An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA20-41

Filed: 6 October 2020

Hertford County, No. 16CRS050772; 16CRS000437; 16CRS000455-56

STATE OF NORTH CAROLINA

v.

SHAKUR STEPHENSON, Defendant.

Appeal by Defendant from judgment entered 12 February 2019 by Judge Marvin K. Blount, III, in Hertford County Superior Court. Heard in the Court of Appeals 11 August 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney General Michael T. Henry, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katy Dickinson-Schultz, for the Defendant.*

BROOK, Judge.

Shakur Stephenson ("Defendant") appeals from judgment entered upon jury verdicts finding him guilty of first-degree murder under the felony murder rule, discharging a weapon into an occupied vehicle, two counts of assault with a deadly weapon with intent to kill inflicting serious injury ("AWDWIKISI"), and three counts of assault with a deadly weapon with intent to kill ("AWDWIK"). Defendant contends

the trial court plainly erred in failing to instruct the jury on self-defense, and, in the alternative, that he received ineffective assistance of counsel when his trial counsel failed to request a self-defense instruction. Defendant also argues that the trial court erred in denying Defendant's motion to dismiss the charges of assault with a deadly weapon inflicting serious injury. We hold that Defendant received a trial free from error and did not receive ineffective assistance of counsel.

## I. Background

### A. Factual Background

Defendant, accompanied by Keondre Taylor, drove to a gas station in Ahoskie, North Carolina, around 1:30 a.m. on 4 August 2016 to put gas in the car he was driving and to speak with Lakeisha Sutton, who worked at the gas station. Defendant was driving a gray Chevrolet Malibu sedan. A few minutes after Defendant pulled in, Curtis Poulson pulled up to the gas station in his Chevrolet Yukon. In Mr. Poulson's car were Antonio Holley, Randy Rankins, and Donald Outlaw. Defendant's Malibu and Mr. Poulson's Yukon were parked at parallel gas pumps but facing opposite directions. Around the same time, Jeremy Bayse, who knew Messrs. Holley and Poulson, pulled into the gas station to buy alcohol and cigarettes.

Mr. Holley went into the convenience store portion of the gas station, followed by Defendant and Mr. Taylor. An argument ensued between Defendant and Mr. Holley at the cash register.

Mr. Holley left the store and got back into the Yukon, and Defendant left with Mr. Taylor moments later. Mr. Bayse followed the men to "diffuse the situation." Defendant got into the driver seat of his car, Mr. Outlaw approached Defendant, and Defendant and Mr. Outlaw continued arguing. Defendant testified he was "picking" on the men who had arrived in the Yukon. He heard Mr. Outlaw say to Mr. Holley, "you got that tool on you" and Mr. Holley said, "Man, get him, get him, man, get him." Defendant understood "tool" to mean "gun." Defendant also saw Mr. Holley with a gun in his hand. Mr. Outlaw then reached into the driver side window of Defendant's car and punched him several times as Defendant started to drive the car forward. Ms. Sutton then left the gas station, approached the men in the Yukon, and asked if everything was okay.

Defendant then made a U-turn, drove back past the men in the Yukon, and fired eight gunshots. He testified that as he was driving around the pumps and passing the Yukon, Mr. Taylor handed him a gun and that he began shooting because "I felt like they was going to kill me. So I – I aim the gun out the window." He testified he wanted to "scare them off and try to get past them," and that he was not aiming at anyone, not "trying to hit them or nobody else," "didn't know where [he] was shooting," and intended only "to scare them off." One shot struck Ms. Sutton in the head, and she later died from her injuries. Mr. Holley was struck once in the buttocks, and Mr. Outlaw was struck once in the foot. Both Messrs. Holley and

Outlaw received treatment at the hospital for their gunshot injuries. Defendant testified that he did not intend to shoot Ms. Sutton and was not aware that she was outside.

B. Procedural History

On 6 September 2016, a Hertford County grand jury indicted Defendant for first-degree murder, three counts of AWDWIK, two counts of AWDWIKISI, one count of discharging a firearm into an occupied vehicle, and five counts of attempted first-degree murder.

A jury trial was held during the 4 through 12 February 2019 criminal sessions of Hertford County Superior Court before Judge Blount. At the jury charge conference, defense counsel requested an instruction on voluntary manslaughter based on imperfect self-defense. Defense counsel conceded the doctrine of perfect self-defense did not apply to the case. The trial court denied the request based on both the evidence and the fact that defense counsel did not file notice of Defendant's intent to argue self-defense pursuant to N.C. Gen. Stat. § 15A-905(c)(1). Defense counsel noted an objection on the record.

On 12 February 2019, the jury found Defendant guilty of first-degree murder under the felony murder rule, discharging a weapon into an occupied vehicle, two counts of AWDWIKISI, and three counts of AWDWIK. The jury found Defendant not guilty of all counts of attempted first-degree murder. Upon these verdicts, the trial

court arrested judgment on the convictions other than for first-degree murder, merged them into Defendant's murder conviction as predicate felonies under the felony murder rule, and sentenced Defendant to life imprisonment without the opportunity for parole. Defendant appealed in open court.

## II. Jurisdiction

Jurisdiction lies with this Court from the judgment of superior court pursuant to N.C. Gen. Stat. § 7A-27(b)(1).

## III. Analysis

Defendant argues that the trial court erred in failing to sua sponte instruct the jury on perfect self-defense. In the alternative, Defendant argues that his counsel was ineffective for requesting an imperfect as opposed to a perfect self-defense instruction. Because we conclude that Defendant was not entitled to a self-defense instruction, we hold that the trial court did not err in failing to give a self-defense instruction and that Defendant has not proved his counsel was ineffective. Defendant also contends that the trial court erred in failing to grant his motion to dismiss the charges of AWDWIKISI for insufficient evidence because the State failed to present sufficient evidence that Mr. Holley's and Mr. Outlaw's injuries were serious. We disagree.

### A. Standard of Review

Where a criminal defendant does not request a jury instruction nor object to a court's failure to give an instruction, we review the appeal under the plain error standard. *State v. Davis*, 349 N.C. 1, 28, 506 S.E.2d 455, 470 (1998) (concluding that the plain error rule permits review of alleged errors affecting substantial rights where a defendant does not preserve the error for review), *cert. denied*, 526 U.S. 1161, 119 S. Ct. 2053, 144 L. Ed. 2d 219 (1999); *see also State v. Davis*, 177 N.C. App. 98, 102, 627 S.E.2d 474, 477 (2006) (reviewing alleged failure to give self-defense instruction for plain error where defendant failed to request instruction).

> The plain error rule is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done . . . or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

*State v. Lemons*, 352 N.C. 87, 96-97, 530 S.E.2d 542, 548 (2000) (internal marks and citations omitted), *cert. denied*, 531 U.S. 1091, 121 S. Ct. 813, 148 L. Ed. 2d 698 (2001).

We review a claim of ineffective assistance of counsel de novo. *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009). "Under a *de novo* review, th[is C]ourt considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (internal marks and citation omitted).

Finally, "[w]hether the State presented substantial evidence of each essential element of [an] offense is a question of law; therefore, we review the denial of a motion to dismiss de novo." *State v. Crockett*, 368 N.C. 717, 720, 782 S.E.2d 878, 881 (2016).

B. Self-Defense Instruction

Defendant contends that the trial court erred in failing to instruct the jury on self-defense. For the following reasons, we disagree.

"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. Locklear*, 349 N.C. 118, 154, 505 S.E.2d 277, 298 (1998) (citation omitted), *cert. denied*, 526 U.S. 1075, 119 S. Ct. 1475, 143 L. Ed. 2d 559 (1999).[1]

> A defendant is entitled to an instruction on perfect self-defense as an excuse for a killing when evidence is presented tending to show that, at the time of the killing:
>
> (1) it appeared to defendant and he believed it to be necessary to kill [his adversary] 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

[1] We note that self-defense is not a defense to first-degree murder under the felony murder theory. *State v. Richardson*, 341 N.C. 658, 668, 462 S.E.2d 492, 499 (1995). "In felony murder cases, self-defense is available only to the extent that *perfect* self-defense applies to the relevant underlying felonies." *State v. Martin*, 131 N.C. App. 38, 45, 506 S.E.2d 260, 265 (1998). Where perfect self-defense is a defense to the underlying felony, the defense "would thereby defeat the felony murder charge[.]" *State v. Juarez*, 369 N.C. 351, 354, 794 S.E.2d 293, 297 (2016). We therefore assess Defendant's entitlement to a self-defense instruction on the underlying felony charges, to wit, AWDWIK, AWDIKISI, and discharging a weapon into an occupied vehicle.

> 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. Gappins*, 320 N.C. 64, 70-71, 357 S.E.2d 654, 659 (1987) (citation omitted). In cases in which the defendant was the aggressor or did use excessive force, imperfect self-defense may apply, as articulated by our Court in *State v. Hughes*:

> Imperfect self-defense arises when only elements (1) and (2) are established, in which case a defendant would remain guilty of at least voluntary manslaughter. However, both elements (1) and (2) in the preceding quotation must be shown to exist before the defendant will be entitled to the benefit of either perfect or imperfect self-defense.

82 N.C. App. 724, 727, 348 S.E.2d 147, 150 (1986) (internal marks and citation omitted). Our Supreme Court has held that

> before the defendant is entitled to an instruction on self-defense, two questions must be answered in the affirmative: (1) Is there evidence that the defendant in fact formed a belief that it was necessary to kill his adversary in order to protect himself from death or great bodily harm, and (2) if so, was that belief reasonable? If both queries are answered in the affirmative, then an instruction on self-defense must be given. If, however, the evidence requires a negative response to either question, a self-defense instruction should not be given.

*State v. Bush*, 307 N.C. 152, 160-61, 297 S.E.2d 563, 569 (1982). "In determining whether an instruction on . . . self-defense must be given, the evidence is to be viewed in the light most favorable to the defendant." *State v. Moore*, 363 N.C. 793, 796, 688 S.E.2d 447, 449 (2010).

Our Supreme Court has consistently held that a criminal defendant who claims that he or she did not intend to kill or injure his or her adversary is not entitled to a self-defense instruction.[2] *See, e.g.*, *State v. Blankenship*, 320 N.C. 152, 155, 357 S.E.2d 357, 359 (1987) (finding no entitlement to self-defense instruction where "defendant's evidence tended to show that the shooting was an accident"). Similarly, where a defendant testifies that he merely intended to scare the victim but killed him instead, he is not entitled to a self-defense instruction. *See, e.g.*, *State v. Williams*, 342 N.C. 869, 873, 467 S.E.2d 392, 394 (1996) (holding no self-defense instruction required where "defendant testified that he fired his pistol three times into the air to

---

[2] The cases that follow involve factual scenarios in which the victim and the defendant's alleged aggressor were one and the same; such is not the case here where Defendant testified he shot toward the men in the Yukon but accidentally killed Ms. Sutton. However,

> [i]t is an accepted principle of law that where one is engaged in an affray with another and unintentionally kills a bystander or a third person, his act shall be interpreted with reference to his intent and conduct towards his adversary. Criminal liability, if any, and the degree of homicide must be thereby determined. Such a person is guilty or innocent exactly as though the fatal act had caused the death of his adversary. It has been aptly stated that "The malice or intent follows the bullet."

*State v. Wynn*, 278 N.C. 513, 519, 180 S.E.2d 135, 139 (1971) (quoting 40 Am. Jur. 2d *Homicide* § 11, at 302). As such, we rely on this doctrine of transferred intent in applying the applicable law to the facts at hand.

scare [his adversary] and the others and make them retreat so he could leave the area"); *State v. Lyons*, 340 N.C. 646, 662, 459 S.E.2d 770, 779 (1995) (holding self-defense instruction not appropriate where "from defendant's own testimony regarding his thinking at the critical time, it is clear he meant to scare or warn and did not intend to shoot anyone"); *see also State v. Cook*, 254 N.C. App. 150, 153-54, 802 S.E.2d 575, 577 (2017) ("[A] person under an attack of deadly force is not entitled to defend himself by firing a warning shot, even if he believes that firing a warning shot would be sufficient to stop the attack; he must shoot to kill or injure the attacker to be entitled to the instruction."), *aff'd per curiam*, 370 N.C. 506, 809 S.E.2d 566 (2018).

Here, Defendant testified unequivocally and repeatedly that he did not intend to shoot his adversaries. He instead insisted that he "was just trying to shoot, to be honest, to scare them off and try to get past them." He amplified: "I just started shooting. I just started shooting to be honest to try to get past them. I wasn't intending to shoot nobody or hurt nobody." He then again reiterated, "I was just shooting, shooting trying to scare the other guys off, after they attack me and everything." When defense counsel asked Defendant, "Were you aiming at anyone?" he replied, "No, sir." He later returned to this point stating, "I didn't know where I was shooting. Like I said[,] I was trying to scare them off." His counsel similarly returned to this point asking, "And were you shooting to hit anybody with that gun?"

to which Defendant answered, "I wasn't shooting trying to hit anyone. I was just basically really trying to get out of harm's way." By Defendant's admission, he merely intended to scare the men in the Yukon, and he therefore failed to establish the first element of self-defense: that "he believed it to be necessary to kill [his adversary] in order to save himself from death or great bodily harm[.]" *Gappins*, 320 N.C. at 71, 357 S.E.2d at 659.

While there are no " 'magic words' a defendant must use to satisfy the elements of self-defense[,]" *State v. Harvey*, 260 N.C. App. 706, 817 S.E.2d 500, 501, 2018 WL 3734234, at *6 (2018) (unpublished), *aff'd*, 372 N.C. 304, 828 S.E.2d 481 (2019), a "defendant is not entitled to an instruction on self-defense while still insisting that he did not fire the pistol at anyone," *Williams*, 342 N.C. at 873, 467 S.E.2d at 394. Here, Defendant testified, by our count, 16 times either that he shot only to scare the men off or that he did not intend to shoot anybody. Considering the evidence in the light most favorable to Defendant, we cannot, given his repeated testimony to the contrary, conclude that (1) he intended to shoot the men in the Yukon, and (2) that he did so based on a reasonable fear that doing so was necessary to save himself from great bodily harm. The trial court did not err in not sua sponte giving a self-defense instruction.

### C. Ineffective Assistance of Counsel

In the alternative, Defendant argues that he received ineffective assistance of counsel ("IAC") because his trial counsel failed to request that the trial court instruct the jury on perfect self-defense. We disagree.

To prevail on an IAC claim, a criminal defendant must show that his trial counsel's performance was deficient, and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). "If this Court 'can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different,' we do not determine if counsel's performance was actually deficient." *State v. Frazier*, 142 N.C. App. 361, 368, 542 S.E.2d 682, 687 (2001) (quoting *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 249 (1985)).

We conclude that there is no reasonable probability that the result of the proceeding would have been different because, as we concluded above, Defendant was not entitled to a self-defense instruction. Therefore, defense counsel's failure to request such an instruction did not prejudice Defendant. As a result, we conclude Defendant cannot prevail on an IAC claim.

D. Motion to Dismiss AWDWIKISI Charges

Defendant argues that the trial court erred in denying Defendant's motion to dismiss the charges of AWDWIKISI for insufficient evidence because he contends that the State did not introduce substantial evidence of the severity of Mr. Holley's

and Mr. Outlaw's injuries sufficient to send the charge of AWDWIKISI to the jury. We disagree.

When a criminal defendant moves to dismiss a charge for insufficient evidence, "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. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). In evaluating such a motion, the trial court must consider the evidence in the light most favorable to the State, and "the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom[.]" *Id.* at 99, 261 S.E.2d at 117. "[C]ontradictions and discrepancies are for the jury to resolve and do not warrant dismissal[.]" *Id.*

The elements of AWDWIKISI are "(1) an assault (2) with a deadly weapon (3) inflicting serious injury (4) not resulting in death." *State v. Ryder*, 196 N.C. App. 56, 66, 674 S.E.2d 805, 812 (2009) (citation omitted). Our Courts have not particularly defined "serious injury" in the context of assault cases; however, our Supreme Court has said that "[t]he injury must be serious[,] but it must fall short of causing death" and that "[f]urther definition seems neither wise nor desirable." *State v. Jones*, 258 N.C. 89, 91, 128 S.E.2d 1, 3 (1962). "Whether a serious injury has been inflicted is a factual determination within the province of the jury." *State v. Morgan*, 164 N.C.

App. 298, 303, 595 S.E.2d 804, 809 (2004). "Relevant factors in determining whether serious injury has been inflicted include[ ] but are not limited to: (1) pain and suffering; (2) loss of blood; (3) hospitalization; and (4) time lost from work." *Id.* For example, our Court has upheld a denial of a motion to dismiss for insufficient evidence on this charge where the State presented evidence that a victim was shot in the arm and received medical treatment at a hospital. *State v. Owens*, 65 N.C. App. 107, 108-09, 308 S.E.2d 494, 496-97 (1983).

Here, the State presented evidence that Messrs. Holley and Outlaw arrived at the hospital shortly after Defendant shot them with a 9mm handgun. The State presented further evidence that Mr. Holley was "moaning" and "in a lot of pain" at the hospital as a result of the gunshot wound to his buttocks, and that Mr. Outlaw was "in obvious pain" as a result of the gunshot wound to his foot. In fact, the responding officer could not immediately take a statement from Mr. Holley because the hospital staff was "very busy" tending to his injury. Further, Mr. Bayse, who was standing near Mr. Holley when Defendant shot toward the men, had blood on his pants from his hip to his ankle, and the rear seat of the Yukon was also covered in blood from the men's injuries. This constitutes substantial evidence that Defendant inflicted serious injuries sufficient to submit the AWDWIKISI charge to the jury.

## IV. Conclusion

Because we conclude that Defendant was not entitled to a self-defense instruction, we hold that the trial court did not plainly err in failing to instruct the jury sua sponte on self-defense and that Defendant did not receive ineffective assistance of counsel. We further conclude that the trial court did not err in denying Defendant's motion to dismiss for insufficient evidence. We therefore hold that Defendant received a trial free from error.

NO ERROR.

Judges BRYANT and STROUD concur.

Report per Rule 30(e).