Issues in Self-Defense Law in North Carolina

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August 2025

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Self-Defense and Retreat from Places Where the Defendant Has a "Lawful Right to Be"

Author : John Rubin

Categories : Crimes and Elements, Uncategorized

Tagged as : lawful place, retreatself-defense

Date : August 29, 2017

Our appellate courts are beginning to issue decisions concerning the impact of the General Assembly's 2011 changes to North Carolina law on self-defense. A case earlier this summer addressed whether a defendant has a duty to retreat before using deadly force in self-defense in a place where he or she has a "lawful right to be." *See State v. Bass*, ___ N.C. App. ___, 802 S.E.2d 477, *temp. stay and rev. granted*, ___ N.C. ___, 800 S.E.2d 421 (2017). In *Bass*, the Court of Appeals held that the defendant did not have a duty to retreat and further had the right to have the jury instructed that he did not have a duty to retreat.

Defendant's evidence. The case concerned an ongoing conflict between the defendant, Bass, and the alleged victim, Fogg, which resulted in Bass shooting Fogg. Bass was charged with attempted murder and assault with a deadly weapon with intent to kill inflicting serious injury. The jury convicted him of assault with a deadly weapon inflicting serious injury.

In determining whether a defendant is entitled to instructions on self-defense and other defenses, the court must consider the evidence in the light most favorable to the defendant. In this case, Bass's evidence showed that ten days before the shooting, Fogg assaulted him and broke his jaw in three places, requiring surgery, placement of screws in his jaw, and wiring of his jaw shut. Fogg was 240 pounds, Bass was 165 pounds. This incident was captured on video on Fogg's cellphone. *Bass*, slip op. at 2–3.

Bass's evidence showed that on the day of the shooting, July 3, he was watching fireworks with friends at the apartment complex where he lived. He was standing on the sidewalk at the complex when he saw a car pull into the parking lot, with Fogg in the passenger seat. In an effort to avoid Fogg, Bass walked to the breezeway of another building in the apartment complex, "praying and hoping" that Fogg would not approach him, but Fogg did. Fogg began speaking aggressively to Bass, who observed that Fogg was carrying a large knife in a sheath attached to his belt. The knife, which was in the record on appeal, resembled a short machete with a wide, curved blade approximately ten inches long. Fearing that Fogg was going to beat him up or cut him and not wanting to be trapped in the breezeway, Bass moved to a grassy area outside the breezeway. After Fogg demanded that Bass get "on the concrete," Bass pulled out a gun and pointed it at Fogg, hoping to scare him into leaving. Fogg said "oh . . . you wanna shoot me?" and approached Bass while reaching for his knife. Bass testified that he then shot Fogg because he was "scared for [his] life." Slip op. at 3–5.

Jury instructions and deliberations. The trial judge instructed the jury on the defendant's right to use deadly force in self-defense when the defendant reasonably believes that the force is necessary to protect the defendant from imminent death or great bodily harm. The trial judge used North Carolina Pattern Jury Instruction ("N.C.P.I.") 308.45 to convey these principles.

The defendant further requested that the trial judge instruct the jury that he did not have a duty to retreat because he was in a place where he had a "lawful right to be." The pattern jury instruction includes such a statement, providing that "the defendant has no duty to retreat in a place where the defendant has a lawful right to be." N.C.P.I. 308.45. The trial judge declined to include this part of the instruction because the defendant was not within the curtilage of his

home when he shot Fogg. Slip op. at 9–11.

During deliberations, the jury sent a note to the judge asking for "further explanation on NC law with regard to 'duty to retreat.'" The judge instructed the jury that "by North Carolina statute, a person has no duty to retreat in one's home, one's own premises, one's place of residence, one's workplace, or one's motor vehicle. This law does not apply in this case." Slip op. at 12.

Majority applies statutory language. A majority of the Court of Appeals found that the trial judge erred in his initial instruction by omitting the statement that the defendant did not have a duty to retreat and erred in his supplemental instruction by advising the jury that the principle did not apply in this case. The Court of Appeals recognized that North Carolina's self-defense statutes address two different situations: defensive force in a person's home, workplace, or vehicle under G.S. 14-51.2; and defense of oneself and others under G.S. 14-51.3.

The first statute, sometimes referred to as the castle doctrine, creates a rebuttable presumption that the defendant has a reasonable fear of death or great bodily injury when an intruder forcibly and unlawfully enters the premises, and it provides that the defendant does not have a duty to retreat. Under the second statute, the presumption does not apply; a defendant who uses deadly force must produce evidence that he or she had a reasonable fear of death or great bodily injury. The second statute still provides, however, that a person does not have a duty to retreat in a place where he or she has a "lawful right to be."

Because both statutes recognize that a defendant does not have a duty to retreat, the majority found it unnecessary to determine whether the defendant was in the curtilage of his home. The majority observed that a defendant has a lawful right to be in a public place, including the common area of the apartment complex where Fogg approached Bass. Therefore, Bass did not have a duty to retreat before acting in self-defense and the jury should have been so instructed. Sl. op. at 14–15, 23.

Dissent finds earlier decision controlling but agrees with majority's no duty to retreat analysis. The dissent believed that the court was bound by its earlier decision in *State v. Lee*, ___ N.C. App. ___, 789 S.E.2d 679 (2016), *rev. granted*, ___ N.C. ___, 796 S.E.2d 790 (2017). There, the trial judge failed to instruct the jury that the defendant did not have a duty to retreat in a place he had a lawful right to be—in that case, a public street near his home. The court in *Lee* acknowledged that the defendant may not have had a duty to retreat before acting in self-defense, recognizing that G.S. 14-51.3 provides that "'a person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to be . . . .'" 789 S.E.2d at 686 (quoting G.S. 14-51.3). But, the court found that to the extent the statute applies to any public place, the trial judge's failure to instruct on the principle did not warrant a new trial. *Id.* at 686–87.

The majority in *Bass* found that the circumstances in *Lee* were distinguishable and did not control the outcome in *Bass*. The dissent in *Bass* believed that *Lee* was not distinguishable, but her opinion indicates that she agreed with the majority's analysis of the law on retreat in North Carolina. The dissent recognized that a defendant does not have a duty to retreat in a place where he or she has a lawful right to be. The dissent based this conclusion on both the statutory provisions and common law. Slip. Op. at 4 (Bryant, J., dissenting). The dissent also found that the trial judge in *Bass* should have instructed the jury that the defendant did not have a duty to retreat, stating "candidly, I tend to agree with the majority's opinion that a new trial is necessary . . . ." *Id.* at 1. Likewise, the dissent found that the trial judge in *Lee* should have instructed the jury on this principle, stating that "it would seem that basic rules of statutory construction indicate that a no duty to retreat instruction should have been given." *Id.* at 6. The dissenting judge ended by expressing her "reluctant[] dissent" from the majority's decision that the trial judge's instructions to the jury warranted a new trial. *Id.* at 13. She noted that should the North Carolina Supreme Court reverse *Lee*—review is pending in both *Lee* and *Bass*—her dissent on that portion of the majority's opinion in *Bass* would be moot. *Id.* at 13 n.6.

North Carolina Criminal Law Blog

The Common Law is Dead; Long Live the Common Law!

January 25, 2023 **Joseph L. Hyde** <https://nccriminallaw.sog.unc.edu/author/genegant/>

In State v. McLymore, 380 N.C. 185, 868 S.E.2d 67 (2022), our Supreme Court held that Section 14-51.3 "supplants the common law on all aspects of the law of self-defense addressed by its provisions," and "the only right to perfect self-defense available in North Carolina [is] the right provided by statute." Id. at 191, 868 S.E.2d at 72-73. At the same time, it interpreted the felony disqualifier provision of Section 14-51.4 – consistently with "common law principles" – to require a causal nexus between the felony and the use of force. Id. at 197, 868 S.E.2d at 77. The common law is apparently not so easily dispensed with. This post – my first contribution to this forum – addresses the persistence of the common law in the area of self-defense. My colleague Phil Dixon provided color commentary on McLymore **here** <https://www.sog.unc.edu/blogs/nc-criminal-law/color-commentary-recent-cases>. My colleague John Rubin discussed the felony disqualifier provision (and anticipated the holding in McLymore) **here** <https://nccriminallaw.sog.unc.edu/statutory-felony-disqualification-self-defense/>.

Our Reception Statute: G.S. Section 4-1.

The American Revolution was not a rejection of English law. The law familiar to the colonists, and which they largely retained, was the English common law. This body of law found its most accessible form in Blackstone's *Commentaries*, published between 1765 and 1770. Until the 1930s, Blackstone was required reading for admission to the North Carolina bar. See John V. Orth, Blackstone's Ghost: Legal Education in North Carolina, chapter in Re-Interpreting Blackstone's Commentaries: A Seminal Text in National and International Context (Wilfred Prest ed.) (Hart Publishing Ltd. 2014).

By statute, the common law is declared to be in force within this State except where it has been abrogated, been repealed, or become obsolete. N.C.G.S. § 4-1. Our Supreme Court has said the common law referred to in Section 4-1 is the common law of England as it existed at the time of the signing of the Declaration of Independence. See e.g., State v. Buckom, 328 N.C. 313, 316, 401 S.E.2d 362, 364 (1991). Hence, absent a contrary decision by the General Assembly, the common law remains in effect in North Carolina. E.g., State v. Rankin, 371 N.C. 885, 896, 821 S.E.2d 787, 796 (2018); cf. Virmani v. Presbyterian Health Servs. Corp., 350 N.C. 449, 472, 515 S.E.2d 675, 691 (1999) (North Carolina Supreme Court may modify the common law where obsolete), cert. denied, 529 U.S. 1033, 146 L. Ed. 2d. 337 (2000).

The Common Law: Crimes and Defenses.

Unlike the federal government and some states, North Carolina recognizes a number of common law crimes, that is, offenses not defined by statute. See Carissa Byrne Hessick, The Myth of Common Law Crimes, 105 Va. L. Rev. 965, 980-81 (2019). Common law robbery, as its name implies, obviously depends on elements specified by caselaw. See State v. Bond, 345 N.C. 1, 22, 478 S.E.2d 163, 174 (1996), cert. denied, 521 U.S. 1124, 138 L. Ed. 2d. 1002 (1997). Statutes enumerating the degrees of burglary and arson explicitly incorporate the common law. See N.C.G.S. §§ 14-51 ("burglary as defined at the common law"), 14-58 ("arson as defined at the common law"). And offenses like murder and assault, though the subject of criminal statutes, are still defined by the common law. See State v. Vance, 328 N.C. 613, 622, 403 S.E.2d 495, 501 (1991) (murder); State v. Floyd, 369 N.C. 329, 335, 794 S.E.2d 460, 464 (2016) (assault).

Just as there are common law crimes, so too there are common law defenses. Necessity may constitute a defense to driving while impaired. See State v. Miller, 258 N.C. App. 325, 327, 812 S.E.2d 692, 694 (2018); State v. Hudgins, 167 N.C. App. 705, 710, 606 S.E.2d 443, 447 (2005). Similarly, our Supreme Court recently recognized duress (somewhat anomalously titled "justification") as a defense to possession of a firearm by a felon. See State v. Mercer, 373 N.C. 459, 462, 838 S.E.2d 359, 362 (2020).

Until 1993, self-defense was governed largely by the common law. As John Rubin **noted** <https://nccriminallaw.sog.unc.edu/the-statutory-law-of-self-defense-in-north-carolina/> , "North Carolina was a common law state when it came to self-defense." At common law, an innocent person was privileged to use deadly force to prevent a forcible felony. See State v. Hornbuckle, 265 N.C. 312, 315, 14 S.E.2d 12, 14 (1965). Developed as an imperfect privilege available to those whose fault in the affray precluded the justification of crime prevention, self-defense excused a killing if it was shown to be necessary to preserve life and limb. See Rollin Perkins & Ronald N. Boyce, Criminal Law, 1126 (3rd ed. 1982). This historical distinction between a *justifiable* homicide and an *excusable* homicide finds some parallel in the present difference between perfect and imperfect self-defense. The concept of fault was retained in the modern rule that one may not claim self-defense who brought upon himself the need to use force. See State v. McCray, 312 N.C. 519, 530, 324 S.E.2d 606, 614 (1985). A person committing robbery, for example, cannot claim self-defense. See State v. Jacobs, 363 N.C. 815, 822, 689 S.E.2d 859, 864 (2010).

Self-defense: Statutes and Precedents.

Our legislature apparently made its first foray into the lawful use of defensive force with Section 14-51.1 (enacted 1993, repealed 2011). That statute provided that the lawful occupant of a home was justified in using deadly force to prevent or to terminate a forcible entry into the home. This section, it said, is not intended to repeal, expand, or limit any other defense that may exist under the common law. N.C.G.S. § 14-51.1. Insofar as Section 14-51.1 codified a defense against burglary, it was placed reasonably enough in Chapter 14, Article 14 (re burglary). As recognized in State v. Blue, 356 N.C. 79, 565 S.E.2d 133 (2002), this statute broadened the defense of habitation to justify the use of force not only to prevent an unlawful entry (as the common law had done) but also *to terminate* an unlawful entry. Id. at 89, 565 S.E.2d at 139.

In 2011, our legislature repealed Section 14-51.1 and enacted Sections 14-51.2, -51.3, and -51.4. Defense of habitation, such as was implicated by the prior 14-51.1, is now addressed by Section 14-51.2. The remaining additions – Sections 14-51.3 and 14-51.4 – deal with defense of person: self-defense and defense of others. Accordingly, a person is "justified" in using deadly force when he or she reasonably believes such force is necessary to prevent imminent death or great bodily harm. N.C.G.S. § 14-51.3(a)(1). Under Section 14-51.4, however, this justification is not available to one who: (1) was committing a felony, or (2) initially provoked the use of force against himself (except as provided). N.C.G.S. § 14-51.4.

Our Court of Appeals interpreted the felony disqualifier provision of Section 14-51.4 literally, according to the plain language of the statute, to preclude a defendant who was committing any felony – in that case, possession of a firearm by a felon – from asserting a statutory right to self-defense. See State v. Crump, 259 N.C. App. 144, 151, 815 S.E.2d 415, 420 (2018) (finding no "causal nexus requirement"). The Court of Appeals thus declined to read the felony disqualifier as codifying the common law concept of "fault," which would deny self-defense to one committing a felony only if it precipitated the use of force. There is some support for this conclusion in the structure of Section 14-51.4, which lists as discrete bases for ineligibility commission of a felony and provocation for the use of force. The provocation prong reflects the common law idea of fault; the felony disqualifier arguably does something more. The Court of Appeals evidently did not consider a hybrid category, an intermediate position soon taken up by our Supreme Court.

State v. McLymore: Out with the Old, In with the Old.

The defendant in McLymore, who previously had been convicted of multiple felonies, was working as a door-to-door salesman in April 2014. While riding in a car with his supervisor, the defendant shot and killed his supervisor, dumped the body, and fled in his supervisor's car. Claiming that his supervisor had attacked him while the vehicle was stopped at a traffic light, the defendant alleged self-defense. At trial, the trial court instructed the jury that the defendant was not entitled to the benefit of self-defense if he was committing possession of a firearm by a felon. The defendant was convicted of first-degree murder, armed robbery, and speeding to elude arrest and appealed, arguing error in the jury instructions. McLymore, 380 N.C. at 187-89, 868 S.E.2d at 70-71. Relying on Crump, the Court of Appeals found no error. Our Supreme Court allowed discretionary review and ultimately overruled Crump. Id. at 189, 868 S.E.2d at 71-72.

Our Supreme Court first considered whether the common law defense survived the 2011 statutes. Reciting its own four-elements test for self-defense (including the concept of fault), it observed that Section 14-51.3 "closely tracks this earlier common law definition of the right to self-defense." Id. at 191, 868 S.E.2d at 72. It concluded "the General Assembly meant to replace the existing common law right to perfect self-defense with a new statutory right" and that, after the enactment of Section 14-51.3, "there is only one way a criminal defendant can claim perfect self-defense: by invoking the statutory right to perfect self-defense." Id. Hence, "Section 14-51.3 supplants the common law on all aspects of the law of self-defense addressed by its provisions." Id. "[T]o the extent the relevant statutory provisions do not address an aspect of the common law of self-defense, the common law remains intact." Id. at 191 n.2, 868 S.E.2d at 72 n.2.

Our Supreme Court next addressed the scope of the felony disqualifier created by Section 14-51.4. It posited that "statutes which alter common law rules should be interpreted against the backdrop of the common law principles being displaced." Id. at 196, 868 S.E.2d at 76. Our Supreme Court acknowledged that the plain language of Section 14-51.4 does not support a causal nexus requirement. Id. at 194, 868 S.E.2d at 75. It declared, however, that "a literal interpretation of the felony disqualifier is fundamentally inconsistent with common law principles," raises constitutional issues, and would produce absurd results. Id. at 197, 868 S.E.2d at 77. Reviewing the common law concept of "fault," our Supreme Court decided that the imposition of a causal nexus requirement better reflected "a sensible broadening of the common-law" concept. Id. at 196, 868 S.E.2d at 76. "It is doubtful," it said, "that the General Assembly intended to completely disavow a fundamental common law principle in a statute which otherwise closely hews to the common law." Id. at 197, 868 S.E.2d at 76. Accordingly, in order to disqualify a defendant from asserting self-defense under Section 14-51.4, "the State must prove the existence of an immediate causal nexus between the defendant's disqualifying conduct and the confrontation during which the defendant used force." Id. at 197, 868 S.E.2d at 77. Because the trial court failed to instruct the jury on this causal nexus requirement, the jury instructions were erroneous. Id. at 198, 868 S.E.2d at 77.

The Law after McLymore.

1. Statutory Construction. Despite McLymore's insistence that our defensive force statutes track the common law, it is beyond dispute that the terminology used is not the same. That leaves the duty of reconciliation to the courts. It is of course not unusual for our Supreme Court to acknowledge preexisting law when construing a new statute. See Blue, 356 N.C. at 88-89, 565 S.E.2d at 139. What is surprising about McLymore is that the common law is given such a prominent place in the analysis. See McLymore, 380 N.C. at 196-97, 868 S.E.2d at 76. Indeed, the methodology is reminiscent of a time when statutes were fewer and farther between. See Samuel L. Bray, The Mischief Rule, 109 Geo. L.J. 967, 1007 (2021). Whatever might be the consequences for criminal law, McLymore revives a canon of statutory construction that prioritizes the common law. That aspect of the case may transcend the law of self-defense; anyone puzzling over a new statute take note.

2. Footnote 2. As stated above, McLymore held that Section 14-51.3 supplants the common law on all aspects of the law addressed by its provisions. At the same time, it declared in Footnote 2 that "the common law remains intact" to the extent the statutes do not address an aspect of the common law of self-defense. McLymore, 380 N.C. at 191 n.2, 868 S.E.2d at 72 n.2. Our Supreme Court may have been thinking of State v. Holloman, 369 N.C. 615, 799 S.E.2d 824 (2017), where it noted that Section 14-51.4 does not appear to recognize the common law distinction between an aggressor with murderous intent and one without. Id. at 627, 799 S.E.2d at 832. In that case, as in McLymore, our Supreme Court decided the legislature had marginally changed the common law, while refusing to adopt the drastic departure advocated by one of the parties. The General Assembly certainly has the authority to alter the common law. McLymore, 380 N.C. at 196, 868 S.E.2d at 76. But the assertion in Footnote 2 that the common law remains intact when the statutes are silent, coupled with a mode of statutory interpretation that looks to the common law even when they are not, shows the common law is not dead. Indeed, taken as a whole, McLymore rather affirms the vitality of the common law in the area of self-defense, notwithstanding its declaration the General Assembly intended to "abolish the common law right." McLymore, 380 N.C. at 190, 868 S.E.2d at 72.

3. Imperfect Self-defense. Our Supreme Court took great care in McLymore to articulate that the common law supplanted by statute was the right to *perfect* self-defense. McLymore, 380 N.C. at 191, 868 S.E.2d at 72. Perhaps the most significant question after McLymore is the status of *imperfect* self-defense. At common law, a defendant tried for murder may be convicted of manslaughter when, though he killed with a reasonable belief deadly force was necessary to prevent death or great bodily harm, yet the defendant was the aggressor (without murderous intent) or used excessive force. See State v. McAvoy, 331 N.C. 583, 596, 417 S.E.2d 489, 497 (1992). If the "justification" prescribed by our defensive force statutes pertains only to perfect self-defense, there is a good argument that the law of imperfect self-defense (understood as an *excuse*) remains intact via Footnote 2. Alternatively, our defensive force statutes might be interpreted – consistently with common law principles – to retain the same factors that would otherwise partially excuse a homicide. In any event, the courts are not likely to dispense entirely with the common law of imperfect self-defense.

4. Causal Nexus. After McLymore, a defendant may be denied the benefit of self-defense under Section 14-51.4(1) when the State establishes that, but for the defendant's felony, the confrontation would not have occurred. McLymore, 380 N.C. at 197, 868 S.E.2d at 77. This obstacle exists *in addition to* that concept of fault that denies self-defense to a person who provoked the use of force against himself. See N.C.G.S. § 14-51.4(2). If the provocation prong largely codifies the common law, the felony disqualifier is something new. And while it is not as harsh as the Court of Appeals in Crump believed, still it provides the prosecution with a powerful tool. If, as McLymore said, the felony disqualifier expands the common law concept of fault, it must include circumstances beyond that which traditionally would have rendered a defendant ineligible. Scenarios can be imagined, but the precise parameters of the disenfranchisement remain to be seen.

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North Carolina Criminal Law Blog

O'er the Ramparts: Sizing Up the Castle Doctrine in State v. Carwile and State v. Williams

January 29, 2025 **Joseph L. Hyde** <https://nccriminallaw.sog.unc.edu/author/genegant/>

The castle doctrine statute, G.S. 14-51.2, provides that it is presumptively reasonable for the lawful occupant of a home or motor vehicle to respond to an intruder with deadly force. ***State v. Phillips*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936> , 386 N.C. 513, 527 (2024). Two recent decisions examine the scope of this protection. In ***State v. Carwile*** <https://appellate.nccourts.org/opinions/?c=2&pdf=43793> , No. COA23-885 (N.C. Ct. App. Dec. 17, 2024), the Court of Appeals held that the castle doctrine did not apply when the defendant was outside his home. By contrast, in ***State v. Williams*** <https://appellate.nccourts.org/opinions/?c=2&pdf=44064> , COA24-50 (N.C. Ct. App. Dec. 31, 2024), the Court of Appeals held the castle doctrine did apply though the defendant was outside of his car. This post seeks to harmonize *Carwile* and *Williams*.

The Castle Doctrine Statute

Until 1993, the law of self-defense in North Carolina was governed largely by the **common law** <https://nccriminallaw.sog.unc.edu/the-common-law-is-dead-long-live-the-common-law/> . Enacted in 1993, G.S. 14-51.1 broadened the common law defense of habitation to justify the use of force not only to prevent but also to terminate an unlawful entry. ***State v. Blue*** <https://appellate.nccourts.org/opinions/?c=1&pdf=8413> , 356 N.C. 79, 89 (2002). In 2011, however, the legislature repealed G.S. 14-51.1 and enacted our current defensive force statutes, G.S. 14-51.2, -51.3 and -51.4. *See* ***State v. Kuhns*** <https://appellate.nccourts.org/opinions/?c=2&pdf=36196> , 260 N.C. App. 281, 285 (2018).

Under G.S. 14-51.2, the lawful occupant of a home, motor vehicle, or workplace is presumed to have had a reasonable fear of death or serious bodily harm when using deadly force if (1) an intruder was unlawfully and forcefully entering, and (2) the occupant knew it. G.S. **14-51.2** <https://www.ncleg.gov/enactedlegislation/statutes/html/bysection/chapter_14/gs_14-51.2.html> (b). The presumption is rebuttable and does not apply in five enumerated circumstances, including when the intruder has exited the premises and discontinued all efforts to enter. ***Id.*** <https://www.ncleg.gov/enactedlegislation/statutes/html/bysection/chapter_14/gs_14-51.2.html> at (c)(5). Under the castle doctrine, excessive force is impossible unless the State rebuts the statutory presumption by proving one of the five circumstances prescribed. ***State v. Phillips*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936> , 386 N.C. 513, 527 (2024).

State v. Carwile

In *State v. Carwile*, the defendant, his wife, and Joshua Chinault were inside a home on September 4, 2018, when Christopher Easter entered, wearing a mask and wielding a chainsaw. Easter struck the defendant with the chainsaw. The defendant pushed Easter out of the house, and the two men fought while they crossed the yard. Easter dropped the chainsaw, raised his hands, and backed into a used car dealership lot about five hundred yards from the home. The defendant, his wife, and Chinault pursued him. Easter fell to the ground, and the defendant beat him to death. **Carwile** <https://appellate.nccourts.org/opinions/?c=2&pdf=43793> , Slip Op. 1-3.

The defendant was tried for first-degree murder and convicted of second-degree murder. On appeal, the defendant argued the trial court erred by failing to instruct the jury on the castle doctrine. In particular, he claimed that the trial court should have advised the jury that his fear for his life was presumptively reasonable. **Carwile** <https://appellate.nccourts.org/opinions/?c=2&pdf=43793>, Slip Op. 5.

The Court of Appeals disagreed. It recognized that, under G.S. 14-51.2, "a person has a presumptively reasonable fear of imminent death or serious bodily harm when another seeks to unlawfully and forcefully enter that person's home while he is present." **Carwile** <https://appellate.nccourts.org/opinions/?c=2&pdf=43793>, Slip Op. 8. But the presumption does not apply in certain circumstances, including when the intruder has exited and discontinued all efforts to enter. **Id.** <https://appellate.nccourts.org/opinions/?c=2&pdf=43793> at 8-9 (citing G.S. **14-51.2** <https://www.ncleg.gov/enactedlegislation/statutes/html/bysection/chapter_14/gs_14-51.2.html> (c)(5)). Here it was undisputed that, at the time the defendant used deadly force against Easter, Easter had exited the home. Further, it was evident that Easter had also discontinued all efforts to enter the home. The Court of Appeals noted in particular (1) that Easter was not moving toward the defendant or the home, (2) that there was a period of time when there was a distance between Easter and the defendant, and (3) that the defendant continued his attack while Easter lay motionless on the ground. It concluded that Easter had discontinued all efforts to enter the home, and the Castle Doctrine did not apply. **Id.** <https://appellate.nccourts.org/opinions/?c=2&pdf=43793> at 10-11.

State v. Williams

The defendant in *State v. Williams* was sitting in his car talking with his passenger, Miracle Lewis, when her ex-boyfriend Martin Penny approached the car. **Williams** <https://appellate.nccourts.org/opinions/?c=2&pdf=44064>, Slip Op. 2. Penny opened the passenger side door, leaned in, and began punching the defendant. **Id.** <https://appellate.nccourts.org/opinions/?c=2&pdf=44064> at 4-5. The defendant exited the car. Penny withdrew from the car, came around the front, and met the defendant in the street. Penny thereupon continued his attack, and the defendant shot him twice, killing Penny. **Id.** <https://appellate.nccourts.org/opinions/?c=2&pdf=44064> at 6.

At the defendant's murder trial, he requested an instruction under the castle doctrine statute. The trial court refused, reasoning the statute applies to an occupant, and the car was not occupied at the time of the shooting. The defendant was convicted of manslaughter. **Williams** <https://appellate.nccourts.org/opinions/?c=2&pdf=44064> , Slip Op. 7-8.

On appeal, the defendant argued the trial court erred by failing to instruct on the castle doctrine. To warrant such an instruction, the Court of Appeal said, the evidence had to show (1) the defendant was an occupant of the vehicle, and (2) Penny had unlawfully and forcefully entered. **Williams** <https://appellate.nccourts.org/opinions/?c=2&pdf=44064> , Slip Op. 15. The Court of Appeals found the term "occupant" ambiguous, but concluded – based on "the language, object, and spirit" of the statute – that the lawful occupant of a home, vehicle, or workplace need not remain within in order to invoke the statute's protection. **Id.** <https://appellate.nccourts.org/opinions/?c=2&pdf=44064> at 24.

Applying this interpretation, the Court of Appeals ruled that the trial court erred in finding the defendant was not an occupant of the vehicle at the pertinent time. **Williams** <https://appellate.nccourts.org/opinions/?c=2&pdf=44064> , Slip Op. 28. It further found that Penny had unlawfully and forcefully entered the car and the defendant knew it. It followed that the defendant was entitled to a Castle Doctrine instruction. **Id.** <https://appellate.nccourts.org/opinions/?c=2&pdf=44064> at 29. As for the State's argument that Penny had exited and discontinued all efforts to enter the vehicle, the Court of Appeals said this was a question for the jury, "and one which we will not consider on appeal." **Id.** <https://appellate.nccourts.org/opinions/?c=2&pdf=44064> at 31. The error was prejudicial, it held, and the defendant was entitled to a new trial. **Id.** <https://appellate.nccourts.org/opinions/?c=2&pdf=44064> at 32.

Conclusion

The concept of occupancy has proved troublesome before. Domestic criminal trespass occurs when a person makes an unauthorized entry into a premises "occupied" by an estranged partner. G.S. **14-134.3** <https://www.ncleg.net/enactedlegislation/statutes/html/bysection/chapter_14/gs_14-134.3.html> (a). In ***State v. Vetter*** <https://appellate.nccourts.org/opinions/?c=2&pdf=36023>, 257 N.C. App. 915 (2018), the Court of Appeals addressed the argument that there was no domestic criminal trespass when the victim was not physically present at the time of the entry. The Court of Appeals rejected the argument, reasoning that the harm sought to be prevented, namely the infliction of mental distress, can occur whether the victim is physically present or not. ***Id.*** <https://appellate.nccourts.org/opinions/?c=2&pdf=36023> at 926. This sort of occupancy was distinguished from occupancy for purposes of discharging a firearm into occupied property, G.S. **14-34.1** <https://www.ncleg.net/enactedlegislation/statutes/html/bysection/chapter_14/gs_14-34.1.html>, or secret peeping, G.S. **14-202** <https://www.ncleg.net/enactedlegislation/statutes/html/bysection/chapter_14/gs_14-202.html>, where the harm "could not logically occur absent the victim's physical presence at the time." ***Id.*** <https://appellate.nccourts.org/opinions/?c=2&pdf=36023>

The prevailing understanding has been that the harm sought to be prevented by the defense of habitation is danger to one physically present inside the premises. As counsel noted in *Carwile*, defense of habitation did not apply because the killing occurred outside of the home. ***Carwile*** <https://appellate.nccourts.org/opinions/?c=2&pdf=43793>, Slip Op. 3-4. The trial court in *Williams* ruled the statutory privilege under G.S. 14-51.2 was similarly inapplicable because no one was inside the car at the time of the shooting. ***Williams*** <https://appellate.nccourts.org/opinions/?c=2&pdf=44064>, Slip Op. 7-8. But the decision in *Carwile* did not turn on the fact that the killing occurred outside of the home; rather, the Court of Appeals there found sufficient evidence the victim had exited and discontinued all efforts to enter (the same issue *Williams* declined to consider). For its part, *Williams* challenges the prevailing understanding by extending the protection of the statute to one outside the premises.

For practitioners, the takeaway is that occupancy for purposes of G.S. 14-51.2 has both a temporal and spatial dimension. If the protection extends beyond the ramparts – and *Williams* says it does – then the limitation lies in other circumstances. As shown in *Carwile*, it does not permit a person no longer under attack to pursue an intruder into an adjoining property and kill him there.

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North Carolina Criminal Law Blog

Outsourcing Reasonableness: Redefining Defensive Force in State v. Phillips.

September 10, 2024 **Joseph L. Hyde** <https://nccriminallaw.sog.unc.edu/author/genegant/>

Coke claimed the common law was the perfection of reason. Our Supreme Court began its recent opinion in ***State v. Phillips*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936> , No. 281A23 (N.C. Aug. 23, 2024), by citing Coke, albeit for a different proposition (i.e., a person's home is his castle). Construing G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> , our Supreme Court held that the legislature has abrogated the common law rule that prohibited excessive force in defense of the home. The trial court erred therefore in instructing the jury that the defendant homeowner did not have the right to use excessive force. This post examines the recent opinion in ***Phillips*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936> .

The Phillips Scenario

The facts in ***Phillips*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936> were contested. In April 2021, the victim approached the defendant's home angry with a grievance (and possibly intoxicated), entered the front porch, and knocked on the door. The defendant answered and a brief confrontation followed, during which the defendant struck the victim (possibly with a gun). The defendant then fired multiple shots at the victim, one shot striking the victim's left side, leaving her permanently disabled. ***Phillips*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936> , Slip Op. at 2.

The defendant was charged with assault with a deadly weapon with intent to kill inflicting serious injury. At trial, the defendant asserted self-defense and defense of habitation. Over objection, the trial court instructed the jury that the defendant did not have the right to use excessive force in defense of the home. The defendant was convicted of assault with a deadly weapon inflicting serious injury and appealed, arguing error in the instruction. ***Phillips*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936> , Slip Op. at 2-5.

Common Law and Statute

Our defensive force statutes date from 2011. As their placement in Chapter 14, Article 14 (Burglary) suggests, they can be traced to the common law privilege to use force to prevent a house breaking. Under the common law, a homeowner was permitted to use deadly force to prevent an unlawful entry if he reasonably believed an intruder intended to commit a felony or inflict serious injury upon the occupants. *See State v. Miller*, 267 N.C. 409, 411 (1966). By contrast, the privilege to use deadly force in self-defense required a person to have a reasonable belief such force was necessary to prevent death or great bodily harm. *See State v. Richardson*, 341 N.C. 585, 590 (1995).

By statute, a person is justified in the use of deadly force if: (1) he reasonably believes such force is necessary to prevent death or great bodily harm, or (2) "under the circumstances permitted pursuant to G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html>." G.S. **14-51.3** <https://www.ncleg.net/enactedlegislation/statutes/html/bysection/chapter_14/gs_14-51.3.html>. Curiously, G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> does not explicitly permit the use of force. Instead, that statute creates two presumptions. First, a homeowner, when using deadly force, "is presumed to have held a reasonable fear of imminent death or serious bodily harm" if an intruder was unlawfully and forcefully entering and the homeowner knew it. G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> (b). This presumption is rebuttable and does not apply in several statutorily defined circumstances, such as when the victim was a lawful resident of the home, authorized to enter. G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> (c). Second, a person who unlawfully and forcefully enters is presumed to be doing so with the intent to commit an unlawful act of force or violence. G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> (d). A person who uses force "as permitted by this section" is justified in using such force and is immune from civil or criminal liability. G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> (e). As my colleague John Rubin **noted** <https://nccriminallaw.sog.unc.edu/defensive-force-in-the-home/>, G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> is a complex statute.

A presumption of reasonableness appears to be unique in our criminal statutes. The common law of self-defense employs both rules and standards. Rollin M. Perkins & Ronald N. Boyce, *Criminal Law*, 1116 (3rd ed. 1982). One rule of law is that deadly force is not privileged against nondeadly force. *State v. Pearson*, 288 N.C. 34, 40 (1975). The jury then uses the reasonable person standard to assess the propriety of the defendant's conduct. *Id.* at 39. The role of excessive force is disputed. Some cases treated it as a manifestation of the proportionality rule and some as an application of the reasonable person standard. *Compare State v. Richardson*, 341 N.C. 585, 590 (1995) (when the assault on the defendant is insufficient to give rise to a reasonable apprehension of death or great bodily harm, the use of deadly force "is excessive force as a matter of law"); *with State v. Norman*, 324 N.C. 253, 265 (1989) ("The use of deadly force in self-defense to prevent harm other than death or great bodily harm is excessive as a matter of law."). Prior to *Phillips*, it was thus unclear what component of the defense of habitation the statutory presumption of reasonableness was intended to address. *Cf.* ***State v. Walker*** *<https://appellate.nccourts.org/opinions/?c=2&pdf=41727>* , 286 N.C. App. 438, 448 (2022) (G.S. 14-51.2 creates "a rebuttable presumption that deadly force is reasonable").

Subsequent Caselaw

Courts have labored to reconcile the new statutes with the prior common law rules.

In ***State v. Benner*** <https://appellate.nccourts.org/opinions/?c=1&pdf=41245> , 380 N.C. 621 (2022), the defendant (who was attacked in his home) argued the trial court erred by failing to instruct the jury that the defendant could stand his ground and repel force with force, regardless of the character of the assault. ***Id.*** <https://appellate.nccourts.org/opinions/?c=1&pdf=41245> at 630; *cf.* **N.C.P.I. – Crim. 308.10** <https://www.sog.unc.edu/sites/default/files/pji-master/r/r308.10%20Self-Defense,%20Retreat%E2%80%94Including%20Homicide%20(to%20Be%20Used%20Following%20Self-Defense%20Instructions%20Where%20Retreat%20Is%20in%20Issue).%20%5b6-2019%5d.pdf> . But the trial court had instructed the jury that the defendant had no duty to retreat in the home, and our Supreme Court found no material difference between a no-duty-to-retreat and a stand-your-ground instruction. ***Benner*** <https://appellate.nccourts.org/opinions/?c=1&pdf=41245> , 380 N.C. at 635. As for the qualifier, "regardless of the character of the assault," it had no application where there was no prior suggestion that the nature of the assailant's attack had any bearing on the defendant's duty to retreat. ***Id.*** <https://appellate.nccourts.org/opinions/?c=1&pdf=41245> at 636. In any event, "the proportionality rule inherent in the requirement that the defendant not use excessive force continues to exist even in instances in which a defendant is entitled to stand his or her ground." ***Id.*** <https://appellate.nccourts.org/opinions/?c=1&pdf=41245>

In ***State v. Copley*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43700> , 386 N.C. 111 (2024), the defendant (who fired upon the victim from inside his home) argued the trial court erred by instructing the jury on lying-in-wait. ***Id.*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43700> at 120. Under a theory of lying in wait, the defendant is guilty of first-degree murder – absent any showing of premeditation or deliberation – if the evidence shows the defendant stationed himself or lay in wait for a private attack upon the victim. *See State v. Leroux*, 326 N.C. 368, 375 (1990); *cf.* **N.C.P.I. – Crim. 206.16** <https://www.sog.unc.edu/sites/default/files/pji-master/r/r206.16%20First%20Degree%20Murder%20by%20Lying%20in%20Wait.%20G.S.%2014-17.%20%5b6-2014%5d.pdf> . The defendant in *Copley* argued that the trial court's instruction on lying-in-wait undermined his right to defend the home under G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> . Our Supreme Court agreed in part.

The right to use force in defense of the home under G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> , it said, "is not a license to kill." ***Copley*** *<https://appellate.nccourts.org/opinions/?c=1&pdf=43700>* , 386 N.C. at 123. The State might rebut the presumption of reasonableness, and hence a homeowner's right to use deadly force, by means identified in the statute – the victim was a lawful resident of the home, G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> (c)(1); or the victim was a law enforcement officer performing official duties, G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> (c)(4) – or otherwise – the victim was an authorized invitee, a Girl Scout, or a trick-or-treater. ***Id.*** *<https://appellate.nccourts.org/opinions/?c=1&pdf=43700>* But a defendant entitled to the statutory presumption of G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> cannot be convicted of murder by lying in wait because a homeowner defending his castle from invasion cannot be characterized as an assassin waiting to ambush his victim. ***Id.*** *<https://appellate.nccourts.org/opinions/?c=1&pdf=43700>* at 123-34.

Benner <https://appellate.nccourts.org/opinions/?c=1&pdf=41245> and ***Copley*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43700> thus represent an accommodation of the common law to the new statutory scheme. Both recognized that the pattern jury instructions contain propositions derived from the common law and the new statutes. *Cf.* ***State v. Leaks*** <https://appellate.nccourts.org/opinions/?c=2&pdf=39021> , 270 N.C. App. 317, 324 (2020) (noting pattern instructions were revised "to harmonize" common law and 2011 statutes). *Benner* acknowledged a defendant's statutory right to stand his ground, while it retained the common law requirement that a defendant not use excessive force, even in instances where he is entitled to stand his ground. ***Benner*** <https://appellate.nccourts.org/opinions/?c=1&pdf=41245> , 380 N.C. at 636 ("the proportionality rule"). ***Copley*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43700> recognized that the privilege codified in G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> obviates in some circumstances the common law theory of lying in wait for first-degree murder, but it also construed the presumption created by G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> (b) as rebuttable by both statutory and nonstatutory circumstances alike. ***Copley*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43700> , 386 N.C. 111, 123; *see also* ***State v. Austin*** <https://appellate.nccourts.org/opinions/?c=2&pdf=40148> , 279 N.C. App. 377, 384 (2021) (G.S. 14-51.2's "rebuttable presumption is not limited" to enumerated circumstances). As our Supreme Court noted elsewhere, the judicial difficulty is in determining whether the new defensive force statutes merely restate, moderately revise, or entirely abrogate common law rules. *See* ***State v. McLymore*** <https://appellate.nccourts.org/opinions/?c=1&pdf=41177> , 380 N.C. 185, 190 (2022).

State v. Phillips

The defendant in ***Phillips*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936> (who fired upon the victim from inside her home) was convicted of assault with a deadly weapon inflicting serious injury and appealed, arguing the trial court erred by instructing the jury that the defendant did not have the right to use excessive force in defense of habitation. ***Phillips*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936> , Slip Op. at 5. The Supreme Court agreed. Ultimately, it held that excessive force in defense of habitation is legally impossible unless the State rebuts the presumption of reasonableness created by G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> by proving one of the prescribed circumstances. ***Id.*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936> at 20.

The logic of ***Phillips*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936> appears essentially in a syllogism and a roadmap. The syllogism, which controls the outcome of the case, is as follows:

- S. 14-51.3 provides two separate and distinct grounds for the use of deadly force, (1) the reasonable person standard, and (2) under the circumstances permitted by G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> ;
- The reasonable person standard is equivalent to the prohibition on excessive force; hence,
- The circumstances permitted by G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> contain no prohibition on excessive force.

Phillips <https://appellate.nccourts.org/opinions/?c=1&pdf=43936>, Slip Op. at 11; *see also* ***id.*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936> at 18-19 (prohibition on excessive force *is* the requirement that a defendant have a reasonable belief, etc.; this principle "is now codified" at G.S. **14-51.3** <https://www.ncleg.net/enactedlegislation/statutes/html/bysection/chapter_14/gs_14-51.3.html> (a)(1); and "[s]uch is not the case" with G.S. **14-51.3** <https://www.ncleg.net/enactedlegislation/statutes/html/bysection/chapter_14/gs_14-51.3.html> (a)(2), where legislature "abrogated this principle."). Consistent with its restrictive view of statutory provisions (*expression unius*), our Supreme Court added that the presumption that an intruder intends to commit an unlawful act of violence (G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> (d)) is "non-rebuttable," whereas the presumption of the homeowner's reasonable fear (G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> (b)) may be rebutted "only by the circumstances" listed (G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> (c)). ***Id.*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936> at 16.

The roadmap appears in the Supreme Court's explanation of how **G.S. 14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> operates: when a defendant asserts the G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> defense at trial, the jury must first determine whether the defendant is entitled to the presumption of a reasonable fear. If the jury finds the defendant is not entitled to the presumption, G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> does not apply, and the defendant's culpability must be determined under G.S. **14-51.3** <https://www.ncleg.net/enactedlegislation/statutes/html/bysection/chapter_14/gs_14-51.3.html>. If the jury finds the defendant is entitled to the presumption, it then considers whether the State has rebutted the presumption by proving any of the circumstances set forth in G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> (c). If the jury finds the State has rebutted the presumption, it must consider "whether the defendant's use of force was proportional." If it finds the State has not rebutted the presumption, the defendant must be acquitted. ***Phillips*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936>, Slip Op. at 17.

Turning to the facts of the case, the Supreme Court observed that the trial court advised the jury that, even if the defense of habitation applied, the defendant did not have the right to use excessive force. ***Phillips*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936> , Slip Op. at 17. As illustrated by its syllogism (described above), however, that was an inaccurate statement of law. The jury "should not have considered the proportionality of defendant's force" unless it found that the defendant did not qualify for the presumption of reasonable fear or that the State had rebutted the presumption. ***Id.*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936> at 20-21. Because the Court of Appeals failed, however, adequately to consider whether the instructional error was prejudicial, the Supreme Court remanded for that determination. ***Id.*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936> at 21.

Concurring in part, Justice Earls agreed that the presumption of reasonableness essentially confers the privilege of using deadly force. ***Phillips*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936> , Slip Op. at 24 (Earls, J., concurring in part) ("If the presumption applies. . . it permits the occupant to [use] deadly force."). She emphasized, however, that the presumption "does not attach" unless the statutory conditions are satisfied, namely that an intruder "unlawfully and forcefully" entered another's property. ***Id.*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936> Exempt from the category, she said, are Girl Scouts, trick-or-treaters, visiting neighbors, and delivery people. ***Id.*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936>

The Future of Reasonableness

Blackstone reluctantly conceded that the legislature is not bound by the reasonableness of the common law, though he insisted such intent should be made to appear by such evident and explicit words as to leave no doubt. 1 Bl. Comm. *91. ***Phillips*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936> finds such an intent manifest in G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> : "Had the General Assembly intended to require lawful occupants to demonstrate a reasonable belief that deadly force was necessary, it would not have written a statute that explicitly provides the contrary." ***Phillips*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936> , Slip Op. at 20. *Phillips* thus relies on statutory construction, though it was not the first case decided under G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> and its holding should be placed in context.

The immediate difficulty is with ***Copley*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43700> and ***Benner*** <https://appellate.nccourts.org/opinions/?c=1&pdf=41245> , though apparent inconsistencies may be superficial. As noted above, ***Copley*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43700> seems to have recognized unenumerated circumstances whereby the presumption of reasonableness can be rebutted, e.g., Girl Scouts and trick-or-treaters. ***Copley*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43700> , 386 N.C. at 123; *see also* ***Austin*** <https://appellate.nccourts.org/opinions/?c=2&pdf=40148> , 279 N.C. App. at 384. ***Phillips*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936> now declares that the presumption of reasonableness may be rebutted only by the statutorily prescribed circumstances. In her concurrence, Justice Earls reiterates that Girl Scouts and trick-or-treaters are to be protected, if not by rebutting the presumption, then because they do not trigger the presumption to begin with. ***Phillips*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936> , Slip Op. p. 24 (Earls, J., concurring in part). Either way, G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> does not condone the use of deadly force against innocent children, as the majority acknowledges. ***Id.*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936> Slip Op. p. 16.

Benner *<https://appellate.nccourts.org/opinions/?c=1&pdf=41245>* concluded that the prohibition on excessive force "continues to exist" even where, as in the home, the defendant is entitled to stand his ground. ***Benner*** *<https://appellate.nccourts.org/opinions/?c=1&pdf=41245>* , 380 N.C. at 636. True, ***Benner*** *<https://appellate.nccourts.org/opinions/?c=1&pdf=41245>* pertained to an instruction on self-defense within the home, not defense of habitation. So perhaps ***Benner's*** *<https://appellate.nccourts.org/opinions/?c=1&pdf=41245>* conclusion can be squared with ***Phillips'*** *<https://appellate.nccourts.org/opinions/?c=1&pdf=43936>* conclusion that excessive force is impossible under the castle doctrine. ***Phillips*** *<https://appellate.nccourts.org/opinions/?c=1&pdf=43936>* , Slip Op. p. 20. The problem, of course, is that G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> , the so-called "castle doctrine statute," combines elements of self-defense and defense of habitation, such that it may be difficult for prosecutors to determine precisely which defense is being asserted. In any event, ***Phillips*** *<https://appellate.nccourts.org/opinions/?c=1&pdf=43936>* maintains the consideration of excessive force as it pertains to self-defense. ***Phillips*** *<https://appellate.nccourts.org/opinions/?c=1&pdf=43936>* , Slip Op. at 11 (noting that G.S. 14-51.3(a) requires a defendant to demonstrate "that the degree of force used was proportional and not excessive"). ***Benner*** *<https://appellate.nccourts.org/opinions/?c=1&pdf=41245>* thus cabined may be preserved.

The key for prosecutors lies in ***Phillips'*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936> roadmap. When a defendant asserts a defense under G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html>, "the jury must first determine whether the defendant is entitled to the presumption" of reasonableness, which amounts to a rebuttable justification for deadly force. ***Phillips*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936>, Slip Op. p. 17. By statute, the presumption of reasonableness applies if both: (1) the victim was unlawfully and forcefully entering, and (2) the defendant knew or had reason to believe it. G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> (b). Arguably, the defendant has the burden of presenting evidence to satisfy both conditions. *See* ***State v. Cook*** *<https://appellate.nccourts.org/opinions/?c=2&pdf=35251>*, 254 N.C. App. 150, 155 (2017), ***aff'd per curiam*** *<https://appellate.nccourts.org/opinions/?c=1&pdf=36672>*, 370 N.C. 506 (2018); *cf.* ***Copley*** *<https://appellate.nccourts.org/opinions/?c=1&pdf=43700>*, 386 N.C. 111, 122 (G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> uses a "burden-shifting" provision). If a defendant fails to produce evidence that the victim was unlawfully and forcefully entering, and that the defendant knew or had reason to believe it, G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> simply "does not apply." ***Phillips*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936>, Slip Op. at 17.

If the jury finds a defendant is entitled to the presumption, the State still has an opportunity to rebut the presumption of reasonableness. ***Phillips*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936> , Slip Op. at 17. The presumption may be rebutted "only by the circumstances set forth in" G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> (c). ***Phillips*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936> , Slip Op. p. 15. These include that the victim was a lawful resident of the home, authorized to enter; that the defendant was engaged in any violent criminal offense; and that the victim was a law enforcement officer performing official duties. G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> (c). When it appears that the defendant may be entitled to the presumption under G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> (b), the prosecutor should familiarize himself or herself with the bases for rebuttal under G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> (c). The common law might be the perfection of reason, as Coke claimed. In ***Phillips'*** *<https://appellate.nccourts.org/opinions/?c=1&pdf=43936>* rendition, reason is preempted by a presumption of reasonableness.

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Defensive Force in the Home

Author : John Rubin

Categories : Crimes and Elements, Uncategorized

Tagged as : curtilage, Deadly Force, defense of home, habitation, self-defense

Date : August 7, 2018

We now have a number of appellate opinions interpreting the defensive force statutes enacted by the North Carolina General Assembly in 2011. In State v. Kuhns, ___ N.C. App. ___ (July 3, 2018), we have our first opinion squarely addressing the provisions of G.S. 14-51.2, which deals with defensive force in a home, workplace, or motor vehicle. This post focuses on the home, where the conflict in *Kuhns* occurred, but some of the same principles apply to the workplace and motor vehicles.

The Statutory Castle Doctrine in G.S. 14-51.2

Initially, I want to point out that I am intentionally using the phrase defensive force in the home instead of defense of home or defense of habitation. Under the North Carolina common law, a person had the right to use deadly force to *prevent* an unlawful, forcible entry into the home if the occupant reasonably feared death or great bodily injury or reasonably believed that the intruder intended to commit a felony. Under G.S. 14-51.1, enacted in 1994 and repealed in 2011 (when the new defensive force statutes were passed), a person had the right to use deadly force to *prevent* or *terminate* an unlawful, forcible entry into the home in the same circumstances. Under both formulations, a person relying on defense of habitation was claiming that he or she was defending against a wrongful entry.

New G.S. 14-51.2 continues to require an unlawful, forcible entry as a condition of the right to use deadly force. As under repealed G.S. 14-51.1, the entry may be ongoing or may have already occurred. *See* G.S. 14-51.2(b)(1), (2). But, the new statute does not require that the occupant act for the purpose of preventing or terminating the entry. Rather, the impact of an unlawful, forcible entry is that the occupant is presumed to have feared death or great bodily injury to himself or another person. G.S. 15-51.2(b)(1). It is also presumed that the intruder intended to commit an unlawful act involving force or violence. G.S. 14-51.2(d). Unless the presumptions are rebutted or an exception applies, the occupant is justified in using deadly force and is immune from criminal liability. *See* G.S. 14-51.3.

Thus, new G.S. 14-51.2 represents a modified castle doctrine. The essence of the statutory defense is not defending the habitation, or castle, from being attacked or stormed. Rather, G.S. 14-51.2 presumes that the occupants have the right to use defensive force, including deadly force, if their castle is attacked or stormed. (The extent to which common law defenses involving defensive force continue to be available remains to be determined. *See, e.g.,* G.S. 14-51.2(g) (stating that statute is not intended to repeal or limit common law defenses).)

The Conflict in *Kuhns*

In *Kuhns*, the occupant of the home was Donald Kuhns, the defendant. Sadly, he shot and killed his neighbor and friend, Johnny Dockery, after a series of conflicts with him that night. On the night of the shooting, both had been drinking with other friends in the neighborhood. Dockery and his girlfriend got in an argument, and Kuhns told Dockery to leave her alone. Dockery got angry and said that if he caught anyone with his girlfriend he'd kill them. After Dockery's girlfriend drove off, Dockery called 911 to report that she was driving while intoxicated.

When a deputy arrived, Dockery was standing in the middle of the road shouting in the direction of Kuhns' home. Kuhns told the deputy that Dockery needed to leave before something bad happened. The deputy told Dockery to go

home and watched him to be sure he complied.

About an hour later, Kuhns called 911 and said that Dockery was standing in Kuhns' yard threatening his life. When law enforcement officers arrived a second time, Dockery was "yelling pretty loud." Slip Op. at 3. The officers again instructed Dockery to go home and followed him to make sure he complied.

According to Kuhns' evidence, Dockery returned about 45 minutes later for the final, fatal confrontation. Kuhns was inside his trailer trying to go to sleep when he heard Dockery yelling, "[C]ome on out here, you son of a bitch, I'm going to kill you." Slip Op. at 4. Kuhns retrieved his 32-caliber pistol and went outside onto his porch. Dockery was in the yard of Kuhns' home, beside the porch, "cussing and hollering" at Kuhns. *Id.* Kuhns told Dockery to go home. When Dockery saw the gun, he said, "[Y]ou're going to need more than that P shooter, motherf---er, I've been shot before." *Id.* Dockery was pacing back and forth and then came at Kuhns fast. Kuhns took a step back, fired one shot, and killed Dockery.

At the defendant's trial on the charge of first-degree murder, the judge instructed the jury on self-defense but refused the defendant's request for the pattern jury instruction on defense of habitation, N.C.P.I—Crim. 308.80 (Jun. 2012). The judge stated that there was no evidence that Dockery was trying to break in. According to the judge, the defendant's evidence showed he was attempting to prevent injury to himself, not trying to prevent Dockery from coming into the curtilage or Kuhns' home. Therefore, the defendant was not entitled to a defense of habitation instruction. The defendant was convicted of voluntary manslaughter and appealed.

The Meaning of Entry and Home

On appeal, the defendant argued that the trial judge erred in failing to give the requested instruction. The State countered that the defendant was not entitled to the instruction because Dockery never came onto the defendant's porch and never tried to enter his trailer. For two interrelated reasons, the Court of Appeals rejected the State's argument and reversed the defendant's conviction.

First, the Court recognized that G.S. 14-51.2 expressly applies when an intruder is in the process of unlawfully and forcibly entering a person's home *or* has already unlawfully and forcibly entered. The Court found that Dockery, by repeatedly returning to Kuhns' property and threatening Kuhns with bodily harm, had unlawfully and forcibly entered his home. Second, the Court recognized that G.S. 14-51.2 expressly applies to the curtilage of the home. *See* G.S. 14-51.2(a)(1). The statute does not define curtilage, but the term generally means the area immediately surrounding a dwelling. The Court found that Dockery was within the curtilage of Kuhns' property and therefore within his home.

The Court did not specifically discuss the actions that made Dockery's entry forcible, but the opinion indicates that the Court was satisfied that this condition was met. It found that despite numerous requests to leave, Dockery continued to return to Kuhns' property while threatening Kuhns with bodily harm. Slip Op. at 11. The Court also did not distinguish the parts of the property that constituted the curtilage, finding it undisputed that Dockery was within the curtilage of Kuhns' home. *Id.* Presumably, both the yard, which Dockery had entered, and the porch, which Dockery was in the process of trying to enter, were within the curtilage.

The Court concluded that the defendant was prejudiced by the trial judge's failure to give the pattern instruction on defense of habitation. The Court recognized that the instruction, which recites the presumptions discussed above, would have been more favorable to the defendant than an instruction on self-defense alone. Slip Op. at 12.

The specific wording of the pattern jury instruction on defense of habitation was not at issue. At trial the defendant requested the pattern instruction on defense of habitation, and on appeal the State argued that the defendant was not entitled to the instruction. In rejecting the State's argument that defense of habitation applies only when the defendant is acting to prevent an unlawful, forcible entry, the Court of Appeals noted that the language of the instruction correctly states that an occupant may use deadly force to prevent or terminate entry. The Court did not consider whether it is

proper to instruct the jury that the occupant must have acted with this purpose. As discussed at the beginning of this post, the new statute requires that an unlawful, forcible entry be occurring or have occurred; it no longer seems to require that the occupant have acted with the purpose of preventing or terminating the entry.

As you handle these cases, please keep in mind that G.S. 14-51.2 is a complex statute. *Kuhns* only scratches the surface. While the new statute bears similarities to the common law and earlier statute on defense of habitation, it is not identical and affords occupants of a home, workplace, and motor vehicle different and in a number of respects greater rights.

Court of Appeals Approves Justification Defense for Firearm by Felon

Author : Phil Dixon

Categories : Crimes and Elements, Uncategorized

Tagged as : defense, justification, possession of firearm by felon, State v. Mercer

Date : August 21, 2018

For several years now, it has been an open question in North Carolina whether a justification defense to possession of firearm by felon is available. John Rubin blogged about the issue back in 2016, here. Our courts have assumed without deciding that the defense might apply in several cases but have never squarely held the defense was available, finding instead in each previous case that defendants didn't meet the admittedly rigorous standards for the defense. This month, the Court of Appeals unanimously decided the issue in favor of the defendant. In State v. Mercer, ___ N.C. App. ___ (August 7, 2018), the court found prejudicial error in the trial judge's refusal to instruct the jury on justification in a firearm by felon case and granted a new trial. Read on for more details.

Defense of Justification. As John wrote, the leading case on the defense is *U.S. v. Deleveaux*, 205 F.3d 1292 (11th Cir. 2000), which is referenced in the pattern jury instruction for possession of firearm by felon. N.C.P.I-Crim. 254A.11, n.7. That footnote quotes *State v. Edwards*, 239 N.C. App. 391 (2015):

> The test set out in *Deleveaux* requires a criminal defendant to produce evidence of the following to be entitled to an instruction on justification as a defense to a charge of possession of firearm by felon: (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. *Edwards* at 393-94.

At least 11 federal circuit courts have recognized the defense, including the Fourth Circuit. *See, e.g., U.S. v. Mooney*, 497 F.3d 397 (4th Cir. 2007). North Carolina now joins them. So what was different about *Mercer*?

State's Evidence. The facts of the case were, perhaps unsurprisingly, a little messy—beyond the numerous witnesses and parties involved in the fracas, there are mysterious references to "Shoe" and "the candy man" in the opinion. The State's evidence tended to show that the defendant's cousin, Wardell, got into an altercation with a Mr. Mingo regarding a missing phone. Mingo lived in the neighborhood near the defendant's home. The next day, Wardell (along with another man, according to Mingo) engaged in a fight with Mingo while he was on his way to see "the candy man". Within a few minutes of the fight, Mingo contacted various family members about the incident. A group of around fifteen family members (including Mingo) then walked to the defendant's home where Wardell was visiting, with the intention of fighting Wardell. The defendant and Wardell pulled into the driveway as the crowd was arriving, and the defendant got out of the car with a gun in his waistband. The group insisted on fighting despite seeing the defendant's gun, and the defendant fired shots over the crowd's head. Mingo ultimately acknowledged that at least two people in his group also had guns and shot at the defendant. The altercation came to an end without anyone being injured. The Mingo family members left and contacted the police, resulting in the defendant being charged with two counts of assault with a deadly weapon with intent to kill and one count of possession of firearm by felon.

Defendant's Evidence. The defendant's mother testified about the earlier fight between Wardell and Mingo.

According to her, that first fight was only between those two men and did not involve a third person. She added that Mingo left that incident threatening to "get his brothers . . . and kill [Wardell]." *Mercer* slip op. at 6. She later heard a disturbance outside of her home and came out to discover the crowd of Mingo family members "basically ambushing her son." *Id.* She saw that Mingo's brother had a gun, and the defendant also had a gun. Mingo's mother was encouraging her son to shoot the defendant, and the defendant's mother tried to get in between her son and the armed person in the Mingo crowd. That person fired their gun towards the defendant, and Mingo's mother also later fired a gun at him.

The defendant took the stand and testified that, upon his arrival at home and seeing the crowd, he tried to explain that he had no role in the earlier fight between Wardell and Mingo, but "the group kept approaching the defendant, stating they were 'done talking.'" *Id.* at 7. The defendant saw at least three guns among the Mingo group. Wardell pulled out a gun, and the defendant heard people in the crowd "cocking their guns." The defendant then told Wardell to give him the gun because Wardell "didn't know what he was doing [with the gun]." *Id.* The defendant acknowledged on the stand that he knew he was a felon and therefore unable to lawfully possess a firearm, but explained he only did so out of a fear of injury or death to himself or his family members: "So at that time, my mother being out there . . . I would rather make sure we [are] alive versus my little cousin making sure, who was struggling with the gun." *Id.* He repeatedly tried to get the crowd to back away to no avail, and someone shot in the Mingo group shot at "Shoe" (apparently a person in the defendant's group). He further testified that shots were fired at him, but he couldn't determine from whom. The defendant claimed he only fired his gun once, after a Mingo group member fired at him as he fled across the street. The gun malfunctioned after that shot, so he tossed the gun back to his cousin and ran home. The defendant turned himself in to the police the next day.

Jury Instructions at Trial. The defendant requested an instruction in writing on the justification defense for the firearm charge before the charge conference. The trial judge agreed to instruct the jury on self-defense as to the assaults, but refused to give the justification instruction, over the defendant's objection. During deliberations, the jury sent the judge a note specifically asking about whether possession of a firearm by a felon could ever be justified. The trial judge declined to answer the question directly and instead repeated the instructions on firearm by felon and reasonable doubt. The jury acquitted the defendant of both assaults but convicted on firearm by felon. The defendant appealed, arguing that his evidence, taken in the light most favorable to the defendant, supported his proposed justification instruction.

***Mercer* Opinion.** The opinion begins by acknowledging the *Deleveaux* opinion and the state of the law in North Carolina regarding the defense. John's post summarizes most of those earlier cases so I won't rehash them here, but suffice it to say the court distinguished the defendant's situation in *Mercer* from the previous cases. The court agreed that there was an imminent threat of death or serious bodily injury—the defendant only possessed the gun once he heard other guns being cocked and saw "[Wardell] struggling with the gun." *Id.* at 13. While not specifically discussed in the opinion, the large crowd determined to fight at the defendant's home likely also helped to establish an imminent threat. The defendant didn't recklessly or negligently place himself in the situation—the situation was unfolding as he arrived in his driveway, only to meet a large crowd (with at least some in the crowd armed) ready to fight. The defendant repeatedly tried to talk to the crowd and calm things down, and only grabbed the gun from his cousin when it was clear that talk wasn't working—thus, there was no reasonable alternative to his act of possessing the weapon. Put another way, it was unforeseeable that the act of pulling up in the driveway of his own home would create a need to engage in criminal activity, and the defendant didn't have other realistic options at that point to defending himself with the weapon. Finally, the causal relationship between the crime of possessing the weapon and the avoidance of the threatened harm was met—the defendant only possessed the gun once the situation became extremely serious (i.e., guns being cocked) and gave the gun back to his cousin as soon as he got away from the situation. The harm avoided was death or serious injury to himself and his family members by the Mingo crowd, and the defendant possessed the weapon no longer (or sooner) than was necessary to deal with the situation.

The State focused on the defendant's alleged reasonable alternatives. The defendant had a cell phone and could have called 911, they argued, or he could have fled the scene sooner—he had alternatives to grabbing the gun. The

court rejected this argument, citing to the defendant's brief: "[O]nce guns were cocked, time for the State's two alternative courses of action—calling 911 or running away—had passed." *Id*. at 14.

To be clear, the opinion doesn't say that the possession of the firearm *was* justified in this case. Rather, it was a question for the jury to resolve "after appropriate instruction." *Id*. at 14. The fact they were not so instructed was error. The court had no difficulty concluding that this error was prejudicial. For one, the defendant was acquitted of the assault charges, presumably on the basis of self-defense. For another, the jury specifically asked the trial judge about a justification defense. This, the court held, strongly suggested that there was a reasonable probability of a different result at trial had the jury received the justification instruction. *Id*. at 15-16.

Impact of *Mercer*. Justification for firearm by felon is now here, at least with the right set of facts. Beyond that, *Mercer* raises another interesting point: how should this defense work with self-defense or defense of others? In another recent post, John talked about the felony disqualification in the self-defense statutes. *See* G.S. 14-51.4 (self-defense not available to one committing a felony). In *State v. Crump*, ___ N.C. App. ___, 815 S.E.2d 415 (April 17, 2018), the Court of Appeals took a strict interpretation, indicating that one engaged in contemporaneous felony conduct loses the right to self-defense, regardless of any causal connection between the felony and defensive act—that is, one is disqualified by *any* felony being committed at the time of the defensive act, whether or not the felony was related to the need to act defensively, and without regard to whether the felony involved violent force or serious risk of death or physical harm. *Mercer* suggests, however, that the disqualification doesn't apply where the defendant has a defense to the underlying felony. The parties in *Mercer* agreed on the self-defense instructions, and the felony disqualification apparently wasn't argued. A lot potentially turns on that point though. Would a defendant previously convicted of a felony always lose the right to self-defense if he picks up a gun? Or would an act excused by justification overcome the disqualification? The latter view has greater appeal as matter of logic and fairness and seems in line with the holding in *Mercer*: if a jury finds that a person previously convicted of a felony is justified in possessing a weapon, the possession would not constitute a felony and therefore would not disqualify the person from acting in defending himself and his family. The scenario isn't just a thought experiment. In *Crump,* the court of appeals stated that the defendant stipulated to being a felon in possession and held that he was disqualified from a self-defense instruction on that basis (although the jury in Crump was still instructed on self-defense). [As an aside, a petition for discretionary review has been filed in the N.C. Supreme Court in *Crump*]. When the facts are contested or support a justification defense to what otherwise may be a disqualifying felony, the jury would seem to have to decide the issue.

Perhaps the trickier question is whether a defendant who *doesn't* meet the strict standards for a justification instruction always loses the right to defend him or herself or others in all cases. It isn't difficult to imagine a situation where the defendant might not meet the standard for justification (and thus is contemporaneously committing a felony), but the use of defensive force was still necessary to protect life and the requirements of self-defense were otherwise met. Or even more broadly, what about when a defendant contemporaneously commits a felony (any felony) completely unrelated to the need for self-defense? Is there a due process limit on the disqualification in that scenario? And does the disqualification apply to both statutory and common law self-defense? *Mercer* perhaps raises more questions than it answers in this regard.

Moving on to procedure, when deciding the case, should the jury first have to determine whether or not the possession of the weapon was justified before they are instructed on self-defense? Or, would the question of justification be part of the larger self-defense instructions? If the former, a special verdict form might be useful. We'll have to wait for additional cases to see how justification works in other circumstances. If you have thoughts on *Mercer*, justification, or self-defense (or the Charlotte candy man), post a comment and let me know.

North Carolina Criminal Law Blog

Confession and Avoidance: Self-defense in State v. Myers

December 10, 2024 **Joseph L. Hyde** <https://nccriminallaw.sog.unc.edu/author/genegant/>

The defendant presented competent evidence tending to show that he was acting in self-defense when he shot Raquan Neal, the Court of Appeals recently said in ***State v. Myers*** <https://appellate.nccourts.org/opinions/?c=2&pdf=44044>, No. COA24-435 (N.C. Ct. App. Nov. 19, 2024), and the trial court's failure to instruct on self-defense was error. Reciting both the common law and the statutory test for self-defense, the opinion in *Myers* seems to represent a straightforward application of settled law – except for one thing. The defendant "testified he was not trying to kill Neal." ***Myers*** <https://appellate.nccourts.org/opinions/?c=2&pdf=44044>, Slip Op. 3. Under the common law, a defendant was not privileged to use deadly force unless he believed at the time that it was necessary to kill his assailant. Prior cases found no error in the trial court's denying an instruction on self-defense when the defendant thus disavowed the requisite intent. This post considers the opinion in *Myers*.

An Unlawful Killing

There is no statutory definition of the term "murder." *Cf.* **G.S. 14-17** <https://www.ncleg.net/enactedlegislation/statutes/html/bysection/chapter_14/gs_14-17.html>. Rather, murder is defined, as at common law, as an intentional and unlawful killing of another human being with malice aforethought. *State v. Crawford*, 329 N.C. 466, 480 (1991). Unlawfulness is thus an element of the offense. Indeed, the element of unlawfulness cannot be eliminated without removing murder from the category of crime. *See* Rollin M. Perkins & Ronald N. Boyce, *Criminal Law*, 79 (3rd ed. 1982). Self-defense negates the element of unlawfulness. *State v. Marley*, 321 N.C. 415, 420 (1988).

Absent evidence of justification or excuse, the State carries its burden of proving unlawfulness by showing the killing resulted from the intentional use of a deadly weapon. *Marley*, 321 N.C. at 420. When, however, there is evidence of self-defense, the presumption of unlawfulness disappears but the logical inference from the facts proved may be weighed against this evidence. *State v. Hankerson*, 288 N.C. 632, 651 (1975), *rev'd on other grounds*, 432 U.S. 233 (1977). Hence, to avoid the presumption, the defendant has the burden to produce some evidence of self-defense or rely on such evidence as may be present in the State's case. *Id.* at 650; *accord State v. Reynolds*, 307 N.C. 184, 190 (1982). In any event, the defendant's burden is not a heavy one. *See State v. Bush*, 307 N.C. 152, 160 (1982) ("when there is any evidence in the record"); *see also* John Rubin, *The Law of Self-Defense in North Carolina*, § 8.2(c), 186 (1996).

Defensive Force in Transition

Until the twentieth century, the law of self-defense in North Carolina was governed largely by common law. By the 1980s, the common law of self-defense had crystalized into a four-factor test. The law of perfect self-defense was said to excuse a killing if, at the time of the killing,

> *(1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and*
>
> *(2) defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; and*
>
> *(3) defendant was not the aggressor in bringing on the affray, . . .*
>
> *(4) defendant did not use excessive force, ...*

State v. Norris, 303 N.C. 526, 530 (1981).

Under this formulation, perfect self-defense was available only if it appeared that the defendant believed it was necessary to kill his attacker in order to save himself. ***State v. Cook*** <https://appellate.nccourts.org/opinions/?c=2&pdf=35251>, 254 N.C. App. 150, 153 (2017), ***aff'd*** <https://appellate.nccourts.org/opinions/?c=1&pdf=36672>, 370 N.C. 506 (2018). Consequently, a defendant was 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. Williams*, 342 N.C. 869, 873 (1996). The defendant's own testimony then "disproves the first element of self-defense." *Id.* In sum, "the use of a firearm that a defendant describes as something other than an aimed, deliberate attempt to kill the victim cannot support a finding of perfect self-defense." ***State v. Fitts*** <https://appellate.nccourts.org/opinions/?c=2&pdf=35413>, 254 N.C. App. 803, 807 (2017). My colleague John Rubin discussed the issue **here** <https://nccriminallaw.sog.unc.edu/warning-shot-self-defense/>.

Our current defensive force statutes date from 2011. Under G.S. 14-51.3, a person is justified in the use of deadly force and does not have a duty to retreat when, among other things, "[h]e or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another." G.S. **14-51.3** <https://www.ncleg.net/enactedlegislation/statutes/html/bysection/chapter_14/gs_14-51.3.html> (a)(1). In ***State v. McLymore*** <https://appellate.nccourts.org/opinions/?c=1&pdf=41177>, 380 N.C. 185 (2022), our Supreme Court observed that G.S. 14-51.3 "closely tracks" the earlier common law definition of self-defense. ***Id.*** <https://appellate.nccourts.org/opinions/?c=1&pdf=41177> at 191. It concluded, however, that G.S. 14-51.3 supplants the common law on all aspects of the law of self-defense addressed by its provisions. ***Id.*** <https://appellate.nccourts.org/opinions/?c=1&pdf=41177>

State v. Myers

In December 2021, the defendant and his friend Zearious Miller visited Monroe Discount Beverage ("Joe's Store") where they ran into Deoveon Byrd and Raquan Neal. The defendant approached Byrd and spoke to him. Miller and Neal approached them, and Miller struck Byrd with a firearm. Neal ran to his car and retrieved a firearm, and Miller followed, trying to grab Neal's gun. The defendant heard gunshots and saw Miller fall, apparently shot by Neal. Neal ran into the store, and the defendant fired eight times at Neal, seriously injuring him. ***Myers*** <https://appellate.nccourts.org/opinions/?c=2&pdf=44044>, Slip Op. 2-3.

The defendant was charged with attempted murder, assault with a deadly weapon inflicting serious bodily injury, and discharging a weapon into occupied property. At trial, the defendant requested a jury instruction on self-defense. Based on the testimony and the caselaw, the trial court believed that an instruction was not warranted, and it refused the defendant's request. **Myers** <https://appellate.nccourts.org/opinions/?c=2&pdf=44044>, Slip Op. 6.

On appeal, the defendant argued the trial court erred by failing to instruct the jury on self-defense. The Court of Appeals recited the relevant statutory provisions: a person is justified in the use of deadly force if he or she reasonably believes such force is necessary to prevent imminent death or great bodily harm. ***Myers*** <https://appellate.nccourts.org/opinions/?c=2&pdf=44044>, Slip Op. 7 (quoting G.S. **14-51.3** <https://www.ncleg.net/enactedlegislation/statutes/html/bysection/chapter_14/gs_14-51.3.html> (a)). It also recited the four-factor common law test. ***Myers*** <https://appellate.nccourts.org/opinions/?c=2&pdf=44044>, Slip Op. 8 (quoting *State v. Bush*, 307 N.C. 152, 158 (1982)). Here, the evidence showed that the defendant fired at Neal as Neal went into the store; that the defendant testified he was scared, and that the defendant testified that he was trying to defend himself. Viewing the evidence in the light most favorable to the defendant, the Court of Appeals concluded "the evidence is sufficient to support an instruction of at least imperfect self-defense, if not perfect self-defense." ***Myers*** <https://appellate.nccourts.org/opinions/?c=2&pdf=44044>, Slip Op. 10. The trial court erred by failing to provide the requested instructions on self-defense, and the defendant was entitled to a new trial. ***Myers*** <https://appellate.nccourts.org/opinions/?c=2&pdf=44044>, Slip Op. 10-11.

Conclusion

It is not apparent from the opinion in *Myers* that the trial court's ruling, denying a self-defense instruction, was based on the defendant's own testimony, disavowing intent to kill. Indeed, the Court of Appeals does not grapple with that line of cases upholding the denial of an instruction in those circumstances. (The State certainly **argued** <https://www.ncappellatecourts.org/show-file.php?document_id=356047> that caselaw on appeal.) The result is an opinion that is somewhat difficult to square with recent precedent. *Cf.* ***Fitts*** *<https://appellate.nccourts.org/opinions/?c=2&pdf=35413>*, 254 N.C. App. 807.

One possible explanation is that the statutory right to use deadly force is not couched in terms of the defendant's belief in the necessity *to kill* his assailant. *Cf.* G.S. **14-51.3** <https://www.ncleg.net/enactedlegislation/statutes/html/bysection/chapter_14/gs_14-51.3.html> ("believes that such force is necessary"). Perhaps the abrogation of the common law recognized in *McLymore* compels reconsideration of those cases decided under the four-factor test. This is not the route *Myers* takes. It recites both the statutory and the common law tests for self-defense, giving preference to neither.

For prosecutors, the lesson is clear. Contesting an instruction on self-defense in doubtful cases provides the defendant with a powerful argument on appeal. The extent to which the old rules have survived the abrogation of the common law of self-defense remains to be seen.

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Another Self-Defense Decision on a Troublesome Doctrine

Author : John Rubin

Categories : Crimes and Elements, Uncategorized

Tagged as : self-defense

Date : July 2, 2019

In *State v. Harvey*, ___ N.C. ___, ___ S.E.2d ___ (June 14, 2019), a five to one majority of the North Carolina Supreme Court affirmed the unpublished decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 817 S.E.2d 500 (2018), holding that the trial judge properly refused to instruct the jury on perfect and imperfect self-defense in a homicide case. In so ruling, the majority in the Supreme Court and Court of Appeals relied on the "belief" doctrine created by our courts over the last 25 years. The opinions, four in all, show that our courts are continuing to wrestle with the implications of that doctrine.

Facts of the Case. The majority and dissenting opinions in *Harvey*, in both the Supreme Court and Court of Appeals, had differing views of the evidence. Here is a summary of the facts described by the majority of the Supreme Court, with some of the differences noted.

Briefly, the decedent, Tobias Toler, went to a party at the mobile home of the defendant, Alphonzo Harvey. Toler was drinking a high alcohol beer and began staggering around Harvey's home, acting in a loud and rowdy manner, and cussing. Harvey told Toler to leave about seven or eight times, but Toler refused to leave unless Harvey went outside with him. Once the two were outside, Toler said he ought to whip Harvey's "damn ass." He threw a plastic bottle at Harvey and missed; he also threw a small broken piece of brick at Harvey, cutting Harvey's finger. (The dissent in the Supreme Court observed that other testimony indicated that the bottle was glass and that the brick hit the side of the mobile home with a loud thud. Slip op., dissent, at 3 n.1.)

While outside, Harvey again told Toler to leave, and Toler hit Harvey in the face. Harvey hit him back in the face. At some point in the conflict, Toler produced a small pocketknife, telling Harvey he ought to kill his "damn ass," and Harvey went inside and retrieved a knife of his own. (The majority noted that witnesses testified that Harvey's knife resembled an iron pipe with a blade on the end, Slip op., majority, at 3 n.3, while the dissent cited Harvey's testimony that the knife was mounted on the end of a wooden rod. Slip op., dissent, at 4.).

The majority and dissenting opinions describe the fatal exchange differently. According to the majority, after returning to the yard, Harvey approached Toler while swinging the knife, made a stabbing motion three times, and pierced Toler's chest, which resulted in Toler's death. Slip op. at 3–4. The dissenting opinion relied on Harvey's testimony that Toler "came up on" him with his pocketknife in hand, which is when Harvey hit Toler with his knife. Slip op., dissent, at 4.

Counsel for Harvey gave notice of the intent to rely on self-defense before trial and requested self-defense instructions at trial, including an instruction on voluntary manslaughter. The trial judge refused these instructions and instructed the jury to consider only whether the defendant was guilty of first-degree murder, guilty of second-degree murder, or not guilty. The jury convicted Harvey of second-degree murder, and the trial judge sentenced him to a term of 483 months (about 40 years) to 592 months imprisonment. (The record indicates that Harvey was in prior record level VI, having been convicted of 16 misdemeanors and one Class I felony during a span of 30 years. Settled Record on Appeal at 37–40.)

The Majority Opinion. The majority of the North Carolina Supreme Court began by recognizing two types of self-

defense in North Carolina—perfect and imperfect self-defense. To obtain an instruction on either of the two, the defendant must produce evidence that (1) he in fact formed a belief that it was necessary to kill his adversary to protect himself from death or great bodily harm and (2) his belief was reasonable. Slip op., majority, at 6–7. Previous decisions have used this phrasing to describe these requirements. *See State v. Bush*, 307 N.C. 152 (1982), *quoting State v. Norris*, 303 N.C. 526 (1981). The majority found that the evidence "fails to manifest any circumstances existing at the time defendant stabbed Toler which would have justified an instruction on either perfect or imperfect self-defense." Slip op., majority, at 8.

Under the majority's view, the problem was essentially with the first requirement.

> Despite his extensive testimony recounting the entire transaction of events from his own perspective, defendant never represented that Toler's actions in the moments preceding the killing had placed defendant in fear of death or great bodily harm . . . . On the other hand, defendant's own testimony undermines his argument that any self-defense instruction was warranted. Slip op., majority, at 8–9.

The majority pointed to portions of Harvey's testimony in which he referred to the stabbing as "the accident," stated that his purpose in getting the knife was because he was "scared" that Toler was going to hurt him, and represented that what he sought to do with the knife was to make Toler leave. *Id.* at 9–10. The majority pointed to prior decisions holding that the defendant was not entitled to self-defense instructions where he claimed the killing was accidental, made self-serving statements that he was scared, or fired a gun to make the victim and others retreat. *Id. at* 9. Because Harvey failed to present evidence that he believed it was necessary to fatally stab Toler in order to protect himself from death or great bodily harm, he was not entitled to an instruction on perfect or imperfect self-defense.

The Dissenting Opinion. Justice Earls, in dissent, found that the trial judge and the majority "are making the judgment that should be made by the jury . . . who heard the evidence and saw the witnesses testify at trial." Slip. op., dissent, at 1.

Justice Earls found that the majority opinion imposed a "magic words" requirement, denying Harvey the right to have the jury decide his self-defense claim because he failed to testify specifically that he was in fear for his life and believed he needed to kill Toler to save himself from death or great bodily injury. She found that Harvey met this requirement based on his "repeated testimony that he was scared of Toler, was afraid he would be hurt, and was being threatened with a knife by Toler, who was drunk and just said he ought to kill him." *Id.* at 6. She found the cases cited by the majority inapplicable. They involved situations in which the defendant claimed that a gun went off by accident, testified that he was firing warning shots to get the victim to retreat, or offered no evidence of the requirements of self-defense other than his self-serving statements that he was scared. Justice Earls found that Harvey's isolated use of these words—such as his reference to the incident as "the accident"—did not negate other evidence showing that he intentionally acted in self-defense. "To imply otherwise is to elevate form over substance." *Id.* at 9.

Justice Earls also noted that the transcript of the testimony showed that defendant was not an articulate person. He had completed the ninth or tenth grade and had sustained a severe head injury in a car accident in 2008, requiring insertion of a metal plate in his head and affecting his memory and ability to talk and function. She observed: "Inarticulate and less well coached defendants should be treated equally with those who can easily learn the 'magic words' the majority would require for a self-defense instruction." *Id.* at 8. Justice Earls concluded that the jury, not the trial judge or majority, had the responsibility to weigh the persuasiveness of the evidence, resolve contradictions in the testimony, and determine whether Harvey acted in self-defense, perfectly or imperfectly.

Open Issues. In my previous post on self-defense, I wrote about the importance of considering the impact of North Carolina's statutory law of self-defense. None of the opinions in *Harvey* mention the self-defense statutes other than to note that counsel for Harvey conceded at trial that a jury instruction on the statutory castle doctrine in G.S. 14-51.2 was not warranted in the circumstances of the case. Slip op., majority, at 4 n.4. The scope of the statutory protections is

therefore left to future cases. The statute may apply, for example, when a person is lawfully on the curtilage of a person's home and then unlawfully and forcibly tries to enter the dwelling itself.

The wording of the statute on defense of person, G.S. 14-51.3, also may have a bearing on whether the belief doctrine, developed by the courts under the common law and the focus of the *Harvey* opinions, applies under the statute. G.S. 14-51.3 states that when using force (that is, nondeadly force), the defendant must reasonably believe the "conduct" is necessary to defend against unlawful force. When using deadly force, the person must reasonably believe "such force" is necessary to prevent death or great bodily harm. This simpler phrasing may lead to a simpler view of the testimony defendants must give to rely on self-defense and avoid complicated, uncertain, and divided views on the adequacy of such testimony.

North Carolina Criminal Law

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Self-defense, Intent to Kill and the Duty to Retreat

Posted on Sep. 18, 2018, 9:44 am by Phil Dixon • 2 comments

Consider the following scenario: Driver Dan is traveling down a dark county two-lane road in his sedan. Traffic is light but slow due to the cold weather and mist. Another driver in a truck appears behind Dan and starts tailgating him, getting within a few feet of his bumper. After unsuccessfully trying to pass Dan, the other driver begins tailgating Dan even more, now staying within inches of his bumper. When the cars ahead turn off and the road is clear, slows to let the other driver pass, but the other driver continues closely riding Dan's bumper for several miles, flashing high beams at times. Eventually, the other driver pulls alongside Dan and begins "pacing" him, staying beside Dan's car instead of passing. The other driver then begins to veer into Dan's lane, forcing Dan's passenger-side tires off the road. As Dan feels the steering wheel begin to shake, he fears losing control of his car and decides to defend himself with his (lawfully possessed) pistol. He aims through his open window at the other driver's front tire and shoots, striking it and halting the other vehicle. The other driver stops without further incident, and Dan leaves. Dan is eventually charged with shooting into an occupied and operating vehicle, a class D felony and general intent crime.

Pop quiz: taking the evidence in the light most favorable to the defendant, is Dan entitled to a self-defense instruction?

- No, because Dan did not intend to kill the other driver when he shot at the tire
- No, because Dan could have stopped his car
- Yes, but without the no-duty-to-retreat language in the instruction
- Yes, with the no-duty-to-retreat language, because Dan intended to shoot the tire and was in a place he had a lawful

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Trial. At least according to the defendant's evidence, those were essentially the facts in *State v. Ayers*, ___ N.C. App. ___ (Sept. 4, 2018); *temp. stay allowed*, ___ N.C. ___ (Sept. 12, 2018). The defendant was a 49 year-old retired Army paratrooper. He was returning from the Veterans Administration hospital in Durham in January 2015 when the above events occurred. He testified at trial to his fear and his intent to shoot the tire. He thought at the time: "I don't have to shoot the guy. I can just disable his vehicle." Slip Op. at 5. The trial judge instructed the jury on self-defense pursuant to N.C.P.I-Crim. 308.45, but omitted the no-duty-to-retreat language of the pattern instruction, consistent with choice C) above. The jury convicted (although, notably, the judge found extraordinary mitigation and suspended the sentence). The defendant appealed, arguing that the jury should have been instructed that he had no duty to retreat under G.S. 14-51.3.

Entitlement to Self-Defense Instruction. Before addressing whether the defendant had a duty to retreat, the court implicitly considered the State's preliminary argument on appeal (seen in its brief)—that the defendant wasn't entitled to a self-defense instruction at all since he didn't shoot with the intent to kill the other driver. Any error in the trial judge's omission of the no-duty-to-retreat language from the instructions was therefore harmless. The Court of Appeals rejected this view, clarifying the intent needed to justify a self-defense instruction:

> *Although the Supreme Court has held that a self-defense instruction is not available where the defendant claims the victim's death was an 'accident', each of these cases involved facts where the defendant testified he did not intend to strike the blow. For example, a self-defense instruction is not available where the defendant states he killed the victim because his gun accidentally discharged. A self-defense instruction is not available when a defendant claims he was only firing a warning shot*

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> *that was not intended to strike the victim. These lines of cases are factually distinguishable from the present case and are not controlling, because it is undisputed Defendant intended to 'strike the blow' and shoot [the other driver's] tires, even if he did not intend to kill [him]. Id. at 10 (internal citations omitted).*

In other words, it was the intentional use of force against his assailant that mattered, not whether the defendant meant for the "blow" to specifically kill. The court said that self-defense, at least in the context of this case, did not require lethal intent, merely a "general intent to strike the blow." *Id*. at 8. John Rubin has been analyzing this issue for several years, both in his book on self-defense and in recent blog posts. Be sure to read his comments at the end of this post, where he explains his views in greater detail.

Duty to Retreat. Turning to the question of whether the jury was properly instructed, the State advanced the argument that the defendant had no right to "stand his ground," in part because he wasn't "standing" anywhere:

> *In the present case, defendant was not standing anywhere. He was in motion on a highway. Nor, by virtue of defendant being in motion, could he necessarily retreat. Defendant is essentially contending that he had a right to stay the course, or to stay in motion driving upwards of thirty miles per hour on a busy highway, rather than a duty to stop to avoid the necessary use of force. Brief of State-Appellee at 29, State v. Ayers, ___ N.C. App. ___ (Sept. 4, 2018).*

Therefore, the argument went, there was no error in failing to instruct the jury on no-duty-to-retreat.

The court rejected this argument and held that the defendant had no duty to retreat on a public highway. G.S. 14-51.3(a) states, in pertinent part: "A person is justified in the use of deadly force and does not have a duty to retreat *in any place he or she has a lawful right to be* if . . . (1) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or

another." The highway was a public place where the defendant was lawfully present in his own vehicle and, under the statute, he had no duty to stop to avoid the use of force. "Defendant was under no legal obligation to stop, pull off the road, veer from his lane of travel, or to engage his brakes and risk endangering himself." *Id*. at 13. Thus, the no-duty-to-retreat language of the instruction should have been given, and the failure to do so was prejudicial. "Without the jury being instructed that Defendant had no duty to retreat from a place where he lawfully had a right to be, the jury could have determined, as the prosecutor argued in closing, that Defendant was under a legal obligation to cower and retreat." *Id*. The court's holding reinforces the breadth of the statutory language that a person has the right to "stand" his or her ground in any lawful place, even when driving and not literally standing.

Takeaway. So, the answer to the poll is D): The defendant was entitled to a self-defense instruction, including a no-duty-to retreat provision. To be clear, the court doesn't say that the defensive force was justified by the defendant in *Ayers*. The court recognized, however, that whether the defendant's use of force was reasonable is a question of fact for the jury to determine upon proper instructions. For, as the court observed in its concluding remarks: "Self-preservation is the most basic and fundamental natural right any individual possesses." *Id*. at 14.

Category: Crimes and Elements, Uncategorized | Tags: duty to retreat, intent to kill, self-defense, State v. Ayers

2 comments on "Self-defense, Intent to Kill and the Duty to Retreat"

John Rubin
September 18, 2018 at 10:43 am

Ayers is an important development with respect to the troublesome question of whether a defendant must intend to kill to rely on self-defense, a requirement that made its way into North Carolina case law in the 1990s and has appeared in some non-homicide cases more recently. At least on the facts of the case before it, the court in Ayers recognized that a person who intentionally uses force, including deadly force, against another person is entitled

to rely on self-defense, whether or not he or she intended to kill. The case leaves some issues open about other offenses and circumstances, however.

• The court in Ayers stated that shooting into occupied property is a general intent crime; therefore, it was sufficient for the defendant to have the general intent to "strike the blow" of intentionally firing at the other vehicle. Does this mean that the defendant in Ayers could not have relied on self-defense if charged with a specific intent crime, such as assault with a deadly weapon with intent to kill? Such a rule could continue to create confusion over the intent required of the defendant. Thus, if the defendant denied the intent to kill, he could not rely on self-defense to assault with a deadly weapon with intent to kill but arguably could rely on self-defense to the lesser offense of assault with a deadly weapon. Apart from being potentially confusing to the jury, it is not clear why the charge chosen by the State, and the elements of the charged offense, should determine whether a jury decides whether a defendant's intentional, defensive act is justified in self-defense.

• The court in Ayers relied on a North Carolina Supreme Court decision from the 1990s, State v. Richardson, 341 N.C. 585 (1995), in which the Supreme Court sought to clarify the intent required of a defendant. In Richardson, the Supreme Court held that a specific intent to kill is not actually required for a defendant to rely on self-defense against a murder charge. The court in Ayers observed that, like the charge before it, the charge in Richardson was a general intent crime—second-degree murder. Thus, Ayers suggests that self-defense is available as a defense to second-degree murder whether or not the defendant intended to kill. It does not appear, however, that the Supreme Court in Richardson intended to limit its holding to second-degree murder (despite later decisions finding an intent-to-kill requirement without discussing the impact of Richardson). The Supreme Court stated generally that although the pattern jury instructions on self-defense for murder required that the defendant have reasonably believed in the need to kill to defend against death or great bodily harm, the instruction didn't mean, and the jury would not have interpreted the instruction as requiring, that the defendant must have had the intent to kill.

• The Ayers court continued to distinguish cases in which the defendant does not specifically intend to injure another person, as in cases in which the defendant fires a warning

shot defensively and hits the victim. In that instance, the defendant does not intend to "strike the blow." This approach distinguishes the facts in Ayers from a decision last year involving a charge of shooting into occupied property, State v. Fitts, ___ N.C. App. ___, 803 S.E.2d 654 (2017). There, the court held that the defendant was not entitled to rely on self-defense where he fired behind him while running in the opposite direction and hit the victim in a car. While the court in Fitts stated the defendant must have intended to kill to rely on self-defense, which the court found he did not have, the facts seem to be in accord with the approach in Ayers. Thus, when a person intentionally fires at a vehicle, he or she intends to "strike the blow" and may rely on self-defense, as in Ayers; when a person fires without regard to whether he hits a vehicle, he may not rely on self-defense, as in Fitts. The drawback to this approach is that it continues to draw potentially difficult distinctions about the defendant's intent. Arguably, a clearer approach would be to allow self-defense when the defendant engages in an intentional, defensive act, whether the act is a shot at a person, a warning shot, a struggle over a gun, or other intentional act; and to disallow self-defense and permit the defendant to rely on accident only when the defendant acts inadvertently, as when the defendant is cleaning a gun, pointing a gun at someone in jest, or engaging in other non-defensive acts. New G.S. 14-51.3 provides support for an approach not dependent on the exact intent of the defendant, as it allows nondeadly force when a defendant reasonably believes the conduct is necessary to defendant against imminent, unlawful force and allows deadly force when a defendant reasonably believes such force is necessary to prevent imminent death or great bodily harm.

Reply

Some Clarity on Self-Defense and Unintended Injuries

Author : John Rubin

Categories : Crimes and Elements, Uncategorized

Tagged as : involuntary manslaughter, self-defense

Date : June 5, 2018

Earlier this year, in *State v. Gomola*, ___ N.C. App. ___, 810 S.E.2d 797 (Feb. 6, 2018), the Court of Appeals addressed a self-defense issue that has sometimes puzzled the North Carolina courts. The question in *Gomola* was whether a person can rely on self-defense to a charge of involuntary manslaughter. The Court answered with a decisive yes . . . if the basis for the involuntary manslaughter charge is an unlawful act such as an assault or affray.

The Conflict in *Gomola.* The events leading to the death of the decedent in *Gomola* were as follows. Some of the evidence came from a video of the incident, some from the testimony of witnesses. The defendant and friends were at a waterfront bar overlooking a marina in Morehead City. One of the defendant's friends saw another customer throw a beer bottle over the railing into the water and asked the customer not to do it again. When the defendant's friend made this request, the decedent shoved him. The defendant stepped in and shoved the decedent, who fell over the railing into the water. The video showed that within six to eight seconds the people at the bar were trying to locate the decedent in the water. He did not resurface and drowned. An autopsy showed that the decedent had a blood alcohol content of .30 or more at the time of his death.

The evidence conflicted over whether the defendant did more than shove the decedent. Some testimony indicated that he flipped the decedent over the railing, but other testimony indicated that his role was limited to an initial shove after his friend was shoved by the decedent. The video did not capture the entire scene.

The defendant was charged with involuntary manslaughter. The trial judge instructed the jury that it could find the defendant guilty if it found beyond a reasonable doubt that the defendant acted unlawfully and that his unlawful act proximately caused the decedent's death. The trial judge further instructed the jury that the "unlawful act" was the crime of participating in an affray, a fight between two or more people in a public place. The trial judge denied the defendant's request to instruct the jury on defense of others, and the jury convicted the defendant of involuntary manslaughter.

The Court's Decision. The Court of Appeals held that the trial judge properly instructed the jury on involuntary manslaughter because the jury could find that the defendant acted unlawfully in shoving the decedent and that the shove proximately caused the decedent's death. The trial judge erred, however, by refusing to instruct the jury on defense of others as a defense to the crime of affray, the underlying act for involuntary manslaughter in the case.

The Court recognized that a person may legally use nondeadly force in defense of another person (as well as in defense of one's self) in response to unlawful force. The Court found that the use of nondeadly force in defense of others is a valid defense under both the common law and statutory law, specifically, G.S. 14-51.3, which describes the statutory standard for defense of person (self or others). The Court held that the defense is proper in a case in which the defendant is charged with affray or assault as well as in a case in which the defendant is charged with involuntary manslaughter based on those offenses and, presumably, other acts to which self-defense would normally apply. Taking the evidence in the light most favorable to the defendant, as courts must do in deciding whether to instruct the jury on a defense, the Court concluded that the jury could have found from the evidence that the defendant's actions were limited to protecting his friend, who had just been assaulted by the decedent. The defendant therefore was entitled to an instruction on defense of others in connection with the trial judge's instruction on affray. Had the jury received this

additional instruction, it could have found that the defendant's involvement in the affray was lawful and therefore that the defendant was not guilty of involuntary manslaughter. The Court reversed the conviction and ordered a new trial.

Open Issues. The Court of Appeals distinguished an earlier decision, *State v. Alston*, 161 N.C. App. 367 (2003), which held that "'self-defense, as an *intentional act*, [cannot] serve as an excuse for the negligence or recklessness required for a conviction of involuntary manslaughter' under the culpable negligence prong." *Gomola,* 810 S.E.2d at 802 (quoting *Alston*) (emphasis in original). The *Gomola* court found this holding inapplicable to the case before it because the State's theory was that the defendant intentionally committed an unlawful act by participating in an affray. "And certainly self-defense/defense of others may serve as an excuse for intentionally participating in a fight." *Id.*

The Court in *Gomola* did not rule out the possibility that self-defense or defense of others may be available as a defense to involuntary manslaughter when the State relies on the culpable negligence prong. In the earlier *Alston* decision, the defendant challenged his conviction of involuntary manslaughter on the ground that the trial judge erred in failing to instruct the jury on self-defense at all. In finding that the failure to instruct on self-defense did not invalidate the involuntary manslaughter conviction, the court reasoned that a reasonable juror could have found from the evidence that the defendant and decedent were struggling with each other, that the decedent introduced a gun during the struggle, and that at some point during the struggle the defendant handled the gun and shot the decedent. From this evidence, according to the court in *Alston*, the jury could have found that the defendant shot the decedent in a culpably negligent or reckless manner without the intent to assault or kill him. If the jury so found, self-defense would not be a defense because it requires an intentional act.

The distinction in *Alston* seems questionable or, at the least, difficult to apply. It isn't clear from the decision what actions the defendant took that were allegedly reckless or culpably negligent. In trying to wrest the gun from his assailant, the defendant in *Alston* certainly was acting intentionally and defensively even if the fatal shot was unintentional. It would probably come as a surprise to someone who found himself in that situation to learn that the law of self-defense would not protect his actions.

Other decisions over the last several years have also imposed intent requirements that people might consider counterintuitive. *See* John Rubin, *A Warning Shot about Self-Defense*, N.C. Crim. L. Blog (Sept. 7, 2016). For example, in *State v. Cook,* ___ N.C. App. ___, 802 S.E.2d 575 (2017), the Court of Appeals held that the defendant was not entitled to rely on self-defense against a felony assault charge when he feared that intruders were trying to break down the door to his bedroom and he fired at the door in response. (The defendant's evidence also showed that he jumped out of the window into the snow, wearing only a tank top and underwear, and ran to a neighbor's house to call the police, not realizing that the police were the ones trying to get into his bedroom.) The Court of Appeals found that the defendant's testimony that he shot at the door, not at his attackers, showed that he did not fear death or great bodily injury, a requirement for the use of deadly force in self-defense. According to the decision, a defendant is not entitled to have the jury instructed on self-defense if he testifies that he was not trying to shoot his attacker.

Two of the three appellate judges in *Cook* expressed doubts about this approach. One dissented and one concurred, with the concurring judge observing that the dissenting judge's approach "more accurately represents what most citizens would believe our law to be and what I believe self-defense law *should* be in our state." 802 S.E.2d at 579 (emphasis in original). The concurring judge encouraged the Supreme Court "to reverse our ruling today and accept the reasoning of the dissent." *Id.* The North Carolina Supreme Court affirmed the decision per curiam without elaboration. ___ N.C. ___, 809 S.E.2d 566 (2018).

A simpler approach would seem to be to consider whether the defendant intended to take the actions he took to defend himself—whether they involved struggling over a gun, shooting at a door, or other defensive actions. *See generally* 2 Wayne R. LaFave, Substantive Criminal Law § 10.4(c) at 200 & nn. 32–33 (3d ed. 2018) (defendant must have a reasonable belief "as to the need for force of the amount used"); *Beard v. United States*, 158 U.S. 550, 560 (1895) (question for jury was whether defendant had reasonable grounds to believe and in good faith believed he could not save his life or protect himself from great bodily harm "except by doing what he did"). This approach would still require

a determination of whether the defendant acted reasonably in taking the actions he took and met the other requirements of self-defense. But, the defense would not stand or fall on the basis of whether the defendant acted with a more specific intent.

Earlier decisions in North Carolina provide some support for this approach. *See* John Rubin, The Law of Self-Defense in North Carolina at 22 & n.4, 41–53 (UNC School of Government, 1996). North Carolina's self-defense statutes also may have an impact. G.S. 14-51.3 states that a person is justified in using force other than deadly force when the person reasonably believes that "the conduct" is necessary to defend one's self or other person against another's use of "unlawful force." The quoted language may justify a person's use of nondeadly force against unlawful force, whether deadly or nondeadly, if it was reasonable for the person to believe that his or her actions were necessary.

By focusing on the defensive action taken by the defendant and not the result intended, decisions such as *Gomola* come closer to this approach. Intent requirements are currently a part of our self-defense law, however. Although difficult to apply in real time, they must be carefully considered by defendants who are charged criminally and who are evaluating the availability of self-defense in their case.

North Carolina Criminal Law

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A Warning Shot about Self-Defense

Posted on Sep. 7, 2016, 2:03 pm by John Rubin

Suppose John is facing a deadly assault and fears that he will be killed or suffer great bodily harm. John has a firearm but, rather than shoot his assailant, he fires a warning shot. The shot goes awry, strikes John's assailant, and kills him. May John rely on self-defense if charged with murder? The answer may be surprising.

John may not be able to rely on self-defense in this scenario. Under current North Carolina case law, his defense may be accident. Here's why.

Focusing on the intended result. Generally, a person may use deadly force—that is, force likely to cause death or great bodily harm—if reasonably necessary to save himself from death or great bodily harm. *See, e.g., State v. Pearson*, 288 N.C. 34 (1975). Thus, in the above scenario, John would have the right to shoot and even kill his assailant if he met the other requirements for self-defense (for example, John wasn't the aggressor).

One might assume from this principle that if faced with a deadly assault, a person could opt to use nondeadly force if the person thought that a lesser degree of force would be sufficient to end the threat. North Carolina decisions define nondeadly force as force neither intended nor likely to cause death or great bodily harm. *See, e.g., State v. Pearson*, 288 N.C. at 39. North Carolina decisions have also found that a warning shot may constitute nondeadly force. *See State v. Whetstone*, 212 N.C. App. 551, 558 n.4 (2011); *State v. Polk*, 29 N.C. App. 360 (1976). Thus, in the above scenario, one might conclude that John could rely on self-defense if he used non-deadly force to defend himself and unintentionally killed his assailant.

Since the mid-1990s, however, the North Carolina courts have tried to establish a firmer boundary between intentional and unintentional killings for purposes of self-defense. In various situations, they have held that a defendant who used nondeadly force and unintentionally killed could not rely on self-defense despite his claim that he was defending against a deadly assault. Thus, in addition to the warning shot scenario above, the courts have held that the defendant was not entitled to rely on self-defense based on evidence that he grabbed a gun from an assailant (or the assailant tried to grab the defendant's gun) and in the ensuing struggle the gun inadvertently went off and killed the assailant. *See, e.g., State v. Nicholson*, 355 N.C. 1, 30–31 (2002)

(warning shots); *State v. Gray,* 347 N.C. 143, 166–67 (1997) (gun struggle), *overruled on other grounds*, *State v. Long*, 354 N.C. 534 (2001); *State v. Hinnant*, ___ N.C. App. ___, 768 S.E.2d 317, 319–20 (2014) (warning shots); *State v. Gaston*, 229 N.C. App. 407 (2013) (gun struggle).

To make a long story short, these decisions rest on the phrasing of the first requirement for self-defense in murder cases. The requirement is often phrased as follows: The defendant must have believed in the need to kill to avoid death or great bodily injury. Focusing on the first part of this requirement, decisions have held that the defendant must literally "believe in the need to kill," shown by an intent to kill or at least an intent to use deadly force. *See also* North Carolina Pattern Jury Instruction—Crim. 206.10 at p. 2 n.4 (June 2014). In other words, the evidence must show that the defendant intentionally shot *at* his assailant in self-defense. Under this approach, a defendant who uses nondeadly force, such as firing a warning shot or struggling over a gun without intending to fire it, is not entitled to claim self-defense even if he believes his actions will address the threat he is facing. Because he does not believe in the need to kill, his defense, if any, is accident, not self-defense.

It's possible that the courts did not intend to impose such a blanket requirement. The courts may have rejected the defendant's claim of self-defense in particular cases because they doubted that the defendant believed he was facing death or great bodily harm, which is also part of the "belief" requirement. Language from some cases suggests that the defendant's perception of the threat against him is the critical inquiry for the "belief" requirement, not the method of force he used or the ultimate result. *See State v. Richardson*, 341 N.C. 585, 590 (1995); *see also* John Rubin, The Law of Self-Defense in North Carolina at 47–48 (UNC Sch. of Gov. 1996). The literal language of the "belief" requirement and cases applying it may not support this narrower focus, however. *See also State v. Crawford*, 344 N.C. 65, 77 (1996) (refusing to modify jury instruction requiring that defendant have believed in need to kill).

The potential impact of accident as a defense instead of self-defense. What is the impact of applying accident instead of self-defense principles to warning shot, gun struggle, and other murder prosecutions in which the defendant acted defensively but did not intend to kill or use deadly force? The case law on accident is relatively undeveloped in these situations, making the rules less certain than in self-defense cases. Based on the above decisions and the additional ones cited below, here are some possibilities to consider.

1. Jury instructions. The courts have held that the defendant is not entitled to have the jury instructed on self-defense in these cases. Still, some explanation to the jury about self-defense principles may be necessary. For the defense of accident to apply, the defendant must have engaged in lawful conduct and must not have acted with culpable negligence. *See, e.g., State v. Riddick*, 340 N.C. 338 (1995). The firing of warning shots or use of physical force to gain control of a gun could be considered unlawful or

criminally negligent unless the defendant had the right to take those actions to defend himself. Accordingly, a hybrid instruction of some kind, explaining how principles of self-defense may make the defendant's actions permissible, may be necessary.

2. Evidence. The courts have sometimes found that the defendant could not offer the sort of evidence allowed in self-defense cases to explain why the defendant believed it necessary to take defensive action—for example, evidence of previous instances in which the victim acted violently, which made the defendant reasonably believe it necessary to use force in self-defense. *See State v. Strickland*, 346 N.C. 443, 445–46 (1997) (finding such evidence inadmissible in support of defense that court characterized as accident defense). Again, however, for the jury to determine whether the defendant acted lawfully and without culpable negligence—requirements for an accident defense—such evidence would seem to be relevant.

3. Lesser offenses. The courts have held that a defendant who did not act with the intent to kill or at least use deadly force is not entitled to a jury instruction on imperfect self-defense, which reduces murder to voluntary manslaughter. A defendant may still be entitled to an instruction on involuntary manslaughter. A person may be found guilty of involuntary manslaughter if he killed another person by either (1) an unlawful act that does not amount to a felony and is not ordinarily dangerous to human life or (2) a culpably negligent act or omission. *See State v. Wilkerson*, 295 N.C. 559, 579 (1978). The cases do not provide clear direction on how to apply these elements to the kinds of cases discussed in this post, however. For example, *State v. Hinnant*, 768 S.E.2d at 320–21, presented a seeming Catch-22 to a defendant who claimed that he fired two warning shots and inadvertently hit the victim. The court held that he was not entitled to a voluntary manslaughter instruction based on imperfect self-defense because he did not intend to shoot anyone, but he was not entitled to an involuntary manslaughter instruction because he intentionally discharged a firearm under circumstances naturally dangerous to human life.

4. Whether the defendant testifies. The cases recognize that for a defendant to rely on self-defense, he need not testify. Other evidence may show that he met the requirements of self-defense, including the requirement in a murder case that he believed in the need to kill to avoid death or great bodily harm. *See State v. Broussard*, ___ N.C. App. ___, 768 S.E.2d 367, 370 (2015). As a practical matter, however, a defendant who relies on self-defense will often take the stand to explain what happened. The defendant's testimony about his intent when he fired or took other actions will likely be critical to whether the case is governed by self-defense principles or the evolving rules on accident.

Category: Uncategorized | Tags: defenses, self-defense, warning shots

This blog post is published and posted

eport a Digital Access Issue

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Court of Appeals Rules on Pretrial Self-Defense Immunity Hearings

Posted on Oct. 13, 2021, 2:15 pm by Jonathan Holbrook

Last month, the Court of Appeals decided *State v. Austin*, ___ N.C. App. ___, 2021-NCCOA-494 (Sept. 21, 2021), and a summary of the opinion is available here. *Austin* addressed several noteworthy self-defense issues, including the sufficiency of the state's evidence to rebut the presumption of reasonable fear under the "castle doctrine" statutes added in 2011 and whether the trial court's jury instructions on that issue were proper.

But first, the court had to decide whether the statutory language conferring "immunity from liability" meant that the defendant was entitled to have this issue resolved by the judge at a pretrial hearing. That's a question I've been asked fairly often over the past few years, and my sense is that prior to *Austin* there were divergent practices on this point around the state.

This post takes a closer look at that portion of the court's opinion, and explores what we now know and what we still don't.

Background Issues and *Austin*

My colleague John Rubin previously wrote an excellent blog post summarizing this issue, which you can revisit here. As his post explains in more detail, G.S. 14-51.2(e) and G.S. 14-51.3(b) provide that a person who uses force as permitted under the statutes in defense of self or others, or in defense of the home, workplace, or vehicle, is "justified in using such force and is immune from civil or criminal liability for the use of such force." In most other states with similar statutes, their courts have consistently interpreted these statutes to mean that the defendant has a right to a pretrial hearing and a judicial determination of the immunity issue. However, unlike in North Carolina, most of those other states provide immunity from *prosecution*, rather than immunity from *liability*. John's post presciently noted back in 2016 that it was unclear whether that difference in phrasing might be legally significant, and therefore our state's "self-defense immunity provision raises several questions, which await further answers."

Austin has now answered the pretrial hearing question in the negative, holding that the trial court did not err by declining to conduct such a hearing on the defendant's claim of

statutory immunity under G.S. 14-51.2(e). The court noted that "traditional immunity" means that a defendant is not merely protected from having a judgment entered against him, but rather that he has "a right not to be forced into court" to defend himself in a trial at all. The court cited several examples of other criminal statutes that confer or address this type of immunity (G.S. 14-205.1, 15A-954(a)(9), 15A-1051, 75-11, 90-96.2, and 90-113.27), and pointed out that those statutes are all couched in terms of immunity from *prosecution*. By contrast, the castle doctrine statutes only provide immunity from *liability*, which means that the "immunity is from a conviction and judgment, not the prosecution itself." This conclusion was reinforced by the fact that, unlike traditional immunity provisions, the immunity conferred under the castle doctrine statutes typically involves "deeply fact-intensive questions" that must be resolved by the jury. Therefore, the court held, "where, as here, the trial court determined that there were fact questions concerning the applicability of the castle doctrine defense, the trial court properly permitted the case to proceed to trial so that a jury can resolve those disputed facts."

So far, I haven't offered very much that you didn't already know from reading the case itself or the earlier blog posts. Let's dig a little deeper.

Is North Carolina alone in taking this view?

Not quite. As noted above, there is a broad consensus among other castle doctrine states that a pretrial hearing before the judge is required, but those states generally confer immunity from prosecution rather than liability. To date, I am aware of one other state (Iowa) with immunity statutes more closely analogous to North Carolina's and whose courts have adopted an interpretation similar to *Austin*. In fact, the Iowa Supreme Court referenced North Carolina's statutes in reaching its conclusion that a pretrial hearing was not required:

> *This case is our attempt to resolve another open question under the 2017 "stand your ground" legislation. […] On appeal, the defendant argues that Iowa Code section 704.13 entitled him to a pretrial evidentiary hearing where he could have presented his justification defense and been vindicated without need for a trial. See Iowa Code § 704.13. We conclude, however, that the 2017 legislation does not require pretrial hearings. Significantly, section 704.13 provides an immunity from "liability," id., not an immunity from "prosecution" as in some other states with stand-your-ground laws. […] Other state laws, similar to Iowa's, do not afford immunity from criminal prosecution. In North Carolina, the statute uses the phrase "immune from civil or criminal liability." N.C. Gen. Stat. Ann. § 14-51.3(b)[….] In any event, Iowa did not opt for the "prosecution" language that has generally been interpreted as affording a right to a pretrial hearing.*

State v. Wilson, 941 N.W.2d 579 (Iowa 2020). In other words, it's undoubtedly a minority view, but perhaps less strikingly so once the different wording of the statutes is taken into account.

Is this <u>really</u> the first case we've ever had on this issue?

For the most part, yes. These statutes have been around for ten years, but until last month there was no clear North Carolina appellate guidance on this point. During several case updates last year, I incorrectly predicted that we might get an answer to this question in *State v. Fernandez*, __ N.C. App. __, 852 S.E.2d 447 (2020), a case that raised many of the same arguments. But *Fernandez* was issued as an unpublished decision, and the court held that it did not need to resolve the matter because even if the defendant was entitled to a pretrial hearing, he waived it:

> *The State contends North Carolina General Statutes §§ 15A-51.2-.3 do not "mandate a pretrial determination" of immunity. The State is correct that "[b]oth statutes are silent about the procedure for raising immunity." See N.C. Gen. Stat. §§ 15A-51.2-.3. But since Defendant waived any potential right to a pretrial determination of immunity, we need not address the proper procedure for determining immunity prior to trial.*

Id. In another interesting twist, *Austin* actually began its appellate journey back in 2017, more than two years before the defendant in *Fernandez* was convicted. The defendant in *Austin* sought interlocutory review of the trial court's order denying her request for a pretrial immunity hearing and motion to dismiss. After the Court of Appeals denied the defendant's petitions for writ of mandamus and writ of certiorari, the state Supreme Court initially allowed a petition for writ of certiorari in December of 2017 to review the appellate court's denial (370 N.C. 378), but then reversed course in a per curiam decision in September of 2018 and concluded that cert had been improvidently allowed (371 N.C. 465). The Court of Appeals opinion being discussed here arose out of the defendant's subsequent conviction at trial in May of 2019.

If you're a fan of appellate procedural labyrinths or interpreting tea leaves, those details may be intriguing. For everyone else, the short answer is yes — this is basically our first direct guidance on the issue.

So is the issue finally settled now?

Not just yet, for a few reasons. First, under Rule 32 of the Rules of Appellate Procedure, the court's mandate normally issues 20 days after the opinion is published, unless the court orders otherwise. The defendant in *Austin* filed a <u>motion</u> last week requesting a rehearing *en banc* and asking that the court stay the issuance of its mandate until the

motion is resolved. In addition to challenging the court's rulings on the issue of rebutting the statutory presumption of reasonableness, the defendant's motion argues that the pretrial hearing issue is one of "exceptional importance" that warrants *en banc* review. And, of course, depending on how the Court of Appeals rules on that motion, the defendant might once again choose to seek discretionary review at the state Supreme Court. I'm not expressing an opinion about the merits of those arguments or speculating about how either court might respond, but simply pointing out that as of the time of this writing (and potentially as of the time that many of us are participating in case updates later this month), there is still a possibility that the final outcome will be different.

Even if the current *Austin* opinion stands unaltered, there are some lingering issues that may arise in future cases. For example, the court said that it was appropriate to have the statutory immunity issue decided by the jury "where, as here, the trial court determined that there were fact questions concerning the applicability of the castle doctrine defense." One could imagine a situation, however rare, where the relevant facts are *not* in dispute and the applicability of statutory self-defense immunity turns solely on a legal determination, such as whether a particular location qualifies as being within the curtilage of the home. That wasn't the issue before the court in *Austin*, but the limiting introductory phrase used in the opinion may indicate that a separate hearing before the judge would be the appropriate procedure in such cases.

Furthermore, if it's correct that there are still some types of criminal cases in which statutory self-defense immunity should be decided by the judge at a hearing rather than by the jury at a trial, when should that hearing be held? G.S. 15A-952(f) states that "when a motion is made before trial, the court in its discretion may hear the motion before trial, on the date set for arraignment, on the date set for trial before a jury is impaneled, or during trial." A key holding in *Austin* was the court's conclusion that the castle doctrine statutes only provide a defendant with immunity from conviction and judgment, not immunity from undergoing a trial at all. So it seems that it would still be within the trial judge's discretion to conduct the hearing at some later point "during trial," such as after all the evidence has been presented, but it may be just as much within the judge's discretion to conduct that hearing "before trial" if she chooses.

Will the *Austin* opinion stand as currently issued? Are there still some criminal cases in which a separate hearing before the judge would be appropriate? If so, what exactly is the test for distinguishing between the two types? When should the hearing be held? Additionally, to circle back to John Rubin's earlier post, if the trial court does conduct such a hearing, what are the procedural rules and the parties' respective burdens of proof? I'm afraid those are all questions which continue to "await further answers," but with this latest case we finally seem to be getting a little closer to finding out.

Category: Case Summaries, Crimes and Elements, Procedure, Uncategorized | Tags: castle doctrine, G.S. 14-51.2(e), G.S. 14-51.3(b), immunity, pretrial hearing, self-defense, state v. austin

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Evidence about the "Victim" in Self-Defense Cases

Author : John Rubin

Categories : Uncategorized

Date : February 5, 2019

In self-defense cases, the defendant typically claims that the "victim" was actually the assailant and that the defendant needed to use force to defend himself, family, home, or other interests. Because of this role reversal, the rules of evidence allow the defendant to offer evidence to show that the victim was the assailant or at least that the defendant reasonably believed that the victim intended to do harm. In *State v. Bass*, ___ N.C. ___, 819 S.E.2d 322 (2018), the North Carolina Supreme Court clarified one form of evidence that a defendant may *not* offer about the victim in a self-defense case. This post reviews the evidence found impermissible in *Bass* as well as several types of evidence that remain permissible.

Background

To make a long story short, the defendant, Bass, shot Fogg while the two were in the breezeway of Bass's apartment complex. He relied on self-defense against the charges of attempted murder and assault with a deadly weapon with intent to kill inflicting serious injury. The jury convicted him of assault with a deadly weapon inflicting serious injury.

One issue concerned the jury instructions given by the trial judge. Although the judge instructed the jury on self-defense, he denied Bass's request for an instruction that he did not have a duty to retreat in a place where he had a "lawful right to be," as provided in G.S. 14-51.3 on defense of person. The judge reasoned that Bass was not entitled to the instruction because the breezeway was not within the curtilage of Bass's home. The Court of Appeals reversed and granted a new trial, essentially finding that the statutory language means what it says—a person does not have a duty to retreat in a place where he has a lawful right to be, including a public place. I wrote a previous post about this aspect of the Court of Appeals' decision. The Supreme Court affirmed, holding that when a defendant is entitled to a self-defense instruction, he "is entitled to a *complete* self-defense instruction, which includes the relevant stand-your-ground provision." Slip Op. at 10, 819 S.E.2d at 326 (emphasis in original).

A second issue concerned the admissibility of testimony about previous violent acts by Fogg.

> Williford, Fogg's ex-girlfriend, would have testified that Fogg had, without provocation and in front of Williford's three-year-old daughter, pulled a gun on Williford and choked her until she passed out. She also would have testified that Fogg beat her so badly that her eyes were swollen shut and she was left with a bruise reflecting an imprint of Fogg's shoe on her back. Michael Bauman would have testified that, on one occasion, he witnessed Fogg punch his own dog in the face because it approached another individual for attention. On another occasion, Bauman encountered Fogg at a restaurant, where Fogg initiated a fight with Bauman and also "grabbed" and "threw" Bauman's mother-in-law when she attempted to defuse the situation. Terry Harris would have testified that Fogg, a complete stranger to him, initiated a verbal altercation with him in a convenience store. Two or three weeks later, Fogg pulled over when he saw Harris walking on the side of the road and hit him until Harris was knocked unconscious. According to Harris, Fogg "[s]plit the side of [his] face" such that he required stitches. Slip Op. at 14–15, 819 S.E.2d at 328.

The trial judge excluded this testimony. The Court of Appeals held that the evidence was admissible in support of Bass's defense that Fogg was the aggressor on the night Bass shot him. The Court of Appeals also held the trial judge erred in denying the defendant's motion to continue after the prosecutor learned the night before trial of five additional

instances of assaultive behavior by Fogg, which the prosecutor disclosed to defense counsel. The Supreme Court reversed, holding that the testimony offered by the defendant was inadmissible character evidence and that evidence of the additional acts would have been inadmissible for the same reason.

Evidence about the Victim

Character to show conduct. The rules on character evidence, the subject of the Supreme Court's opinion, have several precise steps. Please bear with me.

Generally, evidence of a person's character is not admissible to prove he "acted in conformity therewith on a particular occasion." N.C. R. Ev. 404(a). In other words, a party may not offer evidence of a person's past character to show that he committed the current deed. An exception to this general rule allows a defendant in a criminal case to offer evidence of "a pertinent trait of character of the victim." N.C. R. Ev. 404(a)(2). The Supreme Court in *Bass* recognized that evidence of a victim's violent character is pertinent and thus admissible in determining whether the victim was the aggressor in a case in which the defendant claims self-defense. Slip Op. at 13, 819 S.E.2d at 327.

The inquiry does not end there. North Carolina Rule of Evidence 405 specifies the forms of evidence that are permissible to show character, including violent character. Rule 405(a) allows reputation and opinion testimony in "all cases in which evidence of character or a trait of character of a person is admissible." Thus, a witness who knows the victim can give an opinion that the victim is a violent person. However, Rule 405(b) only allows evidence of specific instances of conduct to show character when "character or a trait of character of a person is an essential element of a charge, claim, or defense." Thus, a witness can testify that the victim engaged in specific acts of violence only if the victim's character for violence is an essential element.

Here, the Court of Appeals and Supreme Court disagreed. The Court of Appeals held that whether the defendant or victim was the aggressor is an essential inquiry, or element, of self-defense. Rule 405(b) therefore allowed Bass to present evidence of specific acts of violence by Fogg to show that he had a violent character and therefore was the aggressor. The Supreme Court agreed that whether the defendant or victim was the aggressor is a central inquiry. However, to the Supreme Court, the determinative question under Rule 405(b) is whether the victim's violent or aggressive character is an essential element, which is a different question than whether the victim was the aggressor in the current incident. The Supreme Court answered no. Accordingly, Fogg's past acts were not admissible under Rule 405(b) to show that he was the aggressor. Contrary language in another recent Court of Appeals decision, *State v. Greenfield*, ___ N.C. App. ___, Slip Op. at 6–8 (Dec. 4, 2018), probably does not survive the ruling in *Bass*.

But wait, there's more. *Bass* does not address or rule out other theories of admissibility of prior violent acts by the victim. These are discussed at greater length in Chapter 7 of my book The Law of Self-Defense in North Carolina (1996), which obviously has aged but still reflects the applicable evidence principles and includes cites to pertinent court decisions.

Known acts to show reasonable fear. If the defendant knows of prior violent acts by the victim, longstanding law in North Carolina recognizes that the defendant may offer evidence about the acts to show why he feared the victim and why his fear was reasonable. *See, e.g., State v. Johnson*, 270 N.C. 215, 218–20 (1970). The evidence is not subject to the limitations on character evidence because its relevance is to show the defendant's state of mind and the reasonableness of his apprehension of the victim. The *Bass* decision, which dealt with prior acts by the victim that were *not* known by the defendant, does not affect this theory of admissibility. Another recent decision, in which the Court of Appeals relied on this type of evidence to show that the defendant reasonably believed it was necessary to use deadly force, should remain good law. See *State v. Irabor*, ___ N.C. App. ___, Slip Op. at 7–9 (Nov. 20, 2018).

Threats by the victim. Evidence of threats by the victim against the defendant are admissible under North Carolina law for various reasons. Whether known or unknown by the defendant, such threats show the victim's intent. The cases treat threatening statements by the victim against the defendant like threats by the defendant against the victim:

they are statements of intent tending to show how the person making the threat later acted. Thus, in a self-defense case, threats by the victim against the defendant are relevant to show that the victim was the aggressor. *See, e.g., State v. Ransome*, 342 N.C. 847 (1996). If the defendant knows of the threats, they are relevant and admissible for the additional reason that they show the defendant's reasonable apprehension of the victim. *See, e.g., State v. Macon*, 346 N.C. 109, 114–15 (1997). Again, this evidence is not subject to the limitations on character evidence.

Impeachment. When the rules on character evidence apply, other exceptions allow the defendant to offer evidence of specific acts by the victim. If a witness testifies about the victim's peaceful character or otherwise opens the door, North Carolina Rule of Evidence 405(a) allows cross-examination into "relevant specific instances of conduct." For example, if a witness testifies about the victim's peaceful character (permitted under Evidence Rule 404(a)(2) in some instances), the defendant may impeach the witness through cross-examination about prior violent acts of the victim. *See generally State v. Gappins*, 320 N.C. 64, 68–70 (1987) (applying this rule to allow State's cross-examination of defendant's character witnesses).

Rule 404(b). North Carolina Rule of Evidence 404(b) creates another exception to the limits on character evidence. It allows evidence of specific crimes, wrongs, or acts "for other purposes," such as motive, intent, preparation, plan, and absence of mistake. The North Carolina courts have held that Rule 404(b) is a rule of inclusion. *See State v. Coffey*, 326 N.C. 268, 278–79 (1990). Prior acts, including acts of the victim, are admissible if they are relevant for some purpose other than to show that the person has the propensity, or character, to commit the current act under consideration. *See, e.g., State v. Smith*, 337 N.C. 658, 664–67 (1994) (holding that prior acts of victim were not admissible under Rule 404(b) in this case). Whether Fogg's prior acts might have been admissible under Rule 404(b) for a non-character purpose was not considered in *Bass*.

Potential impact of defensive-force statutes. Another question concerns the impact of the defensive-force statutes enacted by the General Assembly in 2011, which recent cases have recognized depart from prior law in some important respects. Provisions potentially relevant to this discussion include G.S. 14-51.2(d), which establishes a presumption that a person who unlawfully and forcibly enters a person's home, motor vehicle, or workplace is presumed to be doing so with the intent to commit an unlawful act involving force or violence. Suppose the State tries to rebut this presumption by offering evidence that the person did not enter with this intent. Would such evidence open the door to further rebuttal by the defendant through evidence of prior acts by the victim?

On their face, this provision and others in the defensive-force statutes do not address evidence law. I wonder, however, whether the expanded rights enacted by the General Assembly could be read as affecting, or at least simplifying, the overall approach to evidence issues in self-defense cases. Although many avenues remain after *Bass* for the defendant to introduce evidence about the victim's prior conduct, the road map is complicated and has some unexpected potholes.

Fundamental Principles of Statutory Self-Defense

Author : John Rubin

Categories : Crimes and Elements, Uncategorized

Tagged as : defense of habitation, defense of home, defense of others, self-defense

Date : August 6, 2019

The common law right to use defensive force in North Carolina rests on three fundamental principles: necessity, proportionality, and fault. Ordinarily, when a person uses defensive force, the force must be reasonably necessary to prevent harm; the force must be proportional to the threatened harm; and the person using defensive force must not be at fault in the conflict. *See* John Rubin, The Law of Self-Defense § 2.1(b), at 14–15 (UNC School of Government, 1996). North Carolina's new statutes on defensive force continue to rely on these principles. As under the common law, the statutes do not always refer to these principles in describing the circumstances in which a person may use defensive force. But, as this post is intended to show, the basic principles of necessity, proportionality, and fault remain central to the statutory rights.

Necessity. Under the common law, defensive force is permissible only when necessary, or more accurately when it reasonably appears to be necessary, to prevent harm. The common law expresses this principle in the requirement that the defendant must have a reasonable belief in the need to use defensive force.

The principle of reasonable necessity can be seen in the statutes on defensive force. A lawful occupant of a home, workplace, or motor vehicle has the right to use deadly force against a person who is unlawfully, forcibly entering those areas or had done so. This right arises because the statutes create a presumption of "reasonable" fear of imminent death or great bodily injury in those circumstances. G.S. 14-51.2(b) (stating presumption and also applying it to unlawful removal of person from those areas); G.S. 14-51.3(a)(2) (stating right to use deadly force in circumstances permitted by G.S. 14-51.2(b)); *see also State v. Coley*, ___ N.C. App. ___, 822 S.E.2d 762 (2018) (recognizing presumption of reasonable fear), *review granted*, ___ N.C. ___, 824 S.E.2d 428 (2019).

The presumption is new, but the principle of reasonable necessity underlies it. The presumption essentially views an unlawful, forcible entry as creating a reasonable necessity for the use of defensive force, including deadly force. The presumption is rebuttable as provided in the statute, a topic for another post.

The statute on defense of person also expresses the principle of reasonable necessity through a reasonable belief requirement. It states that a person is justified in using nondeadly force when the person "reasonably believes that the conduct is necessary" to defend against the imminent use of unlawful force. Likewise, the statute recognizes a person's right to use deadly force when the person "reasonably believes that such force is necessary" to prevent imminent death or great bodily harm. G.S. 14-51.3(a), (a)(1); *see also State v. Parks*, ___ N.C. App. ___, 824 S.E.2d 881 (2019) (holding that trial judge erred in failing to instruct on self-defense where evidence was sufficient to support defendant's assertion of reasonable apprehension of death or great bodily harm).

Proportionality. The common law distinguishes between situations in which a person may use deadly force against a threat of harm—that is, force likely to cause death or great bodily harm—and nondeadly force. This distinction implements the principle of proportionality, recognizing that deadly force is not permissible to prevent relatively minor harms such as a nondeadly assault or the loss of property.

The statutes retain this distinction by allowing deadly force against some threats of harm and not others. Under G.S. 14-51.2, an unlawful, forcible entry into the home, workplace, or motor vehicle is considered so threatening that deadly

force is presumptively permissible. Under G.S. 14-51.3, deadly force is permissible to prevent imminent death or great bodily harm but not to prevent mere "unlawful force." *See also State v. Pender*, ___ N.C. App. ___ (June 18, 2019) (recognizing distinction).

Both statutes contain a "stand-your-ground" provision, which allows a person to use deadly force without retreating. The right of a person to stand his or her ground, however, does not give the person the right to use deadly force when only nondeadly force is permissible. For example, if A slaps B, the stand-your-ground provision does *not* give B the right to use deadly force in response. B may only use nondeadly force if reasonably necessary to defend himself—his response must be proportional to the harm he faces.

Fault. The common law ordinarily takes away the right to use defensive force when the person is the aggressor in the encounter. There are different kinds of aggressors and different circumstances in which an aggressor may regain the right to use defensive force. Generally, the aggressor doctrine reflects the principle that a person is not justified in using defensive force if he or she was at fault, as that term is used in the law, in bringing about the conflict.

The statutes include an aggressor provision, which recognizes that the statutory rights to use defensive force are ordinarily unavailable to a person who provokes the use of force against himself or herself. G.S. 14-51.4(2); *see also State v. Holloman*, 369 N.C. 615 (2017) (holding that statutory provision allowing initial aggressor to regain right to use defensive force without withdrawing does not apply to aggressor with murderous intent).

The statutes contain an additional fault disqualification. The statutory rights of defensive force are unavailable to a person who was attempting to commit, committing, or escaping after the commission of a felony. G.S. 14-51.4(1). Two cases pending in the North Carolina Supreme Court raise the question of how far this disqualification goes. *See State v. Coley*, ___ N.C.___, 824 S.E.2d 428 (2019); *State v. Crump*, ___ N.C. ___, 820 S.E.2d 811 (2018); *see also* Wayne R. LaFave, Substantive Criminal Law § 10.4(c), at 211 & n.74 (3d ed. 2018) (noting that some state statutes declare that people involved in certain criminal activities do not have a right of self-defense).

In future posts, I will delve further into the specific conditions and circumstances in which a person has the statutory right to use defensive force.

The Statutory Law of Self-Defense in North Carolina

Author : John Rubin

Categories : Crimes and Elements, Evidence, Procedure, Uncategorized

Tagged as : defense of habitation, defense of others, self-defense

Date : June 4, 2019

Several years ago (some might say that's an understatement) I wrote The Law of Self-Defense in North Carolina, in which I looked at over 200 years' worth of North Carolina court opinions on self-defense and related defenses, such as defense of others and defense of habitation. The book's approach reflected that North Carolina was a common law state when it came to self-defense. The right to act in self-defense depended primarily on the authority of court decisions. The General Assembly's adoption in 2011 of three defensive force statutes—G.S. 14-51.2, G.S. 14-51.3, and G.S. 14-51.4—changed that. An understanding of the law of self-defense in North Carolina now must begin with the statutory law of self-defense.

I must admit that I did not fully appreciate the significance of the statutes when they first appeared. I saw them as revising, supplementing, and clarifying the common law. Now that we have almost twenty reported appellate decisions that have grappled with the statutes (as well as some unpublished decisions), I can see I had it wrong. The statutes create independent defenses, with their own requirements. The enormous body of common law remains significant, both as a means for interpreting and applying the statutes and as a source of additional rights. It is important to recognize, however, that the statutes do not necessarily align with the common law.

The statutory defenses affect both the right to use defensive force outside the courtroom in the real world and the procedures used in the formal world of the courtroom for judging acts of defensive force. The statutes affect such important procedural issues as whether evidence is relevant and admissible, the circumstances in which the jury should be instructed about defensive force, and the wording of those instructions.

Below are some initial takeaways from the cases, which illustrate the importance of closely examining the statutory provisions in every case involving defensive force. In future posts, I intend to discuss the impact of the statutes on specific rules and procedures.

The statutory defenses. G.S. 14-51.2 creates a statutory right to use defensive force in one's home, workplace, or motor vehicle under the conditions stated there. There are obvious and subtle differences between the statutory defense and the common law defense of habitation. Among other things, the statute's protections extend to motor vehicles as well as homes and businesses and include presumptions that insulate a lawful occupant's use of deadly force against someone who unlawfully and forcibly enters those areas. The cases recognize the statute's expanded scope. For example, in *State v. Kuhns*, ___ N.C. App. ___, 817 S.E.2d 828 (2018), the court recognized that the statutory protections apply to the "curtilage" of the home, including in that case the yard around the defendant's home, and not just the home and structures attached to the home. *See also State v. Copley*, ___ N.C. App. ___ (May 7, 2019) (directing pattern jury committee to revise pattern instruction to include broader definition of curtilage), *temp stay allowed*, __ N.C. ___ (May 23, 2019). The statute does not merely enlarge the common law defense of habitation. It creates a separate and different right to use deadly force in one's home, workplace, or motor vehicle (discussed further in my blog post here).

G.S. 14-51.3 creates a statutory right to use force in defense of one's self or another person, which differs from the common law on defense of person. Most notably, the statute includes an explicit stand-your-ground provision, stating that a person does not have a duty to retreat "in any place he or she has the lawful right to be" when the person meets

the requirements of the statute. G.S. 14-51.3(a). In several cases, the courts have reversed convictions for the failure to instruct the jury about this right. *See, e.g., State v. Lee*, 370 N.C. 671 (2018); *State v. Bass*, __ N.C. __, 819 S.E.2d 322 (2018); *State v. Irabor*, ___ N.C. App. ___, 822 S.E.2d 421 (2018); *State v. Ayers*, ___ N.C. App. ___, 819 S.E.2d 407 (2018). Other cases working their way through the courts will show the extent to which the defense-of-person statute diverges from the common law in other respects.

G.S. 14-51.4 elaborates on the right to use defensive force in the above two statutes. Thus, a person may not rely on the statutory defenses if he or she was "[w]as attempting to commit, committing, or escaping after the commission of a felony." G.S. 14-51.4(1). The courts are currently considering the meaning of this provision, which differs from the phrasing of common law aggressor principles. One panel of the Court of Appeals has applied the felony disqualification literally, holding that a defendant who had a previous felony conviction and was unlawfully in possession of a firearm was not entitled to a jury instruction on the statutory right of defense of person. The North Carolina Supreme Court has agreed to hear the case. *See State v. Crump*, ___ N.C. App. ___, 815 S.E.2d 415 (2018), *discretionary review allowed*, ___ N.C. ___, 820 S.E.2d 811 (2018). (The Court of Appeals opinion is discussed further in my blog post here.) In a more recent case, another panel of the Court of Appeals didn't mention the felony disqualification in considering whether the trial judge should have instructed the jury on defensive force. In *State v. Coley*, ___ N.C. App. ___, 822 S.E.2d 762 (2018), the defendant had a broken leg and was using crutches and a wheelchair. His evidence showed that he had been repeatedly assaulted by the victim and, when the victim reentered the defendant's home, the defendant managed to climb back into his wheelchair, retrieve a gun, and shoot the victim. The majority found that the trial judge erred in failing to instruct the jury on self-defense and defense of habitation. The dissent would have found no error. Neither the majority nor the dissent addressed whether the felony disqualification applied to the defendant, who had a previous felony conviction and was actually convicted in the case of being a felon in possession of a firearm. The North Carolina Supreme Court has also accepted review of this case.

The common law still matters. Although the statutes establish independent rights to use defensive force, the common law still matters. For one, the statutes restate bedrock common law principles. For example, the defensive force statutes incorporate the concept of "reasonable necessity"—that is, that a person may use defensive force if reasonably necessary to defend against harm (although reasonableness is presumed in the statute on defensive force in the home, workplace, or motor vehicle). Common law decisions involving this central tenet of defensive force therefore remain significant in interpreting and applying the statutory provisions. Among other things, as under the common law, a defendant may offer evidence about why he or she had a reasonable apprehension of harm from the victim, including evidence about prior violence by the victim. *See State v. Irabor*, ___ N.C. App. ___, 822 S.E.2d 421 (2018) (holding that such evidence supported instruction on statutory self-defense). [The admissibility of evidence about the victim in self-defense cases is discussed further in my blog post here]. The cases rely on other common law principles in addressing the statutory defenses, such as the requirement that the evidence must be considered in the light most favorable to the defendant when determining whether the defendant is entitled to a jury instruction on the defense. *Id.*; *see also State v. Coley*, above.

The common law also may be a source of additional rights. The statute on defensive force in the home, workplace, and motor vehicle explicitly states that it does not repeal or limit other common law defenses. The statute on defense of person does not contain such a provision, but it also does not state that it abrogates common law rights. Imperfect self-defense, which reduces murder to voluntary manslaughter, is an example of a common law defense that isn't mentioned in the statute but probably remains viable. It is difficult to imagine that the General Assembly intended to eliminate that common law doctrine. *Cf. State v. Lee*, 370 N.C. 671, 678–79 (2018) (Martin, C.J., concurring) (observing that defendant may be entitled to perfect defense of another based on statutory defense of person in situations in which the common law only allows imperfect defense of another).

Going forward. Defensive force cases have always been complicated, perhaps more so than necessary. *See Brown v. United States*, 256 U.S. 335, 343 (1921) (Holmes, J.) (observing that the law of self-defense has had a "tendency to ossify into specific rules"). They will probably get more complicated in the near future as the courts sort out the meaning and impact of the defensive force statutes. Based on my understanding of the cases so far, the best course is

to figure out the statutory rights in each case, use the common law as appropriate in interpreting and applying the statutes, and identify the potential applicability of common law rights in addition to the statutory rights. These principles will determine such critical issues as whether the defendant is entitled to instructions to the jury on defensive force, what instructions should be given, and how the instructions should be worded, which have been central concerns in many of the recent decisions.