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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-189

Filed: 7 January 2020

Rowan County, Nos. 16 CRS 51603, 51634

STATE OF NORTH CAROLINA

v.

KEITH LITAKER, Defendant.

Appeal by defendant from judgments entered 27 July 2018 by Judge Jeffery K. Carpenter in Rowan County Superior Court. Heard in the Court of Appeals 18 September 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Daniel P. O'Brien and Assistant Attorney General Joseph L. Hyde, for the State.

Office of the Appellate Defender, by Assistant Appellate Defender Anne M. Gomez, for defendant-appellant.

BERGER, Judge.

On July 27, 2018, a Rowan County jury found Keith Litaker (“Defendant”) guilty of assault with a deadly weapon inflicting serious injury and possession of a firearm by a felon. Defendant was sentenced to twenty-nine to forty-seven months in prison for assault with a deadly weapon inflicting serious injury and fourteen to

STATE V. LITAKER

Opinion of the Court

twenty-six months for possession of a firearm by a felon. On appeal, Defendant argues that the trial court erred when it (1) declined to instruct the jury on justification as an affirmative defense to possession of a firearm by a felon; (2) instructed the jury on the felony disqualifier for statutory self-defense under N.C. Gen. Stat. § 14-51.4; (3) failed to instruct the jury on Defendant's proposed "causal nexus" requirement; and (4) denied Defendant's motion to dismiss the charge for possession of a firearm by a felon. We disagree.

Factual and Procedural Background

In August 1999, Defendant pleaded guilty to the Class I felony of possession of a Schedule II controlled substance. In 2009, Defendant purchased a .45-caliber handgun for his wife, Samantha Litaker ("Samantha"), while the couple lived in Florida. According to Defendant, he purchased the weapon for Samantha because Defendant was away from home for extended periods of time while employed as a truck driver.

On April 5, 2016, Defendant and Samantha held a small cookout at their home in Rowan County. Gotti Litaker ("Gotti"), Defendant's nephew, attended the cookout. Gotti's cousin, Joel Leach ("Joel"), also attended the cookout. During the cookout, Defendant and Gotti became angry during a conversation concerning Gotti's mother. Gotti and Joel left Defendant's home immediately following the conversation.

STATE V. LITAKER

Opinion of the Court

Joel returned to Defendant's home without Gotti. Samantha went to bed, leaving Defendant and Joel to talk. However, according to Samantha, before going to bed, she left the .45-caliber pistol, purchased by Defendant, on a table beside Defendant. Samantha testified that she left the handgun on the table beside her husband "[b]ecause that night there was [sic] hunters in the area."

The State and Defendant presented conflicting evidence concerning the events that followed. Evidence presented by the State tended to show that Gotti, who was staying near Defendant's home, heard a gunshot from inside Defendant's home. Gotti, fearing his cousin Joel had been shot, ran to the home and entered through the front door. At trial, Gotti testified that, after entering Defendant's home, he caught a glimpse of his cousin, heard another gunshot, and then fell to the floor.

Defendant testified at trial that as Joel was getting ready to leave Defendant's home for the evening, Gotti "flung open" Defendant's front door unprovoked. According to Defendant, Gotti looked as if "he was in a trance" and was holding a knife in his hand. Defendant testified that Samantha had reentered the room and was standing behind him. Defendant alleges that he then picked up the .45-caliber handgun from the table and fired several warning shots, but Gotti kept coming toward him. As Gotti continued advancing, Defendant decided that it was "going to be either me or him" and shot Gotti.

Samantha testified that her front door “flung wide open” and that Gotti entered the home wearing a “hoodie over his head” and with a knife in his hand. According to Samantha, Defendant picked up the handgun and fired three warning shots but Gotti kept advancing. She testified that Defendant shot Gotti with his fourth shot.

After the shooting, the parties agree that Joel called 9-1-1. Gotti’s sister, Laqueta Litaker (“Laqueta”), ran to Defendant’s home after hearing several gunshots. According to Laqueta, one to two minutes passed between the first and second gunshots and then she heard two more gunshots in quick succession. Laqueta testified that Joel was crying while on the phone with police. She further testified that Gotti, who was awake and alert, stated that Defendant shot him. Defendant fled the scene by the time Laqueta arrived.

According to Defendant, he decided to leave his home while Joel was calling 9-1-1 because he “had a lot on [his] mind.” Defendant picked up his cell phone and the .45-caliber handgun and went into the woods behind his home. Defendant testified that he took the handgun because he did not want anyone to “pick it up and shoot [him] with it.” Defendant was in the woods for several hours and alleged that he lost his cell phone and the handgun after getting caught up in a briar patch and falling.

When law enforcement arrived on the scene, Samantha initially told officers that she did not witness the shooting. Rather, she alleged to have been woken up by the sound of gunshots and to have found Gotti on the living room floor. At the scene,

officers did not find any weapons on Gotti and his clothes collected from the scene did not include a hooded garment. Additionally, law enforcement was unable to recover the firearm that Defendant dropped in the woods. Gotti was airlifted to a hospital where he underwent emergency surgery and has since recovered from his injuries.

On April 6, 2016, Defendant went to the Rowan County Sheriff's Department to turn himself in and give a statement. In a written statement, Defendant described the events of April 5 and repeatedly referred to the handgun as "my gun." At trial, when asked why Defendant described the handgun as "my gun," he responded, "That's just a figure of speech." Defendant claimed that he referred to the firearm as "my gun" because he "was holding it at that time."

On June 27, 2016, Defendant was indicted for assault with a deadly weapon with intent to kill inflicting serious injury and possession of a firearm by a felon. The matter came on for trial by jury on July 23, 2018. Defendant was convicted by a Rowan County jury of assault with a deadly weapon inflicting serious injury and possession of a firearm by a felon. He was sentenced to consecutive prison terms of twenty-nine to forty-seven months for assault with a deadly weapon inflicting serious injury and fourteen to twenty-six months for possession of a firearm by a felon.

Defendant appeals, alleging that the trial court erred when it (1) declined to instruct the jury on justification as an affirmative defense to possession of a firearm by a felon; (2) instructed the jury on the felony disqualifier for statutory self-defense

under Section 14-51.4; (3) failed to instruct the jury on Defendant's proposed "causal nexus" requirement; and (4) denied Defendant's motion to dismiss the charge for possession of a firearm by a felon. We disagree.

Analysis

I. Justification Instruction

A trial court must give all requested jury instructions, at least in substance, if the requested instructions are proper and supported by the evidence. *State v. Craig*, 167 N.C. App. 793, 795, 606 S.E.2d 387, 388 (2005). Whether the evidence is sufficient to warrant an instruction on self-defense, necessity, duress, or justification presents a question of law which this Court reviews *de novo*. *State v. Edwards*, 239 N.C. App. 391, 393, 768 S.E.2d 619, 621 (2015). In determining whether there is evidence to support an instruction, the facts must be viewed in the light most favorable to the defendant. *State v. Watkins*, 283 N.C. 504, 509, 196 S.E.2d 750, 754 (1973). A trial court's erroneous failure to give a requested instruction "is prejudicial and requires a new trial only if there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) (citation and quotation marks omitted).

Under N.C. Gen. Stat. § 14-415.1(a), it is "unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or

control any firearm.” N.C. Gen. Stat. § 14-415.1(a) (2016). A person found in violation of Section 14-415.1(a) is guilty of a Class G felony. N.C. Gen. Stat. § 14-415.1(a).

In *State v. Mercer*, this Court adopted a four-prong test for determining whether a defendant is entitled to an instruction on justification as an affirmative defense to possession of a firearm by a convicted felon. ___ N.C. App. ___, ___, 818 S.E.2d 375, 381 (2018), *writ of supersedeas allowed and disc. review granted*, 371 N.C. 789, 820 S.E.2d 809 (2018).¹ To receive an instruction on the defense of justification, a convicted felon must show that at the time he possessed a firearm:

- (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.

¹ As this Court recently noted, in *State v. Holshouser*, our State Supreme Court has granted a temporary stay and subsequently granted a petition for writ of supersedeas and discretionary review in *Mercer*. ___ N.C. App. ___, ___ n.2, 833 S.E.2d 193, 196 n.2. Accordingly, we do not treat *Mercer* as binding authority but use it “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 . . . without deciding that the *Deleveaux* test applies.” *Id.* at ___ n.2, 833 S.E.2d at 196 n.2.

Id. at ___, 818 S.E.2d at 379 (quoting *United States v. Deleveaux*, 205 F.3d 1292, 1297 (11th Cir. 2000)). If a defendant can establish these four elements to the satisfaction of the jury, then he has a complete defense to the crime of possession of a firearm by a felon. *See State v. Lockhart*, 181 N.C. App. 316, 321, 639 S.E.2d 5, 8 (2007) (identifying the “satisfaction of the jury” standard as the burden of proof for affirmative defenses).

However, this Court has previously determined that a convicted felon loses entitlement to the defense of justification by continuing to possess a firearm after the threat giving rise to the justification has passed. *Craig*, 167 N.C. App. at 796-97, 606 S.E.2d at 389. After the threat has passed, a defendant cannot satisfy the first prong of the justification analysis because he is no longer under any imminent and impending threat of death or serious bodily injury. *Id.* at 796-97, 606 S.E.2d at 389.

Here, Defendant testified at trial that he continued to possess the firearm after shooting Gotti and fleeing the scene. According to Defendant, “[he] wasn’t going to leave the gun because somebody could pick it up and shoot [him] with it.” On appeal, Defendant argues that he was under imminent threat of death or serious bodily harm from Joel, who was visibly upset after his cousin was shot. But the record is devoid of any evidence indicating that Joel ever approached Defendant in a threatening manner or intended to use any type of force against Defendant. In fact, Defendant

testified at trial that he and Joel “never had a problem with each other” and that “[they] still don’t.”

Accordingly, viewing the evidence in a light most favorable to Defendant, we conclude there was insufficient evidence to warrant an instruction on justification as an affirmative defense to possession of a firearm by a felon. Therefore, the trial court did not err by declining to instruct the jury on justification.

II. Self-Defense Instruction

Defendant next argues that the trial court erred by instructing the jury on the felony disqualifier for statutory self-defense under Section 14-51.4. “Whether a jury instruction correctly explains the law is a question of law, reviewable by this Court *de novo*.” *State v. Barron*, 202 N.C. App. 686, 694, 690 S.E.2d 22, 29 (2010). A jury instruction is “sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed.” *State v. Barr*, 218 N.C. App. 329, 342, 721 S.E.2d 395, 404 (2012) (citation and quotation marks omitted).

Under Section N.C. Gen. Stat. § 14-51.3,

a person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to be if . . . he or she 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)(1) (2016). However, under Section 14-51.4(1), the defense provided by Section 14-51.3(a)(1) is not available to a person who uses defensive force while “attempting to commit, committing, or escaping after the commission of a felony.” N.C. Gen. Stat. § 14-51.4(1) (2016). As our Court noted in *State v. Crump*, Section 14-51.4(1) “makes manifest that the General Assembly . . . intended to limit the invocation of self-defense in this instance solely to the law[-]abiding.” ___ N.C. App. ___, ___, 815 S.E.2d 415, 420 (2018), *disc. review granted*, 371 N.C. 786, 820 S.E.2d 811 (2018).

In this case, the trial court’s instruction to the jury included the following:

As to the charges of assault with a deadly weapon with intent to kill inflicting serious injury and assault with a deadly weapon inflicting serious injury, the justifications of self-defense and defense of habitation as previously described do not apply if the defendant in using defensive force was already committing a felony. Possession of a firearm by a convicted felon is a felony.

At trial, Defendant objected to this instruction and informed the court that the basis of his objection was not with the instruction as provided but with statute itself. Defendant’s objection also made vague references to the Due Process Clause of the United States Constitution. But rather than clarify the basis of his objection for the trial court, defense counsel simply stated, “Someone down the road maybe [*sic*] find something, and may be smarter than me.”

Under the plain language of Section 14-51.4(1), the right to use deadly force in self-defense, as provided for by Section 14-51.3(a)(1), is not available to a person who is committing a felony. N.C. Gen. Stat. § 14-51.4(1). Additionally, as previously noted, it is a Class G felony for a “person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm.” N.C. Gen. Stat. § 14-415.1(a).

Therefore, we conclude that the trial court’s instruction to the jury correctly explained the application of the felony disqualifier under Section 14-51.4(1) to the statutory right of self-defense found in Section 14-51.3(a)(1) where the disqualifying felony is possession of a firearm by a felon under Section 14-415.1(a). Accordingly, the trial court did not err by instructing the jury on the felony disqualifier for statutory self-defense under Section 14-51.4.

Defendant also argues, for the first time on appeal, that even if he lost his statutory right to self-defense pursuant to Section 14-51.4(1), the trial court erred by failing to instruct the jury on the common law right to self-defense. However, it is well-settled in this State that where a theory argued on appeal was not raised at trial, “the law does not permit parties to swap horses between courts in order to get a better mount.” *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934); *accord State v. Sharpe*, 344 N.C. 190, 194-95, 473 S.E.2d 3, 5-6 (1996) (refusing to address a party’s new argument made for the first time on appeal). Thus, because Defendant failed to

request an instruction on the common law right to self-defense at trial and does not allege that the trial court's failure to instruct on common law self-defense amounts to plain error on appeal, we will not address Defendant's new argument on appeal. *See State v. Frye*, 341 N.C. 470, 496, 461 S.E.2d 664, 677 (1995) (holding that the defendant failed to preserve additional grounds for review on appeal where a specific objection was made at trial and the defendant failed to specifically and distinctly argue plain error on appeal).

III. Proposed "Causal Nexus" Requirement of Section 14-51.4

Defendant next argues that the trial court erred by declining to instruct the jury on the "causal nexus" requirement between the disqualifying felony and the circumstances giving rise to the need for defensive force under Section 14-51.4.

Defendant failed to request an instruction on the "causal nexus" requirement at trial and such an instruction would run contrary to this Court's precedent in *State v. Crump*, ___ N.C. App. ___, ___, 815 S.E.2d 415, 420 (holding that the plain language of Section 14-51.4, "makes clear that the disqualifying felony need not precipitate the circumstances giving rise to the perceived need to use force"). Therefore, we will not address Defendants' new argument made for the first time on appeal. *Sharpe*, 344 N.C. at 194-95, 473 S.E.2d at 5-6.

IV. Motion to Dismiss

Lastly, Defendant argues that the trial court erred by denying Defendant's motion to dismiss the charge for possession of a firearm by a felon because Section 14-415.1 is unconstitutional as applied to Defendant under the Second and Fourteenth Amendments of the Federal Constitution and Article I, Section 19 of the North Carolina Constitution. "This Court reviews alleged violations of constitutional rights *de novo*." *State v. Barnes*, 226 N.C. App. 318, 320, 741 S.E.2d 457, 460 (2013).

Our State Supreme Court has held that "regulation of the right to bear arms is a proper exercise of the General Assembly's police power, but that any regulation must be at least reasonable and not prohibitive, and must bear a fair relation to the preservation of the public peace and safety." *Britt v. State*, 363 N.C. 546, 549, 681 S.E.2d 320, 322 (2009) (citation and quotation marks omitted). As previously noted, in North Carolina, Section 14-415.1 makes it "unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm." N.C. Gen. Stat. § 14-415.1.

The Second Amendment of the Federal Constitution provides, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. The Second Amendment is made applicable against the States through the Due Process Clause of the Fourteenth Amendment. *Dist. of Columbia v. Heller*, 554 U.S. 570, 635 (2008). Interpreting the Second Amendment, the Supreme Court has recognized "the

right of law-abiding, responsible citizens to use arms in defense of hearth and home.”
Id. at 635.

In *State v. Fernandez*, this Court addressed whether Section 14-415.1 was constitutional under the Second Amendment of the Federal Constitution as applied to the defendant in that case. 256 N.C. App. 539, 545, 808 S.E.2d 362, 367 (2017). Our Court applied a test articulated by the Fourth Circuit in *U.S. v. Chester*, 628 F.3d 673 (4th Cir. 2010), and later streamlined by *Hamilton v. Pallozzi*, 848 F.3d 614 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 500 (2017). Under that test, “conviction of a felony necessarily removes one from the class of ‘law-abiding, responsible citizens’ for the purposes of the Second Amendment.” *Fernandez*, 256 N.C. App. at 546, 808 S.E.2d at 367 (quoting *Hamilton*, 848 F.3d at 626).

Here, Defendant is a convicted felon. Therefore, because he is not within the class of “law-abiding, responsible citizens” entitled to bear arms under the Second Amendment, his federal constitutional rights are not violated by Section 14-415.1.

Article I, Section 19 of the North Carolina Constitution provides, “No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land.” N.C. CONST. art. I, § 19. As noted by our Court in *Johnston v. State*, Section 14-415.1 does not implicate deprivation of liberty concerns under

STATE V. LITAKER

Opinion of the Court

Article I, Section 19 of the North Carolina Constitution. 224 N.C. App. 282, 308, 735 S.E.2d 859, 877 (2012).

In the motion to dismiss, as recognized by Defendant's brief on appeal, "Defense counsel cited the Second Amendment to the United States Constitution and the Law of the Land Clause of our State Constitution." However, on appeal, Defendant again attempts to "swap horses between courts" by arguing in support of the motion pursuant to Article I, Section 30 of the North Carolina Constitution, which Defendant failed to cite before the trial court. We will not address Defendant's new argument made for the first time on appeal. *Sharpe*, 344 N.C. at 194-95, 473 S.E.2d at 5-6.

Accordingly, because Section 14-415.1 does not violate Defendant's constitutional rights under either the Second and Fourteenth Amendments of the Federal Constitution or Article I, Section 19 of the North Carolina Constitution, the trial court did not err in denying Defendant's motion to dismiss.

Conclusion

For the reasons stated herein, Defendant received a fair trial, free from error.

NO ERROR.

Judges INMAN and MURPHY concur.

Report per Rule 30(e).