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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-442

Filed 5 March 2024

Mecklenburg County, Nos. 20 CRS 231606-607

STATE OF NORTH CAROLINA

v.

EZEKIEL EXCELL MCKINLEY, Defendant.

Appeal by defendant from judgments entered 14 October 2022 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 6 February 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Taylor H. Crabtree, for the State.

Caryn Devins Strickland, for the Defendant.

DILLON, Chief Judge.

Defendant Ezekiel Excell McKinley appeals from judgment entered upon a jury's verdict convicting him of assault with a deadly weapon with intent to kill inflicting serious injury, discharging a weapon into occupied property inflicting serious bodily injury, attempted robbery with a dangerous weapon, and possession of a firearm by a felon. We conclude that Defendant received a fair trial, free of

reversible error.

I. Background

The evidence at trial tended to show the following: On 15 September 2020, Defendant was standing outside a convenience store located in Charlotte. The victim was parked in the front of the store and had just returned to her vehicle. Defendant approached her vehicle, where she sat with the window rolled down.

Video surveillance from the convenience store showed that the victim handed Defendant a cigarette and lit it for him. Defendant then reached for the belt of his pants, pulled a gun, leaned into the vehicle, and shot the victim in the face. The vehicle rolled backwards across the parking lot, and Defendant fled the scene.

Defendant was arrested six days later. Defendant was convicted of several crimes in connection with the incident and now appeals those convictions.

II. Analysis

A. Impeachment Evidence

In his first argument on appeal, Defendant argues that the trial court erred when it granted the State's motion to exclude evidence of the victim's prior drug-related arrests under Rule 404(b) of our Rules of Evidence.

It appears from the record that Defendant objected to the trial court's exclusion of the victim's previous arrests pursuant to Rule 609 of our Rules of Evidence. Accordingly, Defendant has abandoned this argument for appeal. N.C. R. App. Pro.

R. 10 (2021). Further, Rule 609 allows a witness's prior *convictions* not arrests which do not lead to convictions.

In any event, assuming the trial court erred in failing to allow the jury to hear about the victim's prior, drug-related arrests, given the video recording of the shooting and other evidence that was before the jury, we conclude that Defendant has failed to show that such error was prejudicial.

B. Officer Testimony

Next, Defendant argues that the trial court plainly erred when it allowed the State to elicit testimony from Officer Whitley that "without the magazine, without the ammo," the victim's "firearm cannot shoot bullets." Officer Whitley made this statement regarding the firearm found in the victim's vehicle, which was found on the passenger's side without a magazine. Defendant argues that Officer Whitley's testimony was false because the owner's manual for the firearm states that the gun can fire without the magazine *if there is a bullet in the chamber*.

Because Defendant did not object to the admission of this testimony at trial, we are bound by plain error review. *State v. Lawrence*, 365 N.C. 506, 516, 732 S.E.2d 326, 333 (2012). However, to show plain error, Defendant must show error. That is, he must show how the trial court erred by not intervening *ex mero motu* to exclude the testimony.

We conclude that Defendant has failed to show how the trial court so erred. Further, the owner's manual Defendant is referencing was not entered into evidence.

Thus, there was nothing in the record before the trial court to suggest anything different than Officer Whitley's testimony. And Officer Whitley did not expressly testify that it was impossible for the gun to shoot without the magazine. He merely stated the obvious—that the firearm needed ammunition to shoot. His reference to the magazine appears to be regarding its purpose of holding the ammunition. Defense counsel could have elicited testimony clarifying this point on cross-examination, yet she did not.

C. Self-defense Instruction

Defendant next argues that the trial court erred when it denied Defendant's request for a self-defense instruction.

This Court has consistently held that "where competent evidence of self-defense is presented at trial, the defendant is entitled to an instruction on this defense, as it is a substantial and essential feature of the case, and the trial judge must give the instruction even absent any specific request by the defendant." *State v. Coley*, 375 N.C. 156, 159, 846 S.E.2d 455, 458 (2020); *State v. Morgan*, 315 N.C. 626, 643, 340 S.E.2d 84, 95 (1986) (emphasis omitted) (citations omitted). In determining whether a defendant has presented competent evidence sufficient to support a self-defense instruction, we consider the evidence in the light most favorable to the defendant. *State v. Moore*, 363 N.C. 793, 796, 688 S.E.2d 447, 449 (2010).

For a defendant to be entitled to a self-defense instruction, there must be competent evidence that he "(1) reasonably believes (2) that his or her use of force (3)

is necessary (4) to defend himself or herself against the imminent use (5) of unlawful force by another.” *State v. Hooper*, 382 N.C. 612, 628-29, 879 S.E.2d 549, 559-60 (2022). Here, we conclude there was insufficient evidence from which the jury could have found that Defendant was justified to shoot the victim.

Defendant points to the interview he gave to law enforcement in which he stated that he shot the victim in self-defense. However, when he explained his version of what transpired, he never stated that the victim was pointing a gun at him when he shot her. Rather, the gist of his interview was that he felt threatened because the victim possessed a gun. He claims that he and the victim exchanged guns and that he shot her while she was trying to roll up her window with his gun in her car. On one occasion, when law enforcement asked him to explain why he shot the victim in self-defense, Defendant evaded the question or deflected, at one point responding with “I don’t know you. You gotta ask her.”

Further, the jury was able to see a recording of the event. From the video, Defendant began to reach for his gun immediately after the victim lit a cigarette from him. The recording did not show the victim holding a firearm or acting in a threatening manner, but rather, showed that Defendant was completely unprovoked.

Therefore, we conclude that the trial court did not err when it denied Defendant’s request for a self-defense instruction.

D. Cumulative Error

Defendant finally argues that he should be granted a new trial on the theory

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of cumulative error. We conclude that any errors that may have occurred do not warrant a new trial. *See State v. Betts*, 377 N.C. 519, 527, 858 S.E.2d 601, 607 (2021).

NO ERROR.

Judges ZACHARY and FLOOD concur.

Report per Rule 30(e).