

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1138

Filed: 3 September 2019

Iredell County, 15 CRS 55659

STATE OF NORTH CAROLINA

v.

CHRISTOPHER A. HOLSHOUSER, Defendant.

Appeal by Defendant from Judgment entered 18 July 2017 by Judge Julia Lynn Gullett in Iredell County Superior Court. Heard in the Court of Appeals 24 April 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Hilda Burnett-Baker, for the State.

Edward Eldred for defendant-appellant.

MURPHY, Judge.

Where a criminal defendant testifies at trial that he did not commit the offense for which he has been charged, that defendant is not entitled to a jury instruction regarding the affirmative defense of justification. Defendant Christopher A. Holshouser testified at trial that he did not possess the shotgun he was charged with possessing in violation of our law against the Possession of a Firearm by a Felon (“PFF”). On appeal, Defendant argues the trial court committed plain error in failing to provide a jury instruction regarding the affirmative defense of justification. Because Defendant repeatedly testified that he did not possess the firearm in

question, the trial court did not commit plain error in forgoing an instruction regarding justification.

BACKGROUND

On 28 September 2015, Deputy Leo Hayes and Detective Chris Lambreth, both of the Iredell County Sheriff's Office, responded to a domestic dispute involving "a subject armed with a shotgun" at the home of Defendant. Upon their arrival, Defendant met the officers on the front porch of his residence and denied knowing anything about a shotgun. The officers explained that they had been told Defendant had thrown the gun into the woods behind his house. Deputy Hayes testified at trial that Defendant eventually admitted that he had thrown the shotgun into the woods and told the deputy where he had thrown it. Upon running Defendant's criminal history, the officers learned he was a convicted felon. The officers then placed Defendant under arrest for PFF.

At trial, Defendant testified that he had been involved in an altercation with his stepson, Nick, on the night in question but had never possessed the shotgun that was the subject of his indictment.¹ In relevant part, Defendant testified, "I don't think I remember taking [the shotgun] from [Nick,]" and—when asked directly whether he took possession of the gun—"[w]ell, that gun, no."

¹ Defendant was indicted for possessing "a New England Firearms Pardner Model 12 Gauge Shotgun, which is a firearm."

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At the conclusion of Defendant's trial, the trial court read the pattern jury instruction regarding PFF verbatim. There were no objections lodged regarding the jury instructions. After deliberation, a jury unanimously found Defendant guilty of PFF. Defendant was also found guilty of having attained habitual felon status and sentenced to an active sentence of 120 to 156 months. Defendant timely appeals.

ANALYSIS

A. Jury Instruction

Defendant's first argument on appeal is that the trial court committed plain error in failing to instruct "the jury that he was not guilty of being a felon in possession of a firearm if he acted in self-defense." This argument is inconsistent with our caselaw and overlooks the fact that Defendant testified at trial that he did not possess the firearm in question. The trial court did not err in foregoing a jury instruction as to the affirmative defense of justification.

Understanding Defendant's argument requires some background explanation of the crime of PFF and our caselaw relating to unpreserved jury instruction arguments. Under N.C.G.S. § 14-415.1(a), there are two elements of a PFF offense: "(1) the defendant has been convicted of a felony, and (2) the defendant subsequently possessed a firearm." *State v. Floyd*, 369 N.C. 329, 333, 794 S.E.2d 460, 463 (2016); N.C.G.S. § 14-415.1(a) (2017). Although self-defense is not, *per se*, a defense to PFF, it is inexorably intertwined with the defense of "justification" set out in *United States*

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v. Deleveaux, 205 F.3d 1292 (11th Cir. 2000), and adopted by a number of courts in the context of PFF cases. *See, e.g., State v. Mercer*, 818 S.E.2d 375, 380-81 (N.C. Ct. App. 2018); *State v. Monroe*, 233 N.C. App. 563, 564-65, 756 S.E.2d 376, 380 (2014), *aff'd*, 367 N.C. 771, 768 S.E.2d 292 (2015) (reviewing cases). The *Deleveaux* rationale

requires a criminal defendant to produce evidence of the following to be entitled to an instruction on justification as a defense to a charge of [PFF]:

(1) that the defendant was under unlawful and present, imminent, and impending threat of death or serious bodily injury;

(2) that the defendant did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct;

(3) that the defendant had no reasonable legal alternative to violating the law; and

(4) that there was a direct causal relationship between the criminal action and the avoidance of the threatened harm.

State v. Edwards, 239 N.C. App. 391, 393-94, 768 S.E.2d 619, 621 (2015) (quoting *Deleveaux*, 205 F.3d at 1297).

Prior to 2018, where a defendant was denied a special instruction pursuant to *Deleveaux* at trial our court had repeatedly “assume[d] *arguendo*, without deciding, that the *Deleveaux* rationale applies in North Carolina prosecutions for [PFF].”

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Mercer, 818 S.E.2d at 379.² However, in *Mercer*, we applied the *Deleveaux* test where the defendant “presented evidence that he grabbed the gun only after he heard guns cocking and witnessed his cousin struggling with the gun[,]” and requested a special instruction as to justification at trial. *Id.* at 380. The trial court explicitly denied the defendant’s motion for special instruction regarding justification and, in essence, did so a second time when—during their deliberation—the jury sent the trial court a note asking for clarification as to whether justification applies as an affirmative defense in PFF cases. *Id.* at 378. Based on the unique facts of *Mercer*, we held the defendant “was entitled to have the jury instructed on justification as a defense to the charge of possession of a firearm by a felon.” *Id.* at 380-81.

Based on our application of the *Deleveaux* factors in *Mercer*, Defendant argues the justification defense is a substantial and essential feature of a PFF charge and that, consequently, the trial court was required to present it to the jury. In making this argument on appeal, Defendant relies upon our opinion in *State v. Scaturro*, 802 S.E.2d 500 (N.C. Ct. App. 2018), which holds, “[a] defendant’s failure to request an instruction as to a substantial and essential feature of the case does not vitiate the

² Shortly after we decided *Mercer*, our Supreme Court granted the State’s *Motion for Temporary Stay*, 371 N.C. 480, 817 S.E.2d 209 (2018) (Memorandum), and subsequently granted the State’s Petition for Writ of Supersedeas and Discretionary Review, 371 N.C. 573, 820 S.E.2d 809 (2018) (Memorandum). We do not cite *Mercer* as binding authority, but only to show why Defendant advances this specific argument on appeal. For the purposes of this case, we follow our precedent as it stood when Defendant’s case was still before the trial court and assume *arguendo* without deciding that the *Deleveaux* test applies in North Carolina PFF prosecutions. *Mercer*, 818 S.E.2d at 379 (citing *Monroe*, 233 N.C. App. at 569, 756 S.E.2d at 380).

trial court's affirmative duty [to instruct the jury upon that feature]." *Id.* at 506. The facts of this case are markedly different from those of *Scaturro*, and Defendant's argument to the contrary is unavailing.

In *Scaturro*, the Defendant was charged with felony hit and run resulting in serious bodily injury after he struck a cyclist with his car, drove the victim to the hospital, and failed to return to the scene. *Id.* at 502-03. In charging the jury, the trial court instructed that an essential element of the offense was that "the defendant's failure to remain at the scene of the crash was willful, that is intentional." *Id.* at 504. Willful action on the part of the defendant is an essential element of the hit and run offense as it is set out in our criminal statutes. *See* N.C.G.S. § 20-166 (2017). We held the trial court committed plain error by failing to instruct the jury "that an act is willful if it is without justification or excuse" and by "conflat[ing] willful acts with intentional ones." *Scaturro*, 802 S.E.2d at 507. At trial, the defendant's sole defense was that he was authorized and required by statute to leave the scene in order to take the victim to the hospital. *Id.* We held the jury instruction deprived the defendant of the "gravamen of his basis for acquittal" and ordered a new trial. *Id.*

In contrast to *Scaturro*, even assuming *arguendo* the *Deleveaux* rationale applies in North Carolina it is not clear a justification defense is a "substantial and essential feature" of a PFF charge. Again, the only two elements of PFF are (1) a prior felony conviction, and (2) possession of a firearm. Unlike in *Scaturro*, there is

nothing in the PFF statute that describes justification or self-defense as an element of the offense. *Compare* N.C.G.S. § 14-415.1 *with* § 20-166. Additionally, there is no North Carolina pattern jury instruction on the “justification” defense and the PFF pattern instruction does not include any language regarding justification, necessity, or self-defense. This is markedly different from the circumstances in *Scaturro*, where willfulness was explicitly set out in the governing statute and defined in the pattern instruction but the trial court chose not to read that instruction in its entirety.

Nevertheless, Defendant’s own testimony rendered an instruction on the justification defense unavailable to him. Our self-defense caselaw dictates that a defendant is not entitled to a self-defense instruction where he testifies that he did not commit the underlying offense. *State v. Williams*, 342 N.C. 869, 873, 467 S.E.2d 392, 394 (1996); *State v. Cook*, 254 N.C. App. 150, 153, 802 S.E.2d 575, 577 (2017), *aff’d*, 370 N.C. 506, 809 S.E.2d 566 (2018). As is true in the context of self-defense claims, a defendant seeking to avail himself of the affirmative defense of justification must show that he reasonably believed he was under an impending threat of death or serious bodily injury. *Williams*, 342 N.C. at 872-73, 467 S.E.2d at 394; *Deleveaux*, 205 F.3d at 1297. Indeed, the affirmative defense of justification “does not negate any element of [the charged crime],” but “serves only as a legal excuse for the criminal act and is based on additional facts and circumstances that are distinct from the conduct constituting the underlying offense.” *Deleveaux*, 205 F.3d at 1297-98.

Consistent with our self-defense caselaw, a defendant is not entitled to an instruction regarding justification where he testifies that he did not commit the criminal act at all.

Here, Defendant was indicted for possessing “a New England Firearms Pardner Model 12 Gauge Shotgun, which is a firearm.” At trial, Defendant testified that he never possessed that gun, stating: “I don’t think I remember taking [the shotgun] from [Nick,]” and—when asked directly whether he took possession of the gun—“[w]ell, that gun, no.” Defendant repeatedly testified that he never committed PFF because he never possessed the shotgun at issue. Consequently, Defendant was not entitled to an instruction regarding justification, which is premised upon a defendant’s having committed the offense with which he is charged but being legally excused from punishment. The trial court did not err in forgoing such an instruction during its jury charge.

B. Ineffective Assistance of Counsel

Defendant’s second argument on appeal is that his attorney rendered ineffective assistance when he failed to request a special jury instruction regarding the affirmative defense of justification.

To prove his counselor rendered ineffective assistance, a defendant must show (1) “counsel’s representation fell below an objective standard of reasonableness[.]” and (2) “there is a reasonable probability that, but for counsel’s unprofessional errors,

the result of the proceeding would have been different.” *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (*quoting Wiggins v. Smith*, 539 U.S. 510, 521, 534, 156 L. Ed. 2d 471, 484, 493 (2003)). IAC claims should be resolved through a Motion for Appropriate Relief (“MAR”) in the trial court, rather than on direct appeal, unless “the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing.” *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001). Defendant’s IAC claim is exceptional in that it may be resolved based on the cold record alone.

Defendant’s sole purported reason that he received IAC is that “his attorney’s failure to ask for the instruction [regarding justification] constituted [IAC.]” Defendant was not entitled to a justification instruction because he repeatedly testified that he did not possess the shotgun he was charged with possessing. Consequently, even if Defendant’s counsel had requested such an instruction the trial court should not have granted his request. The fact that his attorney did not ask for such an instruction did not have any impact on Defendant’s trial. As the lack of prejudice is apparent from the cold record, we deny Defendant’s IAC argument.

CONCLUSION

The trial court did not err in forgoing a jury instruction as to the affirmative defense of justification as Defendant’s testimony at trial made such a defense

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unavailable. Likewise, Defendant's counsel did not render IAC by failing to request a special instruction regarding the affirmative defense.

NO ERROR.

Judges DILLON and HAMPSON concur.