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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-52

Filed 3 December 2024

Wayne County, Nos. 22CRS282982, 22CRS632

STATE OF NORTH CAROLINA

v.

WARREN ODIS HOGGARD, Defendant.

Appeal by defendant from judgment entered 15 March 2023 by Judge Alma L. Hinton in Wayne County Superior Court. Heard in the Court of Appeals 27 August 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General David D. Larson, Jr., for the State-appellee.

Willingham Law, by Jackie Willingham, for defendant-appellant.

GORE, Judge.

Defendant, Warren Odis Haggard, was charged with possession of a firearm by a felon (“PFF”) and resisting a public officer (“RPO”). A jury found him guilty of both charges. The trial court imposed a consolidated active sentence of 25 to 39 months in prison. Defendant appeals as a matter of right pursuant to N.C.G.S. §§ 7A-27(b) and 15A-1444(a) (2023).

Defendant presents two issues on appeal: (1) whether the trial court plainly erred by failing to instruct the jury on the defense of necessity; and (2) whether trial counsel provided ineffective assistance of counsel (“IAC”) by not requesting a jury instruction on the defense of necessity. We discern no error in the trial court’s judgment.

I.

In the early morning hours of 31 August 2022, defendant called 911 and reported his vehicle stolen. Law enforcement arrived on scene and discovered a vehicle in a ditch approximately 125 yards from defendant’s home. There was no one in the vehicle, and it was not running.

As law enforcement discussed the situation, they noticed defendant walking toward them in the middle of the road—carrying a rifle. They told defendant to drop the weapon several times—he did not. An officer drew his sidearm and approached defendant, seized the rifle, and took defendant into custody. Defendant appeared highly intoxicated at the time of his arrest.

At trial, defendant testified about what happened that night. He was working on his “bass boat” when he heard someone start the engine on his mother’s Chevy Tahoe. When he approached the carport, he saw two young men: one “with long hair” standing outside and another in the driver’s seat of his mother’s vehicle. The long-haired man said, “something about money,” and defendant responded, “you ain’t getting no daggone money from me.” The man grabbed a knife, swiped, and cut

defendant's arm. Defendant grabbed "an electric weedeater" and "wrapped it around" the man's head. The man "fell" and "dropped the knife," while the other man drove off in the Tahoe.

During a break in the altercation, defendant ran "back to the shed . . . where my rifle has been there for years, I mean that rifle has been in the family for 60 years. And I grabbed it." Defendant admitted he was "not supposed to possess a firearm" because of his "felony conviction." Defendant "didn't really know if it was loaded or not." Once defendant had the gun, the long-haired man fled the property.

Defendant "got a flashlight" and "tore out after him," through the woods and a swamp, eventually losing the man in a trailer park. Defendant testified he armed himself and chased the man "to bring him in," to "try and arrest him." Defendant admitted, "I shouldn't have had the gun, but I had to protect myself."

After the chase, defendant returned to his property. He saw law enforcement and slowly approached them while holding his rifle. Defendant testified he heard officers instruct him to put the gun down, but he told them that he "didn't want to drop it on the asphalt." Defendant opined, "I guess I waited too long for them because they were coming," and "they come around and give me the shanghai, I don't know where they learned that from, but it was rough. They pure slammed the back of my head on the concrete and near about knocked me out."

Defendant admitted that he was intoxicated at the time, after about "three or four" beers, but that he was not "stumbling drunk or nothing." Officers handcuffed

defendant and took him back towards a police vehicle. Defendant kicked the police vehicle because he “was pissed,” and “had been chasing somebody through a woods, worried about somebody going to go in there and kill my mama, and I just lost it.”

On cross-examination, defendant stated he kept the rifle “in the shed, it’s been in the shed for the end of time, from the beginning of time, I mean it’s always been there.” When asked whether “it was a good idea to walk down the street with a gun as a felon,” defendant stated, “I hadn’t even thought about a felon, I was so upset at what just happened, the felon went out the window, . . . but I didn’t really know I was even a felon hardly.” Defendant recalled that at the time he approached law enforcement officers he “had ended the chase” and “was going to talk to a lawman.”

On 7 November 2022, defendant was indicted on charges of PFF and RPO. Defense counsel made no request for a jury instruction on the defense of necessity. A jury found defendant guilty of both PFF and RPO. On 15 March 2023, defendant gave oral notice of appeal in open court.

II.

As a preliminary matter, defendant concedes he failed to preserve the issue of whether the trial court erred by failing to instruct the jury on the defense of necessity. *See* N.C.R. App. P. 10(a)(1). 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). “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 (2012) (cleaned up).

Here, defendant “specifically and distinctly” alleges plain error. N.C.R. App. P. 10(a)(4). Thus, we review the alleged error under a plain error standard of review. *See State v. Collington*, 375 N.C. 401, 410 (2020) (citations omitted) (“[U]npreserved issues related to jury instructions are reviewed under a plain error standard”).

A.

Defendant presumes he was entitled to raise the defense of necessity in this PFF prosecution. He asserts the trial court plainly erred by failing to instruct the jury in accordance with N.C.P.I. Crim. 310.12 (“Necessity”). We disagree.

“Generally, the trial court must give an instruction on any substantial feature of a case, regardless of whether either party has specifically requested an instruction. Any defense raised by the evidence is a substantial feature of the case, and as such an instruction is required.” *State v. Smarr*, 146 N.C. App. 44, 54 (2001) (citations omitted). “North Carolina has recognized the defense of necessity in limited circumstances.” *State v. Napier*, 149 N.C. App. 462, 464 (2002).

The pressure of natural physical forces sometimes confronts a person in an emergency with a choice of two evils: either he may violate the literal terms of the criminal law and thus produce a harmful result, or he may comply with those terms and thus produce a greater or equal or lesser amount of harm. For reasons of social policy, if the harm which will result from compliance with the law is

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greater than that which will result from violation of it, he is justified in violating it. Under such circumstances he is said to have the defense of necessity, and he is not guilty of the crime in question—unless, perhaps, he was at fault in bringing about the emergency situation, in which case he may be guilty of a crime of which that fault is an element.

State v. Gainey, 84 N.C. App. 107, 110 (1987) (quoting LaFave and Scott, Criminal Law Sec. 50 at 381 (1972)). “As an affirmative defense, the burden rests upon the defendant to establish this defense, unless it arises out of the State’s own evidence, to the satisfaction of the jury.” *State v. Miller*, 258 N.C. App. 325, 327 (2018) (internal quotation marks omitted) (quoting *State v. Caddell*, 287 N.C. 266, 290 (1975)).

In North Carolina, “[a] defendant must prove three elements to establish the defense of necessity: (1) reasonable action, (2) taken to protect life, limb, or health of a person, and (3) no other acceptable choices available.” *Hudgins*, 167 N.C. App. 705, 710–11 (2005) (citation omitted). The pattern jury instruction for necessity, N.C.P.I. Crim. 310.12, reiterates these elements—as do other opinions involving the defense of necessity in our jurisdiction. *See, e.g., State v. Miller*, 258 N.C. App. at 333; *State v. Thomas*, 103 N.C. App. 264, 265 (1991). The defense of necessity is available, for example, in a driving while impaired (“DWT”) prosecution, *Miller*, 258 N.C. App. at 329; *Hudgins*, 167 N.C. App. at 710, or in a prosecution for felony fleeing to elude arrest with a motor vehicle and speeding in excess of eighty miles per hour, *State v. Templeton*, 899 S.E.2d 588, 589 (N.C. Ct. App. 2024). “This extraordinary rule” is generally restricted to situations where “a human being was thereby saved from

death or peril, or relieved from severe suffering.” *State v. Brown*, 109 N.C. 802, 803, 807 (1891). Defendant cites no reported opinions in this state that address the application of the necessity defense to PFF prosecutions.

In *State v. Mercer*, however, our Supreme Court held that, “in narrow and extraordinary circumstances, *justification* may be available as a defense to a charge under N.C.G.S. § 14-415.1 [(PFF).]” 373 N.C. 459, 463 (2020) (emphasis added). The defense of “necessity” is “[a] justification defense[.]” *Necessity*, BLACK’S LAW DICTIONARY (8th ed. 2004); “traditionally a branch of the common-law doctrine of justification[.]” *United States v. Richardson*, 588 F.2d 1235, 1239 (9th Cir. 1978). A justification defense essentially “negates an assertion of wrongful conduct.” Mitchell N. Berman et al., *Justification and Excuse, Law and Morality*, 53 DUKE L.J. 1, 3–4 (2003) (citation omitted). “An excuse[.]” in contrast, “negates a charge that the particular defendant is personally to blame for the wrongful conduct.” *Id.* at 4.

Necessity is a defense which exemplifies *justification*, and some of our prior decisions use these terms interchangeably, due in part to an ambiguity in the law. *See State v. Monroe*, 233 N.C. App. 563, 565 (2014) (surveying prior Court of Appeals cases). But in North Carolina, “necessity” and “justification” are discrete defenses—although closely related—with different elements and applications. The Court in *Mercer* adopted a four-element test from *United States v. Deleveaux*, 205 F.3d 1292 (11th Cir. 2000), and specified that these elements apply to prosecutions under N.C.G.S. § 14-415.1 (PFF). *Mercer*, 373 N.C. at 463–64. “[A] *justification* instruction

must be given when each *Deleveaux*” element “is supported by evidence taken in the light most favorable to defendant” *Id.* at 464 (emphasis added). We reiterate that defendant cites no case that applies the elements of necessity to PFF prosecutions—nor does he cite *Mercer* for its application of *Deleveaux*.

[T]o establish justification as a defense to a charge under N.C.G.S. § 14-415.1 [(PFF)], 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. (quoting *Deleveaux*, 205 F.3d at 1297). A North Carolina Pattern Jury Instruction for the defense of justification exists as N.C.P.I. Crim. 310.14 (“Justification”)—it preserves the *Deleveaux/Mercer* elements verbatim.

Here, defendant does not phrase his argument in terms of justification—only necessity. It is clear, moreover, that defendant did not intend to invoke the justification defense. In the argument section of his brief, defendant provides only cursory citations to *Miller* and *Hudgins* (DWI cases) for their general rules concerning the trial court’s duty to instruct the jury on a substantial feature of the case, *see, e.g., Miller*, 258 N.C. App. at 327; *Hudgins*, 167 N.C. App. at 708, and the requisite elements needed to prove the defense of necessity to the satisfaction of the jury,

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Hudgins, 167 N.C. App. at 710–11 (DWI). These cases “are not analogized or otherwise analyzed in support of [defendant’s] position.” *K2HN Constr. NC, LLC v. Five D Contractors, Inc.*, 267 N.C. App. 207, 215 (2019).

Defendant merely recites a string of facts, without any application to guiding legal principles, and without appropriate reference to any essential component of his defense. He invites this Court to independently assess those facts and to construct an argument for him under the plain error standard of review—a task that we refuse. *See Viar v. N. Carolina Dep’t of Transp.*, 359 N.C. 400, 402 (2005) (“It is not the role of the appellate courts . . . to create an appeal for an appellant.”). Additionally, “[d]efendant is missing necessary reasons or arguments as to why the alleged error rises to plain error. He offers nothing on why this is an exceptional case or why this will seriously affect the fairness, integrity, or public reputation of judicial proceedings.” *State v. Patterson*, 269 N.C. App. 640, 645 (2020). We conclude that defendant has abandoned his argument. *See* N.C.R. App. P. 28(b)(6) (“Issues not presented in a party’s brief, or in support of which no reason or argument is stated, will be taken as abandoned.”).

Nevertheless, defendant’s contention lacks merit. “Under any definition of these defenses one principle remains constant: if there was a reasonable, legal alternative to violating the law, a chance both to refuse to do the criminal act and also to avoid the threatened harm, the defenses will fail.” *United States v. Bailey*, 444 U.S. 394, 410 (1980) (cleaned up).

The uncontroverted evidence in this case shows that defendant: retrieved the gun from his own property; took it with him; and chased the man “to bring him in,” to “try and arrest him.” Defendant stated he gave chase because he was “pretty, pretty . . . pissed.” Defendant recalled that, at the time he approached law enforcement officers, he “had ended the chase.” On these facts, we cannot say that a rational juror could find defendant’s conduct was a reasonable course of action under the circumstances. Ultimately, defendant fails to meet his burden; he has not presented evidence tending to show that he “had no reasonable legal alternative to violating the law[.]” *Mercer*, 373 N.C. at 464 (citation omitted); *see also State v. Craig*, 167 N.C. App. 793, 797 (2005) (holding that “the evidence did not support giving a special instruction on justification because there was a time period where [the] [d]efendant was under no imminent threat while possessing the gun.”); *accord State v. Boston*, 165 N.C. App. 214, 222 (2004); *Napier*, 149 N.C. App. at 465.

Setting aside the question of whether the elements of necessity are applicable in any PFF prosecution, defendant has not established that his actions were reasonable[.]” nor has he shown that “he had no acceptable alternative available” under either test—necessity (N.C.P.I. Crim. 310.12) or justification (N.C.P.I. Crim. 310.14). *Templeton*, 899 S.E.2d at 591. Thus, we discern no error, let alone plain error, in the trial court’s failure to instruct the jury on the elements of either defense.

B.

Defendant argues he received IAC because his counsel failed to request an

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instruction on the defense of necessity. We have already determined, however, that the trial court had no duty to instruct on necessity. Defendant's IAC argument is, therefore, without merit. *See State v. Henderson*, 64 N.C. App. 536, 539 (1983) ("If the trial [court] had no duty to instruct the jury on duress or coercion as a justification for his participation in the crime, the defendant was not denied the effective assistance of his counsel who failed to request such an instruction.").

III.

For the foregoing reasons, we discern no error in the trial court's judgment. Defendant abandoned his argument, and regardless, it lacks merit. Defendant presented no "evidence on the lack of acceptable alternatives or the reasonableness of his actions." *Templeton*, 899 S.E.2d at 591.

NO ERROR.

Judges ZACHARY and MURPHY concur.

Report per Rule 30(e).