IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-79

No. COA19-879

Filed 16 March 2021

Davidson County, Nos. 17CRS050138, -165

STATE OF NORTH CAROLINA

v.

MATTHEW BENNER

Appeal by Defendant from judgments entered 22 October 2018 by Judge Kevin M. Bridges in Davidson County Superior Court. Heard in the Court of Appeals 1 April 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State-Appellee.

Rudolf Widenhouse, by M. Gordon Widenhouse, Jr., for Defendant-Appellant.

COLLINS, Judge.

¶ 1 Defendant Matthew Benner appeals from judgments entered upon jury verdicts of guilty of first-degree murder and possession of a firearm by a felon. Defendant argues that the trial court reversibly erred by omitting certain verbiage from the first-degree murder jury charge and plainly erred by omitting certain verbiage from the possession of a firearm by a felon jury charge. Defendant also

argues that the trial court erred by ordering restitution.

¶ 2 Because the trial court's jury instructions presented the law of first-degree murder and possession of a firearm by a felon adequately, fairly, and clearly to the jury, we discern no error. Because Defendant failed to properly notice appeal from the restitution order, which was docketed as a civil judgment, we dismiss this argument.

I. Procedural History

¶ 3 Defendant was indicted on 13 March 2017 for the first-degree murder of Damon Christopher Dry and for possession of a firearm by a felon. The case came on for trial on 1 October 2018. On 19 October 2018, the jury returned a verdict of guilty of possession of a firearm by a felon. On 22 October 2018, the jury returned a verdict of guilty of first-degree murder. Defendant was sentenced to a term of life imprisonment without parole for the murder conviction and a concurrent term of 14-26 months' imprisonment for the possession of a firearm by a felon conviction. Defendant was ordered to pay costs and to pay restitution in the amount of $1,874.49, to be docketed as a civil judgment against him. Defendant gave oral notice of appeal in open court.

¶ 4 The case was heard in the Court of Appeals on 1 April 2020 by a panel consisting of Judges Murphy, Collins, and Young. On 4 May 2020, this Court, *ex mero motu*, ordered the appeal held in abeyance pending the outcome of the appeal to the

North Carolina Supreme Court of this Court's opinion in *State v. Crump*, 259 N.C. App. 144, 815 S.E.2d 415 (2018). On 18 December 2020, the North Carolina Supreme Court issued its opinion, *State v. Crump*, 851 S.E.2d 904 (N.C. 2020). On 4 February 2021, Judge Carpenter replaced Judge Young on the panel.

II. Factual Background

¶ 5 The evidence at trial tended to show the following: In January 2017, Samantha Wofford was living in a mobile home with her husband, Russell Gwyn, and her mother. Defendant lived in an adjacent mobile home. Defendant's home had a small deck with steps going down to the front yard.

¶ 6 It was snowing on the evening of 6 January 2017 when Wofford and Gwyn went outside to walk their dogs. Wofford saw an unfamiliar car parked at Defendant's trailer. Around 10 p.m., Wofford went back inside her home with one dog, leaving Gwyn outside with the other. Gwyn walked around to the side of Defendant's trailer, where he heard loud bickering. Walking toward Defendant's front steps, Gwyn heard a gunshot. He turned around and saw a man fall off the bottom of Defendant's steps and hit the ground.

¶ 7 Wofford had just sat down in her home when Gwyn came running inside saying, "Call 911. Somebody's been shot." Wofford went outside and saw a man lying in Defendant's front yard. Defendant was standing on his steps holding a gun. Wofford went inside her home and called 911.

¶ 8 Deputies Benjamin Schlemmer and Matthew Higgins with the Davidson County Sheriff's Office responded to the scene. They observed Dry lying on his back at the bottom of Defendant's steps. Dry was not moving. The steps were bloody and snow-covered. There was a loud rumbling noise coming from inside the trailer. Schlemmer and Higgins approached the trailer, banged on its side, and ordered whoever was inside to come out.

¶ 9 Defendant opened the front door, put his hands up, and came down the stairs. Higgins handcuffed Defendant, walked him to his patrol vehicle, and put him in the back seat. Defendant had alcohol on his breath; blood on his face, arms, and hands; and bloodstains on his sweatpants.

¶ 10 Schlemmer and Higgins did a security sweep of Defendant's home and found no one inside. There was blood on the screen door and the door frame. Schlemmer put up crime scene tape while Higgins checked on Dry. Dry appeared to be dead. Dry was wearing a t-shirt and the front was stippled with what appeared to be shot. Dry's eyes were fixed, there was blood around him, he was not breathing, and Higgins did not find a pulse. Dry was shot twice in the upper left chest from within a few feet. The cause of death was later determined to be the gunshot wounds to the chest.

¶ 11 Schlemmer and Higgins alternated sitting in the patrol car with Defendant. Defendant's behavior was erratic. He was initially calm, then got angry and kicked the window. Schlemmer opened the rear passenger door to get Defendant to stop.

Davidson County Sheriff's Sergeant Christopher Stilwell came over to assist. Defendant said, "You know I shot him. Take me to jail. Take these cuffs off me. Put them up front."

¶ 12 Law enforcement officers removed Defendant from the patrol car, and Davidson County Sheriff's Deputy Matthew Riddle swabbed Defendant's hands for gunshot residue ("GSR"). Defendant, once calmly compliant, had become agitated and said, "I don't even know why we're doing this. I shot the mother [****]er." Riddle completed the information sheet for GSR, sealed the box, and secured it in his vehicle. Upon Defendant's return to the patrol car, he was screaming, "I shot the mother [****]er."

¶ 13 The officers obtained a warrant to search Defendant's home. Inside, they found blood on several pieces of newspaper by the front door. In the kitchen sink, they found a .38 caliber revolver containing two spent and four live rounds of ammunition. Officers found another revolver in the master bedroom. In a work-out room at the opposite end of the trailer, they found a safe in the closet containing six long guns and a third handgun.

¶ 14 At trial, Defendant's prior felony conviction was admitted into evidence without objection.

¶ 15 Defendant testified at trial on his own behalf; his testimony tended to show the following: Defendant and Dry met through a mutual friend, William Tuller, and

became fishing buddies. Defendant had not spoken to Tuller in five years, and had not seen Dry in person since before then. Defendant admitted he had several guns in his home and claimed he was not aware of the law prohibiting felons from having firearms.

¶ 16 On 6 January 2017, Defendant left work about 11:00 a.m., bought vodka, and rented movies before getting home around 5:00 p.m. He made himself a drink. Dry showed up unexpectedly at around 8:00 p.m.; Defendant invited Dry inside and made him a drink. Dry told Defendant he had lost his job, and asked Defendant if there were any jobs where Defendant worked. Defendant showed Dry around his home and showed him a .22 single action revolver. Around 9:30 p.m., Defendant told Dry he should leave.

¶ 17 Dry said, "I need money," and pushed Defendant against the sink. Defendant pushed Dry off, opened the door, and told Dry to leave. Dry pushed Defendant into the door jamb, saying, "I'm not leaving. I need money." They started fighting.

¶ 18 Defendant ran to his bedroom, retrieved a handgun, and returned to the kitchen, telling Dry to leave. Dry ran at Defendant, and Defendant shot Dry. Dry stood up and walked out the front door.

¶ 19 Defendant went to the door and saw Dry lying in the yard. Defendant went down the steps to investigate and could not feel a pulse. Defendant went inside, washed his hands, called his mother, and called 911. Defendant did not remember

the police knocking or yelling. He put his hands up and surrendered to the police.

III. Discussion

A. First-Degree Murder Jury Instruction

¶ 20 Defendant first argues that the trial court reversibly erred by omitting certain verbiage from the jury charge of first-degree murder.

1. Preservation and Standard of Review

¶ 21 Defendant first appears to argue that the trial court erred by failing to give a "requested . . . jury instruction that, as '[t]he lawful occupant of [his] home,' [Defendant] was 'presumed to have held a reasonable fear of imminent death or serious bodily harm to himself' when Dry attacked him." However, Defendant did not request this instruction, which comports with N.C.P.I.—Crim. 308.80, DEFENSE OF [HABITATION] . . . - HOMICIDE AND ASSAULT,[1] and did not argue plain error on appeal. *See* N.C. R. App. P. 10(a)(4). Any argument relating to this instruction is thus not before us.

¶ 22 Defendant also argues that the trial court erred by failing to instruct the jury using N.C.P.I.—Crim. 308.10, SELF-DEFENSE, RETREAT—INCLUDING

[1] The relevant language of this instruction is as follows: "In addition, (absent evidence to the contrary), the lawful occupant of a [home] . . . is presumed to have held a reasonable fear of imminent death or serious bodily harm to [himself] . . . when using defensive force that is intended or likely to cause death or serious bodily harm to another if both of the following apply: . . ." N.C.P.I.—Crim. 308.80 (June 2012) (footnote omitted) (brackets in original).

HOMICIDE. Defendant requested at the charge conference that the trial court instruct the jury with N.C.P.I.—Crim. 308.10, the trial court refused to do so, Defendant objected, and Defendant renewed his objection after the trial court charged the jury. Defendant therefore properly preserved for our review the denial of this requested instruction.

¶ 23 Where a defendant has properly preserved his challenge to jury instructions, an appellate court reviews the trial court's decisions regarding jury instructions de novo. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). On appeal, a defendant is required not only to show that a challenged jury instruction was erroneous, but also that such error prejudiced the defendant. N.C. Gen. Stat. § 15A-1442(4)(d) (2018).

2. Analysis

¶ 24 During the charge conference, the trial court stated it would give N.C.P.I.—Crim. 206.10, FIRST-DEGREE MURDER WHERE A DEADLY WEAPON IS USED, including the incorporated self-defense instruction. Defendant requested the trial court also give N.C.P.I.—Crim. 308.10, SELF-DEFENSE, RETREAT—INCLUDING HOMICIDE. This instruction includes the following "stand your ground" provision:

> If the defendant was not the aggressor and the defendant was in the defendant's own home, . . . the defendant could stand his ground and repel force with force regardless of the character of the assault being made upon the defendant. However, the defendant would not be excused

> if the defendant used excessive force.

N.C.P.I.—Crim. 308.10 (June 2012) (brackets and footnote omitted).

¶ 25 Pattern instruction 308.10 is derived from N.C. Gen. Stat. § 14-51.2 and N.C. Gen. Stat. § 14-51.3. "A lawful occupant within his or her home . . . does not have a duty to retreat from an intruder[,]" N.C. Gen. Stat. § 14-51.2(f) (2018), and in certain specified circumstances,

> is presumed to have held a reasonable fear of imminent death or serious bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or serious bodily harm to another . . . .

Id. § 14-51.2(b) (2018).

¶ 26 Under 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 . . . [h]e or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another.

Id. § 14-51.3(a)(1) (2018).

¶ 27 However, pursuant to N.C. Gen. Stat. § 14-51.4, "[t]he justification described in [N.C. Gen. Stat. §§] 14-51.2 and . . . 14-51.3 is not available to a person who used defensive force and who . . . [w]as attempting to commit, committing, or escaping after the commission of a felony." N.C. Gen. Stat. § 14-51.4 (2018). As our Court explained in *Crump*, "[t]he plain language of this statutory provision makes clear that the disqualifying felony need not precipitate the circumstances giving rise to the

perceived need to use force; there is no qualifying or limiting language in this provision modifying the word 'felony.'" *Crump*, 259 N.C. App. at 150, 815 S.E.2d at 420, *reversed on other grounds*, 851 S.E.2d 904 (N.C. 2020).[2] "[T]he absence of a plain and explicit causal nexus enunciated in section 14-51.4(1) makes manifest that the General Assembly omitted it purposefully and intended to limit the invocation of self-defense in this instance solely to the law-abiding." *Id.* at 151, 815 S.E.2d at 420. We are bound by *Crump*. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (explaining that this Court is bound by its own precedent, and one panel of this Court cannot overrule another).

¶ 28 In this case, Defendant admitted to having a cache of firearms at his home at the time he shot and killed Dry, and admitted to having been convicted of a felony in 1991. The State offered evidence supporting both of these admissions. Defendant thus admitted to the Glass G felony of being a felon in possession of a firearm, in violation of N.C. Gen. Stat. § 14-415.1. "[As] [D]efendant admitted to a disqualifying felony in advance of the charge conference, . . . he was not entitled to a self-defense

[2] On appeal to our Supreme Court, defendant raised three issues. "First, defendant challenged the trial court's jury instructions on self-defense, asserting that the trial court erred by failing to include language requiring the jury to find a 'causal nexus' between the circumstances leading to defendant's perceived need to use defensive force and the felonious conduct that would otherwise disqualify him from claiming self-defense under N.C.[Gen. Stat]. § 14-51.4(1)." *Crump*, 851 S.E.2d at 909. However, because the Supreme Court awarded defendant a new trial based on its analysis of a different issue on appeal, the Supreme Court did not reach defendant's argument regarding the trial court's jury instruction. *Id.* at 918.

instruction pursuant to N.C. Gen. Stat. § 14-51.4(1) . . . . " *Crump*, 259 N.C. App. at 151, 815 S.E.2d at 421.

¶ 29 Because N.C.P.I.—Crim. 308.10 is derived from N.C. Gen. Stat. §§ 14-51.2 and 14-51.3, but the justification described in those statutes was not available to Defendant, pursuant to N.C. Gen. Stat. § 14-51.4, the trial court did not err by declining to instruct the jury on the "stand your ground" language provided in N.C.P.I.—Crim. 308.10.

B. Jury Charge on Possession of Firearm by Felon

¶ *30* Defendant next argues that the trial court committed plain error by failing to instruct the jury on "mistake of fact" concerning Defendant's erroneous belief that his right to possess a firearm had been restored after his felony conviction.

1. Preservation and Standard of Review

¶ 31 Defendant concedes that he neither requested a mistake-of-fact instruction, nor objected to the lack thereof at trial. However, as Defendant "specifically and distinctly" contends the failure to so instruct the jury amounts to plain error, we will review this issue for plain error. N.C. R. App. P. 10 (a)(4). Plain error is "fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quotation marks and citation omitted).

¶ 32 The State erroneously contends that Defendant's failure to object at trial to the

lack of jury instruction constituted "invited error" which waived his right to all review, including plain error review. It is true that where a defendant requests that the trial court give a specific jury instruction, "[t]he defendant will not be heard to complain on appeal when the trial court has instructed adequately on the law and in a manner requested by the defendant. If there was error in the charge, it was invited error and we shall not review it." *State v. Wilkinson*, 344 N.C. 198, 236, 474 S.E.2d 375, 396 (1996) (quotation marks and citations omitted). However, where, as here, a defendant simply fails to object to the instruction given, or lack thereof, "we will review the record to determine if the instruction constituted plain error." *State v. Hardy*, 353 N.C. 122, 131, 540 S.E.2d 334, 342 (2000) (citations omitted).

2. Analysis

¶ 33 The elements of possession of a firearm by a felon are: "(1) defendant was previously convicted of a felony; and (2) thereafter possessed a firearm." *State v. Cunningham*, 188 N.C. App. 832, 836, 656 S.E.2d 697, 700 (2008) (quotation marks and citation omitted); *see* N.C. Gen. Stat. § 14-415.1 (2018). While a defendant must have knowingly possessed the firearm, this offense does not require that the defendant knew his possession of the firearm was a violation of the law.

¶ 34 When an offense contains an element of knowledge or intent, mistake of fact is available as a defense where that mistake negates the requisite knowledge or intent. *See State v. Bowman*, 188 N.C. App. 635, 649, 656 S.E.2d 638, 649 (2008). On the

other hand, the general rule is that ignorance of the law or a mistake of law is no defense to criminal prosecution. *Cheek v. United States*, 498 U.S. 192, 199 (1991).

¶ 35 At trial, Defendant admitted that he had a prior felony conviction in 1991 and testified that as a result of that conviction, he went through "a three-month paramilitary boot camp, and . . . spent six years on probation." Defendant further testified, "after the probation was completed, because of the deal I had made with the district attorney to go to the boot camp instead of prison, I had all my citizenship rights reinstated to me." When asked by his attorney, "Were you aware of the law prohibiting people who have felony convictions from having firearms?", Defendant responded, "No, sir. I had had all my rights restored to me over 20 years ago, including the right to keep and bear arms." When asked by his attorney, "Did you have firearms in your house on the night of January the 6th, 2017?", Defendant responded, "Yes."

¶ 36 To the extent Defendant was mistaken about his rights being restored, this mistake is not a defense to possession of a firearm by a felon because (1) this mistake does not negate Defendant's knowledge that he possessed a gun–a fact to which he admitted–and (2) this offense does not require that Defendant knew his possession of the firearm was a violation of the law. Moreover, to the extent Defendant was not aware of the law prohibiting people who have felony convictions from having firearms, this is a mistake of law, not of fact, and is not a defense. *Cheek*, 498 U.S. at

199. Finally, to the extent Defendant in fact had his rights to keep and bear arms restored,[3] this would not be a mistake but would rather be a complete defense.

¶ 37 For these reasons, Defendant was not entitled to a mistake-of-fact instruction, and the trial court did not err, much less plainly err, by failing to give such instruction. *State v. Nobles*, 329 N.C. 239, 244, 404 S.E.2d 668, 671 (1991) (absent evidence to support a reasonable mistake-of-fact defense, the trial court does not err by omitting that instruction).

C. Restitution

¶ 38 Defendant finally argues that the trial court erred when it ordered restitution in the amount of $1,874.49, because there was no evidence at trial to support the amount ordered. Defendant failed, however, to notice appeal in writing from the order for restitution, which was docketed as a civil judgment, *see* N.C. R. App. P. 3(a) (requiring written notice of appeal in a civil matter), and did not file a petition for writ of certiorari to allow this Court to address the merits of his argument, *see State v. Meeks*, 848 S.E.2d 310 (N.C. Ct. App. 2020) (unpublished) (defendant failed to file a written notice of appeal from a civil judgment for restitution and petitioned for a writ of certiorari to allow this Court to address the argument on the merits). Due to Defendant's noncompliance with N.C. R. App. P. 3(a), we dismiss his appeal of this

[3] Other than Defendant's testimony, no evidence was presented at trial that Defendant's right to bear arms had been restored.

issue for lack of jurisdiction. *See State v. Springle*, 244 N.C. App. 760, 763, 781 S.E.2d 518, 520 (2016) (quoting *In re Moore*, 234 N.C. App. 37, 40, 758 S.E.2d 33, 36 (2014)) ("[F]ailure to comply with Rule 3 is a jurisdictional default that prevents this Court from acting in any manner other than to dismiss the appeal.") (quotation marks and citation omitted).

IV. Conclusion

¶ 39 Because the trial court's jury instructions presented the law of first-degree murder and possession of a firearm by a felon adequately, fairly, and clearly to the jury, we discern no error. Because Defendant failed to properly notice appeal from the restitution order, which was docketed as a civil judgment, we dismiss this argument.

NO ERROR IN PART AND DISMISSED IN PART.

Judges MURPHY and CARPENTER concur.

Report per Rule 30(e).