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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-1073

Filed 19 November 2024

Cumberland County, No. 20 CRS 060600

STATE OF NORTH CAROLINA

v.

JAMALE DAISHAWN SMITH, Defendant.

Appeal by Defendant from judgment entered 1 March 2023 by Judge Claire V. Hill in Cumberland County Superior Court. Heard in the Court of Appeals 14 August 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General J. Blake Norman, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Emily Holmes Davis, for defendant-appellant.

MURPHY, Judge.

Defendant cannot show that the jury probably would have reached a different verdict on the charge of second-degree murder absent the trial court's alleged error in giving the felony bar to self-defense instruction, as the jury determined in finding

Defendant guilty of discharging a firearm into occupied property that Defendant did not fire into the vehicle in self-defense.

Furthermore, assuming, arguendo, that Defendant's trial counsel's failure to object to the trial court's felony bar instruction amounted to deficient performance, Defendant cannot show that, but for counsel's failure to object, there is a reasonable probability that the result of the proceeding would have been different.

BACKGROUND

On 15 November 2021, Defendant Jamale Daishawn Smith was indicted on charges of first degree murder and discharging a firearm into occupied property in connection with the 10 November 2020 shooting death of Dajuan T. McDonald. On 8 July 2022, Defendant gave notice of his intent to use the affirmative defense of self-defense against the charges.

Defendant's trial began on 16 February 2023. Carolyn McEachern, who had been in the backseat of McDonald's car when the shooting occurred, testified that she had dated both Defendant and McDonald prior to the shooting and that each man had fathered a child by her. Prior to the shooting, Defendant and McDonald had met on only one occasion in 2016. At the time of the shooting, McEachern and McDonald had reengaged in a romantic relationship, and Defendant was unaware of their involvement.

On 10 November 2021, McEachern and McDonald argued over the telephone, and McDonald accused McEachern of being unfaithful. McEachern drove towards

McDonald's mother's home to meet with McDonald but spotted his car in the parking lot of a gas station along the way. McEachern drove into the parking lot and approached the car, and McDonald pulled McEachern onto his lap through the driver's car door. McEachern moved from McDonald's lap into the front passenger seat, and the pair alternated between arguing about money and talking for around 25 minutes. McEachern attempted to grab a bag belonging to McDonald, and McDonald threw the bag into the back passenger seat. McEachern followed the bag into the back passenger seat and retrieved it. McDonald turned to McEachern, and the two began struggling for the bag and shouting at one another.

During this time, Defendant arrived at the gas station. Defendant testified that he recognized McEachern's mother's car in the parking lot, approached the car, and knocked on its window. McEachern's car was unoccupied, but its engine was running. Defendant searched for McEachern inside of the gas station store but was unable to find her. When he returned to the parking lot, he heard loud arguing coming from McDonald's car. Defendant approached the car and recognized McEachern sitting in the back passenger seat. Defendant testified that he witnessed the altercation between McDonald and McEachern and heard McEachern say, "Give me my shit so I can go." McEachern and Defendant gave conflicting testimonies about the events after Defendant approached McDonald's car.

McEachern testified that Defendant opened the side backdoor of McDonald's car and began yelling at McEachern about her relationship with McDonald.

Defendant stood between the open car door and the backseat of McDonald's car, retrieved a gun from his bag, and fatally shot McDonald. McEachern and two bystanders testified that Defendant also pointed his gun at McEachern. McEachern stated that Defendant was obsessed with her and had threatened to kill her.

Defendant, however, testified that the backdoor swung open from the inside of the car; furthermore, Defendant's DNA was not found on the exterior door handle. Defendant testified that he did not recognize the man in the driver's seat as McDonald. Defendant spoke to McEachern through the opened car door, asking whether she was alright. McDonald turned towards Defendant, raised his right arm, pointed a gun at Defendant, slid the driver's seat back to face Defendant, and began shouting expletives. At that moment, Defendant believed that McDonald was going to kill him and reacted by drawing and firing his own gun. Defendant fatally shot McDonald four times.

Defendant returned to his car and recognized that he had dropped his cellphone on the ground next to McDonald's car. As Defendant attempted to retrieve his cellphone, he heard McEachern say, "He shot him for no reason." Defendant pointed his hand towards McEachern and accused her of lying, saying, "He pointed a gun at me to try to kill me, tell the truth, bro." Afterwards, Defendant got inside of his car and drove away.

On 1 March 2023, the jury found Defendant guilty of second-degree murder and of discharging a firearm into occupied property, and Defendant was sentenced to an active term of 325 to 402 months. Defendant appealed.

ANALYSIS

Defendant argues on appeal that the trial court committed plain error in giving a felony bar to self-defense jury instruction; or, alternatively, trial counsel's failure to object to the felony bar to self-defense jury instruction constituted ineffective assistance of counsel.

A. Jury Instructions

Since Defendant failed to object to the felony bar to self-defense instruction at trial, we review “whether the instructions given amount to plain error.” *State v. Bell*, 166 N.C. App. 261, 263 (2004); *See* N.C. R. App. P. 10(c)(4) (2023). To demonstrate that the trial court's felony bar instruction amounted to plain error, Defendant must show that, “absent the error, the jury probably would have reached a different verdict.” *Id.* (citing *State v. Odom*, 307 N.C. 655, 661 (1983)).

[S]howing that a jury *probably would have* reached a different result—requires a showing that the outcome is significantly more likely than not. In ordinary English usage, an event will “probably” occur if it is “almost certainly” the expected outcome; it is treated as synonymous with words such as “presumably” and “doubtless.”

State v. Reber, 386 N.C. 153, 159 (2024) (emphasis in original). Here, Defendant fails to demonstrate that the trial court committed plain error in its felony bar to self-

defense instruction, as the jury determined that Defendant was not acting in self-defense when he discharged the firearm into McDonald's car.

The pattern jury instruction for the felony bar reads:

For the defendant to be disqualified from the benefit of using defensive force, the State must prove beyond a reasonable doubt, among other things, that the defendant, *while acting in self-defense*, was [attempting to commit] [committing] [escaping after the commission of] the felony of (name felony offense alleged), and there was an immediate causal connection between the defendant's *use of such defensive force* and [his] [her] felonious conduct. In other words, the State must prove that but for the defendant [attempting to commit] [committing] [escaping after the commission of] the felony of (name felony offense alleged), the confrontation resulting in [injury to] [the death of] the victim would not have occurred.

N.C. Pattern Instruction Crim. 308.90 (June 2022) (emphasis added).

The trial court instructed as follows with respect to Defendant's discharging a firearm into occupied property charge:

[Defendant] has been charged with discharging a firearm into occupied property. For you to find [Defendant] guilty of this offense the State must prove three things beyond a reasonable doubt.

First, that [Defendant] willfully or wantonly discharged a firearm into a vehicle *without justification or excuse*. An act is willful or wanton when it is done intentionally with knowledge or reasonable ground to believe that the act would endanger the rights or safety of others.

Second, that the vehicle was occupied by one or more persons at the time the firearm was discharged.

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And third, that [Defendant] knew that the vehicle was occupied by one or more persons.

If the State has satisfied you beyond a reasonable doubt that [Defendant] assaulted Dajuan McDonald while discharging a weapon into occupied property with deadly force, then you would consider whether [Defendant's] actions are excused, and [Defendant] is not guilty because [Defendant] acted in self-defense.

The State has the burden of proving from the evidence beyond a reasonable doubt that [Defendant's] action was not in self-defense. If the circumstances would have created a reasonable belief in the mind of a person of ordinary firmness that the assault was necessary or appeared to be necessary to protect that person from imminent death or great bodily harm and the circumstances did create such belief in [Defendant's] mind at the time [Defendant] acted such assault—such assault would be justified by self-defense. You, the jury, determine the reasonableness of [Defendant's] belief from the circumstances appearing to [Defendant] at the time.

Defendant makes no argument of prejudice with respect to the trial court's discharging a firearm into occupied property or self-defense instructions. Based on this instruction, the jury returned a guilty verdict for the offense of discharging a firearm into occupied property. As the State argues, even if Defendant successfully demonstrates that the trial court erred in its felony bar to self-defense instruction, Defendant cannot show that, absent the error, the jury would probably have returned a not guilty verdict for the offense of second-degree murder.

The trial court instructed with respect to Defendant's second-degree murder charge, in pertinent part, as follows:

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For you to find [Defendant] guilty of second-degree murder, the State must prove beyond a reasonable doubt that [Defendant] unlawfully, intentionally, and with malice wounded Dajuan McDonald with a deadly weapon, proximately causing Dajuan McDonald's death. The State must also prove that [Defendant] did not act in self-defense, or that [Defendant] was committing the felony of discharging a weapon into occupied property *if [Defendant] did act in self-defense.*

....

If you find from the evidence beyond a reasonable doubt that on or about the alleged date [Defendant] intentionally and with malice but not in self-defense wounded Dajuan McDonald with a deadly weapon thereby proximately causing Dajuan McDonald's death, it would be your duty to return a verdict of guilty of second-degree murder.

The trial court further instructed:

[Defendant] would be excused of . . . second-degree murder on the ground of self-defense if first, [Defendant] believed it was necessary to kill Dajuan McDonald in order to save [Defendant] from death or great bodily harm; and second, the circumstances as they appeared to [Defendant] at the time were sufficient to create such a belief in the mind of a person of ordinary firmness.

....

[Defendant] would not be guilty of any murder or manslaughter if [Defendant] acted in self-defense and did not use excessive force under the circumstances and was not committing the felony of discharging a firearm into occupied property.

....

[Defendant] is not entitled to the benefit of self-defense if he was committing the felony of discharging a weapon into occupied property.

. . . .

[I]n order for you to find [Defendant] guilty of . . . second-degree murder, the State must prove beyond a reasonable doubt among other things that [Defendant] did not act in self-defense or that [Defendant] was committing the felony of discharging a firearm into occupied property *if [Defendant] did act in self-defense*.

If the State fails to prove that [Defendant] did not act in self-defense or that [Defendant] did not commit a felony of discharging a firearm into occupied property you may not convict [Defendant] of . . . second-degree murder.

We agree with the State that, given the trial court’s “full self-defense instruction with no barring language with regard to the charge of discharging a firearm into an occupied vehicle[,]” “[b]y convicting Defendant of discharging a firearm into [occupied property], the jury rejected [Defendant’s] claim that he was acting in self-defense when he fired the weapon.” This is so because “[t]he homicide and the discharging firearm charges arise from the same substantive” action that Defendant argues he took in self-defense: drawing and firing his weapon four times into the vehicle, fatally shooting McDonald.

The trial court instructed that, in order to find Defendant guilty of discharging a firearm into occupied property, the jury must find (1) that all of the elements for that offense are met and (2) that Defendant was not acting in self-defense. Here, that Defendant did not shoot into the car in self-defense is inherent to a verdict of guilty for the offense of discharging a firearm into occupied property. The trial court instructed, in accordance with the felony bar pattern jury instruction, that the jury

must first find that Defendant acted in self-defense before it need consider the felony bar instruction. Since the jury determined that Defendant was not acting in self-defense when he fired into the vehicle, the felony bar instruction would never have factored into the jury's guilty verdict for second-degree murder. Thus, any potential error in the trial court's felony bar instruction would not have the prejudicial effect that, absent the error, the jury would probably have reached a different verdict.

B. Ineffective Assistance of Counsel Claim

We review ineffective assistance of counsel claims de novo. *State v. Wilson*, 236 N.C. App. 472, 475 (2014).

In order to prevail on an ineffective assistance of counsel claim, a defendant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense. Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Covington, 248 N.C. App. 698, 706 (2016).

[T]he prejudice standard for ineffective assistance claims is lower—the defendant need only show a “reasonable probability” that absent the error the jury would have reached a different result. This means a defendant might prevail on an ineffective assistance claim even when unable to prevail on plain error review.

Reber, 386 N.C. at 166 (citation omitted).

Although the prejudice standard for ineffective assistance claims is lower than that of plain error review, Defendant cannot show that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different, because—as discussed more fully above—the trial court's felony bar instruction did not factor into the jury's guilty verdict for second-degree murder. Even assuming, *arguendo*, that Defendant's trial counsel's representation fell below an objective standard of reasonableness for counsel's failure to object to the trial court's felony bar to self-defense instruction, Defendant was not prejudiced by this alleged error. Accordingly, we deny Defendant's IAC claim. *See State v. Oglesby*, 382 N.C. 235, 245-46 (2022).

CONCLUSION

Defendant fails to show that the trial court committed plain error or that he received ineffective assistance of counsel, as Defendant cannot show that any alleged error arising from the trial court's felony bar to self-defense instruction prejudiced his defense.

NO PLAIN ERROR IN PART; DENIED IN PART.

Judges COLLINS and FLOOD concur.

Report per Rule 30(e).