Issues in Self-Defense Law in North Carolina

John Rubin

UNC School of Government

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rubin@sog.unc.edu

919.962.2498

Contents

Self-Test on Issues in Self-Defense Cases

1. In a homicide case, the defendant does not give notice of any defenses. At trial the evidence supports an instruction on imperfect self-defense. Should the judge deny the instruction on the ground that the defendant failed to give notice in violation of the discovery statutes?

    a. Yes
    b. No
    c. I need more information

2. The defendant moves for a pretrial determination of whether he acted in self-defense based on the language of G.S. 14-51.3(b) stating that a defendant who satisfies the terms of the statute is immune from criminal liability. Should the judge hold a pretrial hearing on self-defense?

    a. Yes
    b. No
    c. I'm waiting for the Court of Appeals to rule on this issue

3. The evidence in the light most favorable to the defendant shows that, without provocation, the decedent came at the defendant with a gun. Fearing for his life, the defendant grabbed for the gun. The gun went off and killed the decedent. Should the judge instruct on self-defense?

    a. Yes
    b. No
    c. I need more information

4. Assuming that the defendant in no. 3 can rely on self-defense, should the judge include the aggressor portion of the self-defense instruction when instructing the jury.

    a. Yes
    b. No
    c. I need more information

5. The conflict occurs on a public street. If the judge finds sufficient evidence to instruct on self-defense, should the judge instruct that the defendant did not have a duty to retreat?

    a. Yes
    b. No

6. The defendant was attempting to buy cocaine from the alleged victim when the victim shot at the defendant. Fearing for his life, the defendant returned fire and killed the victim. Should the judge instruct on self-defense?

    a. Yes
    b. No

7. Assume that the defendant in no. 6 was unarmed. During the struggle, he took the gun away from the victim. The defendant has a previous felony conviction. Does the defendant have a defense to being a felon in possession of a firearm?

    a. Yes
    b. No
    c. I need more information

§ 14-51.2. Home, workplace, and motor vehicle protection; presumption of fear of death or serious bodily harm.

(a) The following definitions apply in this section:

(1) Home. - A building or conveyance of any kind, to include its curtilage, whether the building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it, including a tent, and is designed as a temporary or permanent residence.

(2) Law enforcement officer. - Any person employed or appointed as a full-time, part-time, or auxiliary law enforcement officer, correctional officer, probation officer, post-release supervision officer, or parole officer.

(3) Motor vehicle. - As defined in G.S. 20-4.01(23).

(4) Workplace. - A building or conveyance of any kind, whether the building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it, including a tent, which is being used for commercial purposes.

(b) The lawful occupant of a home, motor vehicle, or workplace is presumed to have held a reasonable fear of imminent death or serious bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or serious bodily harm to another if both of the following apply:

(1) The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a home, motor vehicle, or workplace, or if that person had removed or was attempting to remove another against that person's will from the home, motor vehicle, or workplace.

(2) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.

(c) The presumption set forth in subsection (b) of this section shall be rebuttable and does not apply in any of the following circumstances:

(1) The person against whom the defensive force is used has the right to be in or is a lawful resident of the home, motor vehicle, or workplace, such as an owner or lessee, and there is not an injunction for protection from domestic violence or a written pretrial supervision order of no contact against that person.

(2) The person sought to be removed from the home, motor vehicle, or workplace is a child or grandchild or is otherwise in the lawful custody or under the lawful guardianship of the person against whom the defensive force is used.

(3) The person who uses defensive force is engaged in, attempting to escape from, or using the home, motor vehicle, or workplace to further any criminal offense that involves the use or threat of physical force or violence against any individual.

(4) The person against whom the defensive force is used is a law enforcement officer or bail bondsman who enters or attempts to enter a home, motor vehicle, or workplace in the lawful performance of his or her official duties, and the officer or bail bondsman identified himself or herself in accordance with any applicable law or the person using force knew or reasonably should have known that the person entering or attempting to enter was a law enforcement officer or bail bondsman in the lawful performance of his or her official duties.

(5) The person against whom the defensive force is used (i) has discontinued all efforts to unlawfully and forcefully enter the home, motor vehicle, or workplace and (ii) has exited the home, motor vehicle, or workplace.

(d) A person who unlawfully and by force enters or attempts to enter 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.

(e) A person who uses force as permitted by this section is justified in using such force and is immune from civil or criminal liability for the use of such force, unless the person against whom force was used is a law enforcement officer or bail bondsman who was lawfully acting in the performance of his or her official duties and the officer or bail bondsman identified himself or herself in accordance with any applicable law or the person using force knew or reasonably should have known that the person was a law enforcement officer or bail bondsman in the lawful performance of his or her official duties.

(f) A lawful occupant within his or her home, motor vehicle, or workplace does not have a duty to retreat from an intruder in the circumstances described in this section.

(g) This section is not intended to repeal or limit any other defense that may exist under the common law. (2011-268, s. 1.)

§ 14-51.3. Use of force in defense of person; relief from criminal or civil liability.

(a) A person is justified in using force, except deadly force, against another when and to the extent that the person reasonably believes that the conduct is necessary to defend himself or herself or another against the other's imminent use of unlawful force. However, 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 if either of the following applies:

(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.

(2) Under the circumstances permitted pursuant to G.S. 14-51.2.

(b) A person who uses force as permitted by this section is justified in using such force and is immune from civil or criminal liability for the use of such force, unless the person against whom force was used is a law enforcement officer or bail bondsman who was lawfully acting in the performance of his or her official duties and the officer or bail bondsman identified himself or herself in accordance with any applicable law or the person using force knew or reasonably should have known that the person was a law enforcement officer or bail bondsman in the lawful performance of his or her official duties. (2011-268, s. 1.)

§ 14-51.4. Justification for defensive force not available.

The justification described in G.S. 14-51.2 and G.S. 14-51.3 is not available to a person who used defensive force and who:

(1) Was attempting to commit, committing, or escaping after the commission of a felony.

(2) Initially provokes the use of force against himself or herself. However, the person who initially provokes the use of force against himself or herself will be justified in using defensive force if either of the following occur:

a. The force used by the person who was provoked is so serious that the person using defensive force reasonably believes that he or she was in imminent danger of death or serious bodily harm, the person using defensive force had no reasonable means to retreat, and the use of force which is likely to cause death or serious bodily harm to the person who was provoked was the only way to escape the danger.

b. The person who used defensive force withdraws, in good faith, from physical contact with the person who was provoked, and indicates clearly that he or she desires to withdraw and terminate the use of force, but the person who was provoked continues or resumes the use of force. (2011-268, s. 1.)

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

Author : John Rubin

Categories : Crimes and Elements, Uncategorized

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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.

Self-Defense Provides Immunity from Criminal Liability

Author : John Rubin

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So say two statutes enacted by the General Assembly in 2011 as part of its revision of North Carolina's self-defense law. G.S. 14-51.2(e) and G.S. 14-51.3(b) both state that a person who uses force as permitted by those statutes—in defense of home, workplace, and vehicle under the first statute and in defense of self or others under the second statute—"is justified in using such force and is immune from civil or criminal liability for the use of such force . . . ." What does this protection mean in criminal cases? No North Carolina appellate cases have addressed the self-defense immunity provision. This blog post addresses possible implications.

Does North Carolina's immunity provision merely confirm that a person may rely on self-defense as an affirmative defense at trial and, if successful, not be convicted? Or, does it do more?

The immunity provision may do more. It may create a mechanism for a defendant to obtain a determination by the court, before trial, that he or she lawfully used defensive force and is entitled to dismissal of the charges.

Several states now have self-defense immunity provisions. The exact wording varies. Some have explicit procedures for determining immunity (*see* Ala. Code § 13A-3-23), but most are silent. In interpreting these statutes, the courts agree that the immunity provision does "not merely provide that a defendant cannot be convicted as a result of legally justified force." *See Dennis v. State*, 51 So.3d 456, 462 (Fla. 2010). Surveying the various states with immunity provisions, one commentator has observed: "There is consensus that "Stand Your Ground" statutory immunity is not an affirmative defense, but rather a true immunity to be raised pretrial." *See* Benjamin M. Boylston, Immune Disorder: Uncertainty Regarding the Application of "Stand Your Ground" Laws, 20 Barry Law Review 25, 34 (Fall 2014).

North Carolina's immunity statute is in the silent camp. It does not describe procedures for determining immunity or elaborate on the meaning of the term. The statute appears to distinguish between defensive force as an affirmative defense and defensive force as the basis for immunity, providing that a person who meets the statutory requirements for defensive force is "justified" in using such force and is "immune" from liability. The first term appears to afford the defendant an affirmative defense—a justification—against criminal charges, while the second term appears to afford the defendant something more. *See also* G.S. 15A-954(a)(9) (providing that on motion of defendant court must dismiss charges if defendant has been granted immunity by law from prosecution).

North Carolina's self-defense immunity provisions may differ in that they protect a person from criminal "liability" while other states' provisions protect a person from criminal "prosecution." *See, e.g.,* Fla. Stat. § § 776.032(a) (protecting person from criminal prosecution and civil action and defining criminal prosecution as including arresting, detaining in custody, and charging or prosecuting); Colo. Rev. Stat. § 18-1-704.5 (protecting person from criminal prosecution and civil liability but not defining terms). Whether the difference is legally significant is unclear.

Have other state courts interpreted their self-defense immunity statutes as giving the defendant a right to a pretrial hearing on immunity?

Yes. Although the courts differ on the requirements for such hearings, discussed below, they have found that their self-defense immunity statutes give defendants the right to a pretrial hearing to determine immunity. *See, e.g., People v.*

Guenther, 740 P.2d 971, 975 (Colo. 1987).

In what kinds of cases involving defensive force have courts found a right to a pretrial immunity determination?

The answer depends on the particular statute. For example, the Alabama Court of Criminal Appeals held that its immunity provision applies to all claims of self-defense, not just those involving a "stand-your-ground" defense. *Malone v. State*, 2016 WL 3136212 (Ala. Crim. App., June 3, 2016). The Colorado Supreme Court held that its immunity statute applies to occupants of dwellings who use force against an unlawful entry as provided in its statute. *Guenther*, 740 P.2d at 979.

North Carolina's immunity provision is included in both G.S. 14-51.2 and G.S. 14-51.3, which together cover defense of home, workplace, vehicle, and person. Therefore, regardless of its exact meaning, the immunity provision applies to the use of defensive force in compliance with either statute.

What is the standard of proof at a pretrial immunity determination?

Most courts have held that the defendant has the burden to establish immunity by a preponderance of the evidence. *See State v. Manning*, 2016 WL 4658956 (S.C., Sept. 7, 2016); *Bretherick v. State*, 170 So.3d 766, 779 (Fla. 2015); *Bunn v. State*, 667 S.E.2d 605, 608 (Ga. 2008); *Guenther*, 740 P.2d at 981; *see also Harrison v. State*, 2015 WL 9263815 (Ala. Crim. App., Dec. 18, 2015) (adopting this burden before statute was revised to impose this burden). Because the defendant has the burden of proof, presumably the defendant presents evidence first.

Courts taking this view have rejected other burdens making it easier or harder for the State to resist immunity motions. For example, the Florida Supreme Court held that the existence of disputed issues of material fact (a standard common to summary judgment motions in civil cases) does not warrant a denial of immunity. *See Dennis*, 51 So.2d at 462–63. Similarly, the Florida Supreme Court held that the existence of probable cause does not warrant a denial of immunity; the court reasoned that its legislature intended the immunity provision to provide greater rights than already existed under Florida law. *Id.* at 463. The Florida Supreme Court refused, however, to require the State to prove beyond a reasonable doubt that the defendant did not lawfully use defensive force, the standard at trial. *See Bretherick*, 170 So.2d at 775 (also citing decisions from other jurisdictions; two justices dissented).

Kansas and Kentucky appellate courts have held that the State need only establish probable cause that the defendant did not lawfully use defensive force. *See State v. Ultreras*, 295 P.3d 1020 (Kan. 2013); *Rodgers v. Commonwealth*, 285 S.W.3d 740, 756 (Ky. 2009). The Kansas Supreme Court has also held that a trial judge may set aside on immunity grounds a jury verdict of guilty. *See State v. Barlow*, 368 P.3d 331 (Kan. 2016).

What is the nature of the hearing?

In states in which the defendant has the burden of establishing immunity, the trial court holds an evidentiary hearing and resolves factual disputes. *See, e.g., Dennis*, 51 So.3d at 462–63; *Guenther*, 740 P.2d at 981. The South Carolina Supreme Court recently held that a judge may decide the immunity issue without an evidentiary hearing if undisputed evidence, such as witness statements, show that the defendant has not met his or her burden of proof. *See State v. Manning*, 2016 WL 4658956 (S.C., Sept. 7, 2016).

Kentucky and Kansas, which require only that the State establish probable cause that the defendant did not lawfully use defensive force, differ from each other. The Kentucky courts have held that an evidentiary hearing is not required and that the State may meet its burden with other record evidence. *See Rodgers*, 285 S.W.3d at 755–56. The Kansas Court of Appeals has held that an evidentiary hearing is required and that the rules of evidence apply at such hearings, but the judge should construe the evidence in a light favorable to the State, resolving conflicts in the evidence to the State's benefit and against immunity. *See State v. Hardy*, 347 P.3d 222, 228 (Kan. Ct. App. 2015), *review granted*, ___

P.3d ___ (Kan., Apr. 21 2016)

In all of the states, the court must dismiss the charges if the defendant prevails. *See also Fair v. State*, 664 S.E.2d 227, 230 (Ga. 2008) (holding that trial court may not reserve ruling until trial).

Is the defendant barred from relying on self-defense at trial if he or she loses a pretrial immunity motion?

No. Courts in other states have recognized that a defendant still may rely on defensive force as an affirmative defense at trial under the standards of proof applicable to the trial of criminal cases. *See, e.g., Bretherick*, 170 So.3d at 778; *Bunn*, 667 S.E.2d at 608. In North Carolina, the State has the burden at trial to prove beyond a reasonable doubt that the defendant did not lawfully use defensive force.

As the foregoing indicates, the North Carolina self-defense immunity provision raises several questions, which await further answers.

A Warning Shot about Self-Defense

Author : John Rubin

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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 it 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.

The Statutory Felony Disqualification for Self-Defense

Author : John Rubin

Categories : Procedure, Uncategorized

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I am working on a new edition of the self-defense book I wrote in 1996. As in the story of Rip Van Winkle, a lot has changed in twenty years. Most notably, the General Assembly adopted new statutes in 2011 on self-defense and related defenses. This blog post addresses one of those provisions, in G.S. 14-51.4, which disqualifies a person from relying on self-defense while committing, attempting to commit, or escaping from the commission of a felony. North Carolina appellate courts have not yet considered the meaning of this provision. *Cf. State v. Rawlings*, ___ N.C. App. ___, 762 S.E.2d 909 (2014) (felony disqualification did not apply to case in which defendant's offense predated enactment of provision, and court expressed no opinion on proper construction of provision).

What felonies are disqualifiers? Interpreted literally, the language in G.S. 14-51.4 covers all felonies, regardless of the nature of the offense or its relationship to the incident in which the need for defensive force arose. To take an extreme example, a woman in possession of a little more than one and a half ounces of marijuana, a felony in North Carolina, could not rely on self-defense to justify the use of defensive force if her abusive boyfriend, for reasons unrelated to her marijuana possession, began to beat and threaten to kill her. Such a result would represent a drastic change to self-defense law in North Carolina and elsewhere, which provides for forfeiture of a person's right to act in self-defense only when the person is "at fault" in some sense for bringing about the conflict. *See* John Rubin, The Law of Self-Defense in North Carolina § 2.1(b), at pp. 14–15 (UNC Sch. of Gov., 1996) (discussing underlying principles of self-defense).

The structure of G.S. 14-51.4 suggests that the General Assembly did not intend such a result and intended to retain a "fault" requirement, although not expressly stated in the statute. The statute contains two subsections. Subsection (1) contains the felony disqualifier. Subsection (2) contains the "aggressor" disqualifier, which provides that a person forfeits the right of self-defense (subject to certain exceptions) if he or she "provokes the use of force against himself or herself." The aggressor doctrine has been the principal means by which North Carolina and other jurisdictions have expressed the concept that a person who is at fault in provoking an encounter generally loses the right to self-defense. The pairing of the felony and aggressor disqualifier provisions suggests that both are mechanisms for addressing the impact of fault in an encounter involving the use of defensive force.

Decisions from jurisdictions that have adopted crime disqualification language support this view. *See* 2 Wayne R. LaFave, Substantive Criminal Law § 10.4(e), at p. 154 & n.64 (2d ed. 2003) (identifying jurisdictions). For example, Indiana's self-defense statutes state that a person is not justified in using defensive force while committing or escaping after the commission of a crime. The Indiana Supreme Court rejected a literal application of this exception, finding that such an interpretation "would nullify claims for self-defense in a variety of circumstances and produce absurd results in the process." *Mayes v. State*, 744 N.E.2d 390, 393–94 (Ind. 2001). The Court found that its legislature "could not have intended that a defense so engrained in the jurisprudence of this State be dependent upon . . . happenstance . . . ."

We conclude that because a defendant is committing a crime at the time he is allegedly defending himself is not sufficient standing alone to deprive the defendant of the defense of self-defense. Rather, there must be an immediate causal connection between the crime and the confrontation. Stated differently, the evidence must show that but for the defendant committing a crime, the confrontation resulting in injury to the victim would not have occurred.

Florida and a few other states provide that self-defense is unavailable during the commission of a "forcible felony," defined by Florida statute to include certain dangerous felonies such as robbery, burglary, and any other felony that involves the use or threat of physical force or violence against any individual. Florida's courts have recognized the explicit limits of this provision, holding that the right of self-defense is only lost during the commission of one of the enumerated felonies or a felony that has as an element the use or threat of physical force or violence. *Perkins v. State,* 576 So. 2d 1310, 1313 (Fla. 1991). The concurring opinion in *Perkins* observed further that a broader disqualification would violate a defendant's state constitutional rights in two respects. First, it would violate a defendant's fundamental right to defend his or her life and liberty in court by asserting a reasonable defense. Second, it would violate the fundamental right to meet force with force in the field when attacked illegally and without justification, the "right to life itself." 576 So. 2d at 1314. The concurrence observed that the State has a compelling interest in disallowing the use of self-defense only when "a person's own unprovoked, aggressive, and felonious acts set in motion an unbroken chain of events leading to a killing or other injury." *Id.*

The foregoing suggests that the felony disqualification statute in North Carolina contains some causation limitation, which would bring it more in line with North Carolina's established law on aggressors. The exact nature of the limitation will depend on further appellate interpretation.

How should trial judges handle the matter? The felony disqualification statute affects how trial judges instruct the jury on self-defense. In the absence of any North Carolina appellate opinions so far, the pattern jury instructions track the language of the statute. The instruction is to be given to the jury in cases in which the evidence shows that the defendant engaged in a disqualifying felony. *See, e.g.,* N.C.P.I.—Crim. 2016.10 at p. 4 n.6 (June 2014) (first-degree murder). If a causal connection is a required part of the felony disqualifier, additional language may be necessary. The Indiana courts have found it to be reversible error for jury instructions to include a blanket statement that one committing a crime may not assert self-defense; the instructions should indicate that a defendant "may not be precluded from asserting the defense of self-defense if there is no immediate causal connection between his or her crime and the confrontation which occasioned the use of force." *Smith v. State*, 777 N.E.2d 32, 36 (Ind. Ct. App. 2002); *accord Fuentes v. State*, 952 N.E.2d 275 (Ind. Ct. App. 2011). The Indiana courts have found that the failure to include such language may not be error, however, if not specifically requested. *See Smith*, 777 N.E.2d at 36.

It also may be inappropriate for trial judges to instruct the jury about the felony disqualification if the evidence doesn't show that the felony had a causal relationship to the conflict. The North Carolina courts have consistently held that it is error to instruct on the aggressor doctrine, which likewise disqualifies a defendant from asserting self-defense, unless there is evidence that the defendant was the initial aggressor. *See, e.g., State v. Juarez*, ___ N.C. App. ___, 777 S.E.2d 325, 332 (2015) (citing principle and cases), *review granted*, ___ N.C. ___, 781 S.E.2d 473 (2016).

Is imperfect self-defense still available against a murder charge? Yes, it appears so. The felony and aggressor provisions in G.S. 14-51.4 disqualify a person from relying on the "justification" defenses in G.S. 14-51.2 and G.S. 14-51.3. Those two statutes describe the circumstances in which the defendant is entitled to acquittal when defending his or her home and other interests, himself or herself, and other people. Satisfaction of those circumstances constitutes "perfect" self-defense and "justifies" the defendant's conduct. Imperfect self-defense, although a variation of self-defense, reduces murder to voluntary manslaughter, does not result in acquittal, and is typically not considered a justification defense. The statutory disqualification for commission of a felony therefore does not appear to deprive a defendant of imperfect self-defense.

The pattern jury instructions appear to recognize this result. The felony disqualification is included in the portion of the instructions addressing the defendant's right to engage in perfect self-defense; it is not included as basis for precluding a defendant from reducing murder to voluntary manslaughter. *See* N.C.P.I—Crim. 206.10 at pp. 10–11 (June 2014) (stating that jury may return verdict of voluntary manslaughter if the defendant kills in self-defense but was the aggressor without murderous intent or used excessive force). This result is also consistent with existing self-defense law. If a person provokes a conflict by an action that is not life threatening, whether or not the action is a felony, the person is considered an aggressor without murderous intent and may rely on imperfect self-defense against a murder

charge. *See* John Rubin, The Law of Self Defense § 3.3(d), at pp. 71–72.

Commission of a disqualifying felony would, however, preclude a defendant from asserting self-defense against an assault charge. The reason is that North Carolina law does not recognize imperfect self-defense against charges other than murder. Consequently, if the defendant is charged with an assault and does not meet the requirements for perfect self-defense—by having committed a disqualifying felony, among other things—the defendant loses all rights to self-defense.

Is "Justification" a Defense to Possession of a Firearm by a Person with a Felony Conviction?

Author : John Rubin

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North Carolina law prohibits a person who has been convicted of a felony from possessing a firearm. The prohibition, set forth in G.S. 14-415.1, contains narrow exceptions, such as for antique firearms. The question has arisen in several cases whether a person with a prior felony conviction may possess a firearm if necessary to defend himself or others—in other words, whether the person may rely on a justification defense.

So far, the North Carolina appellate courts have withheld final judgment on the question. Several North Carolina decisions acknowledge that other courts have recognized that a person with a prior felony conviction may assert a justification defense to a charge of illegally possessing a firearm. These decisions set forth the requirements for the defense and measure the defendant's conduct against them. They do not recognize the defense explicitly, however, stating that assuming the defense exists, the defendant did not satisfy the requirements. *See, e.g., State v. Edwards*, ___ N.C. App. ___, 768 S.E.2d 619 (2015); *State v. Monroe*, 233 N.C. App. 563, 571 (2014) (Stroud, J., dissenting) (arguing for explicit recognition of defense and noting that several North Carolina decisions have relied on the test for the defense, "although only assuming *arguendo* that it would apply because the facts in those cases did not satisfy the test"), *aff'd per curiam*, 367 N.C. 771 (2015).

In anticipation that the North Carolina courts would allow the defense in appropriate circumstances, this post provides a brief summary of the defense and potential issues.

The defense may go by different names. Defendants raising the defense have used various labels to describe it, including duress, coercion, necessity, and self-defense. *See U.S. v. Nolan*, 700 F.2d 479 (9th Cir. 1983) (so noting); *see also State v. Monroe*, 233 N.C. App. at 565 (noting blurring of duress and necessity defenses). It is probably most accurate to call the defense simply a "justification" defense because the courts have merged the requirements into a single defense in this context.

Almost all federal courts recognize the defense. Like North Carolina law, federal law prohibits a person with a prior felony conviction from possessing a firearm. Of the twelve federal circuit courts of appeal, eleven have recognized a justification defense in limited circumstances. Only the Eighth Circuit has withheld judgment. *See U.S. v. Mooney*, 497 F.3d 397, 403 (4th Cir. 2007) (recognizing that first, second, third, fourth, fifth, sixth, ninth, tenth, and eleventh circuits have recognized defense); *U.S. v. Kilgore*, 591 F.3d 890 (7th Cir. 2010) (recognizing defense); *U.S. v. Mason*, 233 F.3d 619 (D.C. Cir. 2000) (also recognizing innocent possession defense); *compare U.S. v. El-Alamin*, 574 F.3d 915 (8th Cir. 2009).

The Fourth Circuit has held that an attorney provided ineffective assistance of counsel by advising a client that no such defense is "ever available." *U.S. v. Mooney*, 497 F.3d at 404.

The federal courts have found that the federal statute does not preclude the defense. Like North Carolina's statute, the federal prohibition on possession of a firearm by a person with a felony conviction does not specifically provide for a justification defense. In recognizing the availability of the defense, the federal courts have observed that "'Congress in enacting criminal statutes legislates against a background of Anglo-Saxon common law." The failure to

provide specifically in a statute for a common-law defense does not preclude the defense. *U.S. v. Crittendon*, 883 F.2d 326, 329 (4th Cir. 1989) (quoting *U.S. v. Bailey*, 444 U.S. 394, 415 n.11 (1980)).

The federal courts also have rejected the argument that because possession of a firearm by a person with a felony conviction is a strict liability offense, a justification defense is unavailable. *See U.S. v. Nolan*, 700 F.2d 479, 484 (9th Cir. 1983) (noting availability of defense even though federal firearms laws "impose something approaching absolute liability"). As one court noted, "[c]ommon sense dictates that if a previously convicted felon is attacked by someone with a gun, the felon should not be found guilty for taking the gun away from the attacker in order to save his life." *U.S. v. Singleton*, 902 F.2d 471, 472 (6th Cir. 1990); *see also U.S. v. Gomez*, 92 F.3d 770, 774 n.7 (9th Cir. 1996) (author of opinion suggests that statute might not pass constitutional muster if it is not subject to justification defense).

In another context, the North Carolina courts rejected the argument that the defense of necessity is inapplicable to DWI prosecutions, which the State characterized as a strict liability offense. *See State v. Hudgins,* 167 N.C. App. 705 (2005).

The test for the defense is strict. In cases in which defendants have sought to rely on justification as a defense, the North Carolina courts have referred to the test stated in *U.S. v. Deleveaux*, 205 F.3d 1292 (11th Cir. 2000). Under *Deleveaux*, the defendant has the burden to show by a preponderance of the evidence that:

1. he was under an unlawful and present, imminent, and impending threat of death or serious bodily injury;
2. he did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct;
3. he had no reasonable legal alternative to violating the law; and
4. there was a direct causal relationship between the criminal action and the avoidance of the threatened harm.

The test may differ slightly in other circuits, but the defense is still available only in rare instances. *See, e.g., U.S. v. Mooney*, 497 F.3d 397, 406 (4th Cir. 2007) (requiring that defendant be under unlawful and present threat of death or serious bodily injury and that defendant not have recklessly placed himself in situation where he would be forced to engage in criminal conduct).

These requirements are stricter than for self-defense. For example, a defendant who acts recklessly (or negligently) loses the defense, while a defendant must have been the aggressor to lose the right of self-defense.

North Carolina decisions finding that the defendant failed to satisfy the test demonstrate its strictness. A defendant may fail the test by unnecessarily possessing a gun before or after the incident in which he needed the gun. For example, in *State v. Craig,* 167 N.C. App. 793 (2005), the defendant's evidence showed that his girlfriend handed him a gun while he was on the floor being kicked by several men; however, because the defendant unnecessarily kept the gun after he got away from his assailants and was no longer under an imminent threat, the court found the evidence was insufficient to warrant a justification instruction to the jury. In *State v. Boston*, 165 N.C. App. 214 (2004), the defendant took a gun with him to confront a person who had threatened to kill him and, after chasing the person, put the gun on the ground so they could "fight like men," at which time the person shot the defendant four times. The court held that the defendant was not entitled to a jury instruction on justification because he was not under an imminent threat when he made the decision to carry the gun. *See also State v. Edwards*, ___ N.C. App. ___, 768 S.E.2d 619 (2015) (defendant stated only that he got gun an hour earlier because people were threatening his life; evidence of generalized fear insufficient).

Defendants have satisfied the test in some instances. Although the test is strict, defendants have satisfied it in some instances, illustrated by the evidence they presented in the following cases:

- In *U.S. v. Ricks*, 573 F.3d 198 (4th Cir. 2009), the defendant knocked a gun away from his partner, who was acting erratically and talking incoherently; the defendant then removed the clip and threw the pieces in different

directions. After his partner ran off, the defendant put the clip and gun underneath some clothes on top of a dresser in the bedroom that the two shared. The defendant's partner returned with the police 15 to 30 minutes later, and the defendant retrieved the gun after several inquires by the police. The court found that the trial court erred in failing to instruct the jury on justification as a defense.

- In *U.S. v. Mooney*, 497 F.3d 397 (4th Cir. 2007), the defendant's ex-wife put a gun to his head and, after he took it away, he called his boss and said he was bringing it in to give to the police. He then walked directly to his place of employment to turn in the gun. The court found that the defendant was prejudiced by his attorney's advice that a justification defense was unavailable.
- In *U.S. v. Gomez,* 92 F.3d 770 (9th Cir. 1996), after the government inadvertently disclosed that the defendant was an informant against a murder-for-hire conspirator, the defendant received repeated death threats and went on the run, living on the streets, riding buses for hours, and falsely telling his parole agent that he was illegally using drugs so he could go back to jail, where he received additional death threats. After his release, the defendant obtained a shotgun, which the government discovered when it served a subpoena on him in the murder-for-hire case. The court held that the trial court erred in denying the defendant's request to present evidence about why he had a gun.
- In *U.S. v. Panter*, 688 F.2d 268 (5th Cir. 1982), the defendant was tending bar when he was stabbed by a bar patron after an argument; as he was fighting back, he fell on the floor beneath his assailant. The defendant reached underneath the bar for a club that he knew was there and found a pistol, which he used to shoot his assailant. The defendant then placed the pistol on the bar. The court found that the trial court erred in instructing the jury that it could not consider the defendant's reasons for possessing the firearm.

See also U.S. v. Rice, 214 F.3d 1295, 1297 (11th Cir. 2000) (comparing additional cases). Decisions such as these, as well as North Carolina decisions acknowledging the test for a justification defense, suggest that in appropriate circumstances defendants may be able to rely on the defense.