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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-1147

Filed: 15 December 2020

Brunswick County, Nos. 17 CRS 55091, 18 CRS 2146-47, 19 CRS 819

STATE OF NORTH CAROLINA

v.

JEMAR BELL

Appeal by defendant from judgments entered 22 May 2019 by Judge Robert F. Floyd in Brunswick County Superior Court. Heard in the Court of Appeals 7 October 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Terence Steed, for the State.

Dunn, Pittman, Skinner & Cushman, PLLC, by Rudolph A. Ashton, III, for defendant-appellant.

ZACHARY, Judge.

Defendant Jemar Bell appeals from judgments entered upon a jury's verdicts finding him guilty of false imprisonment, assault inflicting serious bodily injury, and possession of a firearm by a felon. After careful review, we conclude that Defendant received a fair trial, free from error.

Background

In August 2017, Defendant and Keisha Berger met on an online dating website. Keisha moved from Virginia into Defendant's residence in North Carolina a few weeks later. She bought Defendant a cell phone, a crossbow, and a shotgun.

After going through Defendant's phone and seeing that he was talking with other women, Keisha confronted him about it and declared that she was going to leave him. Defendant choked, punched, and kicked Keisha, and would not allow her to leave. A few days later, Keisha attempted to leave a second time, but Defendant beat her again, and threatened to shoot her in the back with the crossbow if she tried to leave.

Upon Keisha's third attempt to leave, Defendant brandished the shotgun. Defendant threatened to shoot Keisha, and the two "tussl[ed]" over the gun. Keisha grabbed the gun "in the middle" and Defendant tried to shoot her. At some point in the altercation, Keisha released the gun to grab her phone and call for help. Keisha thought that she was going to die. Defendant snatched the phone away from her. In response, Keisha kneed Defendant in the groin area, and Defendant retaliated by punching her in the face, severely damaging her eye.

Defendant also took Keisha's car keys, and she lay in bed for days. She found her phone under the bed sometime thereafter; eventually, while Defendant was out hunting, Keisha found the keys under the bed as well. Even so, she could not leave because her car had a flat tire, she did not know anyone to call for help, and she was

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too scared to call the police. However, Keisha sent photographs of her injury to her cousin, who contacted the police. While Defendant was still gone, a deputy arrived and took Keisha to the local hospital. Keisha was admitted, and then transferred to New Hanover Regional Medical Center in Wilmington. Initially, doctors anticipated that Keisha would never again have vision in her right eye; ultimately, doctors removed her right eye.

On 20 May 2019, Defendant's case came on for jury trial in Brunswick County Superior Court, the Honorable Robert F. Floyd presiding. The jury returned verdicts finding Defendant guilty of false imprisonment, assault inflicting serious bodily injury, possession of a firearm by a felon, and felonious assault on a female; however, the jury found Defendant not guilty of malicious maiming of an eye, and assault by strangulation. Defendant pleaded guilty to attaining the status of a habitual felon.

The trial court consolidated the offenses of assault inflicting serious bodily injury and false imprisonment for judgment, and sentenced Defendant to 117-153 months in the custody of the North Carolina Division of Adult Correction. For the offense of possession of a firearm by a felon, the trial court sentenced Defendant to 117-153 months' imprisonment set to begin at the expiration of the sentence for assault inflicting serious bodily injury and false imprisonment. The trial court arrested judgment on the offenses of felony assault on a female and habitual misdemeanor assault. Defendant gave notice of appeal in open court.

Discussion

On appeal, Defendant challenges the trial court’s denial of his motions to dismiss the charge of possession of a firearm by a felon, and the trial court’s declination of his request that the court instruct the jury on self-defense. We address each argument in turn.

I. Sufficiency of the Evidence

Defendant first contends that the trial court erred by denying his motions to dismiss the charge of possession of a firearm by a felon for insufficient evidence of the element of possession, because “no gun was ever located or admitted into evidence in this case,” “there was no complaint about a gun” from Keisha when she spoke to law enforcement, and “[t]he evidence consists solely of the vague and uncorroborated testimony of Keisha.” We disagree.

A. Standard of Review

“Upon a defendant’s motion to dismiss for insufficient evidence, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged and (2) of [the] defendant’s being the perpetrator of such offense. If so, the motion is properly denied.” *State v. Cox*, 367 N.C. 147, 150, 749 S.E.2d 271, 274 (2013) (citation omitted). “The evidence is to be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom.” *Id.* (citation omitted). “[W]e conduct a de novo review to determine

whether there was substantial evidence that [the] defendant was previously convicted of a felony and subsequently possessed a firearm.” *Id.* at 151, 749 S.E.2d at 275.

B. Analysis

N.C. Gen. Stat. § 14-415.1(a) (2019) provides, in pertinent part, that “[i]t shall be 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 or any weapon of mass death and destruction as defined in G.S. 14-288.8(c).” Thus, “[i]n order to obtain a conviction for possession of a firearm by a felon, the State must establish that (1) the defendant has been convicted of or pled guilty to a felony and (2) the defendant, subsequent to the conviction or guilty, possessed a firearm.” *State v. Taylor*, 203 N.C. App. 448, 458, 691 S.E.2d 755, 764 (2010), *cert. dismissed*, 366 N.C. 408, 736 S.E.2d 180 (2012). Defendant does not challenge his status as a convicted felon; therefore, the issue on appeal is whether Defendant possessed a firearm. *See State v. Bailey*, 233 N.C. App. 688, 691, 757 S.E.2d 491, 493, *disc. review denied*, 367 N.C. 789, 766 S.E.2d 678 (2014).

“Possession of a firearm may be actual or constructive.” *Taylor*, 203 N.C. App. at 459, 691 S.E.2d at 764. “Actual possession requires that the defendant have physical or personal custody of the firearm.” *Id.* When a defendant does not have actual possession of a firearm, the defendant may nonetheless have constructive

possession “when the weapon is not in the defendant’s physical custody, but the defendant is aware of its presence and has both the power and intent to control its disposition or use. . . . Constructive possession depends on the totality of the circumstances in each case.” *Id.* (citations omitted).

In the instant case, the State contends that the victim’s testimony provided sufficient evidence of Defendant’s possession of a firearm. In support of its argument, the State cites *State v. Hussey*, 194 N.C. App. 516, 669 S.E.2d 864 (2008). In *Hussey*, this Court held that the trial court properly denied the defendant’s motion to dismiss for insufficient evidence where “[a] certified copy of [the] defendant’s prior felony conviction was admitted into evidence, and the victim testified that the defendant had a gun in his hand in the restroom.” *Hussey*, 194 N.C. App. at 521, 669 S.E.2d at 867.

Here, the State presented similar evidence of possession of a firearm. Keisha testified that as she was attempting to leave, Defendant “pulled out the shotgun and [they] got to tussling over the shotgun,” and that “[h]e tried to shoot” her. Keisha further explained that she paid for the shotgun, that Defendant kept the shotgun under the mattress in their bedroom, and that Defendant called her from jail to tell her that his brother had moved the shotgun. On cross-examination, Keisha acknowledged that Defendant “threaten[ed] [her] life with a crossbow and a shotgun.”

Indeed, Keisha’s credibility was crucial to the jury’s decision; however, it is axiomatic that the “question of whether a witness is telling the truth is a question of credibility and is a matter for the jury alone.” *State v. Chapman*, 359 N.C. 328, 363, 611 S.E.2d 794, 820 (2005) (citation omitted); *see also State v. Kim*, 318 N.C. 614, 621, 350 S.E.2d 347, 351 (1986) (“The jury is the lie detector in the courtroom and is the only proper entity to perform the ultimate function of every trial – determination of the truth.”). Accordingly, the State presented sufficient evidence of possession, and the trial court did not err in denying Defendant’s motion to dismiss.

II. Jury Instructions

Defendant next argues that the trial court erred by denying his request for self-defense instructions to be submitted to the jury, maintaining that “[i]t should have been up to the jury whether or not [he] acted in self-defense.”

A. Standard of Review

We review a challenge to the trial court’s decision regarding jury instructions de novo. *State v. Yarborough*, ___ N.C. App. ___, ___, 843 S.E.2d 454, 462 (2020).

B. Analysis

As a general matter, “[a] trial court must give the substance of a requested jury instruction if it is correct in itself and supported by the evidence.” *State v. Mercer*, 373 N.C. 459, 462, 838 S.E.2d 359, 362 (2020) (citation and internal quotation marks omitted). “A defendant is entitled to a jury instruction on self-defense when there is

evidence from which the jury could infer that he acted in self-defense.” *State v. Broussard*, 239 N.C. App. 382, 385, 768 S.E.2d 367, 369 (2015) (citation omitted). “In determining whether there was any evidence of self-defense presented, the evidence must be interpreted in the light most favorable to [the] defendant.” *State v. Webster*, 324 N.C. 385, 391, 378 S.E.2d 748, 752 (1989).

The right of self-defense is only available . . . to a person who is without fault, and if a person voluntarily, that is aggressively and willingly, enters into a fight, he cannot invoke the doctrine of self-defense unless he first abandons the fight, withdraws from it and gives notice to his adversary that he has done so.

State v. Skipper, 146 N.C. App. 532, 538-39, 553 S.E.2d 690, 694 (2001) (citation and internal quotation marks omitted). It follows that an instruction on self-defense is not required where “[t]here is simply no evidence in the record which would support an inference that [the] defendant did not enter into the altercation with [the victim] voluntarily.” *Id.* at 539, 553 S.E.2d at 694.

Here, there is no testimony indicating that Defendant punched Keisha in self-defense. Keisha testified that the third time she told Defendant she was going to leave him, Defendant aggressively and willingly brandished a shotgun, threatened to shoot her, and actually tried to shoot her. Keisha thought that she was going to die. After they “tussl[ed]” over the gun, Keisha grabbed her cell phone to call for help, which Defendant subsequently snatched from her. Keisha then kneed Defendant in the

groin, and Defendant forcefully struck her in the face. As a result, Keisha lost her eye.

Although Defendant contends on appeal that he was not the aggressor, and that he punched Keisha in self-defense, he did not testify at trial, and was thus reliant on the State's evidence to support his contention, which it did not. To be sure, a defendant is not required to testify or otherwise offer evidence in order to receive a self-defense instruction. *See State v. Revels*, 195 N.C. App. 546, 551, 673 S.E.2d 677, 681, *disc. review denied*, 363 N.C. 379, 680 S.E.2d 204 (2009); *see also State v. Dooley*, 285 N.C. 158, 163, 203 S.E.2d 815, 818 (1974) ("Where there is evidence that [the] defendant acted in self-defense, the court must charge on this aspect even though there is contradictory evidence by the State or discrepancies in [the] defendant's evidence."). Nonetheless, the evidence must provide grounds for instructing the jury on self-defense. *See Skipper*, 146 N.C. App. at 539, 553 S.E.2d at 694. Against this backdrop, our review of the record demonstrates that Defendant aggressively and willingly initiated the fight with Keisha. *See id.*

Viewing the evidence presented in the light most favorable to Defendant, we conclude that there is insufficient evidence to infer that Defendant assaulted Keisha as an act of self-defense. Defendant was neither without fault nor did he abandon the fight, withdraw from it, or give notice to Keisha that he would do so. Accordingly, the trial court did not err in omitting an instruction on self-defense from its jury charge.

Conclusion

We conclude that (1) the trial court did not err in denying Defendant's motions to dismiss, and (2) the trial court did not err in declining to instruct the jury on self-defense.

NO ERROR.

Judge BROOK concurs.

Judge BERGER concurs in result only.

Report per Rule 30(e).