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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-73

No. COA20-737

Filed 15 March 2022

Wake County, Nos. 17 CRS 219568; 17 CRS 2340

STATE OF NORTH CAROLINA

v.

KIYONA LASHAWN BROWN

Appeal by Defendant from Judgments entered 4 October 2019 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 7 September 2021.

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

Patterson Harkavy LLP, by Narendra K. Ghosh, for defendant-appellant.

HAMPSON, Judge.

¶ 1 Kiyona Lashawn Brown (Defendant) appeals from Judgments entered upon jury verdicts convicting him of Voluntary Manslaughter and Possession of a Firearm by a Felon. These convictions stemmed from a 2017 confrontation at Defendant's home in which he shot and killed Ray Wooten (Wooten). Before the jury began its deliberations, the trial court instructed the jury on the statutory defense of habitation—also referred to as the "Castle Doctrine"—which, in basic terms creates

a presumption that a person is justified in using deadly force against an intruder to their home.[1] The trial court further instructed the jury that the presumption afforded by the statutory defense of habitation would not be available to Defendant if the jury found that at the time force was used, Defendant was engaged in the commission of a felony—specifically, here, the felony of Possession of a Firearm by a Felon. However, the trial court clarified even if the presumption was not available to Defendant, Defendant's actions were excused if (1) "such force was being used to prevent or terminate a forceable entry into the defendant's place of residence," (2) "the defendant reasonably believed the intruder might kill or inflict serious bodily harm . . . [(3)] reasonably believed the degree of force he used was necessary . . . and [(4)] the defendant was not the aggressor." Ultimately, Defendant was found guilty of Voluntary Manslaughter and two counts of Possession of a Firearm by a Felon. Defendant subsequently gave Notice of Appeal in open court.

¶ 2 On appeal, Defendant contends the trial court erred in failing to further instruct the jury that Defendant would still be entitled to the presumption afforded by the statutory defense of habitation if the jury were to further find his commission of Possession of a Firearm by a Felon was itself justified. Indeed, Defendant further

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[1] "The 'castle doctrine' is derived from the principle that one's home is one's castle and is based on the theory that if a person is bound to become a fugitive from her own home, there would be no refuge for her anywhere in the world." *State v. Stevenson*, 81 N.C. App. 409, 412, 344 S.E.2d 334, 335 (1986).

contends he was entitled to a pre-trial hearing and determination on the question of whether application of the statutory defense of habitation rendered him immune from criminal liability.

¶ 3 Additionally, Defendant argues the trial court erroneously permitted the jury to consider evidence of text messages allegedly sent and received by Defendant regarding transactions involving the buying and selling of firearms on the basis the probative value of any such evidence to impeach Defendant's credibility was far outweighed by its unfair prejudice. Ultimately, we conclude: (I) Defendant was not entitled to a pre-trial hearing and determination of whether the statutory defense of habitation immunized him from criminal liability; (II) by failing to submit a proposed jury instruction on justification in writing at trial, Defendant failed to preserve the issue of whether he was entitled to an instruction that justification may revive his statutory Castle Doctrine defense, but reviewing for plain error on the particular facts of this case, the trial court did not err by failing to instruct the jury on justification as a defense to Possession of a Firearm by a Felon for purposes of allowing Defendant to avail himself of the presumption afforded by the statutory defense of habitation; and (III) the trial court did not abuse its discretion in admitting evidence of the text messages allegedly showing Defendant's involvement in buying and selling firearms for purposes of impeaching Defendant's credibility. As a result, we conclude there

was no error at Defendant's trial and affirm the Judgments entered against him in this case.

Factual and Procedural Background

¶ 4 The Record before us, including evidence presented at trial, tends to reflect the following:

¶ 5 Defendant and Wilnetta Crudup (Crudup) were in a relationship together which ended in 2014. As a result of this relationship, Defendant and Crudup had a minor daughter together. While their daughter lived primarily with Crudup, the daughter would stay with Defendant on occasion to accommodate Crudup's work schedule. In 2015, Crudup married Wooten.

¶ 6 On 7 October 2017 Crudup dropped their daughter off at Defendant's apartment with a plan to pick her up the following day. Around 10 a.m., Crudup texted Defendant that she had changed her mind and would pick up their daughter after work, but Defendant responded Crudup would have to wait until the next day. Defendant and Crudup began to argue over the custody of their daughter.

¶ 7 After she finished work, Crudup picked up Wooten and drove to Defendant's residence. Crudup knocked on Defendant's door and asked for their daughter. Defendant instead walked past Crudup and went to his car to get a cigarette. While in his car, Defendant, a previously convicted felon, retrieved a handgun from the

glove box and concealed it in his shirt. According to Defendant, he grabbed the handgun because Defendant was aware Wooten had a reputation for violence and had previously been convicted of Robbery with a Dangerous Weapon. Defendant also believed Wooten had previously threatened him with a firearm and allegedly feared a physical confrontation with the much larger Wooten.

¶ 8 While at his car, Defendant smoked the cigarette and walked back into his residence, closed the door, and locked it. Crudup again began to bang on Defendant's door demanding their daughter be returned to her. Wooten, who up until now had been sitting in Crudup's vehicle, joined Crudup at Defendant's door. Defendant then re-opened the door, displayed the handgun, and told Wooten and Crudup to get away from his door. Wooten demanded Defendant bring the daughter outside while aggressively pounding on Defendant's door.

¶ 9 Testimony differs as to what occurred next. According to Defendant's version of events, Wooten rushed towards Defendant and lunged at him in the doorway. Defendant fired three to four shots at Wooten, which proved to be fatal. According to Crudup's testimony, Defendant simply opened the door and began shooting. Defendant's son testified Defendant warned Wooten, Wooten put his foot in the door twice, and then Defendant shot Wooten.

¶ 10 Defendant then fled the scene in his vehicle, still carrying the firearm.

Defendant was arrested later the same day after surrendering to police following a brief police pursuit. A police search of Defendant's vehicle revealed a .380 caliber handgun with three bullets in the eight-round magazine and one in the chamber. Four spent .380 caliber casings were recovered from the scene of the shooting. In addition to the handgun, police also found fifteen rounds of nine-millimeter ammunition in Defendant's vehicle.

¶ 11 Defendant was ultimately indicted for First Degree Murder of Wooten and three counts of Possession of a Firearm by a Felon. The first count of Possession of a Firearm by a Felon was based on Defendant having the .380 caliber handgun in his vehicle prior to the shooting. The second count was based on his possession of the firearm at the time of the shooting. The third count was based on Defendant's possession of the firearm after the shooting during his flight and up to his arrest. The second count was subsequently dismissed before trial.

¶ 12 On 13 August 2019, Defendant filed a "Motion for a Determination of Immunity Under the Castle Doctrine" seeking a determination Defendant was immune from civil and criminal liability under the statutory Castle Doctrine defense and dismissal of the case against him. In the alternative, Defendant requested the trial court hold a pretrial evidentiary hearing to determine whether the statutory immunity afforded by N.C. Gen. Stat. § 14-51.3 should apply to bar his prosecution.

The trial court denied this motion on 26 August 2019.

¶ 13 The matter came on for trial on 23 September 2019. After the State presented its case-in-chief, Defendant took the stand in his own defense. Defendant testified when he opened the door the second time, Wooten lunged at him, and Defendant, acting in defense of habitation, fired the shots to protect himself. During cross-examination, the State attempted to impeach Defendant's credibility, thereby causing the jury to question Defendant's version of events, by questioning Defendant about the ammunition found in his car.

> Q: All right. Mr. Brown, let's talk about .9 millimeters, the ammunition which you gave the—you told this jury under oath yesterday that [the] .9 millimeter ammunition you had—you couldn't recall how long [ ] you had it because you thought it would go into your .380—Ms. Thurmond's. Let's talk about just a few days prior the week of the shooting. You, in fact, trade in guns on the street. You—
>
> [Defense Counsel]: Objection, Your Honor, 403, 404, and due process.
>
> [The Court]: Overruled.
>
> A: Say What?
>
> Q: You trade in guns, sometimes stolen guns, on the street. You buy guns, sell gu[n]s, held broker deals with people, correct?
>
> A: I don't buy and sell guns, no.
>
> . . .

> Q: All right. Would it surprise you if there were SMS messages starting on October 3rd from Work Bruh to your phone, October 3rd, 2017, "Yoo, let your peoples know I got a P95 Ruger with two clips for sale." Within seconds your phone responds back "How much?" Work Bro's phone responds, "350." You again on October 3rd "Aiite," and then two days later you send to Work Bruh "How many shots?" Is this ringing a bell, Mr. Brown?
>
> A: Yes.
>
> . . .
>
> Q: You just were lying to this jury a second ago. Were you not?

¶ 14 After this testimony, the State gave a rebuttal case before the jury was dismissed for the charge conference. During the charge conference, the parties discussed the relevance of the statutory defense of habitation—also referred to as the "Castle Doctrine." The State agreed the defense was relevant in this case but requested the instruction be prefaced with a disqualifier that the presumption of justification is "not available to a person who used defensive force and who . . . was attempting to commit or committing of a felony, which in this case the State contends was Possession of a Firearm by a Felon."

¶ 15 Defendant's counsel objected to this qualifying language on two grounds. First, counsel argued the felony of Possession of a Firearm by a Felon should not be treated as a disqualifier under N.C. Gen. Stat. § 14-51.4. Second, counsel argued that if the felony was a disqualifier, Defendant was entitled to an instruction on justification as

a defense to the charge of Possession of a Firearm by a Felon. Further, Defense counsel contended, the jury should be instructed if they found Defendant was justified in so possessing a firearm, he would not be disqualified from immunity under the statutory Castle Doctrine defense for committing the felony of Possession of a Firearm by a Felon. Ultimately, over the objection of defense counsel, the defense of habitation instruction included the disqualifying language requested by the State and did not include an instruction on the defense of justification.

¶ 16 Defense counsel also revisited his objection to the evidence about the ammunition and requested the court to give a limiting instruction to instruct the jury to only consider the evidence for the limited purpose of determining Defendant's character for truthfulness. The court agreed and the instruction stated:

> Evidence has been received concerning criminal convictions of the defendant. You may consider this evidence for one purpose only. If, considering the nature of the crimes, you believe that this bears on the defendant's truthfulness, then you may consider it, and all other facts and circumstances bearing upon the defendant's truthfulness, in deciding whether you will believe the defendant's testimony at this trial. A prior conviction is not evidence of the defendant's guilt in this case. You may not convict the defendant on the present charges because of something the defendant may have done in the past.

¶ 17 After the jury heard the instructions, it found Defendant guilty on two counts of Possession of a Firearm by a Felon and on the lesser included charge of Voluntary Manslaughter. The trial court entered a Judgment sentencing Defendant to 84 to

113 months imprisonment on the Voluntary Manslaughter conviction and a Judgment sentencing Defendant to 17 to 30 months imprisonment on one count of the Possession of a Firearm by a Felon conviction to run consecutively with the sentence for Voluntary Manslaughter. The trial court arrested judgment on the second count of Possession of a Firearm by a Felon, which was based on Defendant's possession of a firearm after the shooting. Defendant timely gave Notice of Appeal in open court.

Issues

¶ 18 The issues on appeal are whether: (I) the trial court erred in denying Defendant's Motion for a Pretrial Evidentiary Hearing on the statutory Castle Doctrine defense; (II) the trial court erred in failing to include an instruction he would not be disqualified under the statutory Castle Doctrine defense for committing the felony of Possession of a Firearm by a Felon if the jury found he was justified in so possessing a firearm; and (III) Defendant was unduly prejudiced by the admission of Defendant's text messages concerning firearms for the purpose of impeachment.

Analysis

I. Motion for Pretrial Evidentiary Hearing

¶ 19 First, Defendant contends he was entitled to a pretrial determination of his immunity under the Castle Doctrine statute because it states, in relevant part,

persons using force are "immune from civil or criminal liability for the use of such force." N.C. Gen. Stat. § 14-51.2(e) (2019). Defendant asserts that by using the term "immune" the General Assembly intended the immunity to extend to any prosecution whatsoever and, therefore the question must be resolved by the judge prior to trial, not by the jury. We disagree. We recently addressed this very question in *State v. Austin*. In that case, we determined the General Assembly intended for immunity under the Castle Doctrine to extend only to a conviction and judgment, not the prosecution itself. *State v. Austin*, 2021-NCCOA-494, ¶ 21.[2] Thus, a defendant is not entitled to a pre-trial hearing on the issue of whether the defendant is entitled to immunity from liability under the Castle Doctrine. This is particularly so when, as here, there are disputed issues of fact, which are properly left for the jury to decide at trial. *Id.* Therefore, consistent with our decision in *State v. Austin*, we conclude the trial court here did not err in denying Defendant's Motion for a Pretrial Determination of Immunity.

II. Jury Instructions

A. Standard of Review

¶ 20 As a threshold matter, we address the State's contention that Defendant failed

[2] This Court also subsequently denied rehearing en banc in *Austin* by Order entered 26 October 2021.

to preserve the jury instruction issue for review. "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired . . ." N.C.R. App. P. 10(a)(1) (2021). More specifically, to preserve the trial court's refusal to deliver a special instruction to the jury, a defendant must submit the request in writing. *State v. Holden*, 321 N.C. 125, 156, 362 S.E.2d 513, 533 (1987). Nevertheless, "[i]n criminal cases, an issue that was not preserved . . . may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C.R. App. P. 10(a)(4) (2021). "For error to constitute plain error, a defendant must demonstrate . . . 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) (citation and quotation omitted).

¶ 21 Here, Defendant did not submit his request for the special instruction in writing, and thus, did not properly preserve the issue for appellate review. Without proper preservation, we review the alleged error under a plain error standard of review.

B. Justification Instruction

¶ 22 Defendant contends he was entitled to an instruction that he would not be

disqualified from presumptive immunity under the statutory Castle Doctrine defense for Possession of a Firearm by a Felon if the jury further found he was justified in possessing a firearm at the time of the shooting. Thus, he argues, the trial court erred in failing to instruct the jury on justification as a defense to Possession of a Firearm by a Felon in conjunction with the jury instructions on defense of habitation.

¶ 23 The statutory defense of habitation as codified in N.C. Gen. Stat. § 14-51.2 provides: "[a] lawful occupant of a home, motor vehicle, or workplace is presumed to have held a reasonable fear of imminent death or serious bodily harm to himself . . . or another when using defensive force that is intended or likely to cause death or serious bodily harm" in the case of forcible entry and is justified in using such force. N.C. Gen. Stat. § 14-51.2 (2019)[3]. Nonetheless, the presumption that the lawful occupant of a home has a reasonable fear of imminent death or serious bodily harm 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(1) (2019). This Court has previously recognized a person who is committing the felony of Possession of a Firearm by a Felon at the time when the person discharged the firearm in defensive force has a "disqualifying felony" under section 14-51.4, and thus, the presumption that the lawful occupant had a reasonable fear of

[3] A separate statutory presumption for defense of self is codified at N.C. Gen. Stat. § 14-51.3.

imminent death or serious bodily harm does not arise. *State v. Crump*, 259 N.C. App. 144, 151, 815 S.E.2d 415, 421 (2018), *rev'd on other grounds*, 376 N.C. 375, 851 S.E.2d 904 (2020).

¶ 24 Defendant first asks us to revisit our decision in *Crump* to the extent *Crump* held there was no requirement of any direct causal relation between a defendant's commission of a felony and the confrontation leading to the use of force and conclude the trial court erred in instructing the jury that Possession of a Firearm by a Felon was a disqualifying felony section 14-51.4 absent a direct causal nexus between the commission of the felony and the confrontation with Wooten. Indeed, our Supreme Court recently expressly overruled *Crump* on this very point. *State v. McLymore*, 2022-NCSC-12, ¶ 14. Specifically, the Supreme Court held:

> that in order to disqualify a defendant from justifying the use of force as self-defense pursuant to N.C.G.S. § 14-51.4(1), the State must prove the existence of an immediate causal nexus between the defendant's disqualifying conduct and the confrontation during which the defendant used force. The State must introduce evidence that "but for the defendant" attempting to commit, committing, or escaping after the commission of a felony, "the confrontation resulting in injury to the victim would not have occurred."

Id. at ¶ 30 (citation omitted).

¶ 25 Here, assuming the trial court erred in failing to instruct the jury consistent with *McLymore*, Defendant cannot establish prejudice. The uncontroverted evidence

showed Defendant only retrieved the firearm after Crudup and Wooten arrived and after Crudup had requested the return of their child. Indeed, Defendant retrieved the firearm from his car specifically for the confrontation. He then retreated to his residence behind the closed door which directly led to the confrontation with Wooten. As such, "but for" Defendant retrieving and possessing the firearm "the confrontation resulting in injury to the victim would not have occurred." *Id*. Thus, the uncontroverted evidence establishes the causal nexus required by *McLymore*. Therefore, Defendant cannot establish prejudicial error in the trial court's instruction to the jury in this case that Defendant's possession of a firearm as a felon would serve as a disqualifying felony.

¶ 26 Next, turning to the primary argument in this case, Defendant—conceding he was committing Possession of a Firearm by a Felon at the time of the shooting—contends the jury should have been instructed to consider whether Defendant was justified in his possession of the firearm, and if so, then Defendant would still be entitled to the statutory presumption his use of force was reasonable. Indeed, our Supreme Court has recognized the justification defense may be applicable to Possession of a Firearm by a Felon in narrow and extraordinary circumstances. *State v. Mercer*, 373 N.C. 459, 463, 818 S.E.2d 359, 362 (2020). To establish justification as a defense to a charge of Possession of a Firearm by a Felon:

> a defendant must show: (1) that the defendant was under unlawful, present, imminent, and impending threat of death or serious 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.

Id. at 464, 818 S.E.2d at 363 (citation omitted).

¶ 27 The critical inquiry under the first factor, is whether the defendant was under an imminent threat "at the time he took possession of the firearm"—not at the time when defendant used the firearm. *State v. Monroe*, 233 N.C. App. 563, 570, 756 S.E.2d 276, 381 (2014), *aff'd per curiam*, 367 N.C. 771, 768 S.E.2d 292 (2015); *see also State v. Boston*, 165 N.C. App. 214, 222, 598 S.E.2d 163, 168 (2004). For example, in *State v. Mercer*, this Court held defendant was entitled to the justification defense when he grabbed the gun only after he heard guns cocking and witnessed his cousin struggling to operate his handgun. *Mercer*, 260 N.C. App. at 657, 818 S.E.2d at 380. Conversely, in *State v. Monroe*, this Court held the trial court did not err in denying the defendant's request for the inclusion of a justification instruction when the defendant possessed the gun inside the residence for "five or ten minutes," away from the victim, at which time there was no imminent threat of death or serious bodily injury. *Monroe*, 233 N.C. App. at 569, 756 S.E.2d at 380.

¶ 28 In this case, the evidence at trial showed that on 7 October 2017, Crudup

parked in front of Defendant's apartment, knocked on his door, and asked for their daughter. Defendant, largely ignoring Crudup, walked past her, got a cigarette out of his car, and smoked it in the parking lot. At this time, he grabbed the handgun in his car, walked back up to his apartment, and shut and locked the door to the apartment leaving Crudup and Wooten outside. At this point, Wooten, who had initially remained in the car, joined Crudup in knocking on Defendant's door. Throughout this exchange, Defendant continued to possess the handgun whilst Crudup and Wooten knocked on the door until he finally relented and re-opened the door. Thus, even assuming the jury believed Defendant's version of the ensuing events, that Wooten lunged at Defendant when he opened the door, the uncontroverted evidence showed at the time Defendant initially possessed the gun, he was not under an imminent threat as he had time to smoke a cigarette and walk back up to his apartment to shut and lock the door. Thus, Defendant was not entitled to the justification defense because he possessed the gun for several minutes before the alleged physical confrontation ensued. Therefore, the trial court did not err in refusing to instruct the jury on the justification instruction. Consequently, the trial court also did not err in refusing to instruct the jury that Defendant would not be disqualified from presumptive immunity under the statutory Castle Doctrine defense for committing the felony of Possession of a Firearm by a Felon if the jury found he

was justified in so possessing a firearm. Because we conclude on the facts of this case Defendant was not entitled to the justification defense, we do not reach the broader issue of whether justification for the commission of a felony would serve to reactivate the statutory presumption found in N.C. Gen. Stat. § 15-51.2.

III. Admission of the Evidence Regarding Gun Trading

¶ 29 Finally, Defendant contends the trial court erred by admitting evidence of his alleged trading in guns because its probative value was substantially outweighed by the danger of unfair prejudice. "Exclusion of evidence on the basis of Rule 403 is within the sound discretion of the trial court, and abuse of that discretion will be found on appeal only if the ruling is manifestly unsupported by reason or is so arbitrary it could not have been the result of a reasoned decision." *State v. White*, 349 N.C. 535, 552, 508 S.E.2d 253, 264 (1998) (citation and quotation omitted).

¶ 30 "The primary purpose of impeachment is to reduce or discount the credibility of a witness for the purpose of inducing the jury to give less weight to his testimony in arriving at the ultimate facts in the case." *State v. Nelson*, 200 N.C. 69, 72, 156 S.E. 154, 156 (1930). "Much latitude is allowed in showing the bias, hostility or other interest of a witness with respect to the case or other facts tending to prove that the testimony of the witness is unworthy of credit." *State v. Alston*, 17 N.C. App. 712, 714, 195 S.E.2d 314, 315 (1973). Thus, it is not unfairly prejudicial for the trial court

to admit evidence of a witness's prior inconsistent statement for the purpose of impeaching his credibility, particularly when the jury is instructed to consider the statement only for its limited purpose. *State v. Avent*, 222 N.C. App. 147, 158, 729 S.E.2d 708, 716 (2012); *State v. Gabriel*, 207 N.C. App. 440, 452, 700 S.E.2d 127, 134 (2010).

¶ 31 Here, Defendant testified in his own defense and, insofar as his claim of self-defense depended on the jury believing his version of events, his credibility was at issue. On cross-examination, the State asked Defendant why he had ammunition in his car that did not match the caliber of ammunition needed for the gun in his car. The State followed this question by asking Defendant if he traded in guns, and thus, had different calibers of ammunition to match the various guns he bought and sold. Defendant denied this accusation. The State then attempted to contradict this outright denial by reading text messages that tended to implicate Defendant in an illegal gun sale. Thus, the State used the text messages for the permissible purpose of impeaching Defendant's credibility. Further, upon Defendant's request, the trial court gave a limiting instruction explaining the text messages should only be considered for the purpose of evaluating Defendant's character for truthfulness. Therefore, given the wide latitude the trial court has to admit impeachment evidence, the trial court did not err in admitting the text messages over Defendant's objection.

Conclusion

¶ 32 Accordingly, for the foregoing reasons, we conclude there was no error at the trial of Defendant and affirm the Judgments.

NO ERROR.

Judges WOOD and GORE concur.

Report per Rule 30(e).