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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-1131

Filed 1 October 2024

Mecklenburg County, No. 19 CRS 212974

STATE OF NORTH CAROLINA

v.

KYLE WATSON GRAY, Defendant.

Appeal by Defendant from judgment entered 16 February 2023 by Judge Matt Osman in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 September 2024.

*Attorney General Joshua H. Stein, by Assistant Attorney General Ronnie K. Clark, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Sterling Rozear, for defendant-appellant.*

MURPHY, Judge.

A defendant is not entitled to a necessity defense when he testifies that the underlying *actus reus* did not occur. Here, where Defendant testified with respect to a charge of felonious breaking and entering that he did not enter the building at all, he was not entitled to an instruction on necessity. Accordingly, we hold there was no error—and certainly no plain error.

**BACKGROUND**

Defendant Kyle Watson Gray appeals from his 16 February 2023 conviction for a single charge of felonious breaking and entering.

Defendant's version of the events indicates that, on 5 April 2019, in relevant part, Defendant drove in front of the home of his acquaintance, William Muench, where two men, including Muench, were standing near a motorcycle and a couch that was half-inside Muench's open garage. Upon hearing a verbal address from Muench from his car, Defendant stopped, exited his vehicle, and walked toward the two men, then began asking Muench about a series of unrecognized logins on his Google account.<sup>1</sup> According to Defendant, Muench then approached him, instructed him to leave, and cocked his fists, prompting Defendant to push Muench. As a result of this altercation, Muench began to "back into" the garage alongside the partially protruding couch and produced a box cutter from his pocket.

Defendant, believing he could not turn his back on Muench due to the drawn box cutter, grabbed a section of the couch protruding from the garage and pulled it between himself and Muench to create a barrier. At this point, Muench retreated inside the home. Defendant further testified that, at this point, he produced a knife from his pocket, slashed the couch, and attempted to slash Muench's motorcycle tire because he "was worried that he was going back inside to get a gun . . . ." When

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<sup>1</sup> Defendant believed Muench had some knowledge of, or involvement with, these unrecognized logins.

Muench re-emerged, Defendant left.

During cross-examination, Defendant testified that he remained outside the home the entire time, stating, “I didn’t go anywhere near the garage door, inside. I didn’t go inside the garage.” Defendant did not request, nor did the trial court provide, an instruction to the jury concerning the affirmative defense of necessity with respect to the felonious breaking and entering charge.

### ANALYSIS

On appeal, Defendant argues the Superior Court plainly erred in failing to instruct the jury on necessity because, under his account of events, he was only required to enter Defendant’s garage to protect himself from the then-armed Muench. Recently, in *State v. Reber*, our Supreme Court recapitulated the function of plain error in our jurisdiction:

Ordinarily, to preserve an issue for appellate review, a litigant must raise the issue and secure a ruling from the trial court. For evidentiary and instructional errors, this typically requires the party challenging the evidence or jury instruction to make a timely objection. Without an objection, that error is deemed unpreserved, and the issue is therefore waived on appeal.

This preservation rule serves crucial functions in our justice system. First, and most obviously, it promotes the efficiency of a justice system with limited resources. When a party alerts the trial court of a potential error, the court can correct it. For example, with an evidentiary objection, the trial court can refuse to admit the evidence or offer a limiting instruction to the jury. If the error is not identified until after the trial, the only option is to set aside the judgment and order a new trial. This is an incredibly costly

alternative.

Second, this preservation rule reduces the risk of “gamesmanship” in the appellate process. As noted above, when there is a reversible evidentiary or instructional error in a criminal trial, the remedy on appeal is to vacate the judgment and remand for a new trial. A preservation requirement prevents parties from allowing evidence to be introduced or other things to happen during a trial as a matter of trial strategy and then assigning error to them if the strategy does not work.

Despite the important functions of this preservation rule, its application can be harsh. There will be times when the lack of preservation means the trial court committed a reversible error but the aggrieved party cannot raise that error on appeal.

Plain error exists for the rare cases where the harshness of this preservation rule vastly outweighs its benefits. When we first recognized the rule . . . , we emphasized that it was available only in extraordinary cases. We explained that it should be “applied cautiously and only in the exceptional case,” that it is reserved for “grave error which amounts to a denial of a fundamental right of the accused,” and that it focuses on error that has “resulted in a miscarriage of justice” or the denial of a “fair trial.”

*State v. Reber*, 386 N.C. 153, 157-58 (2024) (marks and citations omitted) (quoting *State v. Lawrence*, 365 N.C. 506, 516-17 (2012) (quoting *State v. Odom*, 307 N.C. 655, 660 (1983))). As plain error is exceptional, the three factors with which a defendant must establish it are exacting:

First, the defendant must show that a fundamental error occurred at trial. Second, the defendant must show that the error had a probable impact on the outcome, meaning that absent the error, the jury probably would have

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returned a different verdict. Finally, the defendant must show that the error is an exceptional case that warrants plain error review, typically by showing that the error seriously affects the fairness, integrity or public reputation of judicial proceedings.

*Id.* at 158.

However, as the name implies, the occurrence of error is a necessary prerequisite to a showing of plain error; and, here, no error occurred. We have held, across multiple affirmative defenses in criminal contexts, that a Defendant's testimony that he did not commit an offense precludes the availability of an affirmative defense with respect to that offense. *See, e.g., State v. Williams*, 342 N.C. 869, 873 (1996) ("The defendant is not entitled to an instruction on self-defense while still insisting that he did not fire the pistol at anyone, that he did not intend to shoot anyone and that he did not know anyone had been shot."); *State v. Cook*, 254 N.C. App. 150, 153 (2017) ("[A] defendant who fires a gun in the face of a perceived attack is not entitled to a self-defense instruction *if he testifies* that he did not intend to shoot the attacker when he fired the gun."), *aff'd*, 370 N.C. 506 (2018); *State v. Holshouser*, 267 N.C. App. 349, 353 (2019) (marks and citations omitted) ("[T]he affirmative defense of justification does not negate any element of the charged crime, but serves only as a legal excuse for the criminal act and is based on additional facts and circumstances that are distinct from the conduct constituting the underlying offense. Consistent with our self-defense caselaw, a defendant is not entitled to an instruction regarding justification where he testifies that he did not commit the criminal act at

all.”)

In this case, Defendant testified that an act necessarily supporting both the breaking and entering conviction and that his entry was a necessity—entering the garage—did not occur. Thus, Defendant was not entitled to a necessity instruction, as he could not obtain an instruction on this affirmative defense while maintaining that he did not engage in the *actus reus* supporting both the crime and the defense.

### **CONCLUSION**

The Superior Court did not err, as Defendant’s testimony that he did not enter the garage left him ineligible for instruction on the affirmative defense of necessity with respect to breaking and entering.

NO ERROR.

Judges ARROWOOD and GRIFFIN concur.

Report per Rule 30(e).