

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-1144

Filed 3 September 2024

Rockingham County, Nos. 22 CRS 457-58; 22 CRS 51130-31

STATE OF NORTH CAROLINA

v.

VICTOR DONTÉ MCCOLLUM, Defendant.

Appeal by defendant from judgments entered 2 May 2023 by Judge John Michael Morris in Rockingham County Superior Court. Heard in the Court of Appeals 14 May 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Marc X. Sneed, for the State.

W. Michael Spivey for defendant-appellant.

THOMPSON, Judge.

Victor Donte McCollum (defendant) was convicted by a jury of assault with a deadly weapon inflicting serious injury (AWDWISI), assault by pointing a gun, and possession of a firearm by a felon. Additionally, defendant admitted his status as a habitual felon. Defendant appealed from the trial court's judgment contending that:

(1) the trial court erred in denying defendant's motion to dismiss the charge of assault by pointing a gun for insufficiency of evidence, (2) the trial court erred in giving the jury instruction for AWDWISI and refusing to instruct on a lesser-included offense, and (3) the trial court erred by not instructing the jury on the defense of justification regarding the possession of a firearm by a felon charge. After careful review, we affirm the judgment of the trial court.

I. Factual Background and Procedural History

On 6 September 2022, defendant was indicted by a Rockingham County Grand Jury for one count of possession of a firearm by a felon, one count of assault with a deadly weapon inflicting serious injury, four counts of assault by pointing a gun, and one count of being a habitual felon.¹ A jury trial on defendant's charges took place from 24 April 2023 to 2 May 2023.

The evidence presented at trial tended to show that on 8 May 2022, a red Kia Soul (KIA) pulled into the parking lot of a gas station, and defendant and Tyler Blackwell (Blackwell) got out of the vehicle and entered the store. Shortly thereafter, a black Ford Mustang (Mustang) pulled into the same parking lot and parked alongside the gas terminals. Demarquis Maynard (Maynard) was driving, Rayshawn

¹ There were four separate indictment sheets relating to the charges that defendant was indicted for on 6 September 2022. 22 CRS 457 relates to the indictment for possession of a firearm by felon; 22 CRS 458 relates to the indictment for habitual felon; 22 CRS 51130 relates to the indictment for one count of assault with a deadly weapon inflicting serious injury and one count of assault by pointing a gun; and 22 CRS 51131 relates to the indictment for three counts of assault by pointing a gun.

Hairston (Hairston) was in the passenger seat, and Maretta Henderson (Henderson) and two minors were in the back seat.

Defendant exited the store and walked toward the KIA but before he was able to get into the car, Hairston got out of the Mustang and approached defendant. Defendant testified that Hairston approached defendant aggressively, saying things like, “[d]o you know who the f[***] I am?” and “[w]hat the f[***] are you looking at?” As Hairston was approaching defendant, Hairston retrieved a gun from his right-front pants pocket but returned it to his pocket without pointing or using the firearm. During the verbal exchange between Hairston and defendant, Blackwell exited the store and Maynard and Henderson exited the Mustang. Henderson walked around the front of the Mustang and leaned against the car, while Maynard walked toward the store. Maynard testified that he told Hairston to “leave it alone[,]” and to “[c]ome on[,]” so they could go inside the store. The interaction between Hairston and defendant lasted for approximately one minute before Hairston walked away and entered the store, and defendant and Blackwell got back into the KIA.

The surveillance footage shows that the KIA backed up and exited the parking lot. However, witness testimony indicated that the KIA stopped in the middle of the road and defendant got out of the car and started walking back toward the front of the gas station, where the interaction with Hairston had occurred. Defendant is seen carrying what was later identified as a “Glock 19 9mm semi-automatic handgun” with an extended clip.

Maynard and Hairston exited the store and walked back to the Mustang. Hairston got into the passenger seat and Henderson got into the back of the car, but before Maynard was able to get into the driver's seat of the Mustang, defendant came around the corner of the building, motioned for bystanders in the parking lot to move/stay out of the way and opened fire on Maynard's vehicle. Maynard was shot as a result. Hairston got out of the vehicle and returned fire toward the direction from which defendant was shooting. However, defendant had already run away and was seen getting back into the KIA and the vehicle sped off.

Maynard testified that after he had been shot, Robert Pettigrew (Pettigrew),² a witness to the shooting, approached him in a panic, but Maynard told Pettigrew, "I'm okay. I got to be all right. I got kids in the car. I can't panic, you know. Call the police." Pettigrew called the police. Maynard testified that police and an ambulance arrived, but he declined to go to the hospital via ambulance because he did not want to leave his children and fiancée, Henderson. Maynard's mother came to the gas station, picked up Maynard and his family, and drove Maynard to the Moses Cone Hospital in Greensboro, North Carolina.

Maynard testified that he attempted to return to work the following day, but after informing his supervisor that he had been shot the night before, his supervisor

² Pettigrew witnessed the entirety of the incident as he was initially stopped at a traffic light adjacent to the front of the gas station, but started traveling toward the gas station as defendant got out of the KIA and opened fire on the Mustang.

sent him home. Maynard further testified that the day after his supervisor sent him home, he received a call from his workplace informing him that his employment had been terminated.

II. Discussion

A. Motion to Dismiss

Defendant contends that the trial court erred in denying his motion to dismiss the charge of assault by pointing a gun at Henderson due to an insufficiency of the evidence. We do not agree.

This Court reviews the trial court's denial of a motion to dismiss de novo. *State v. Buchanan*, 260 N.C. App. 616, 622, 818 S.E.2d 703, 708 (2018). "When reviewing a challenge to the denial of a defendant's motion to dismiss a charge on the basis of insufficiency of the evidence, the relevant inquiry is whether the State presented substantial evidence in support of each element of the charged offense." *Id.* (internal quotation marks and citation omitted). "In this determination, all evidence is considered in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence." *Id.* (citation omitted). Furthermore, "a substantial evidence inquiry examines the sufficiency of the evidence presented but not its weight." *Id.* (internal quotation marks and citation omitted). "Thus, if there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied." *Id.*

(citation omitted).

Here, defendant was charged with assaulting Henderson by intentionally pointing a gun at her without legal justification in violation of N.C. Gen. Stat. § 14-34. Under that statute, “[i]f any person shall point any gun or pistol at any person, either in fun or otherwise, whether such gun or pistol be loaded or not loaded, he shall be guilty of a Class A1 misdemeanor.” N.C. Gen. Stat. § 14-34 (2023). Thus, in order to survive defendant’s motion to dismiss, the State was required to present sufficient evidence to establish that (1) a gun was pointed at Henderson, and (2) that the person pointing the gun was defendant.

At trial, the State “introduce[d] more than a scintilla of evidence of each essential element of the offense and that [] defendant was the perpetrator of the offense.” *State v. Davy*, 100 N.C. App. 551, 556, 397 S.E.2d 634, 636–37 (1990). Not only did the State introduce witness testimony from Maynard, Henderson, the store clerk, Pettigrew, and Officer Lingle and Corporal Menard of the Reidsville Police Department, the State also introduced several exhibits as evidence, including video footage from the gas station and crime scene photographs. State’s Exhibit 4³ tended to show that the windshield of the Mustang was see-through. In the video footage from the left side of the building’s vantage point, not only can the gas terminal be

³ The State’s Exhibit 4 was the video footage from the gas station’s surveillance cameras. State’s Exhibit 4 included four videos from four different vantage points labeled as (1) right side of building, (2) left side of building, (3) side of building, and (4) inside store.

STATE V. MCCOLLUM

Opinion of the Court

seen *through the windshield*, but Maynard can be seen, *through the windshield*, getting out of the vehicle and Henderson can be seen, *through the windshield*, moving from the back of the vehicle to exit out the driver's side door of the vehicle. Additionally, after Henderson exited the Mustang and walked around the front of the car, the video footage showed that defendant shifted his focus to look at Henderson or in Henderson's direction before returning his focus back to the interaction with Hairston. Therefore, this evidence—whether direct or circumstantial—indicates that defendant was aware that Henderson was an occupant of the Mustang on which he opened fire.

State's Exhibit 4 showed that Hairston and defendant's verbal altercation ended with Hairston walking away and defendant getting into the KIA. After defendant got back into the vehicle, the KIA is seen backing around to the side of the building and pulling onto Vance Street. However, defendant is then seen getting out of the KIA, coming back through to the side parking lot on foot, with a firearm in his right hand, headed toward the front of the gas station. After motioning for the bystanders to move/get out of the way, defendant walked directly toward the Mustang, pointed the firearm at the Mustang, and opened fire on the vehicle and its occupants.

Furthermore, when viewing State's Exhibit 4, Henderson can be seen, *through the windshield*, getting into the Mustang on the driver's side of the vehicle and behind the driver's seat. Corporal Menard's testimony indicated that, although there were

bullet holes all over the hood of the Mustang, the majority of the bullet holes were found on the driver's side of the Mustang's hood. Moreover, the State's Exhibit 36, a photograph, showed where one of the bullets from defendant's firearm went through the windshield and entered the dashboard on the driver's side of the Mustang.

Therefore, reviewing defendant's case de novo, considering all this evidence "in the light most favorable to the State," and giving the State "the benefit of every reasonable inference supported by th[is] evidence[.]" *Buchanan*, 260 N.C. App. at 622, 818 S.E.2d at 708, we find that the State "introduce[d] more than a scintilla of evidence of each essential element of the offense and that [] defendant was the perpetrator of the offense." *State v. Davy*, 100 N.C. App. 551, 556, 397 S.E.2d at 636–37. And because, "[a]ny contradictions or discrepancies arising from the evidence are properly left for the jury to resolve[.]" *State v. Rouse*, 198 N.C. App. 378, 381, 679 S.E.2d 520, 523 (2009) (citation omitted), we hold that the trial court properly denied defendant's motion to dismiss.

B. AWDWISI

Next, as it relates to the conviction for assault with a deadly weapon inflicting serious injury, defendant contends that the trial court erred by giving a peremptory instruction to the jury that Maynard's injury was a serious injury, and by not instructing the jury on a lesser-included offense. We agree.

a. Standard of review

“A trial court must instruct the jury on the law arising on the evidence.” *State v. Barron*, 202 N.C. App. 686, 694, 690 S.E.2d 22, 28 (2010). “The chief purpose of a jury charge is to give a clear instruction which applies the law to the evidence in such manner as to assist the jury in understanding the case and in reaching a correct verdict.” *Id.* at 694, 690 S.E.2d at 28–29 (brackets and citation omitted). “Whether a jury instruction correctly explains the law is a question of law, reviewable by this Court de novo.” *Id.* at 694, 690 S.E.2d at 29 (italics omitted).

b. Peremptory jury instruction

“The essential elements of assault with a deadly weapon inflicting serious injury are (1) an assault (2) with a deadly weapon (3) inflicting serious injury (4) not resulting in death.” *State v. Anderson*, 222 N.C. App. 138, 143, 730 S.E.2d 262, 266 (2012) (citation omitted). “Assault is an overt act or attempt, with force or violence, to do some immediate physical injury to the person of another, which is sufficient to put a person of reasonable firmness in fear of immediate physical injury.” *Id.* (citation omitted). “A pistol or a revolver is a deadly weapon *per se*.” *Id.* (citation omitted). “Serious injury is ‘physical or bodily injury resulting from an assault with a deadly weapon,’ but serious injury has not been defined with specificity for the purposes of AWDWISI[.]” *State v. Bagley*, 183 N.C. App. 514, 526, 644 S.E.2d 615, 624 (2007) (citations omitted), because “whether an injury is serious within the meaning of AWDWISI is usually a factual determination that rests with the jury.” *Id.* (citation omitted). “In exceptional cases, the trial court may remove the element of serious

injury from consideration by the jury by peremptorily declaring the injury to be serious.” *Id.* at 527, 644 S.E.2d at 623–24. “However, such a declaration is appropriate only when the evidence is not conflicting and is such that reasonable minds could not differ as to the serious nature of the injuries inflicted.” *Id.* at 527, 644 S.E.2d at 624.

Here, there is substantial evidence to support a jury’s finding that Maynard’s injury was a serious injury. Maynard sustained a gunshot wound to his arm as a result of defendant’s assault on him. The evidence tended to show that Maynard’s arm bled as a result of the gunshot wound. Maynard testified that after being shot, he tried to remain calm and did not want to panic because his children were in the car. Maynard testified that he has scar tissue on the front and back of his upper left arm where the bullet entered and exited, and that he continues to experience pain in that area. Maynard lost his job as a result of the injury. Maynard testified that he called his mother to come pick him and his family up from the scene of the crime to drive him to the hospital so that he could be treated, and that he was at the hospital for approximately two to three hours. Henderson testified that she went into the gas station and got hydrogen peroxide and bandages to clean and wrap up Maynard’s gunshot wound. Henderson testified that she cleaned Maynard’s wound for approximately three weeks, and that the healing process ebbed and flowed—some days it appeared to be closing up and other days it would be re-opened. Henderson also testified that as a result of the injury, Maynard could not lift his arm or play with their children.

Conversely, there is also evidence that would support a jury's finding that Maynard's injury was not serious. Pettigrew testified that Maynard appeared to be calm after being shot. The evidence tended to show that Maynard refused to go to the hospital via the ambulance that arrived on scene, and waited for his mother—who drove from Greensboro to pick Maynard and his family up—to drive him to the Moses Cone hospital in Greensboro as opposed to the hospital in Reidsville.⁴ The evidence also tended to show that once at the hospital, the medical providers “looked at” Maynard's injury and “wrapped it up.” Additionally, the evidence tended to show that although Maynard lost his job due to his injury, he nevertheless attempted to go to work the day after sustaining the injury.

Based on our de novo review, we find that the facts of this case relating to Maynard's injury do not rise to the level of being “exceptional,” and therefore the trial court erred by “remov[ing] the element of serious injury from consideration by the jury” when it “peremptorily declar[ed] [Maynard's] injury to be serious.” *Bagley*, 183 N.C. App. at 527, 644 S.E.2d at 623–24. As such, we must now consider whether this constitutes reversible error such that defendant is entitled to a new trial as to the AWDWISI offense.

c. Lesser-included offense

⁴ We can take judicial notice that Greensboro is approximately twenty-eight miles away from Reidsville. *See, e.g., State v. Brown*, 221 N.C. App. 383, 387, 732 S.E.2d 584, 587–88 (2012) (illustrating that it is well established that the courts can take judicial notice of geographical distances between cities and towns).

“A criminal defendant is entitled to a new trial if the trial court committed reversible error which denied the defendant a fair trial conducted in accordance with law.” *Id.* at 519, 644 S.E.2d at 619 (citation omitted). And reversible error occurs when “there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached.” *Id.* at 519–20, 644 S.E.2d at 619 (citation omitted). And with regard to jury instructions, “[a] trial judge is required to instruct the jury on the law arising from evidence presented at trial[,] [and] [t]he necessity of instructing the jury as to lesser[-]included offenses arises only where there is evidence from which the jury could find that a lesser[-]included offense had been committed.” *State v. Washington*, 142 N.C. App. 657, 659–60, 544 S.E.2d 249, 251 (2001). Lastly, “the trial judge is not required to submit lesser[-]included offenses for a jury’s consideration when the State’s evidence is positive as to each and every element of the crime charged and there is no conflicting evidence related to any element of the crime charged.” *Id.* at 660, 544 S.E.2d at 251.

Based on our discussion above, we conclude that it is entirely plausible that a jury would not have found Maynard’s injury to be serious, and therefore found him not guilty of AWDWISI, which is in opposition to the jury’s guilty verdict in defendant’s trial for AWDWISI. Thus, the trial court committed reversible error by peremptorily instructing the jury that Maynard’s injury was a “serious injury” and declining defendant’s request for a jury instruction on the lesser-included offense of

AWDW. Consequently, we vacate defendant's conviction for AWDWISI, and remand for a new trial on this charge.

C. Defense of Justification

Defendant's next contention is that "the trial court erred by refusing to instruct the jury on the defense of justification to the charge of possession of a firearm by a felon." We do not agree.

"A trial court's decisions regarding jury instructions are reviewed de novo." *State v. Williams*, 283 N.C. App. 538, 542, 873 S.E.2d 433, 436 (2022). Further, "[t]o resolve whether a defendant is entitled to a requested instruction, we review de novo whether each element of the defense is supported by the evidence, when taken in the light most favorable to defendant." *State v. Swindell*, 382 N.C. 602, 606, 879 S.E.2d 173, 175 (2022) (citation omitted). "If a request be made for a special instruction which is correct in itself and supported by evidence, the court must give the instruction at least in substance." *Id.* at 606, 879 S.E.2d at 176 (emphasis omitted) (internal quotation marks and citation omitted).

Here, defendant was charged with violating N.C. Gen. Stat. § 14-415.1 which states, "[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" N.C. Gen. Stat. § 14-415.1(a) (2023). Our Supreme Court has held that, "in narrow and extraordinary circumstances, justification may be available as a defense to a charge under N.C. [Gen. Stat.] § 14-415.1." *State v. Mercer*, 373 N.C. 459, 463, 838 S.E.2d

359, 362 (2020) (footnote omitted). In such circumstances,

to establish justification as a defense to a charge under N.C. [Gen. Stat.] § 14-415.1, the defendant must show: (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.

Id. at 464, 838 S.E.2d at 363 (citation omitted). Therefore, in order to analyze whether the trial court erred by denying defendant's request for a justification instruction, we must determine whether the evidence, taken in the light most favorable to defendant, establishes the elements of a defense of justification. *Id.*

Here, taking the evidence in the light most favorable to defendant, we find that defendant failed to meet his burden of establishing a defense of justification to the possession of a firearm by a felon charge. First, defendant failed to establish that he "was under unlawful and present, imminent, and impending threat of death or serious bodily injury[]" because the verbal altercation in which Hairston allegedly communicated death threats to defendant ended with both parties walking away unharmed.

Second, the evidence suggests that defendant *did* negligently or recklessly place himself in a situation such that he would be forced to engage in criminal conduct. Here, defendant voluntarily chose to get out of the KIA, walk toward the

Mustang, and open fire on the Mustang and its occupants. As noted above, the verbal altercation in which Hairston allegedly communicated death threats to defendant ended with both parties walking away unharmed. The evidence presented showed that defendant got into the KIA and, according to a witness as well as surveillance footage from the gas station, the KIA exited the gas station parking lot and pulled onto Vance Street. Defendant then got out of the KIA and walked back through the parking lot, with a gun in his hand, toward the Mustang. Considering this evidence in the light most favorable to defendant, we conclude that a reasonable jury would find that defendant *did* place himself in a situation where he would be forced to engage in criminal activity.

Third, defendant failed to introduce evidence that supports his claim that he had no reasonable, lawful alternative to violating the law. We are not persuaded by defendant's testimony that he felt as though he had no other alternative to the actions he took based on Blackwell's statements. Defendant testified that Blackwell told him that Hairston was "the guy that shot Peaches' house up last night." Based on this information, defendant stated that he attempted to call his girlfriend to tell her to get out of the house, but his phone died. After Blackwell gave him a gun, defendant made the decision to go shoot "at the hood of the car to kind of slow down the process of them being able to get to [defendant] before [defendant] [could] get to [defendant's] family and get them to a safer area." Defendant testified that he was "thinking about [his] family and not allowing [Hairston] to get to [his] family before [defendant]

could[.]” However, we are not convinced by defendant’s rationale because it was also defendant’s testimony that after the shooting, he got back in the car and went to his brother’s house where defendant “took a couple shots to ease [his] nerve[s]” and played video games. Defendant stated that after being at his brother’s house for approximately fifteen to twenty minutes, he was able to get in touch with his girlfriend. Furthermore, defendant testified that he lived “90 seconds” from the gas station, and that his main concern was getting home to his family to “get them to a safer area.” However, instead of continuing home after getting in the KIA and exiting the gas station parking lot, defendant voluntarily chose to return to the scene of the incident and engage in criminal activity. Therefore, while considering the evidence in the light most favorable to defendant, a reasonable jury could not conclude that defendant was left without any reasonable alternative.

Fourth, defendant failed to provide evidence establishing a direct causal relationship between the criminal action and the avoidance of the threatened harm. Again, as mentioned above, the verbal altercation between defendant and Hairston ended with both parties walking away unharmed. Therefore, there was no additional action by defendant needed to avoid the alleged threatened harm. Thus, we conclude that a reasonable jury could not find that defendant’s possession of the gun was directly caused by his attempt to avoid a threatened harm.

Based on our review of all of the evidence, in the light most favorable to defendant, defendant failed to present sufficient evidence to satisfy all four factors

required for the trial court to give the jury an instruction on the defense of justification. Thus, we hold that the trial court did not err in declining defendant's request for the instruction on justification as a defense to the possession of the firearm by a felon charge.

III. Conclusion

For the foregoing reasons, we conclude that the trial court did not err by denying defendant's motion to dismiss the charge of assault by pointing a gun at Henderson or declining to instruct the jury on the defense of justification. However, we conclude that the trial court committed reversible error by peremptorily instructing the jury that Maynard's gunshot wound was a serious injury per se, and thereby declining to instruct the jury on lesser-included offenses regarding defendant's AWDWISI charge. For these reasons, we vacate defendant's conviction for the AWDWISI offense and remand for a new trial on that charge.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED FOR A NEW TRIAL IN 22 CRS 51130.

Judges STROUD and CARPENTER concur.

Report per Rule 30(e).