the right to use deadly force to defend oneself is provided both by statute and case law. Pursuant to the applicable statutory law, there are two circumstances in which individuals are justified in using deadly force, thus excusing them from criminal culpability under the theory of self-defense. . . . . Under [North Carolina General Statutes §§ 14-51.2-3] a person does not have a duty to retreat but may stand his ground against an intruder."). Considering the jury instructions in their entirety, we conclude there was no error by the trial court. This argument is overruled.

## V. Conclusion

For the foregoing reasons, we conclude Defendant received a fair trial free from prejudicial error.

NO ERROR.

Chief Judge McGEE and Judge ARROWOOD concur.

Report per Rule 30(e).