

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA24-441

Filed 31 December 2024

Mecklenburg County, Nos. 22 CRS 365846, 23 CRS 004290

STATE OF NORTH CAROLINA

v.

BRYAN O'NEAL BRACY II, Defendant.

Appeal by Defendant from judgment entered 3 August 2023 by Judge Matt Osman in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 October 2024.

*Attorney General Joshua H. Stein, by General Counsel Fellow Marc D. Brunton, for the State.*

*John E. Ryan III for defendant-appellant.*

MURPHY, Judge.

Defendant Bryan O. Bracy II appeals from the trial court's judgment entered upon the jury verdict finding him guilty of possession of a firearm by a felon and his guilty plea to attaining the status of a habitual felon. Defendant contends he received ineffective assistance of counsel when his trial counsel failed to provide notice and/or

request a jury instruction on the affirmative defense of justification. Defendant was not entitled to an instruction on the defense and did not receive ineffective assistance of counsel.

### **BACKGROUND**

Around 4:30 p.m. on 16 December 2022, Captain Joshua Case of the Charlotte Fire Department responded to a 911 call for a welfare check on an unresponsive person. Upon arriving at the location, Captain Case saw Defendant lying shirtless on the side of the road. Defendant did not respond to the lights, sirens, or air horn of the fire truck, and Captain Case had to shake him awake.

While getting to his feet, Defendant handed Captain Case a loaded gun magazine from his left pocket. Captain Case then observed a bulge in Defendant's right pocket, and immediately upon feeling it, knew it was a gun. Defendant was cooperative and handed Captain Case the gun. Captain Case observed that Defendant's pupils were constricted, indicating that he was under the influence of a narcotic.

Officer Matthew Tomasino with the Charlotte Mecklenburg Police Department arrived at the scene a few minutes later, and Captain Case handed him the gun. Officer Tomasino ran Defendant's information and learned that he was a convicted felon.

After reading him his *Miranda* rights, Officer Tomasino spoke with Defendant while he was in the back of the ambulance. Defendant told Officer Tomasino that he

found the gun, along with a pipe of “some substance[,]” wrapped up in a little bag in the leaves on the side of the road. Defendant said he fired the gun once at the ground and that he was going to take the gun to the staff at the men’s shelter located about 500 feet away. Defendant admitted he was a drug addict and that he took a hit of the discovered substance and then passed out.

The jury found Defendant guilty of possession of a firearm by a felon. Defendant admitted to attaining the status of a habitual felon. The trial court sentenced Defendant as a habitual felon to an active sentence of 96 to 128 months. Defendant gave oral notice of appeal.

### **ANALYSIS**

In his sole argument on appeal, Defendant contends his trial counsel was ineffective when she failed to provide notice of and to request a jury instruction on the defense of justification. Defendant claims that because his trial counsel stipulated that he was a convicted felon and admitted that he actually possessed the gun, justification was his only available defense.

“On appeal, this Court reviews whether a defendant was denied effective assistance of counsel de novo.” *State v. Wilson*, 236 N.C. App. 472, 475 (2014). Claims of ineffective assistance of counsel “brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing.” *State v. Clark*, 380 N.C.

204, 215–16 (2022) (citation omitted).

To prevail on a claim of ineffective assistance of counsel, a defendant must show “that his counsel’s performance was deficient” and that the “deficient performance prejudiced his defense.” *State v. Allen*, 360 N.C. 297, 316 (citations omitted), *cert. denied*, 549 U.S. 867 (2006).

Defendant was charged with violating N.C.G.S. § 14-415.1, which states that “[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.G.S. § 14-415.1(a) (2023). However, our Supreme Court has 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.” *State v. Mercer*, 373 N.C. 459, 463 (2020).

A defendant is entitled to a jury instruction on the defense of justification when, taken in the light most favorable to the defendant, there is evidence of each of the following four factors:

(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.

Here, the evidence presented, even in the light most favorable to Defendant,

was insufficient to establish the first factor. Even assuming Defendant picked up the gun to return it to a safe place as he told Officer Tomasino, there was no evidence Defendant was under “present, imminent, and impending threat of death or serious bodily injury” when he did so. The evidence does not support the first factor of the *Mercer* test, and Defendant was not entitled to an instruction on justification. *State v. Crooks*, 274 N.C. App. 319, 323 (2020) (holding that “the trial court properly declined to provide a jury instruction on justification” where the evidence at trial was insufficient to support the first factor of the *Mercer* test). Thus, any failure to notice and request the instruction cannot amount to deficient performance.

### **CONCLUSION**

Trial counsel was not deficient for failing to request an instruction on an unavailable defense,<sup>1</sup> and Defendant was not deprived of effective assistance of counsel.

NO ERROR.

Judge FLOOD concurs.

---

<sup>1</sup> Although this Court has not applied the necessity defense to possession of a firearm by a felon, we note Defendant also would not be entitled to the defense. *See State v. Hoggard*, COA24-52, slip op. at 8–10 (N.C. Ct. App. 3 Dec. 2024) (unpublished) (generally discussing, in dicta, the applicability of the necessity affirmative defense to a charge of possession of a firearm by a felon). In order to establish the defense of necessity, a defendant must show “(1) reasonable action, (2) taken to protect life, limb, or health of a person, and (3) no other acceptable choices available.” *State v. Hudgins*, 167 N.C. App. 705, 710–11 (2005). While Defendant stated he was trying to take the gun to a safe place, his deviation from that goal by taking “a hit” of the substance he found with the gun was not a reasonable course of action under the circumstances and negates any necessity defense. The same is true of Defendant’s failure to immediately purge himself of the gun when he handed the magazine over to Captain Case.

STATE V. BRACY

*Opinion of the Court*

Judge STROUD concurs by separate opinion.

Report per Rule 30(e)

No. COA24-441 – *State v. Bracy*

STROUD, Judge, concurring by separate opinion.

As stated in my concurrence in *State v. Melton*, for the same reasons here:

I concur in the majority opinion except as to any citation of unpublished cases of this Court that were not argued in any brief filed in this case. I would not rely upon an unpublished opinion not argued by a party for the same reason as in my concurring opinion in *State v. Hensley*, 254 N.C. App. 173, 803 S.E.2d 744 (2017).

*State v. Melton*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 901 S.E.2d 853, 860 (2024) (Stoud, J., concurring).