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NO. COA14-758
NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2014

STATE OF NORTH CAROLINA

v.

Montgomery County
No. 11 CRS 50655

TONY LEE QUICK

Appeal by defendant from judgment entered 13 March 2014 by Judge Martin B. McGee in Montgomery County Superior Court. Heard in the Court of Appeals 17 November 2014.

Attorney General Roy Cooper, by Assistant Attorney General Nicholas G. Vlahos, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Constance E. Widenhouse, for defendant.

HUNTER, Robert C., Judge.

Defendant appeals the judgment entered after a jury convicted him of second degree murder. On appeal, defendant argues that the trial court committed plain error in failing to instruct on perfect or imperfect self-defense.

After careful review, we find no plain error.

Background

In May 2011, defendant Tony Quick ("defendant") was dating Nicole Smith ("Nicole"). Nicole was Preston Barrett's ("Preston's") half-sister. Preston lived with his mother and his sister Steshellie Barrett ("Stesh") in Candor, North Carolina. Although Preston and defendant knew each other, they were not close friends.

On the evening of 14 May 2011, Stesh and Nicole spent time with defendant and Reggie Moore ("Reggie"), a friend of defendant's, at Reggie's house. Nicole spent the night with defendant; Reggie took Stesh home around midnight. The next morning, around 10:30 a.m., Stesh called Reggie and asked him to come see her. About 45 minutes later, she called Reggie back because Preston wanted to speak to Nicole. Preston reportedly told Nicole to get dressed and that he wanted to talk to her and defendant.

Sometime in the afternoon of 15 May, Reggie drove his car to Preston's house with defendant riding in the passenger seat and Nicole in the back. When they arrived at Preston's house, Stesh came out of the house and began speaking with Reggie through the driver's side window. Nicole got out of the car and started to walk into Preston's house. On the porch, Preston and Nicole spoke quickly and hugged. Preston came down off the

porch and told defendant to get out of the car so that he could talk to him. According to Nicole, Preston told defendant: "Get out of the car, or I'm going to steal off on you." According to Nicole, this meant that Preston was threatening to hit defendant if he did not get out of the car. However, Nicole claimed that Preston said it in a "joking" way.

Instead of getting out of the car, defendant beckoned Preston over to Reggie's car. Reggie was still in the driver's seat. Preston walked up to the passenger side of Reggie's car and rested his hands on the open passenger window. Nicole followed Preston out to Reggie's car and stood beside him while he spoke to defendant. Stesh was still standing beside the driver's side window. Nicole testified at trial that, at first, "there[] [was] no sign of tension." Then, Preston reached both of his arms inside the car and began "struggl[ing]" with defendant over something. Nicole heard Preston say, "hey," and then she heard the first shot. Preston's shoulder dropped after the first shot, but he continued to reach into the car. A few seconds later, a second shot was fired. At this point, Nicole claimed that she saw the gun for the first time, jutting out the passenger window. According to Nicole, as Preston was falling to the ground, she heard two more shots.

Stesh also testified at trial. She claimed that, once defendant, Nicole, and Reggie arrived at her house, Preston kept telling defendant: "Get out of the car, man, I just want to talk to you." After defendant refused to get out of the car, Preston walked up to defendant's side of the car and saw a pistol in defendant's lap. Stesh claimed that defendant lifted up his shirt to show Preston the gun. Preston told defendant that he was not "afraid" of the gun, and Stesh claimed that they started struggling over the gun before the first shot went off. After the first shot, Stesh ran into the house to grab her own gun. After she got her shotgun, Stesh came out of the house and fired the shotgun at them as they drove away.

Preston was pronounced dead at the scene. An autopsy revealed that Preston had been shot four times. One shot was to the upper part of Preston's left arm where the arm meets the shoulder. The concentration of soot around the wound indicated that the gun was about one to two inches from Preston when fired. Another gunshot wound was to the upper left chest and was the fatal shot. There was no soot around the wound; however, Preston's t-shirt that he was wearing at the time he was shot had not been examined for the presence of soot. The

other two gunshot wounds were to the left side of defendant's head and the left side of his back.

Defendant's trial began 11 March 2014. Defendant did not testify at trial. At the close of all the evidence, the trial court instructed the jury on second degree murder, voluntary manslaughter based on a "heat of passion" theory, involuntary manslaughter, and accident. On 13 March, the jury found defendant guilty of second degree murder. The trial court sentenced defendant to a minimum term of 145 months to a maximum term of 183 months imprisonment, a sentence within the presumptive range. Defendant appeals.

Arguments

Defendant's sole argument on appeal is that the trial court committed plain error in failing to instruct on self-defense. Specifically, defendant contends that a reasonable juror could have inferred that defendant shot Preston in self-defense after Preston threatened to hit him and wrestled defendant for control of the gun. Accordingly, defendant alleges that the trial court should have instructed the jury on perfect self-defense, which, if found by the jury, would result in a verdict of not guilty, and on voluntary manslaughter based on the theory of imperfect self-defense. In support of his argument, defendant points to

the evidence showing that: (1) Preston initiated the confrontation by telling Nicole and defendant that he wanted to talk to them; (2) Preston threatened to hit defendant when defendant refused to get out of the car; (3) even after defendant showed Preston the gun, Preston refused to back off; (4) Preston tried to wrestle the gun away from defendant; and (5) all the shots were fired in rapid succession. Based on the evidence of record, we conclude that defendant was not entitled to an instruction on perfect self-defense because all the relevant evidence tends to show that defendant was the aggressor in the fight. Although we do believe that defendant was entitled to an instruction on imperfect self-defense, defendant is unable to show that the trial court's failure to instruct on it constituted plain error.

Standard of Review

As to instructions on self-defense, our Supreme Court has noted that:

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. For defendant to be entitled to an instruction on either perfect or imperfect self-defense, the evidence must show that defendant believed it to be necessary to kill his adversary in order to save himself from death or great bodily

harm. In addition, defendant's belief must be 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.

State v. Ross, 338 N.C. 280, 283, 449 S.E.2d 556, 559-60 (1994) (internal quotation marks and citations omitted). In determining whether the trial court should give an instruction on self-defense, the evidence must be viewed in a light most favorable to the defendant. *State v. Moore*, 363 N.C. 793, 796, 688 S.E.2d 447, 449 (2010).

However, because defendant failed to request an instruction on self-defense at trial, he must show plain error; the plain error standard is well-established:

For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations and quotation marks omitted).

A defendant acts in perfect self-defense if, at the time of the killing, all four of the following elements are satisfied: (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. Jackson, 145 N.C. App. 86, 92, 550 S.E.2d 225, 230 (2001). In contrast, "[a]n imperfect right of self-defense is available to a defendant who reasonably believes it necessary to kill the deceased to save himself from death or great bodily harm even if defendant (1) might have brought on the difficulty without murderous intent, and (2) might have used excessive force." *Id.*

A. Perfect Self-Defense

With regard to perfect self-defense, defendant is unable to establish all four elements because the evidence at trial tends to show that he was the aggressor in the altercation. Defendant willingly came to Preston's house armed with his pistol even though there was no evidence that Preston had threatened defendant prior to his arrival nor any evidence that it was necessary for defendant to arm himself for his protection.

Furthermore, even once defendant arrived and Preston allegedly threatened to hit him, defendant remained at the scene even though he had plenty of opportunity to leave. In fact, according to both Nicole and Stesh, defendant actually beckoned Preston over to Reggie's car after Preston's threat, presumably, to show Preston his gun. In sum, there was no evidence presented to dispute the fact that defendant sought Preston out and initiated and encouraged the confrontation; thus, defendant was the "aggressor in bringing on the affray," *Jackson*, 145 N.C. App. at 92, 550 S.E.2d at 230. Accordingly, defendant is unable to show that he was entitled to an instruction on perfect self-defense.

Furthermore, defendant's reliance on *State v. Spaulding*, 298 N.C. 149, 257 S.E.2d 391 (1979), for his contention that defendant was entitled to an instruction on self-defense is misplaced. In *Spaulding*, *id.* at 152, 257 S.E.2d at 393, the defendant was an inmate at Central Prison, living in one of the most secure blocks of the prison. The defendant brought a home-made knife with him to the yard during his recreation period. *Id.* at 153, 257 S.E.2d at 394. The victim approached the defendant in the yard and backed him up against the fence. *Id.* at 154, 257 S.E.2d at 394. According to the defendant and

several witnesses, the victim threatened to kill the defendant and began advancing toward him with his hand in his pocket. *Id.* at 154, 257 S.E.2d at 396. After the defendant tried, unsuccessfully, to tell the victim that he did not want trouble, the defendant stabbed him several times, killing him. *Id.* at 154-55, 257 S.E.2d at 396.

At trial, the defendant requested that the court instruct on self-defense, which it denied. *Id.* at 154, 257 S.E.2d at 394. On appeal, our Supreme Court agreed with the defendant, noting that although the victim did not make a show of deadly force toward the defendant or even have a weapon, the defendant was entitled to the self-defense instruction. *Id.* at 157, 257 S.E.2d at 396. Specifically, the Court concluded that the defendant was not the "aggressor" in the affray because the defendant did not aggressively seek out the victim nor did he provoke the victim. *Id.* at 156, 257 S.E.2d at 395. Therefore, the defendant was entitled to an instruction on self-defense based on the concept of apparent necessity. *Id.* at 157, 257 S.E.2d at 396.

Unlike *Spaulding*, however, defendant in this case was not "free from fault in the difficulty." *Id.* at 156, 257 S.E.2d at 395. In contrast, the evidence tends to show that defendant not

only sought Preston out "for the purpose of a violent encounter[,] " but he also "provoke[d]" Preston. See *id.* There was no evidence that Preston threatened defendant over the phone or indicated that he planned to respond violently once defendant arrived. Although Preston may have threatened to "hit" defendant once he arrived, defendant had the opportunity to withdraw from the confrontation. Instead, after voluntarily going to Preston's house, defendant beckoned Preston over to Reggie's car and showed Preston his gun. Therefore, unlike *Spalding*, defendant has not shown that he was free from fault in the confrontation nor that he was not the aggressor, and *Spalding* is not controlling. Instead, because all the evidence shows that defendant was the aggressor when he showed up armed and beckoned Preston over to Reggie's car, defendant is unable to show that he was entitled to an instruction on perfect self-defense.

B. Imperfect Self-Defense

Despite the fact that all the relevant evidence tends to show that defendant was the aggressor in the fight, defendant still may be entitled to an instruction on imperfect self-defense if he can show that he reasonably believed it was necessary to kill Preston to save his life or prevent great

bodily harm. See *Jackson*, 145 N.C. App. at 92, 550 S.E.2d at 230 (noting that "[a]n imperfect right of self-defense is available to a defendant who reasonably believes it necessary to kill the deceased to save himself from death or great bodily harm even if defendant (1) might have brought on the difficulty without murderous intent, and (2) might have used excessive force"). Here, taking the evidence in a light most favorable to defendant, once the fight began over control of the pistol and regardless of the fact that defendant brought the gun with him, defendant's belief that he needed to shoot Preston to protect himself was reasonable under the circumstances. At the time defendant first fired the gun, they were still engaged in the fight over the weapon. Furthermore, the findings from the autopsy support this scenario since at least one bullet wound had soot around it, indicating that Preston was shot in close proximity, approximately one to two inches, from defendant at the time defendant fired the gun. In addition, unlike cases where our Courts have concluded that a defendant was not entitled to an instruction on imperfect self-defense based on the "defendant's self-serving statements that he was 'nervous' and 'afraid' and that he thought he was 'protecting [himself],'" *State v. Bush*, 307 N.C. 152, 159, 297 S.E.2d 563, 568 (1982),

here, the evidence showing that Preston's actions may have provided a sufficient basis for believing that defendant had a reasonable belief that it was necessary to shoot Preston to save himself was not derived solely from defendant's testimony. See generally *State v. Moore*, 363 N.C. 793, 798, 688 S.E.2d 447, 450 (2010) ("It is significant that [the evidence showing that the defendant reasonably believed that it was necessary to use force to prevent death or great bodily harm] [wa]s not derived solely from [the] defendant's own testimony, but is corroborated by other testimony and evidence received at trial."). Both Nicole and Stesh testified that, at some point after Preston saw the pistol, he and defendant began fighting over it. In other words, the evidence suggested that defendant shot Preston while they were engaged in the fight. Finally, although defendant did not testify at trial, "a defendant is not required to testify or offer evidence in order for the jury to be instructed on the law of self-defense." *State v. Revels*, 195 N.C. App. 546, 551, 673 S.E.2d 677, 681 (2009). Instead, a defendant may be entitled to a self-defense instruction based on "any evidence" in the record establishing that he had a reasonable, subjective belief that it was necessary to kill the victim to protect himself from death or great bodily harm. *Bush*, 307 N.C. at 160, 297 S.E.2d at 569.

Thus, because there was undisputed evidence offered showing that defendant shot Preston during the fight over the pistol, we cannot say that, based on the circumstances present during the altercation, defendant's belief that it was necessary to shoot Preston to save his life, even though defendant might have brought on the difficulty himself, was unreasonable. Accordingly, the trial court's failure to instruct on imperfect self-defense, which would lead to a conviction for voluntary manslaughter, constituted error.

C. Plain Error

However, even though the trial court erred in failing to instruct on imperfect self-defense, we must still determine whether that omission constituted plain error. See *State v. Loftin*, 322 N.C. 375, 381-82, 368 S.E.2d 613, 617 (1988) (holding that although the trial court erred in failing to instruct on accident, the omission did not constitute plain error); *State v. Morgan*, 315 N.C. 626, 646-47, 340 S.E.2d 84, 96-97 (1986) (trial court's error in not instructing the jury as to the defendant's right to stand his ground was not plain error); *State v. Bennett*, 67 N.C. App. 407, 411, 313 S.E.2d 277, 280 (1984) (reviewing the defendant's alleged instructional error based on the trial court's failure to instruct on

imperfect self-defense for plain error). In other words, although we found that there was evidence that necessitated the instruction, i.e., that there was some evidence from which "the jury reasonably could find that the defendant in fact believed that it was necessary to kill his adversary to protect himself from death or great bodily harm[,]" *Bush*, 307 N.C. at 160, 297 S.E.2d at 569, we must examine the strength of the evidence supporting the jury's verdict of second degree murder to determine whether the jury "probably," *Lawrence*, 365 N.C. at 519, 723 S.E.2d at 335, would have reached a different verdict had it been instructed on imperfect self-defense. See generally *State v. Smith*, 162 N.C. App. 46, 52, 589 S.E.2d 739, 743 (2004) (looking at the strength of the evidence to determine whether an instructional error constituted plain error); *State v. Oliphant*, __ N.C. App. __, __, 747 S.E.2d 117, 124 (2013) (rejecting the defendant's contention that the instructional error constituted plain error based on the strength of the evidence against him).

Based on the record of evidence, we are unable to say that had the trial court given the called-for instruction on imperfect self-defense, "the jury probably would have reached a different verdict[,]" *Lawrence*, 365 N.C. at 519, 723 S.E.2d at 335. See generally *Bennett*, 67 N.C. App. at 411, 313 S.E.2d at

280 (refusing to find that the trial court's failure to instruct on imperfect self-defense constituted plain error when the evidence suggested that the defendant "had an altercation with his teenage daughter which led to his threatening her and then firing at her with a semi-automatic rifle"). With regard to second degree murder, this Court has noted that

Second-degree murder is the unlawful killing of another human being with malice, but without premeditation and deliberation. Malice is implied from a killing with a deadly weapon. When the killing with a deadly weapon is admitted or established, two presumptions arise: (1) that the killing was unlawful; (2) that it was done with malice; and an unlawful killing with malice is murder in the second degree.

State v. McMillan, 214 N.C. App. 320, 325, 718 S.E.2d 640, 644 (2011) (internal quotation marks omitted). Furthermore, not only must the defendant act with malice, but he also must act intentionally. *State v. Bostic*, 121 N.C. App. 90, 98, 465 S.E.2d 20, 24 (1995). Here, since defendant killed Preston with a deadly weapon, there is a presumption that it was done both unlawfully and with malice, and there was little evidence offered to overcome this presumption. The evidence presented at trial tended to show that defendant showed up to Preston's house with a pistol even though there was not any evidence presented at trial that defendant needed to protect himself. After

arriving, Preston allegedly told defendant to get out of Reggie's car and threatened to hit him; however, defendant refused to get out of the car but, instead, beckoned Preston over. Preston, who was unarmed, approached defendant's window and defendant showed Preston the gun. After a brief discussion where Preston allegedly told defendant that he was not "scared," the two began wrestling for the pistol. Soon thereafter, defendant shot Preston four times in rapid succession. Our examination of all the evidence leads us to conclude that, although it was error to not instruct on imperfect self-defense, the error did not have a "probable impact," *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334, on the jury's finding defendant guilty of second degree murder. Although there was some evidence that defendant acted reasonably once they began struggling for the gun, the overwhelming evidence suggests that defendant showed up armed and could have responded in any number of ways that would not have led to Preston's death. Instead, defendant actively encouraged the confrontation with Preston and, once he saw that Preston was not going to simply back down, shot him once the struggle began.

It is also important to note that the jury rejected the theory that defendant acted in a heat of passion after Preston

grabbed for the weapon. See generally *State v. Camacho*, 337 N.C. 224, 233, 446 S.E.2d 8, 13 (1994) (noting that "[v]oluntary manslaughter often occurs when the defendant acts in a heat of passion produced by legal provocation"). Moreover, the jury did not believe that defendant acted without premeditation, intent, or culpable negligence when he killed Preston and rejected defendant's claim of accident, see *State v. Lytton*, 319 N.C. 422, 425, 355 S.E.2d 485, 487 (1987) (explaining when the facts require an instruction on the defense of accident), and did not believe that defendant unintentionally killed Preston as a result of defendant's culpable negligence, see *State v. McGee*, __ N.C. App. __, __, 758 S.E.2d 661, 665 (2014) (defining involuntary manslaughter). Consequently, as the jury did with the possible verdicts of voluntary manslaughter based on the "heat of passion," involuntary manslaughter, and accident, we believe that the jury would "probably," *Lawrence*, 365 N.C. at 519, 723 S.E.2d at 335, still have convicted defendant of second degree murder and rejected the theory of imperfect self-defense. Accordingly, defendant is unable to meet the high burden of plain error.

Conclusion

Although defendant was not entitled to an instruction on perfect self-defense, the trial court should have instructed on imperfect self-defense. However, in light of all the evidence at trial, defendant has failed to show that the trial court's failure to instruct on imperfect self-defense constituted plain error.

NO PLAIN ERROR.

Chief Judge McGEE and Judge BELL concurs.

Report per Rule 30(e).