North Carolina Criminal Law

A UNC School of Government Blog

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

Posted on Aug. 29, 2017, 8:56 am by John Rubin

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.

Category: Crimes and Elements, Uncategorized | Tags: lawful place, retreat, self-defense

One comment on “Self-Defense and Retreat from Places Where the Defendant Has a “Lawful Right to Be””

Evidence about the “Victim” in Self-Defense Cases – North Carolina Criminal LawNorth Carolina Criminal Law
February 5, 2019 at 2:35 pm

[…] 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 […]

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STATE OF NORTH CAROLINA COUNTY OF BUNCOMBE STATE OF NORTH CAROLINA VS. KELVIN OYAKHILOME IRABOR, DEFENDANT.	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION FILE NOS. 15 CRS 90856, 16 CRS 148-49 JURY INSTRUCTIONS

Brady why are we talking @ this

Members of the jury: All of the evidence has been presented. It is now your duty to decide from this evidence what the facts are. You must then apply the law that I am about to give you to those facts. It is absolutely necessary that you understand and apply the law as I give it to you, and not as you think it is, or as you might like it to be. This is important because justice requires that everyone tried for the same crime be treated in the same way and have the same law applied.

The defendant (who I will refer to sometimes as "Kelvin") has entered a plea of "not guilty." The fact that the Kelvin has been charged is no evidence of guilt. Under our system of justice, when a defendant pleads "not guilty," the defendant is not required to prove the defendant's innocence; the defendant is presumed to be innocent. The State must prove to you that Kelvin is guilty beyond a reasonable doubt.

A reasonable doubt is a doubt based on reason and common sense, arising out of some or all of the evidence that has been presented, or lack or insufficiency of the evidence, as the case may be. Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of the defendant's guilt.

You are the sole judges of the believability of witnesses. You must decide for yourselves whether to believe the testimony of any witness. You may believe all, any part, or none of a witness' testimony.

Break in

In deciding whether to believe a witness you should use the same tests of truthfulness that you use in your everyday lives. Among other things, these tests may include: the opportunity of the witness to see, hear, know, or remember the facts or occurrences about which the witness testified; the manner and appearance of the witness; any interest, bias, prejudice or partiality the witness may have; the apparent understanding and fairness of the witness; whether the testimony is reasonable; and whether the testimony is consistent with other believable evidence in the case.

You are the sole judges of the weight to be given any evidence. If you decide that certain evidence is believable you must then determine the importance of that evidence in light of all other believable evidence in the case.

There are two types of evidence from which you may find the truth as to the facts of a case: direct evidence and circumstantial evidence. Direct evidence is the testimony of one who asserts actual knowledge of a fact, such as an eyewitness; circumstantial evidence is proof of a chain or group of facts and circumstances indicating the guilt or innocence of a defendant. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should

weigh all the evidence in the case. After weighing all the evidence, if you are not convinced of the guilt of Kelvin beyond a reasonable doubt, you must find him not guilty.

Proof of motive for the crime is permissible and often valuable, but never essential for conviction. If you are convinced beyond a reasonable doubt that Kelvin committed the crime, the presence or absence of motive is immaterial. Motive may be shown by facts surrounding the act if they support a reasonable inference of motive. When thus proved, motive becomes a circumstance to be considered by you. The absence of motive is equally a circumstance to be considered on the side of innocence.

You may find that a witness is interested in the outcome of this trial. You may take the witness' interest into account in deciding whether to believe the witness. If you believe the testimony of the witness in whole or in part, you should treat what you believe the same as any other believable evidence.

The State contends (and the defendant denies) that the defendant fled. Evidence of flight may be considered by you together with all other facts and circumstances in this case in determining whether the combined circumstances amount to an admission or show a consciousness of guilt. However, proof of this circumstance is not sufficient, in itself, to establish defendant's guilt.

Photographs were introduced into evidence in this case for the purpose of illustrating and explaining the testimony of witnesses. These photographs may not be considered by you for any other purpose.

A video DVD was introduced into evidence in this case. This video DVD may be considered by you as evidence of facts it illustrates or shows.

If you find from the evidence that Kelvin has admitted a fact relating to the crime charged in this case, then you should consider all of the circumstances under which it was made in determining whether it was a truthful admission and the weight you will give to it.

If you find that Kelvin has confessed that he committed one or more of the crimes charged in this case, then you should consider all of the circumstances under which the confession was made in determining whether it was a truthful confession and the weight you will give to it.

Evidence was introduced during this trial tending to show that Kelvin made statements regarding the crimes charged in this case during an interrogation by law enforcement officers. The law requires that whenever a person is interrogated by law enforcement during a criminal investigation, a complete electronic recording must be made of the interrogation. Evidence has been received during this trial tending to show that a complete electronic recording of the defendant's interrogation was made as required by law. If you find that Kelvin made statements during an interrogation by law enforcement in this case and that a complete electronic recording of the interrogation was made, then you may consider this together with all other circumstances under which the statements were made in determining whether the statements were voluntary and reliable.

I instruct you that the State has the burden of proving the identity of Kelvin as the perpetrator of each of the crimes charged beyond a reasonable doubt. This means that you, the jury, must be satisfied beyond a reasonable doubt that Kelvin was the perpetrator of each of the crimes charged

before you may return a verdict of guilty. This is to be determined by you separately as to each crime.

In this case you have heard evidence from a witness who has testified as an expert witness. An expert witness is permitted to testify in the form of an opinion in a field where the witness purports to have specialized skill or knowledge.

As I have instructed you, you are the sole judges of the credibility of each witness and the weight to be given to the testimony of each witness. In making this determination as to the testimony of an expert witness, you should consider, in addition to the other tests of credibility and weight, the witness's training, qualifications, and experience or lack thereof, the reasons, if any, given for the opinion, whether the opinion is supported by facts that you find from the evidence, whether the opinion is reasonable, and whether it is consistent with other believable evidence in the case.

You should consider the opinion of an expert witness, but you are not bound by it. In other words, you are not required to accept an expert witness' opinion to the exclusion of the facts and circumstances disclosed by other testimony.

Evidence has been received from a witness in the form of a lay opinion (i.e., a non-expert opinion). You may only consider the lay opinion of a witness if it is rationally based on the perception of the witness and helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Evidence has been received tending to show that at an earlier time a witness made a statement which may conflict or be consistent with the testimony of the witness at this trial. You must not consider such earlier statement as evidence of the truth of what was said at that earlier time because it was not made under oath at this trial. If you believe the earlier statement was made, and that it conflicts, or is consistent with, the testimony of the witness at this trial, you may consider this, and all other facts and circumstances bearing upon the witness' truthfulness, in deciding whether you will believe or disbelieve the witness' testimony.

The State contends (and the defendant denies) that the defendant made false, contradictory, or conflicting statements. If you find that Kelvin made such statements, they may be considered by you as a circumstance tending to reflect the mental process of a person possessed of a guilty conscience, seeking to divert suspicion or to exculpate himself, and you should consider that evidence, along with all the other believable evidence in this case. However, if you find that Kelvin made such statements, they do not create a presumption of guilt, and such evidence standing alone is not sufficient to establish guilt.

The defendant Kelvin Irabor has been charged with three offenses. You must consider these offenses separately and independently. In other words, a particular verdict as to one offense will not control what your verdict might be for another offense.

The defendant has been charged with second degree murder.

Under the law and the evidence in this case, as to this charge, it is your duty to return one of the following verdicts:

(1) guilty of second degree murder, or

(2) guilty of voluntary manslaughter, or

(3) not guilty.

Second degree murder is the unlawful killing of a human being with malice.

Voluntary manslaughter is the unlawful killing of a human being without malice.

The defendant would be excused of second degree murder on the ground of self-defense if:

First, it appeared to Kelvin, and Kelvin believed it to be necessary, to kill Dondre in order to save himself from death or great bodily harm.

And Second, the circumstances as they appeared to Kelvin at the time were sufficient to create such a belief in the mind of a person of ordinary firmness. It is for you the jury to determine the reasonableness of the Kelvin's belief from the circumstances as they appeared to Kelvin at the time.

In making this determination, you should consider the circumstances as you find them to have existed from the evidence. These circumstances may include the size, age and strength of Kelvin as compared to Dondre, the fierceness of Dondre's assault, if any, upon Kelvin, whether or not Dondre had a weapon in his possession, Dondre's reputation, if any, for danger and violence, Kelvin's personal knowledge of Dondre, including possible gang involvement.

Kelvin would not be guilty of second degree murder or voluntary manslaughter if he acted in self-defense, as long as he was not the aggressor in provoking the fight, and if he did not use excessive force under the circumstances.

Kelvin would be justified in using defensive force when the force used by Dondre was so serious that Kelvin reasonably believed that he was in imminent danger of death or serious bodily harm, and Kelvin's using of force likely to cause death or serious bodily harm was the only way to escape the danger.

Kelvin is not entitled to the benefit of self-defense if he was the aggressor with the intent to kill or inflict serious bodily harm upon the Dondre.

One enters a fight voluntarily if one uses toward one's opponent abusive language, which, considering all of the circumstances, is calculated and intended to provoke a fight. If the defendant voluntarily and without provocation entered the fight, the defendant would be considered the aggressor.

A defendant does not have the right to use excessive force. A defendant uses excessive force if he uses more force than reasonably appeared to him to be necessary at the time of the killing. It is for you the jury to determine the reasonableness of the force used by Kelvin under all of the circumstances as they appeared to Kelvin at the time.

Furthermore, Kelvin had no duty to retreat from a place where he had a lawful right to be, such as the parking lot of the apartment complex where he was living.

If Kelvin was not the aggressor and Kelvin was at a place he had a lawful right to be, Kelvin could stand his ground and repel force with force regardless of the character of the assault being made upon him. However, Kelvin would not be excused if he used excessive force.

Therefore, in order for you to find the defendant Kelvin Irabor guilty of murder in the second degree the State must prove beyond a reasonable doubt, among other things, that Kelvin did not act in self-defense, or if the State fails to prove this, the State must prove beyond a reasonable doubt that Kelvin was the aggressor with the intent to kill or inflict serious bodily harm upon Dondre. If the State fails to prove either that Kelvin did not act in self-defense, or if the State fails to prove that Kelvin was the aggressor with the intent to kill or inflict serious bodily harm, you may not convict Kelvin of second degree murder, but you may convict Kelvin of voluntary manslaughter if the State proves beyond a reasonable doubt that Kelvin was simply the aggressor without murderous intent in bringing on the fight in which Dondre was killed, or that Kelvin used excessive force.

For you to find the defendant Kelvin Irabor guilty of second degree murder, the State must prove four things beyond a reasonable doubt:

First, that the defendant wounded Dondre with a deadly weapon. A firearm is a deadly weapon.

Second, that the defendant acted intentionally and with malice.

Intent is a mental attitude which is seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred. You arrive at the intent of a person by such just and reasonable deductions from the circumstances proven as a reasonably prudent person would ordinarily draw therefrom.

Malice means not only hatred, ill will, or spite, as it is ordinarily understood- to be sure, that is malice- but it also means that condition of mind which prompts a person to take the life of another intentionally or to intentionally inflict serious bodily harm, which proximately results in another's death, without just cause, excuse or justification.

Third, the State must prove that the defendant's act was a proximate cause of Dondre's death. A proximate cause is a real cause, a cause without which Dondre's death would not have occurred, and one that a reasonably careful and prudent person could foresee would probably produce such injury or some similar injurious result.

And Fourth, that the defendant did not act in self-defense or that the defendant was the aggressor in bringing on the fight with the intent to kill or inflict serious bodily harm upon Dondre.

If the State proves beyond a reasonable doubt, that the defendant Kelvin Irabor intentionally killed Dondre with a deadly weapon or intentionally wounded Dondre with a deadly weapon, which proximately caused Dondre's death, you may infer first, that the killing was unlawful, and second, that it was done with malice, but you are not compelled to do so.

You may consider this along with all other facts and circumstances in determining whether the killing was unlawful and whether it was done with malice. If the killing was unlawful and was done with malice, and not in self defense, the defendant would be guilty of second degree murder.

Voluntary manslaughter is the unlawful killing of a human being without malice. A killing is not committed with malice if the defendant acts in the heat of passion upon adequate provocation.

The heat of passion does not mean mere anger. It means that at the time the defendant acted, his state of mind was so violent as to overcome reason, so much so that he could not think to the extent necessary to form a deliberate purpose and control his actions. Adequate provocation may consist of anything which has a natural tendency to produce such passion in a person of average mind and disposition, and the defendant's act took place so soon after the provocation that the passion of a person of average mind and disposition would not have cooled. Words and gestures alone, however insulting, do not constitute adequate provocation when no assault is made or threatened against the defendant.

As to the charge of second degree murder, the burden is on the State to prove beyond a reasonable doubt that Kelvin did not act in the heat of passion upon adequate provocation, but rather that he acted with malice. If the State fails to meet this burden, the defendant can be guilty of no more than voluntary manslaughter.

For you to find the defendant guilty of voluntary manslaughter, the State must prove three things beyond a reasonable doubt:

First, that Kelvin killed Dondre by an intentional and unlawful act.

Second, that Kelvin's act was a proximate cause of Dondre's death. A proximate cause is a real cause, a cause without which Dondre's death would not have occurred.

And Third, that Kelvin did not act in self-defense, or though acting in self-defense, Kelvin was the aggressor, or, though Kelvin was acting in self-defense, he used excessive force under the circumstances.

Again, the burden is on the State to prove beyond a reasonable doubt that Kelvin did not act in self-defense. However, if the State proves beyond a reasonable doubt that Kelvin, though otherwise acting in self-defense, used excessive force, or was the aggressor, though Kelvin had no murderous intent when he entered the fight, Kelvin would be guilty of voluntary manslaughter.

Under our law, Kelvin had no duty to retreat in a place where he had a lawful right to be, such as the parking lot of the apartment complex where he was living.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant Kelvin Irabor, acting intentionally and with malice, but not in self-defense, wounded the Dondre with a deadly weapon thereby proximately causing Dondre's death, it would be your duty to return a verdict of guilty of second degree murder. If you do not so find or have a reasonable doubt as to one or more of these things, you will not return a verdict of guilty of second degree murder and you must then consider whether the defendant is guilty of voluntary manslaughter.

Under our law, there are two way by which the State may prove voluntary manslaughter.

First, if you find from the evidence beyond a reasonable doubt that on or about the alleged date Kelvin intentionally wounded Dondre with a deadly weapon, and that Kelvin was the aggressor in bringing on the fight or if Kelvin used excessive force, it would be your duty to find

Kelvin guilty of voluntary manslaughter, even if the State has failed to prove that Kelvin did not act in self-defense.

Or, if you find from the evidence beyond a reasonable doubt that on or about the alleged date Kelvin intentionally (and not in self-defense) wounded Dondre with a deadly weapon but the State has failed to satisfy you beyond a reasonable doubt that Kelvin did not act in the heat of passion upon adequate provocation, it would be your duty to return a verdict of guilty of voluntary manslaughter.

If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

And finally, if the State has failed to satisfy you beyond a reasonable doubt that the defendant did not act in self-defense, or that the defendant was the aggressor, or that the defendant used excessive force, then the defendant's action would be justified by self-defense; therefore, you would return a verdict of not guilty.

The defendant has been charged with assault with a deadly weapon.

For you to find the defendant guilty of this offense, the State must prove two things beyond a reasonable doubt:

First, that the defendant assaulted Denise Williams by intentionally shooting a pistol at her.

And Second, that the defendant used a deadly weapon. A deadly weapon is a weapon which is likely to cause death or serious bodily injury.

A pistol is a deadly weapon.

An assault is an overt act or attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm. An assault is also an intentional attempt, by violence, to do injury to the person of another.

Self-defense is not an issue as to this charge.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date, Kelvin intentionally assaulted Denise Williams with a pistol it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to one or both of these things, it would be your duty to return a verdict of not guilty.

The defendant has been charged with discharging a firearm into a dwelling.

For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt:

First, that the defendant willfully or wantonly discharged a firearm into a dwelling. An act is willful or wanton when it is done intentionally with knowledge or a reasonable ground to believe that the act would endanger the rights or safety or others.

The "into" element for a charge of the offense of discharging a firearm into a dwelling is satisfied if a bullet damages the exterior of the dwelling.

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

And Third, that the defendant knew that the dwelling was occupied by one or more persons, (or that the defendant had reasonable grounds to believe that the dwelling was occupied by one or more persons).

Self-defense is not an issue as to this charge.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date, Kelvin willfully or wantonly discharged a firearm into the dwelling while it was occupied by one or more persons, and that Kelvin knew it was occupied by one or more persons (or had reasonable grounds to believe that it was occupied by one or more persons), it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

Members of the jury, you have heard the evidence and the arguments of counsel. If your recollection of the evidence differs from that of the attorneys, you are to rely solely upon your recollection. Your duty is to remember the evidence whether called to your attention or not.

You should consider all the evidence, the arguments, contentions and positions urged by the attorneys, and any other contention that arises from the evidence.

The law requires the presiding judge to be impartial. You should not infer from anything I have done or said that the evidence is to be believed or disbelieved, that a fact has been proved or what your findings ought to be. It is your duty to find the facts and to render verdicts reflecting the truth. All twelve of you must agree to your verdicts. You cannot reach a verdict by majority vote.

When you have agreed upon unanimous verdicts as to each charge, your foreperson should so indicate on the verdict forms.

[ALTERNATE JURORS EXCUSED]

After reaching the jury room your first order of business is to select your foreperson. You may begin your deliberations when the bailiff delivers the verdict forms to you. Your foreperson should lead the deliberations. When you have unanimously agreed upon verdicts and are ready to announce them, your foreperson should record your verdicts, sign and date the verdict forms, and

notify the bailiff by knocking on the jury room door. You will be returned to the courtroom and your verdicts will be announced.

Thank you. You may retire and select your foreperson.

North Carolina Criminal Law

A UNC School of Government Blog

Self-Defense Provides Immunity from Criminal Liability

Posted on Oct. 4, 2016, 1:10 pm by John Rubin

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.

Category: Crimes and Elements, Procedure | Tags: immunity, self-defense

8 comments on "Self-Defense Provides Immunity from Criminal Liability"

Peter Zellmer
October 5, 2016 at 8:35 am

John, correct me if I'm wrong, but it seems to me that to get these answers we will need to make a motion for a pre-trial hearing on self-defense immunity. Given that the legislature has provided no rules for said hearing, can/should we make a motion for such a hearing at a very early stage, i.e. in district court? This is important because bonds are often prohibitively expensive (and sometimes denied entirely) and in certain jurisdictions the State takes a very long time to seek transfer to Superior Court. If the idea of "immunity" is that a defendant who exercises self-defense should be spared the costs and burdens of prosecution, then a District Court hearing seems most appropriate. On the other hand, since it is not a court of record, such a hearing is problematic as errors will evade review. What do you think is the best mechanism(s) for the Defense to try to exercise this right to "immunity"?

Lance Sigmon
November 18, 2016 at 6:58 am

This issue was litigated on Monday (11/14/16) in a murder case. The defense requested in writing a pretrial hearing for pretrial immunity. I responded in writing and the judge denied the motion stating that there was no statutory right to the

requested pretrial determination. I can forward you the State's Response if you are interested.

Sarah Wierzba
December 8, 2016 at 11:57 am

Mr. Sigmon, I am researching this matter and would be very interested in a copy of the State's Response if you still have it readily available. Thank you.

T Patch
January 2, 2017 at 1:39 pm

This is a very significant issue requiring a very thorough analysis.

The whole point of an immunity is it is founded on the public policy that persons falling within its scope must not be subjected to the burdens of a criminal or civil proceeding (immunity from suit) or liability (immunity form liability), as applicable, because it would run counter to if not undermine the actions/conduct/speech, etc. involved. For example, reporting acts and/or omissions of a professional licensee (e.g., psychologist) to his/her licensing oversight authority.

A such, immunity by its nature should be resolved as early in the process is possible – even if there are factual disputes, whereas affirmative defenses are by nature only capable of being determined at trial (summary judgment on the civil side being considered "trial"). It follows there should be a full-blown evidentiary pre-trial hearing conducted in front of a judge where the person asserting immunity has the burden of production and the plaintiff/prosecution the burden of persuasion.

The lack of a right to jury determination can be justified on the constitutional grounds that the immunity is conferred by statute and thus can be conditioned on a waiver of a jury determination if asserted pre-trial and the person claiming immunity can always have a jury determination by proceeding to trial.

There is an interesting case arising out of the Ruby Ridge incident where the court wrestled with the concept of a pre-trial immunity determination involving the Supremacy Clause of the US Constitution (Idaho v. Horiuchi, http://caselaw.findlaw.com/us-9th-circuit/1471745.html). A key issue there was whether the immunity under the Supremacy Clause can be properly determined pre-trial (specifically a Fed.R.Crim.P. 12(b)(1) motion). The court pointed to the Reporters Notes to Rule 12(b) as specifically referencing immunity as one of the

issues determinable under Rule 12(b). Significantly, the court also pointed out the need for enhanced protections in construing the parameters of immunity to a criminal defendant versus a civil defendant.

While this opinion should be cited if dealing with the provisions of state criminal procedure cognate to Fed.R.Crim.P. 12(b) even if a statutory immunity, the other issue is whether the state crime at issue has as an element at least one of the elements of the immunity – e.g., the same malice element. In Horiuchi that was not the case because the basis of the immunity was the Supremacy Clause.

Nevertheless, my reading of Rule 12(b) is there is nothing precluding the assertion of a pre-trial 12(b) motion on the immunity issue even if it involves a determination of one or more of the elements of the crime at issue.

The problem with statutory immunity is the failure legislatures to provide the substantive without the corresponding procedure, resulting in the various judiciaries creating immunity procedural "Balkanization".

There is also an interesting case out of MA dealing with statutory immunity on the civil side, addressing public policy underlying statutory immunity, immunity from suit versus liability, and burdens of production and proof. See http://masscases.com/cases/sjc/460/460mass91.html. That opinion also points to the failure of the legislature to provide for a comprehensive immunity scheme, requiring the courts to fill in the missing components.

Attorney Matthew C. Coxe
October 18, 2017 at 9:34 am

Mr. Sigmon, please send me a copy of the State's response. Thanks

tootalltrucker
June 13, 2017 at 8:26 am

Has there been any actual granting of immunity in North Carolina and if so what was the mechanisim for the ruling, such as pre trial immunity hearing?

Superior Court Judge Bill Coward
September 28, 2019 at 12:35 pm

Warning: This reply may be considered in jest, or as a serious search for knowledge, but it should not be considered as a criticism of John, who does an excellent job here and elsewhere. My audience here is educated and thoughtful, better than what I could get with a google search. I have a question: What does John mean by starting his post with "So"? Many lawyers and other people (mostly youngish) do that in response to questions. It is extremely over-used in oral communication, but this is the first time I have seen a scholarly article begin with "so". Why is it so? So that you don't say "Ok…" or "Now…" or "Listen up you dummy, I have the floor and I'm in charge here"? The latter seems to be the implied intent in many situations, and I doubt John intends it this way. He probably just wants to sound modern, and young (who doesn't?) However, until this use obtains a generally understood linguistic meaning, it remains a distraction for those of us who must weigh each word of an otherwise coherent statement involving a complicated legal issue. If it means "Listen up dummy…" then it should not be used, in my humble opinion. Having said all that, this is a good article, with a little moss.

John Rubin
October 1, 2019 at 5:35 pm

I am not immune to a rousing discussion about writing style. On the question of beginning a sentence with "So", here is a link to an article, published this summer, suggesting that lawyers should go lighter on heavy sentence connectors, such as furthermore and accordingly, and use lighter connectors, such as "So". See https://judicature.duke.edu/articles/go-light-on-heavy-connectors/. I would like to say I was aware of this scholarly explanation when I began my post with "So", but I actually used the word differently, as a response to the title I had chosen. Thus: Self-Defense Provides Immunity from Criminal Liability (the title). So say two statutes enacted by the General Statutes (the opening part of the first sentence). Although I believe I have an affirmative defense in this situation, I can see that the construction might not satisfy the reasonable writer standard. Thank you for your comment, your Honor. I appreciate having a hearing on the issue.

FILED

STATE OF NORTH CAROLINA COUNTY OF CALDWELL	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION FILE NO. 13CRS54340

STATE OF NORTH CAROLINA v. NANCY BENGE AUSTIN	**MOTION FOR PRETRIAL GRANT OF IMMUNITY AND RELATED RELIEF**

NOW COMES the Defendant, Nancy Benge Austin, by and through undersigned counsel pursuant to N.C.G.S. § 14-51.2 and 15A-954(a)(9) for a pretrial determination of immunity and related and consequential relief and says the following:

LEGAL BASIS

1. N.C.G.S. § 14-51.2(a)(1) defines a home to include its curtilage. "The curtilage includes the yard around the dwelling and the area occupied by barns, cribs, and other outbuildings. *State v. Blue*, 356 N.C. 79, 86, 565 S.E.2d 133, 138 (2002), *quoting State v. Frizzelle*, 243 N.C. 49, 51, 89 S.E.2d 725, 726 (1955).

2. N.C.G.S. § 14-51.2(b) bestows upon a homeowner the presumption of a reasonable fear of imminent death or serious bodily harm when the homeowner knowingly uses deadly force to repel an unlawful and forceful entry into their home or its curtilage or is attempting to remove the intruder from their home or its curtilage.

3. N.C.G.S. § 14-51.2(d) creates a related presumption that a person who unlawfully and by force enters or attempts to enter a person's home or the home's curtilage is doing so with the intent to commit an unlawful act involving force or violence.

4. N.C.G.S. § 14-51.2(e) confers criminal immunity to a homeowner using force under these circumstances, and subsection (f) recognizes that the homeowner has no duty to retreat under these circumstances.

5. N.C.G.S. § 15A-954(a)(9) notes that on motion of the defendant the Court must dismiss the charges stated in a criminal pleading if it determines that the defendant has been granted immunity by law from prosecution.

6. N.C.G.S. § 14-51.2(g) recognizes that not all defenses of this nature squarely fit within the confines of the statute when it notes that it is not intended to repeal or limit any other defense that may exist under the common law.

7. A Notice of Defense for Self-Defense and Defense of Others was timely given in the matter in accordance with N.C.G.S.§ 15A-905.

ISSUES REGARDING LEGAL PROCESS AND BURDEN OF PROOF

1. North Carolina has not created "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." *See* John Rubin, *Self-Defense Provides Immunity from Criminal Liability*, UNC School of Government Blog (October 4, 2016). Attached hereto as ImmMtnC.

2. Other States with similar statutes have procedures for determining immunity pretrial. The nature of these hearings and the burdens of proof vary between States according to Rubin. *Id.* at 2.

3. "Most courts have held that the defendant has the burden to establish immunity by a preponderance of the evidence," says Rubin citing cases from South Carolina, Georgia, Florida, Colorado and Alabama. In those States, "the trial court holds an evidentiary hearing and resolves factual disputes." *Id* at 2. "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." *Id* at 2.

4. The Florida Supreme Court has held that the existence of disputed issues of material fact does not warrant a denial of immunity and it reasoned that its legislature intended the immunity provision to provide greater rights that already existed under Florida law. *Id* at 2.

5. While courts in Kansas and Kentucky have held that the State need only establish probable cause that the defendant did not use defensive force, the Kansas Supreme Court has held that a trial judge may set aside a guilty verdict on immunity grounds. *Id* at 2.

6. In all of the States the court must dismiss that charges if the defendant prevails. *Id.* at 3. If the defendant fails to establish immunity pretrial, the defendant is not barred from asserting a defensive force defense at trial under the applicable standards. *Id* at 3.

FACTS

1. This incident occurred in the late afternoon of December 26, 2013, in the parking area of the home of the Defendant, Nancy Austin, at 1122 Tara Place in Lenoir.

2. The investigation revealed two witnesses to the incident in addition to Austin: her daughter, Sarah Austin; and Billy Herald, who witnessed the incident from a neighboring residence.

3. Herald did not report the incident at the crime scene. He come forward several hours later with the information. At the time of the incident Herald had outstanding orders

for his arrest for failures to appear in Court and three unserved felony warrants. He alluded to these matters at the outset of his interview. Following his statement that evening he was not served with the orders for arrest or the felony warrants.

4. All three witnesses gave statements. Herald's statement was recorded. Nancy Austin's statement was recorded. Most of Sarah Austin's statement was recorded.

5. Herald provided a hand-written statement. *See* ImmMtnA. Sarah Austin provided a hand-written statement that was typed out by the interviewing officer. *See* ImmMtnB.

6. Herald and the Austins do not know one another.

7. The decedent, Dylan Short, was the father of Sarah Austin's infant son. Sarah Austin had sole custody of the child.

8. Short was married to another woman at the time of the incident and had a child by her.

9. Both he and Sarah Austin were 20 years old at the time and upon information and belief were in good physical health. Short stood 5 feet, 9 inches tall and weighed 136 pounds. Sarah Austin stood 5 feet, 1 inch tall and upon information and belief weighed approximately 110 pounds at the time of the incident.

10. Nancy Austin stood 5 feet and weighed 97 pounds at the time of the incident. She was 57 years old and upon information and belief was prescribed an inhaler for COPD, emphysema, and asthma.

11. According to her written statement, prior to this incident, Sarah Austin had taken her infant son to visit with Dylan Short.

12. Following the visit Short and Sarah Austin drove separately to a local convenience store.

13. At the convenience store Short expressed a desire to continue the evening with Sarah Austin. She declined, an argument ensued and as she drove home, Short followed her in his vehicle as she drove to her home.

14. Short followed her to the parking area of 1122 Tara Place. The parking area is located adjacent to the home at the end of a private gravel driveway. The driveway curves down through wooded property. It is roughly 100 yards long and posted with a No Trespassing sign. *See* ImmMtnD.

15. Short had not been welcome on the property since an incident on August 3, 2012, which was witnessed by Nancy Austin and occurred in her home at 1122 Tara Place.

16. Nancy Austin was in the front yard between the home and the parking area as Sarah Austin pulled in, took her baby from the car and entered the home. Nancy Austin was in this same area as Short pulled in.

17. As Sarah Austin entered the home with her child, Nancy Austin confronted Short in the parking area and demanded that he leave the property. Short did not leave.

18. According to his written statement, Billy Herald observed portions of the incident from the yard of a neighboring residence some 40 to 60 yards away through winter woods. Herald said that he was clearing roots from a vacant hog lot adjacent to the neighboring residence. *See* ImmMtnE.

19. Herald saw the car driven by Sarah Austin drive into the driveway and pull into the parking area at a high rate of speed. He said that her car was followed by the car driven by Short.

20. Herald saw Sarah Austin hastily enter the home. He saw Dylan Short exit his car and call for her.

21. He heard Sarah Austin say that she wanted to be left alone.

22. He saw and heard Short acknowledge that Nancy Austin was brandishing a gun. He saw Short get to one knee.

23. At this point Herald returned to work.

24. While Herald worked on the fence, Sarah and Nancy Austin repeatedly told Short to leave.

25. While the Austins were demanding that Short leave, he attempted to wrest the gun away from Nancy Austin.

26. Sarah Austin said that the gun discharged the first time during the struggle over the gun. This was not the fatal gunshot.

27. Herald's work was interrupted by the sound of a gunshot. When he turned to observe, he saw Short and Nancy Austin struggling over the gun.

28. Herald said that all three ended up on the ground during the struggle over the gun.

29. Nancy Austin was able to gain exclusive control over the gun and she shot Short while he was on his back on the driveway. No evidence suggests that Short was debilitated during the struggle.

30. This shot was fatal.

31. Immediately following the shooting, Sarah Austin called 911 to report it.

ARGUMENT

1. As defined by N.C.G.S. § 14-51.2(a)(1) and related case law, the Defendant, Nancy Austin was in her home at the time of this incident.

2. The decedent, Dylan Short, was not invited onto the property and not welcome on the property for more than a year prior to this incident. His intrusion into the property was corroborated by the observations of Billy Herald.

3. Moreover, a No Trespassing sign was posted along the 100-yard gravel driveway leading to the home.

4. Dylan Short did not leave the residence when asked to do so.

5. Although there are inconsistencies in the statements as to when Nancy Austin retrieved a gun, all the witnesses agree that Nancy Austin brandished a gun during this initial confrontation.

6. This is an unambiguous indication that she wanted him off her property and out of her home as defined by N.C.G.S. § 14-51.2(a)(1) and related case law.

7. Billy Herald said that Short got to one knee at this point as if in plea. Neither Nancy Austin nor Sarah Austin reported this.

8. If Herald's statement regarding Short getting to one knee is accepted as true, a jury could glean a few meanings from his actions. However, based on his attempt to forcibly disarm Austin, a jury should most reasonably conclude that Short was feigning a truce in order to gain an advantage over Nancy Austin and her gun.

9. Billy Herald did not witness the crucial events immediately preceding the first gunshot.

10. At the crucial point when Nancy Austin had a gun pointed at or brandished in the direction of Dylan Short, Billy Herald said that he had seen enough and he returned to work. Herald said that he was interrupted in his work by the sound of gunshot and when he turned to look he saw Dylan Short and Nancy Austin struggling over a gun.

11. The State can offer no evidence that Dylan Short did not attempt to forcefully take the gun away from Nancy Austin prior to the first nonfatal gunshot.

12. Sarah Austin said the gun discharged during the struggle over it.

13. When Dylan Short reached for Nancy Austin's gun, he unequivocally bestowed upon her the reasonable fear of imminent death or serious bodily harm envisioned in N.C.G.S. § 14-51.2(b).

14. His actions also demonstrated the intent commit an unlawful act involving force or violence envisioned in N.C.G.S. § 14-51.2(d).

15. Following the struggle over the gun, Billy Herald said that Dylan Short again asked for a truce prior to the fatal shot. This was not corroborated by the Austins' statements and would certainly be a disputed fact in the trial of this matter.

16. Hypothetically, even if Herald's observation is accurate as to Short's second entreaty for a truce, a reasonable person would conclude it's a sham based on Short's previous bogus call for a truce.

17. Further there is no evidence to indicate that Short was rendered physically incapable of resuming his assault on the Austins if given an opportunity.

18. Based on Dylan Short's actions and not his speculative and false pleas for a truce, N.C.G.S. § 14-51.2 directs that Nancy Austin had no duty to retreat and that she was authorized to use deadly force to defend herself and her daughter against an unwelcome, forceful intrusion into her home.

19. As such she should be granted the immunity from criminal prosecution as set out in N.C.G.S. § 14-51.2(e) and with that immunity her charges should be dismissed pursuant to N.C.G.S. § 15A-954(a)(9).

WHEREFORE based on the Law cited and these Facts, the Defendant respectfully requests the Court to hear this matter prior to trial and to

1. Establish a hearing process regarding the taking of evidence, resolving factual disputes and setting a burden of proof that is in accordance with due process.

2. Bestow upon Nancy Austin the presumption of a reasonable fear of imminent death or serious bodily harm when she knowingly used deadly force to repel and remove Dylan Short as he unlawfully and forcefully entered into the curtilage of her home.

3. Further bestow a related presumption that during Dylan Short's unlawful and forceful entry into the Austins' home's curtilage, he did so with the intent to commit an unlawful act involving force or violence.

4. Recognize that Nancy Austin has no duty to retreat under these circumstances.

5. Dismiss the charges pursuant to N.C.G.S. § 15A-954(a)(9) as the Court has granted criminal immunity to Nancy Austin.

6. For such other relief deemed just and proper.

This the 24th day of October, 2016.

SAMUEL A. SNEAD
Assistant Capital Defender
17 N. Market St., Ste. 101
Asheville, NC 28801
Ph: 828/251-6785
Fx: 828/251-6750

STATE OF NORTH CAROLINA COUNTY OF CALDWELL	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION FILE NO. 13CRS54340

STATE OF NORTH CAROLINA v. NANCY BENGE AUSTIN	**AFFIDAVIT**

The undersigned, being first duly sworn, deposes and says the following:

1. That he is an attorney duly licensed and authorized to practice law in the State of North Carolina and that he is an Assistant Capital Defender.

2. That he received the appointment to represent the Defendant in the above-entitled action on March 5, 2015.

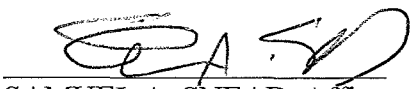
3. That counsel for the Defendant has reviewed the allegations in Defendant's Motion and that they arise in their entirety from the discovery provided to the Defendant in this matter except for the following which should not be of material dispute:

   a. The weight of Sarah Austin at the time of incident is estimated;
   b. The relative health of Sarah Austin and Dylan Short is an estimate based on conversations with Sarah Austin and Nancy Austin;
   c. Nancy Austin's medical diagnosis and health at the time of the incident is based on conversations with her and observations of her medical needs; and
   d. The length of the driveway and the No Trespassing sign is based on visits to the scene and conversations with Sarah and Nancy Austin.

4. Attachments to this Motion include an illustrative photo of the No Trespassing sign, two photos from where Herald said he viewed the incident, a hand-written statement from Billy Herald, a typed statement from Sarah Austin, A NCSOG blogpost regarding pretrial immunity issues, a printout of all supporting case law referenced in this motion and the blogpost, and a printout of N.C.G.S. § 14-51.2.

5. This affidavit accompanies a Motion dated this date.

6. Further affiant sayeth not.



SAMUEL A. SNEAD, Affiant

SWORN to and SUBSCRIBED before me, this the 24th Day of October, 2016.

NOTARY PUBLIC

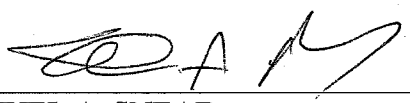
My Commission expires: 11-01-19

TERRY J. MILLER
Notary Public, North Carolina
Buncombe County
My Commission Expires
November 01, 2019

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served on the District Attorney's Office for the 25th Judicial District by leaving a copy at the office with an associate or employee.

This, the 24th day of October, 2016.



SAMUEL A. SNEAD
Assistant Capital Defender
Asheville, NC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CALDWELL COUNTY SHERIFF'S OFFICE — Voluntary Statement

OCA/Citation #: _____

Place:	Date: 12-26-13	Time: 9:18 ☐ AM ☑ PM
Name: (Last, First, Middle): Herald Billy Eugene	DOB: 12-19-78	SS#: 220-92-1848
Full Address: ~~215~~ 4005 Lens Price Ln (mailing address)	City: Lenoir	State: NC	Zip Code: 28645
Phone Number Home: 828-640-6563	Work: same	

I, Billy E. Herald want to make the following statement. This statement is received by Officer _____ on this date. I understand I (☐ am ☐ am not) under arrest at this time and if so I have been advised of my miranda rights and voluntarily waive same. The following is my voluntary statement.

I Billy E. Herald was taking down a fence for Rick Triplett at the end of Terra Pl. on the left behind the old barn it was about 40-60 yards away from the murder. First I hear & see a black car driven by a young lady flying down the driveway, I saw her at the top of the driveway. Shortly behind her a guy driving a red Cavalier or some small car with a high spoiler comes in. The girl is a fast pace to get into the house or away from this guy. She yells for her & is walking in her direction trying to talk to her. I hear the guy say loudly, now she's got a loaded gun, I see him down on one knee saying please stop, I turned around & cut 2 veins off of fence. I hear a gun shot & I stand up. I see the guy behind this older lady trying to get gun away from her, then I see the younger girl jump on his back. The girls are hitting him - punch, slapping, clawing etc. He is trying to get them off of him. I see them go to the ground. The guy is on his back, the younger girl steps far back, the older lady is standing above the guy. While on his back, I hear the guy begging please, I'm done, just let me go, The older lady steps back about one - two steps, points gun at the guy & pulls the the trigger.

Signature of Interviewing Officer	Signatue of Person Making Statement	SSN of Suspect

Attachment ☐ Yes ☐ No Page ____ of ____

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CALDWELL COUNTY SHERIFF'S OFFICE

Voluntary Statement

OCA/Citation #: _____

Place:	Date:	Time: ☐ AM ☐ PM
Name: (Last, First, Middle):	DOB:	SS#:
Full Address:	City:	State: / Zip Code:
Phone Number Home:	Work:	

I, _____ want to make the following statement. This statement is received by Officer _____ on this date. I understand I (☐ am ☐ am not) under arrest at this time and if so I have been advised of my miranda rights and voluntarily waive same. The following is my voluntary statement.

I took off running to Darings house - witch is Rides sm. a guy named Mike or Michal was on the couch & I'm yelling this lady just killed this guy. I pick up a set of binoculars & start looking out the kitchen window. I see the guy laid out on the ground, feet on left side. The young girl is on the front porch with a baby in her arms. The older lady comes from behind the house & either puts something in the guys right hand or checks his pulse.

Signature of Interviewing Officer	Signatue of Person Making Statement	SSN of Suspect

Attachment ☐ Yes ☐ No

Page ____ of ____

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CALDWELL COUNTY SHERIFF'S OFFICE
** SHERIFF ALAN C. JONES **
2351 MORGANTON BLVD. SW * LENOIR, NC 28645
PHONE: 828-758-2324 * FAX: 828-757-8685

Statement of Sarah Leann Austin
12/26/2013 at 1940 hours
Reference to: Dylan Joseph Short homicide

Dylan Short is my son's father I was at his house letting him see the baby (our son Carson Austin). I told him I was going home because he wanted to go get food. He asked if I would follow him to P.D. Store and he texted me while I was in my car waiting for him to come out and I could go home and said "Sherri is working". Sherri Gurley is a woman I worked with 2 years ago at Bojangles. I said "Ok" he said "I love you Sarah c3" and I never texted back. When he came out of the store he said come back to my house and I said no. He got hateful with me so I left to go home. He followed until I got on the 4 lane and he started driving crazy acting like he wanted to race. And then when I got home I took Carson and layed him down. I walked into the living room to see him coming down the hill. My mom, Nancy Austin was outside arguing with him. She was telling him he loved his other baby mama. He said "I love Sarah and Mom said "that's all you know that love is" pointing to his privates. She turned to me and said "he don't love you". She kept telling him to leave. I walked out to him and told him he needed to leave. He kept saying no and grabbed the gun that mom had on him. The gun shot. I don't know where at and then, he pushed me and I hit my head but got up and was hitting him and I grabbed the gun to see where it was. I was hitting him to get him away from her. He then pushed me back on to the ground and hit my head on the ground 2-3 times more. I rolled over and got on top of him and hit him and I had my hand around his neck. When I got up he was starting to get up and my mom shot him. I looked at her and she looked at me and at the same time I said "I'm calling 911" and she said "call 911" When I walked in I woke up Carson accidently and called 911. I stayed on the phone till Lenoir PD got to my house.

Sarah Austin
12/26/13

Self-Defense Provides Immunity from Criminal Liability

Author : John Rubin

Categories : Crimes and Elements, Procedure

Tagged as : immunityself-defense

Date : October 4, 2016

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.


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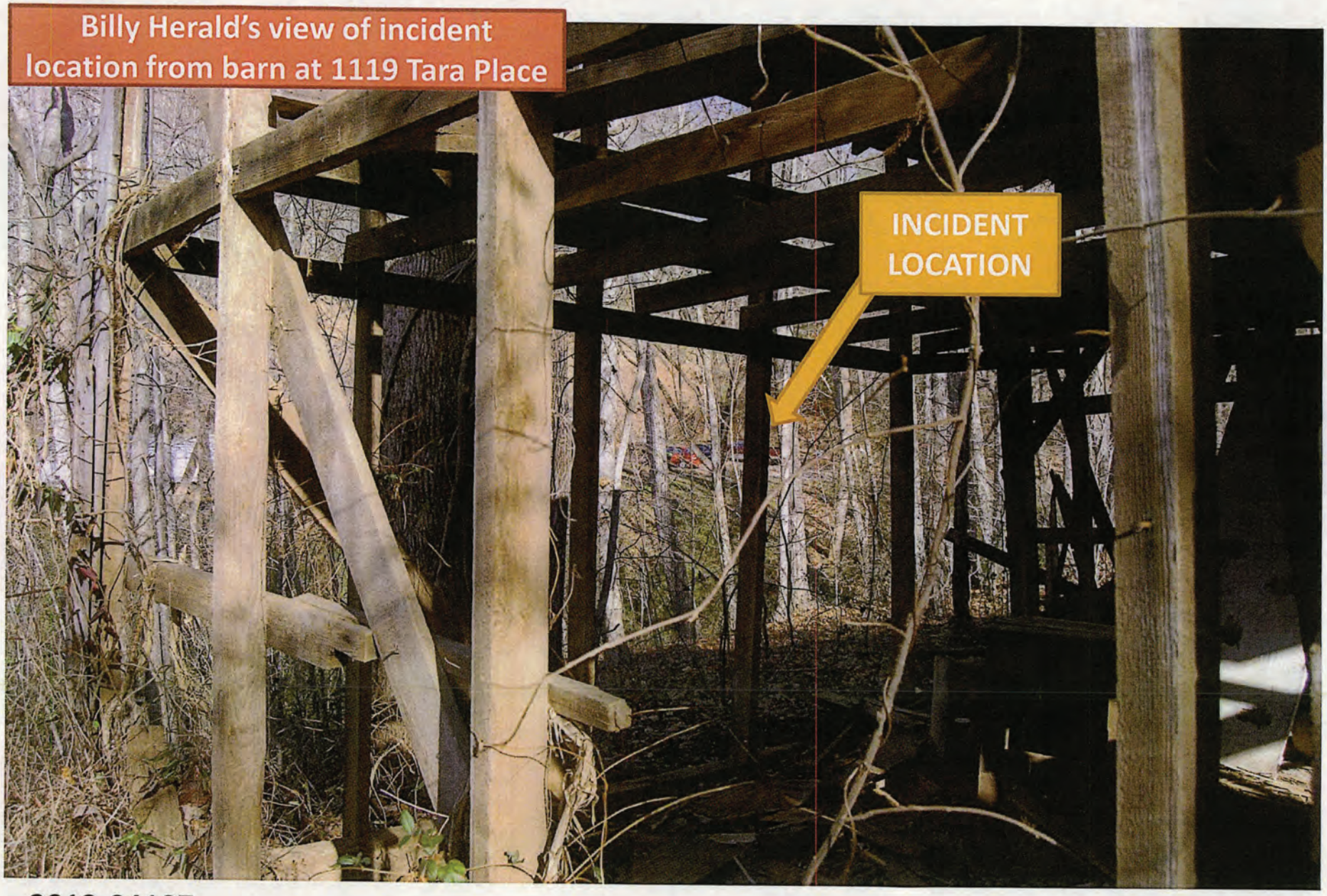
N.C.G.S. 14-159.12



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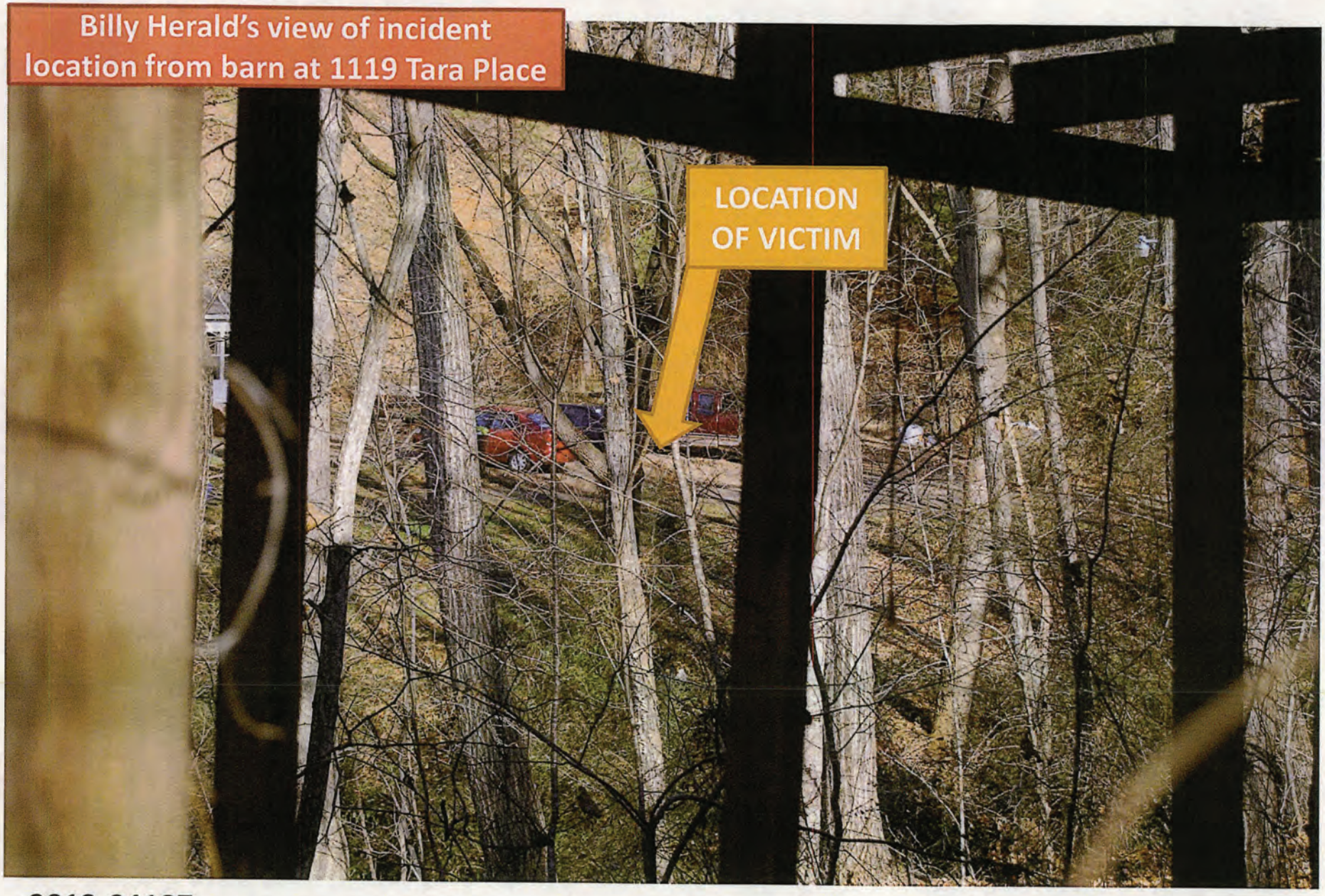

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User Name: Samuel Snead
Date and Time: Nov 02, 2016 17:30
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Documents (14)

1. *Fair v. State, 284 Ga. 165*
   Client/Matter: -None-
2. *N.C. Gen. Stat. § 14-51.2*
   Client/Matter: -None-
3. *State v. Hardy, 51 Kan. App. 2d 296*
   Client/Matter: -None-
4. *State v. Barlow, 303 Kan. 804*
   Client/Matter: -None-
5. *Harrison v. State, 2015 Ala. Crim. App. LEXIS 97*
   Client/Matter: -None-
6. *Malone v. State, 2016 Ala. Crim. App. LEXIS 31*
   Client/Matter: -None-
7. *State v. Manning, 2016 S.C. LEXIS 268*
   Client/Matter: -None-
8. *Rodgers v. Commonwealth, 285 S.W.3d 740*
   Client/Matter: -None-
9. *State v. Ultreras, 296 Kan. 828*
   Client/Matter: -None-
10. *Bunn v. State, 284 Ga. 410*
    Client/Matter: -None-
11. *Bretherick v. State, 170 So. 3d 766*
    Client/Matter: -None-
12. *People v. Guenther, 740 P.2d 971*
    Client/Matter: -None-
13. *Dennis v. State, 51 So. 3d 456*
    Client/Matter: -None-
14. *State v. Blue, 356 N.C. 79*
    Client/Matter: -None-

STATE OF NORTH CAROLINA COUNTY OF BUNCOMBE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION FILE NOS. 15CRS90856
STATE OF NORTH CAROLINA v. KELVIN OYAKHILOME IRABOR	**MOTION FOR PRETRIAL HEARING ON IMMUNITY**

NOW COMES the Defendant, Kelvin O. Irabor, by and through undersigned counsel pursuant to N.C.G.S. § 14-51.3 and 15A-954(a)(9) for a pretrial determination of immunity and related and consequential relief and says the following:

LEGAL BASIS

1. N.C.G.S. § 14-51.3(a)(1) states 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 had a lawful right to be if the person reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself.

2. N.C.G.S. § 14-51.3(b) further notes that a person who uses such force is immune from criminal liability.

3. The plain language of immunity in this context is the protection or exemption from criminal penalty.

4. The most basic principle of statutory interpretation is that when the language of a statute is clear and unambiguous, there is no room for judicial construction of the statute and it must be given its plain meaning. *E.g., Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136-37 (1990). In other words, the legislature is presumed to say what it means and mean what it says.

5. Another principle, related to the principle that the plain language of a statute controls its meaning, is that when the legislature uses words with particular legal significance, such words should be given their term of art meaning. "[W]hen technical terms or terms of art are used in a statute they are presumed to have been used with their technical meaning in mind, absent a legislative intent to the contrary." *Black v. Littlejohn*, 312 N.C. 626, 639, 325 S.E.2d 469, 478 (1985).

6. Furthermore, N.C.G.S. § 15A-954(a)(9) notes that on motion of the defendant the Court must dismiss the charges stated in a criminal pleading if it determines that the defendant has been granted immunity by law from prosecution.

7. A Notice of Defense for Self-Defense and Defense of Others was timely given in the matter in accordance with N.C.G.S.§ 15A-905.

ISSUES REGARDING LEGAL PROCESS AND BURDEN OF PROOF

1. North Carolina has not created "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." *See* John Rubin, *Self-Defense Provides Immunity from Criminal Liability*, UNC School of Government Blog (October 4, 2016).

2. Although there does not appear to be any case law directly addressing §15A-954(a)(9), there is a substantial body of case law addressing other subsections of §15A-954(a). These cases show that motions practice under N.C.G.S. §15A-954(a) follows the general procedure for motions hearings generally.

3. Specifically, as the movant, a defendant moving to dismiss under §15A-954(a) has the burden to prove by a preponderance of the evidence that she is entitled to a dismissal. Further, if a defendant files a motion sufficiently alleging grounds for dismissal under the statute, a trial court must conduct an evidentiary hearing and resolve contested questions of fact.

4. Other States with similar statutes have procedures for determining immunity pretrial. The nature of these hearings and the burdens of proof vary between States according to Rubin. *SOG Blog* at 2.

5. "Most courts have held that the defendant has the burden to establish immunity by a preponderance of the evidence," says Rubin citing cases from South Carolina, Georgia, Florida, Colorado and Alabama. In those States, "the trial court holds an evidentiary hearing and resolves factual disputes." *Id* at 2. "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." *Id* at 2.

6. The Florida Supreme Court has held that the existence of disputed issues of material fact does not warrant a denial of immunity and it reasoned that its legislature intended the immunity provision to provide greater rights that already existed under Florida law. *Id* at 2.

7. While courts in Kansas and Kentucky have held that the State need only establish probable cause that the defendant did not use defensive force, the Kansas Supreme Court has held that a trial judge may set aside a guilty verdict on immunity grounds. *Id* at 2.

8. In all of the States the court must dismiss that charges if the defendant prevails. *Id.* at 3. If the defendant fails to establish immunity pretrial, the defendant is not

barred from asserting a defensive force defense at trial under the applicable standards. *Id* at 3.

FACTS AND ARGUMENT

9. The following background facts are taken from the Court of Appeals decision of this matter:

> In October 2015, defendant lived in apartment 14E in the Oak Knoll apartment complex in Asheville, along with his child, London, London's mother, Denise Williams ("Williams"), and Williams's sister, Shamica Robinson ("Robinson"). Sometimes Dondre Nelson ("Nelson"), who was a friend of one of Robinson's other sisters, stayed with them in apartment 14E.
>
> Defendant testified that he had known Nelson for some time and had befriended Nelson to avoid becoming a "target." According to defendant, Nelson was a high-ranking member of the Blood gang, which was highly active in the Oak Knoll area, and had frequently robbed individuals around the Oak Knoll apartments. Nelson had gained this status by killing a rival gang member in Atlanta, Georgia. Defendant also testified that he knew Nelson always carried a gun on his person, and Nelson had informed defendant that he had shot an individual for allegedly discharging a weapon into the Oak Knoll apartments. Since defendant knew Nelson's reputation, he had hoped his friendship with Nelson would ensure that he did not become a target of gang activity.
>
> On 9 October 2015, defendant rode with Nelson to an ABC store, where they met Jenna Ray ("Ray"), with whom Nelson apparently had a relationship. After defendant and Nelson returned to Oak Knoll, Ray also arrived. Williams was angry when she saw Ray and was prepared to attack her. When defendant stopped her from attacking Ray, Williams became angry with defendant. Williams's niece, Gelisa Madden ("Madden"), attempted to intervene, striking defendant, who struck her back.
>
> While defending himself from Madden, defendant released Williams, who went into apartment 14E and returned with a broomstick, with which she struck defendant. Defendant responded by drawing a firearm and chasing Williams. While chasing her, he fired three shots. Williams fled into apartment 14E, and a neighbor called Nelson. One of defendant's shots allegedly struck the door of apartment 14E, where Nelson's daughter was staying at the time.
>
> After chasing Williams, defendant left Oak Knoll for several hours. He called multiple people asking for a ride and eventually reached Nelson. Nelson was furious and refused to give him a ride. Defendant decided to walk back to Oak Knoll instead. When defendant returned to Oak Knoll, he saw Nelson and two others standing outside apartment 14E. Fearing what Nelson might do to him, defendant went to another apartment first, where he talked

with Jerome Smith ("Smith"). Smith told defendant that Nelson was upset with defendant for firing a shot into apartment 14E, where Nelson's daughter was staying, and warned defendant to be careful. Defendant borrowed Smith's gun for protection.

After defendant left Smith's apartment, he walked along the sidewalk, heading back to apartment 14E. As defendant approached the apartment, Nelson called out to defendant and accused him of shooting at Nelson's daughter, which defendant denied. Nelson responded by telling defendant "this is war, empty your pocket," while advancing towards defendant. Fearing Nelson would attack and rob him, defendant pulled the gun out of his pocket, "racked it," and told Nelson to back up. Nelson continued to advance, and defendant fired two warning shots into the ground; however, Nelson remained undeterred. Nelson then lunged at defendant, and defendant fatally shot Nelson. Defendant then fled, dropping Smith's gun into the bushes.

Defendant was indicted for the first-degree murder of Nelson, assault on a female [and assault by pointing a gun] of Madden, assault with a deadly weapon with intent to kill of Williams, and discharging a firearm into an occupied dwelling. Trial commenced during the 23 January 2017 session of Buncombe County Superior Court. Following the State's presentation of evidence, defendant presented evidence, including his own testimony.

...

The jury returned verdicts finding defendant guilty of second-degree murder, assault with a deadly weapon, and discharging a firearm into an occupied dwelling, and not guilty of assault on a female. [Assault by pointing a gun was dismissed at the close of the state's evidence.] The trial court sentenced defendant to a minimum of 200 and a maximum of 252 months for second-degree murder, and a minimum of 55 and a maximum of 78 months for discharging a firearm and assault, to be served consecutively in the custody of the North Carolina Division of Adult Correction.

State v. Irabor, 822 S.E.2d 421, 422-23 (N.C. Ct. App. 2018).

10. The Court of Appeals held that the trial court committed prejudicial error by failing to include the relevant no duty to retreat and stand-your-ground provisions in the agree-upon jury instructions on self-defense. *Irabor*, 822 S.E.2d at 425.

11. The missing language in the self-defense instruction from the first trial which created prejudicial error mirrors critical language supporting a pretrial immunity determination in N.C.G.S. § 14-51.3(a)(1).

WHEREFORE based on the Law cited and these Facts, the Defendant respectfully requests the Court to hear this matter prior to trial and to

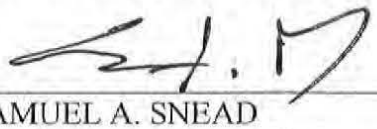
1. Establish a hearing process regarding the taking of evidence, resolving factual disputes and setting a burden of proof that is in accordance with due process and N.C.G.S. § 14-51.3(a)(1).

2. Grant immunity to the defendant pursuant to N.C.G.S. § 14-51.3(b).

3. Dismiss the charges pursuant to N.C.G.S. § 15A-954(a)(9).

4. For such other relief deemed just and proper.

This the 9th day of July, 2019.



SAMUEL A. SNEAD
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STATE OF NORTH CAROLINA COUNTY OF BUNCOMBE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION FILE NOS. 15CRS90856

STATE OF NORTH CAROLINA v. KELVIN OYAKHILOME IRABOR	**AFFIDAVIT**

The undersigned, being first duly sworn, deposes and says the following:

1. I am attorney duly licensed and authorized to practice law in the State of North Carolina and that I work as an Assistant Capital Defender in the Office of the Capital Defender.

2. I was appointed to represent Mr. Irabor in October 2015.

3. As noted, the facts supporting this motion are taken directly from the Court of Appeals opinion from the first trial of this matter, which in turn was taken from sworn testimony.

4. While giving a proper Notice of Defense, defendant did not raise this immunity issue in the first trial of this matter.

5. This affidavit accompanies a Motion filed this date.

6. I have read the foregoing Motion and knows the contents thereof to be true of my own knowledge except as to those matters and things alleged upon information and belief and as to those matters and things I believe them to be true.

7. Further affiant sayeth naught.

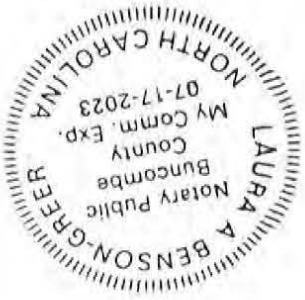
SAMUEL A. SNEAD, Affiant

I certify that this person personally appeared before me this day acknowledging to me that he signed the foregoing document.

SWORN to and SUBSCRIBED before me, this the 9th day of July, 2019.

Laura A. Benson Greer
NOTARY PUBLIC

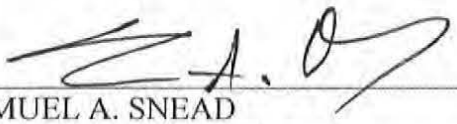
My Commission expires: 7/7/23



CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served on the District Attorney's Office for the 28th Judicial District by leaving a copy at the office with an associate or employee.

This, the 9th day of July, 2019.



SAMUEL A. SNEAD
Assistant Capital Defender
Asheville, NC

STATE OF NORTH CAROLINA COUNTY OF CALDWELL	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION FILE NO. 13CRS54340

STATE OF NORTH CAROLINA v. NANCY BENGE AUSTIN	**2nd PROPOSED INSTRUCTION REGARDING NCPI 308.80 AND CONTROLLING GS 14-51.2**

NOW COMES the Defendant, Nancy Benge Austin, by and through undersigned counsel with a proposed revision of N.C.P.I. 308.80. This proposed instruction is based on the plain language of N.C.G.S. § 14-51.2 and is constructed to conform to the facts presented in this case:

> If Nancy Austin killed Dylan Short to prevent a forcible entry into her home or to terminate his unlawful entry, her actions are excused and she is immune from criminal liability and thus not guilty. The State has the burden of proving from the evidence beyond a reasonable doubt that Nancy Austin did not act in the lawful defense of her home. "Home" is defined to include the driveway and parking area adjacent to her home.
>
> The lawful occupant of a home, Nancy Austin, is presumed to have held a reasonable fear of imminent death or serious bodily harm to 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, Dylan Short, had unlawfully and forcefully entered her home or had unlawfully and forcibly entered her home; and
>
> **(2)** Nancy Austin knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.
>
> Unless the State proves beyond a reasonable doubt that these two conditions are not met then Dylan Short is presumed to be entering Nancy Austin's property with the intent to commit an unlawful act involving force or violence.
>
> [The Defendant argues that no enumerated rebuttal to the presumption applies in this matter. However, should the court entertain that N.G.C.S. § 14-51.2(c)(5) has colorable applicability, which Defendant opposes, the Defendant would offer the following language while reserving exception to the insertion:
>
> *The presumption is rebuttable if the State shows two things beyond a reasonable doubt:*
>
> *That Dylan Short had clearly signaled his intention to cease his unlawful and forceful entry. (Defense would argue that as a matter of law that Dylan Short could*

not clearly signal his intent to cease his unlawful entry when he attempted to take Nancy Austin's gun from her. Furthermore Dylan Short had the duty to retreat from Nancy Austin's home as he had no lawful right to be at her home.)

That Dylan Short had exited the driveway.]

MANDATE

Unless the State proves beyond a reasonable doubt otherwise, if you find that Nancy Austin was at her home's parking area, and she knew or had reason to know that Dylan Short was in the process of unlawfully and forcefully entering or had unlawfully and forcibly entered her home's parking area, Nancy Austin does not have a duty to retreat from Dylan Short in the circumstances described in this section. She is presumed to have held a reasonable fear of imminent death or serious bodily injury, and unless rebutted beyond a reasonable doubt, her use of deadly force presumed reasonable and she is immune from criminal liability and not guilty.

This the 23rd day of May, 2019.

_____

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North Carolina Criminal Law

A UNC School of Government Blog

Evidence about the “Victim” in Self-Defense Cases

Posted on Feb. 5, 2019, 2:25 pm by John Rubin

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.

Category: Uncategorized

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STATE OF NORTH CAROLINA COUNTY OF MCDOWELL	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION FILE NOS.: 15CRS51225

STATE OF NORTH CAROLINA v. JERRY RYAN ECHOLS	**NOTICE OF EVIDENCE REGARDING DECEDENT AND MOTION FOR DISCLOSURE OF EVIDENCE REGARDING DEFENDANT**

NOW COMES the Defendant, Jerry Ryan Echols, by and through undersigned counsel and respectfully gives notice of and requests the following:

1. That the Defendant intends to offer evidence including calling witnesses regarding observations of and interactions with the decedent in this matter as outlined below that will necessitate rulings under N.C. Rules of Evidence or other statute, or legal authority.

2. Likewise the Defendant anticipates that the State may intend to call witnesses or offer evidence of a similar nature.

BRIEF FACTUAL BACKGROUND

1. Defendant is charged with first degree murder of Christopher English from a shooting incident that occurred June 17, 2015.

2. Defendant is also charged with a felony fleeing to elude and a possession of a firearm by felon and two misdemeanors from a June 19, 2015, incident that upon information and belief arose from the investigation of the shooting incident.

3. He was charged with the murder on June 26, 2015, following his voluntary statement while in custody admitting his role in the fatal incident and his motivations therein.

4. His statement as well as information provided by others in this matter support a claim of self-defense. He has given formal notice of self-defense and defense of others in this matter.

LEGAL ISSUES

1. The State must disclose all information concerning prior bad conduct of Defendant under N.C. Gen. Stat. § 15A-903(a). That act gives Defendant access to the "complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant."

This provision clearly contemplates all information connected to any evidence the State intends to offer under North Carolina Rules of Evidence 404(b) or 608.

2. The Defendant has a reciprocal obligation under Rule of Evidence. In addition, the State has requested that the Defendant provide similar discovery pursuant to N.C. Gen. Stat. § 15A-902(e).

3. As such neither party should be permitted to introduce evidence of alleged prior bad acts of which the other party had no notice. The notice and evidence herein serves as Defendant's intention to comply with his statutory and Constitutional obligations in that regard.

4. As it relates to evidence against the Defendant, his right under the state and federal constitutions to confront the accusers and witnesses against him "includes the right to prepare and present a defense." *See State v. Canady*, 355 N.C. 242, 253 (2002) (constitutional error for trial court to permit State's ballistics expert to testify about results of their test when defendant never had opportunity to examine the test shells used by the State's expert to reach his conclusion).This right guarantees that a defendant be given the opportunity to rigorously investigate and challenge the evidence before that evidence is introduced at trial. *Id*. Defendant will not be able to rigorously challenge the evidence against him unless he is given adequate notice of every alleged prior bad act the State intends to offer against him.

5. The prohibition of evidence of other crimes is said to have constitutional implication as due process requires that a person be convicted, if at all, of a particular crime charged and not for other crimes or simply because of who he is. *State v. McKoy*, 78 N.C. App. 531, 538, *rev'd on other grounds*, 317 N.C. 519 (1986). Thus, admission of evidence of other crimes or wrongs potentially violates the defendant's presumption of innocence of the crime charged. *See United States v. Foskey*, 636 F.2d 517 (D.C. Cir. 1980) (cited in *McKoy,* 78 N.C. App. at 538).

6. The Supreme Court of North Carolina has squarely held that before a trial court may admit evidence of other crimes or bad acts of the defendant under Rule 404(b) or 608(b), it must first determine whether or not the evidence is relevant under the Rule. If it determines that the evidence is relevant, the trial court is obligated to engage in a balancing test under Rule 403 of the probative value of the evidence against its prejudicial effect prior to admitting extrinsic conduct evidence.

7. The better practice is for the proponent of the evidence, out of the presence of the jury, to inform the court of the rule under which he is proceeding and to obtain a ruling on its admissibility prior to offering it. *State v. Morgan*, 315 N.C. 626, 639 (1986).

8. The orders the Defendant seeks by this motion will advance the mandate and policy rationale of *Morgan* and will promote the orderly administration of justice by permitting the Defendant and the state to identify these material evidentiary issues prior to trial. Ordinarily it is disclosure rather than suppression, which provides the proper administration of justice. *United States v. Baum,* 482 F.2d 1325, 1331 (2nd Cir. 1973) (conviction reversed for surprise admission of other crimes evidence).

9. In many jurisdictions, 404(b) questions are the most frequently litigated issues in criminal appeals . . . . The erroneous admission of uncharged misconduct too often provides a fertile ground for reversal in criminal cases. *United States v. King*, 121 F.R.D. 277, 281 (E.D.N.C. 1988). *See State v. Al Bayyinah*, 356 N.C. 150 (2002). (Reversing death row inmate's convictions because evidence improperly admitted under 404(b)) "The dangerous tendency of Rule 404(b) evidence to mislead and raise a legally spurious presumption of guilt requires that its admissibility should be subject to strict scrutiny by the courts." *Al Bayyinah*, 356 N.C. at 154.

10. The Defendant cannot be prepared to respond meaningfully to evidence of uncharged crimes and bad acts when he has no formal notice of them. Disclosure in advance of trial will eliminate unfair surprise and therefore avoid the necessity for the defense to seek recesses or other delays during trial to investigate undisclosed accusations of misconduct. In sum, it is both fundamentally unfair and a violation of the right to make a defense to the crime charged not to give a defendant prior notice of all crimes or bad conduct which the prosecution will attempt to use to convict him.

DISCLOSURE OF EVIDENCE BY DEFENDANT

The Defendant has grouped these witnesses in reverse chronological order working back from the incident.

11. One group of witnesses to be offered by the Defendant detail the decedent's actions in the hours leading up to the incident. The Defendant contends these witnesses' observations are relevant and material as they fall so close in time to the incident. Many of these witnesses were interviewed in the investigation. Supplemental interviews are attached as noted. These witnesses are:
    a. **Carly Beam**
    b. **Joel Robinette**, interview attached.
    c. **Seth Carver**
    d. **Austin Whitehead**, interview attached.
    e. **Teigan Hollifield**, interview attached.
    f. **Shirley "Kricket" Hollifield**

12. Two witnesses had relevant dealings with the decedent in the weeks leading up to this incident. The Defendant contends statements made by the decedent to these witness are admissible under N.C. Rules of Evidence 404 and 804(3). Interviews are attached as noted. These witnesses are:
    g. **David Ashe**, interview attached.
    h. **Brady Williams**

13. One witness performed a comprehensive clinical assessment of the decedent in January 2014, that assessment contains relevant information and was produced to the State and the Defendant pursuant to Defendant's motion in this matter. The Defendant contends that the admission of this evidence is contingent upon the Defendant laying a proper foundation through this witness for this evidence to be admitted under either or both N.C. Rules of Evidence 803(3) and 803(4). She is:
    i. **Paula Bynnom**

14. A final witness was a former live-in girlfriend of the decedent. She was a victim of domestic violence from the decedent. She would testify that decedant's violence was triggered almost exclusively by his use of methamphetamine. The decedent had methamphetamine and amphetamine in his system at the time of this incident. The Defendant would contend such evidence is admissible under N.C. Rule of Evidence 404. She is:
    j. **Christy Leigh Hollifield Beaver**, interview attached.

15. The defendant has given notice of an expert in this matter, **Dr. Wilkie Wilson**, who will be offered to provide his expertise on the chronic and acute pharmacological effects of methamphetamine abuse. The defendant does not intend to call other expert witnesses.

16. The Defendant understands his obligation and reserves the right to disclose other witnesses he reasonably intends to call including himself pursuant to N.C. Gen. Stat. § 15A-905(3).

17. The Defendant also reserves the right to make additional arguments regarding the admissibility of this evidence, and has attached a recent article from N.C. School of Government Professor John Rubin on the admissibility of evidence of the

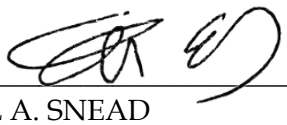
WHEREFORE the Defendant respectfully requests

1. That the State identify and disclose all evidence of bad acts or crimes of Defendant which are not charged in a pending bill of indictment and which the state contends are admissible under N.C. Rules of Evidence 404(b) or 608(b), or other rule of evidence, statute, or legal authority.

2. That the Court consider this notice with regard to the evidence the Defendant intends to elicit as a forecast of evidence to better prepare the court to rule on its admission; and

3. For such other relief deemed just and proper.

This the 15th day of February 2019.

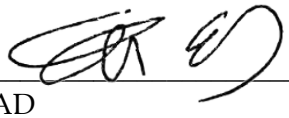


SAMUEL A. SNEAD
Assistant Capital Defender
31 College Place, Ste. 203
Asheville, NC 28801
Ph: 828/259-3434
Fx: 828/259-3435

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served on the District Attorney's Office for McDowell County, by leaving a copy at the office with an associate or employee.

This, the 15th day of February, 2019.



SAM SNEAD
Assistant Capital Defender
Asheville, NC

Investigative Report

State v. Ryan Echols
Interview of Joel W. Robinette Jr.
October 24, 2017
By Brian Luis Cid
Cid Investigations LLC

On October 24, 2017 writer interviewed Joel W. Robinette Jr. (Inmate #0613082) at the Mountain View Correctional Institution located at 545 Amity Park Road, Spruce Pine, NC 28777. After being advised of the identity of the interviewer and the nature of the interview, ROBINETTE provided the following information:

He is currently due to be released on 4/19/19 as the result of a conviction for the crime of Receiving a Stolen Vehicle.

He considers himself friends with both RYAN ECHOLS and the victim, CHRIS ENGLISH. He had known ENGLISH since the 8th grade. Writer reviewed with ROBINETTE a summary of his video interview by the McDowell County Sheriff's Office. After discussing and reviewing the interview ROBINETTE stated that the night of the shooting he was with a girl named DEANA MCKINNEY. At the time ROBINETTE was using methamphetamine (meth), he would smoke it and snort it. DEANA had a friend named CARLY that wanted some meth. CARLY was going to pick them up and they would go to her house eat, shower and have a sexual 'threesome' and use the meth. When they got to CARLY'S house CHRISTOPHER ENGLISH was there waiting outside. CARLY said that she didn't want him there because he had been "acting up." He believes that she was not comfortable with ENGLISH as he was talking to himself. CARLY also didn't want him in the house because he had mud on his boots. ENGLISH was allowed in the house.

After they were all inside ENGLISH came up to ROBINETTE and showed him a cell phone with the name ALLISON written or scratched on its back and told him to remember the name on the phone. It made no sense to ROBINETTE. He observed that ENGLISH needed a shower and had a lot of track marks on his arms from injecting meth. ROBINETTE knew from past experience that ENGLISH had been up for "two to three weeks" and needed to eat, shower and sleep and then he would be better in a few days. ROBINETTE just wanted to get some food in ENGLISH and get him some rest.

ENGLISH also came up to him with a 9 volt battery and two wires and pressed it to his arm and asked him, "Do you feel that?" ENGLISH then stated, "Doesn't that feel better." ROBINETTE thought that this behavior was bizarre and irrational.

ENGLISH was trying to give ROBINETTE the cell phone for some meth. ROBINETTE and the others had something to eat and ENGLISH "only ate a little bit of the meat off of his plate." ROBINETTE stated that you lose your appetite when you are using meth.

ROBINETTE had given some of his meth to CARLY and only had ½ a gram left and smoked some with ENGLISH.

He further described ENGLISH as being "dogged out" that night. He explained that when you are dogged out you don't want to be around people but don't want to be alone either. Another indication of being dogged out is that you become aggressive. He remembers ENGLISH "growling" at him at one point during the evening.

He had never known ENGLISH to be aggressive but he was acting aggressive that evening. He also described ENGLISH as "being out of his mind." ROBINETTE was also "high" that evening but was well aware of ENGLISH'S behavior.

When asked if ENGLISH was hyperactive that day ROBINETTE stated "he was past the point of hyperactivity and the first 3-4 days of using meth and not sleeping you are hyperactive or wide open". ROBINETTE could tell that ENGLISH "had been up for a couple of weeks" as ROBINETTE had done so in the past.

He further described his behavior by saying "you couldn't have taken him into Walmart- if you didn't know what was going on with him you would be afraid of him." He further stated that if you didn't know ENGLISH you would think that he was "crazy and dangerous."

ROBINETTE and the two girls then went in the back bedroom to take a shower and have sex while ENGLISH was in the living room by himself. ROBINETTE was in the shower with DEANA when CARLY came in and told him that shots had been fired at the end of the road. ROBINETTE grabbed his shoes and some clothes and grabbed a baseball bat and ran outside and down the hill. He saw ENGLISH lying on the ground, as he got there the police pulled up.

ROBINETTE had seen ENGLISH approximately a month prior to the shooting and described him as "messed up." He elaborated that ENGLISH was using meth heavily one month before the incident. He further described ENGLISH as acting paranoid at that time.

He had seen ENGLISH a total of three times prior to the shooting and each time he could tell that ENGLISH was using meth. He added that ENGLISH "never acted like he did that night."

Investigative Report

State v. Ryan Echols
Interview of AUSTIN WHITEHEAD
January 14, 2019
By Brian Luis Cid
Cid Investigations LLC

On January 14, 2019 in an attempt to locate and interview AUSTIN WHITEHEAD, writer contacted relatives of WHITEHEAD to include DESTINY N. WHITEHEAD (a cousin-828-782-1649). DESTINY advised that she does not know how to locate AUSTIN and that she would call her grandmother (HAZEL WHITEHEAD, 828-527-0945).

Writer subsequently received a call from AUSTIN'S grandmother, HAZEL WHITEHEAD, telephone 828-527-0945. After being advised of writer's reason for locating AUSTIN, HAZEL advised that AUSTIN and TEIGAN HOLLIFIELD have a child together but they are no longer living together. She also advised that she would reach out to him to see if he was willing to speak with writer.

Writer subsequently received a telephone call from AUSTIN WHITEHEAD. After being advised of the identity of the interviewer and the nature of the interview, WHITEHEAD advised that he was currently unemployed and living with his grandmother, HAZEL WHITEHEAD at 617 Jacktown Road, Marion, NC (telephone 828-527-0945).

AUSTIN agreed to speak with writer and provided the following information:

In June of 2015 he and TEIGAN HOLLIFIELD were living together at 873 Pinnacle Church Road in Marion, NC. CHRIS ENGLISH had been asked to leave his parents' house and was living in a tent basically located behind his mother and father's house. The tent was less than a mile away from the Pinnacle Church Road address. He does not know why ENGLISH was asked to leave his parents' home. AUSTIN had given ENGLISH a watch, so he would know the time, and a book bag. AUSTIN had also given ENGLISH water "every day." ENGLISH liked AUSTIN'S girlfriend, TEIGAN, and would come around regularly. ENGLISH was mad at AUSTIN because TEIGAN wouldn't sleep with him.

The day before his death, ENGLISH came to their house and just walked into their house and without saying anything he started eating their food. AUSTIN talked to ENGLISH about this and told him that it was totally unacceptable. At that point ENGLISH started talking about a song he heard on his radio and the voices in the background of the song were talking about raping TEIGAN. ENGLISH started talking to the trees and the bees. While talking to ENGLISH, ENGLISH "slithered at me like a snake would-He started at his head and wiggled the rest of his body."

AUSTIN also noticed that ENGLISH'S speech seemed "jittery- like a stutter, mumbling, and he had a dry mouth." While talking to AUSTIN, ENGLISH looked him right in the eyes and AUSTIN described his eyes as "soulless, nothing was there."

AUSTIN told him to leave the property and ENGLISH “took off running up the hill as fast as he could.” AUSTIN further advised that ENGLISH was acting like he was invincible.

The next day the police came to the house to talk to them about ENGLISH being found dead.

AUSTIN could provide no further information.

Investigative Report

State v. Ryan Echols
Interview of TEIGAN HOLLIFIELD
October 25, 2017
By Brian Luis Cid
Cid Investigations LLC

On October 25, 2017 writer attempted to contact TEIGAN HOLLIFIELD by leaving a voice message on her cellular telephone, number 828-803-5252. The message advised HOLLIFIELD of writer's identity and the fact that writer wished to speak to her regarding RYAN ECHOLS and CHRISTOPHER ENGLISH. Writer was on his way to her residence at 873 Pinnacle Church Road, Nebo, NC 28761 when HOLLIFIELD called writer. Writer attempted to schedule an in person interview on this date however HOLLIFIELD stated that she would prefer to conduct the interview over the telephone. HOLLIFIELD provided the following information:

She was friends with CHRISTOPHER ENGLISH and he was like her "older brother." She had known him as a friend for 1-2 years; however he had lived in their neighborhood for years. She found his death to be "heartbreaking." She had never known ENGLISH to be violent. She stated, "He wouldn't hurt a fly but the needle and meth got him."

She saw him on the average of 4 times a week for the 8 month period prior to his death. The last 2 months before his death she didn't see him as often however stated that "when we did it wasn't CHRIS, he was not mentally stable."

She believes that it was the day before his death that he came by her house early in the morning and he was holding a radio that had no batteries in it. She has a neighbor that goes by the names "Ben" and "Beano." ENGLISH told her that he heard on the radio that BEN wanted to have sex with her. He was totally irrational. She said that was "the turning point" in her relationship with ENGLISH. Her boyfriend, AUSTIIN WHITEHEAD, confronted ENGLISH in the driveway about his comment and ENGLISH left the area.

The last 4 times that she saw ENGLISH, within a two month period, she stated he "looked plum evil and scared me." One time "he seemed possessed." She added that he was "a little paranoid" and "completely out of his mind the last two months before his death." She could provide no specific examples of this. At times he was "jumpy and jittery" and she heard him talking to himself the day that he came over with the radio. She restated that his behavior scared her.

When asked if she went by the name CARLY she stated that she did not but there is a girl named CARLY MCKINNEY in the area. She does not know a JOEL ROBINETTE.

She could provide no further information.

Investigative Report

Jerry Ryan Echols
Interview of Victim's Probation Officer- David Ashe
October 19, 2015
By Brian Luis Cid
Cid Investigations LLC

On October 19, 2015 writer contacted Probation Officer DAVID ASHE at his place of employment, Marion County Probation, 260 State Street, Marion, NC. After being advised of the identity of the interviewer and the fact that the interview was in regards to CHRISTOPHER WAYNE ENGLISH, ASHE provided the following information:

He supervised CHRISTOPHER WAYNE ENGLISH on post release supervision beginning in October of 2014. ENGLISH'S supervised release was due expire in July of 2015, approximately three weeks after his death.

While on probation ENGLISH had severe mental health issues and substance abuse problems. He was being seen at RHA Health Services Inc., located at 486 Spaulding Road, Marion 28752 for mental health issues and TASC, located at 40 South Main Street, Suite 130, Marion, NC, for drug addiction. Early in his supervision when he attended RHA and he was on his medication he was lucid and would laugh and joke with ASHE. After he started using meth he would miss half of his curfews and started testing positive on his drug tests. It is then that he was referred to TASC for drug abuse treatment.

ENGLISH was initially doing well under supervision and then began "spiraling out of control and using meth."

Violation for carrying a knife

On 5/28/15 ENGLISH reported to the Probation Office and was seen by Probation Officer Brady Williams. Williams searched ENGLISH and found that he was concealing a large knife blade on his person. ASHE described this knife blade as being 7 inches in length. At the time ENGLISH offered no explanation for having the knife. As a result of this his probation was violated. On possibly June 4 or 5th ENGLISH was in custody as a result of the violation. At the violation hearing, ENGLISH was "acting bizarre" and it was apparent to ASHE that ENGLISH had been off his psychotropic drugs.

ENGLISH'S probation was reinstated on approximately June 3, 2015, and it should be noted that ASHE was not certain in regards to the dates. The hearing officer decided that since ENGLISH only had a few weeks left in his supervision that it would be better to reinstate him and supervise him for the last few weeks of his period of probation and "try to keep him out of trouble." ENGLISH was to contact ASHE immediately after the hearing but failed to do so.

ASHE last saw ENGLISH on June 15, 2015. ASHE reprimanded him and also discussed the fact that ENGLISH was carrying a knife and had carried one into the probation office. ENGLISH told ASHE that "I always carry a knife."

Investigative Report

State v. Echols
Interview of CHRISTY LEIGH HOLLIFIELD BEAVER
September 25, 2018
By Brian Luis Cid
Cid Investigations LLC

On September 25, 2018 writer traveled to 49 Meadow Ridge Drive, Marion, NC to interview CHRISTY and GAVIN BEAVER (telephone 828-738-3511). Upon arrival at the residence writer noticed a "No Trespassing" sign on the entrance to the short driveway. Writer sounded his horn and a male exited the residence. This male was identified as GAVIN BEAVER and after being advised of the identity of the interviewer and the nature of the interview GAVIN gave writer permission to enter the property.

GAVIN advised that his mother, CHRISTY, was getting dressed and while waiting for her writer briefly interviewed GAVIN. Concerning prior criminal charges against CHRIS ENGLISH involving he and his mother he commented, "They got in a fight and he smacked my mom, he was acting real aggressive." He added that he knew CHRIS ENGLISH well and ENGLISH "was the closest thing that I had to a Dad." GAVIN then became very emotional and stated crying.

At that point CHRISTY exited the residence and after being advised of the identity of the interviewer and the fact that the interview concerned CHRIS ENGLISH, CHRISTY started crying. Her mother then exited the residence and asked her if she was alright and if she needed help. She replied that she did not. As the interview was beginning a friend, not identified, arrived at the residence and spoke to CHRISTY briefly and then entered the residence.

Writer was able to get CHRISTY to calm down and the interview proceeded both outside and inside the residence; with her mother present inside the residence. CHRISTY provided the following information:

They had attended school together and met in the 7th or 8th grade. She is currently 42 years old and she and CHRIS started going together when she was 30 years old. She and CHRIS were together for nine years. Her three children lived with them and one of his kids "on and off. " CHRIS was abusive and in relation to one of the charges mentioned she stated that "they wouldn't let me pursue it." One of the charges involved him assaulting her sons on Mother's Day. She later added that she didn't show up for court concerning this charge.

On April 6, 2013 CHRIS got angry and beat her with a fishing pole that he had broken, that was the first time that she saw him get violent. He was never violent when he was sober. When he was using methamphetamine he was violent. CHRIS had been using drugs in the past and was clean for 7 years. In 2013 he started using again. In 2013 around the time of her birthday she "went missing for 11 days" to get away from him.

When he was using drugs, as they both were using methamphetamine, he would become paranoid and controlling. He had to know what she was doing at all times. He wouldn't let her even have a shower curtain so he could see what she was doing in the shower. On one occasion he hid under the house for four hours to see what she was doing. He didn't think that she knew he was there.

CHRIS was smoking and injecting methamphetamine. He wanted her to show him how to inject methamphetamine because she was an intravenous user. He was "extremely paranoid when using" he would be up awake for a few days and then not remember what had happened.

She was "terrified of him" and while on probation she "activated" her sentence to get away from him. As a result she was in jail when he was killed. She was in jail on a 6-17 month sentence. She went to jail on March 3, 2015 and was released on June 25, 2015. CHRIS was killed on June 17, 2015.

Concerning ECHOLS' story of CHRIS barking like a dog on all fours and attacking him, she stated "that's very possible, I can see that happening." She believes that he was possibly bi-polar.

When told that CHRIS had gone to visit his probation officer at the probation office concealing a knife she stated, "This may have been on purpose so that he could get locked up."

CHRIS had a lot of issues: he was adopted and DOUG was his father and his mother was 13 when she had CHRIS. His brother was the favorite of the parents.

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.

STATE OF NORTH CAROLINA COUNTY OF BUNCOMBE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION FILE NOS. 15CRS90856; 16CRS148-149

STATE OF NORTH CAROLINA v. KELVIN OYAKHILOME IRABOR	**MOTION TO BAR WITNESS TESTIMONY**

NOW COMES the defendant, by and through his undersigned counsel, and moves the Court to bar the testimony of material witnesses due to documented acts of violent intimidation on the part of Brandy Perez and unnamed others in the days following this incident.

LEGAL ARGUMENT

1. This request for relief is based on the doctrine of forfeiture by wrongdoing.

> "Under the doctrine of forfeiture by wrongdoing, 'one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.'" *State v. Weathers*, 219 N.C. App. 522, 524, 724 S.E.2d 114, 116 (2012) (quoting *Davis v. Washington*, 547 U.S. 813, 833, 126 S. Ct. 2266, 165 L. Ed. 2d 224, 244 (2006)), *cert. denied*, 366 N.C. 596, 743 S.E.2d 203 (2013). Pursuant to this doctrine,
>
> > when defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they do have the duty to refrain from acting in ways that destroy the integrity of the criminal trial system. *Id.*
>
> Although North Carolina courts have applied this doctrine, they have not yet taken a position on the standard necessary to demonstrate forfeiture by wrongdoing. *Id.* at 525, 724 S.E.2d at 116. Here, the trial court held the government to the preponderance of the evidence standard. The preponderance of the evidence standard is generally applied by federal courts applying Rule 804(b)(6) of the Federal Rules of Evidence, and tends to also be applied by state courts assessing forfeiture by wrongdoing. *See Davis*, 547 U.S. at 833, 165 L. Ed. 2d at 244. In accord with these courts, we hold the trial court correctly determined that the State was required to establish forfeiture by wrongdoing pursuant to the preponderance of the evidence standard.
>
> *State v. Allen*, No. COA18-1159, 2019 N.C. App. LEXIS 454, at *14-15 (Ct. App. May 21, 2019)

2. The defendant understands that the doctrine in rooted in an examination of a defendant's wrongdoing that would trigger a forfeiture of the right of confrontation of adverse witnesses.

3. However, any similar private conduct that seeks to undermine the integrity of the criminal trial system insults due process and is no less harmful regardless of which side it may favor.

4. Baring the testimony of a witness who perpetrated overt acts of retaliation and intimidation is within the inherent authority of court under due process and is certainly no greater a sanction than the forfeiture of the right to confrontation.

5. Likewise baring the testimony of witnesses who were subject to retaliation and intimidation also comports with the interest of due process in that our system of justice cannot tolerate willful attempts to tamper with witnesses. A legal analog would be found in the fruit of the poisonous tree doctrine.

6. Furthermore, that subverting conduct does not need to exclusively take the form of conduct that would result in silencing the targeted witnesses. Given the strong public interest at stake, a substantial remedy should be provided upon a satisfactory showing that overt acts of intimidation were made against material witnesses.

BACKGROUND

1. The following background facts are taken from the Court of Appeals decision of this matter:

> In October 2015, defendant lived in apartment 14E in the Oak Knoll apartment complex in Asheville, along with his child, London, London's mother, Denise Williams ("Williams"), and Williams's sister, Shamica Robinson ("Robinson"). Sometimes Dondre Nelson ("Nelson"), who was a friend of one of Robinson's other sisters, stayed with them in apartment 14E.
>
> Defendant testified that he had known Nelson for some time and had befriended Nelson to avoid becoming a "target." According to defendant, Nelson was a high-ranking member of the Blood gang, which was highly active in the Oak Knoll area, and had frequently robbed individuals around the Oak Knoll apartments. Nelson had gained this status by killing a rival gang member in Atlanta, Georgia. Defendant also testified that he knew Nelson always carried a gun on his person, and Nelson had informed defendant that he had shot an individual for allegedly discharging a weapon into the Oak Knoll apartments. Since defendant knew Nelson's reputation, he had hoped his friendship with Nelson would ensure that he did not become a target of gang activity.
>
> On 9 October 2015, defendant rode with Nelson to an ABC store, where they met Jenna Ray ("Ray"), with whom Nelson apparently had a relationship. After defendant and Nelson returned to Oak Knoll, Ray also arrived. Williams was angry when she saw Ray and was prepared to attack her. When defendant stopped her from attacking Ray, Williams became angry with defendant. Williams's niece, Gelisa Madden ("Madden"), attempted to intervene, striking defendant, who struck her back.
>
> While defending himself from Madden, defendant released Williams, who went into apartment 14E and returned with a broomstick, with which she struck defendant.

Defendant responded by drawing a firearm and chasing Williams. While chasing her, he fired three shots. Williams fled into apartment 14E, and a neighbor called Nelson. One of defendant's shots allegedly struck the door of apartment 14E, where Nelson's daughter was staying at the time.

After chasing Williams, defendant left Oak Knoll for several hours. He called multiple people asking for a ride and eventually reached Nelson. Nelson was furious and refused to give him a ride. Defendant decided to walk back to Oak Knoll instead. When defendant returned to Oak Knoll, he saw Nelson and two others standing outside apartment 14E. Fearing what Nelson might do to him, defendant went to another apartment first, where he talked with Jerome Smith ("Smith"). Smith told defendant that Nelson was upset with defendant for firing a shot into apartment 14E, where Nelson's daughter was staying, and warned defendant to be careful. Defendant borrowed Smith's gun for protection.

After defendant left Smith's apartment, he walked along the sidewalk, heading back to apartment 14E. As defendant approached the apartment, Nelson called out to defendant and accused him of shooting at Nelson's daughter, which defendant denied. Nelson responded by telling defendant "this is war, empty your pocket," while advancing towards defendant. Fearing Nelson would attack and rob him, defendant pulled the gun out of his pocket, "racked it," and told Nelson to back up. Nelson continued to advance, and defendant fired two warning shots into the ground; however, Nelson remained undeterred. Nelson then lunged at defendant, and defendant fatally shot Nelson. Defendant then fled, dropping Smith's gun into the bushes.

Defendant was indicted for the first-degree murder of Nelson, assault on a female [and assault by pointing a gun] of Madden, assault with a deadly weapon with intent to kill of Williams, and discharging a firearm into an occupied dwelling. Trial commenced during the 23 January 2017 session of Buncombe County Superior Court. Following the State's presentation of evidence, defendant presented evidence, including his own testimony.

…

The jury returned verdicts finding defendant guilty of second-degree murder, assault with a deadly weapon, and discharging a firearm into an occupied dwelling, and not guilty of assault on a female. [Assault by pointing a gun was dismissed at the close of the state's evidence.] The trial court sentenced defendant to a minimum of 200 and a maximum of 252 months for second-degree murder, and a minimum of 55 and a maximum of 78 months for discharging a firearm and assault, to be served consecutively in the custody of the North Carolina Division of Adult Correction.

State v. Irabor, 822 S.E.2d 421, 422-23 (N.C. Ct. App. 2018). Attachment A.

See Attachment B for an illustrative map of the scene.

OVERT ACTS OF INTIMIDATION

1. In this matter, violent acts of overt intimidation were made by a material witness, **Brandy Perez,** and others directly against five other material witnesses: **Denise Williams**, **Shamica Robinson**, **Jerome Smith**, **Juaneisha Mills** and **Jenna Ray**.

2. The evidence supporting this allegation is identified and attached as follows:

   Attachment C: Asheville Police Department Incident Report 15-026537 involving the October 13, 2015 breaking and entering and ransacking of the apartment occupied by Juaneisha Mills and Jerome Smith.
   Attachment D: Asheville Police Department Incident Report 15-027051 involving the October 17, 2015 breaking and entering and ransacking of the apartment occupied by Shamica Robinson and Denise Williams.
   Attachment E: Asheville Police Department Incident Report 15-027058 involving the attempt to run Jenna Ray's car off the road and intentional damage inflicted on her car.

3. These overt acts of retaliation and intimidation not only should be presumed to have achieved their intended effect, they materially affected the witnesses.

   a. Ms. Mills and Mr. Smith immediately vacated their apartment following the incident. Reports were that they did not return for weeks. The

   b. Ms. Robinson, Ms. Williams witnessed the breaking and entry and the ransacking and they reported it immediately and identified Ms. Perez as the coordinator of it. Ms. Perez testified she was not present when this occurred.

   c. A little over an hour later, Ms. Ray reported being run off the road by Ms. Perez and Ms. Perez and others inflicting thousands of dollars in damage to her car and otherwise menacing her. Ms. Perez acknowledged inflicting the damage to Ms. Ray's car. She testified that she was unconcerned with Ms. Ray's reaction to it.

4. The overt acts of intimidation involving the apartment reansackings likely had a spillover effect on two other witnesses, **Ericca Garland** and **Eddie Floyd Haggins**, who lived in the adjacent 13 building at the time as they were carried out within days of the incident at the scene of the incident, drew considerable police attention and they were in view of the their residence.

   a. Ms. Garland recalled the break-in and the ransacking of Ms. Mills and Mr. Smith's apartment in a January 5, 2017, statement to the DA's office. She also said she was at work on that day from 3-11 pm in that statement. In the summary of an unrecorded interview with an investigator on October 21, 2015, 11 days after the incident and 8 days after the break-in, no mention is made as to whether she saw or was aware of the break-in. Otherwise, Ms. Garland's two prior statements and her testimony contain material inconsistencies.

b. Mr. Haggins materially changed his statements in this matter. In his first statement to law enforcement on November 13, 2015, when asked directly if he was present during the fatal incident Mr. Haggins said that he was not present at the scene. In a second statement given January 11, 2017, Mr. Haggins said he was present giving specific details of the interaction that were remarkably consistent with information given by Ms. Perez. He testified similarly at trial.

WHEREFORE, the Defendant respectfully requests

1. That the Court bar the testimony of the following witnesses:

    a. Brandy Perez
    b. Denise Williams
    c. Shamica Robinson
    d. Juaneisha Mills
    e. Jerome Smith
    f. Ericca Garland
    g. Eddie Floyd Haggins

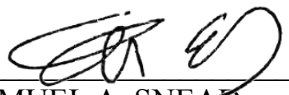
2. That Brandy Perez be barred from the courtroom during the entirety of this matter except as may be needed to find facts in furtherance of this motion.

3. That the Court sequester all the witnesses in this matter.

4. That the Court make formal inquiry into those individuals who acted in concert with Ms. Perez in these matters.

5. For such other relief deemed just and proper given the egregious conduct in this matter.

This the 28th day of June, 2019.



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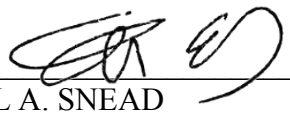
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served on the District Attorney's Office for Buncombe County, by leaving a copy at the office with an associate or employee.

This, the 28th day of June, 2019.



SAMUEL A. SNEAD
Assistant Capital Defender
Asheville, NC

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-243

Filed: 20 November 2018

Buncombe County, Nos. 15 CRS 090856, 16 CRS 000148-49

STATE OF NORTH CAROLINA

v.

KELVIN OYAKHILOME IRABOR

Appeal by defendant from judgments entered 2 February 2017 by Judge Robert T. Sumner in Buncombe County Superior Court. Heard in the Court of Appeals 3 October 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General James M. Stanley, Jr., for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Daniel Shatz, for defendant-appellant.

CALABRIA, Judge.

Kelvin Oyakhilome Irabor ("defendant") appeals from a judgment entered upon a jury's verdict finding him guilty of second-degree murder, assault with a deadly weapon, and discharging a firearm into an occupied dwelling. After careful review, we conclude that the trial court committed prejudicial error by failing to include the relevant no duty to retreat and stand-your-ground provisions from its jury instructions on self-defense. Therefore, we reverse the trial court's judgment and remand for a new trial.

I. Factual and Procedural Background

In October 2015, defendant lived in apartment 14E in the Oak Knoll apartment complex in Asheville, along with his child, London, London's mother, Denise Williams ("Williams"), and Williams's sister, Shamica Robinson ("Robinson"). Sometimes Dondre Nelson ("Nelson"), who was a friend of one of Robinson's other sisters, stayed with them in apartment 14E.

Defendant testified that he had known Nelson for some time and had befriended Nelson to avoid becoming a "target." According to defendant, Nelson was a high-ranking member of the Blood gang, which was highly active in the Oak Knoll area, and had frequently robbed individuals around the Oak Knoll apartments. Nelson had gained this status by killing a rival gang member in Atlanta, Georgia. Defendant also testified that he knew Nelson always carried a gun on his person, and Nelson had informed defendant that he had shot an individual for allegedly discharging a weapon into the Oak Knoll apartments. Since defendant knew Nelson's reputation, he had hoped his friendship with Nelson would ensure that he did not become a target of gang activity.

On 9 October 2015, defendant rode with Nelson to an ABC store, where they met Jenna Ray ("Ray"), with whom Nelson apparently had a relationship. After defendant and Nelson returned to Oak Knoll, Ray also arrived. Williams was angry when she saw Ray and was prepared to attack her. When defendant stopped her from attacking Ray, Williams became angry with defendant. Williams's niece, Gelisa

Madden ("Madden"), attempted to intervene, striking defendant, who struck her back.

While defending himself from Madden, defendant released Williams, who went into apartment 14E and returned with a broomstick, with which she struck defendant. Defendant responded by drawing a firearm and chasing Williams. While chasing her, he fired three shots. Williams fled into apartment 14E, and a neighbor called Nelson. One of defendant's shots allegedly struck the door of apartment 14E, where Nelson's daughter was staying at the time.

After chasing Williams, defendant left Oak Knoll for several hours. He called multiple people asking for a ride and eventually reached Nelson. Nelson was furious and refused to give him a ride. Defendant decided to walk back to Oak Knoll instead. When defendant returned to Oak Knoll, he saw Nelson and two others standing outside apartment 14E. Fearing what Nelson might do to him, defendant went to another apartment first, where he talked with Jerome Smith ("Smith"). Smith told defendant that Nelson was upset with defendant for firing a shot into apartment 14E, where Nelson's daughter was staying, and warned defendant to be careful. Defendant borrowed Smith's gun for protection.

After defendant left Smith's apartment, he walked along the sidewalk, heading back to apartment 14E. As defendant approached the apartment, Nelson called out to defendant and accused him of shooting at Nelson's daughter, which defendant

denied. Nelson responded by telling defendant "this is war, empty your pocket," while advancing towards defendant. Fearing Nelson would attack and rob him, defendant pulled the gun out of his pocket, "racked it," and told Nelson to back up. Nelson continued to advance, and defendant fired two warning shots into the ground; however, Nelson remained undeterred. Nelson then lunged at defendant, and defendant fatally shot Nelson. Defendant then fled, dropping Smith's gun into the bushes.

Defendant was indicted for the first-degree murder of Nelson, assault on a female of Madden, assault with a deadly weapon with intent to kill of Williams, and discharging a firearm into an occupied dwelling. Trial commenced during the 23 January 2017 session of Buncombe County Superior Court. Following the State's presentation of evidence, defendant presented evidence, including his own testimony.

At the charge conference, the trial court agreed to deliver N.C.P.I.–Crim. 206.10, the pattern jury instruction on first-degree murder and lesser-included offenses. This instruction includes instructions on self-defense and a "no duty to retreat" provision as part of the explanation of self-defense. *See* N.C.P.I.–Crim. 206.10 (June 2014) (providing that a "defendant has no duty to retreat in a place where the defendant has a lawful right to be"). N.C.P.I.–Crim. 206.10 also incorporates by reference a "stand-your-ground" provision found in N.C.P.I.–Crim. 308.10. *See id.* 308.10 (June 2017) (providing that "[i]f the defendant was not the

aggressor and the defendant was . . . [at a place the defendant had a lawful right to be], the defendant could stand the defendant's ground and repel force with force") (second set of brackets in original).

Although the trial court agreed to instruct the jury on self-defense according to N.C.P.I.–Crim. 206.10, it ultimately omitted the "no duty to retreat" language from its actual instructions without prior notice to the parties and failed to give any part of the "stand-your-ground" instruction. Defense counsel failed to object to the instructions as given.

The jury returned verdicts finding defendant guilty of second-degree murder, assault with a deadly weapon, and discharging a firearm into an occupied dwelling, and not guilty of assault on a female. The trial court sentenced defendant to a minimum of 200 and a maximum of 252 months for second-degree murder, and a minimum of 55 and a maximum of 78 months for discharging a firearm and assault, to be served consecutively in the custody of the North Carolina Division of Adult Correction.

Defendant appeals.

II. Self-Defense Instruction

Defendant contends the trial court erroneously omitted the relevant no duty to retreat and stand-your-ground provisions from the jury instructions on self-defense, which constituted reversible error. We agree.

A. Standard of Review

"It is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence." *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988) (citation omitted). "A defendant is entitled to a jury instruction on self-defense when there is evidence from which the jury could infer that he acted in self-defense." *State v. Allred*, 129 N.C. App. 232, 235, 498 S.E.2d 204, 206 (1998) (citation omitted). "In determining whether an instruction on . . . self-defense must be given, the evidence is to be viewed in the light most favorable to the defendant." *State v. Moore*, 363 N.C. 793, 796, 688 S.E.2d 447, 449 (2010) (citation omitted). Whether the trial court erred in instructing the jury is a question of law, reviewed *de novo*. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009).

B. Analysis

Self-defense is an affirmative defense, whereby "the defendant says, 'I did the act charged in the indictment, but I should not be found guilty of the crime charged because * * * .' " *State v. Caddell*, 287 N.C. 266, 289, 215 S.E.2d 348, 363 (1975). Our amended "statutes provide two circumstances in which individuals are justified in using deadly force, thus excusing them from criminal culpability." *State v. Lee*, 370 N.C. 671, 674, 811 S.E.2d 563, 566 (2018). N.C. Gen. Stat. § 14-51.3(a) states, in relevant part:

> 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 . . . 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.

N.C. Gen. Stat. § 14-51.3(a) (2017) (emphasis added).

On appeal, the State contends that defendant was not entitled to an instruction on self-defense for several reasons. First, the State asserts defendant failed to present sufficient evidence to support defendant's actual and reasonable belief that shooting Nelson was necessary to protect himself from imminent death or great bodily harm. Second, the State argues since defendant was the initial aggressor, he lost the protections of the self-defense statute. Therefore, according to the State, the trial court was not required to instruct the jury on self-defense and any error in the self-defense instruction was harmless. We disagree.

Viewed in the light most favorable to defendant, the evidence supports a jury instruction on self-defense, and the trial court agreed to give it. Defendant was fully aware of Nelson's violent and dangerous propensities on the night of the shooting. According to defendant's testimony, Nelson had achieved his high-ranking membership in the Blood gang by killing a rival gang member. In addition, Nelson stated that he shot an individual who he believed had shot into the Oak Knoll

apartments. Furthermore, defendant observed Nelson robbing individuals in the apartments on multiple occasions and testified that, to his knowledge, Nelson always carried a gun with him.

Defendant's knowledge of Nelson's violent propensities, being armed, and prior acts supports the trial court's finding that defendant reasonably believed it was necessary to use deadly force to save himself from death or great bodily harm. *See State v. Strickland*, 346 N.C. 443, 459, 448 S.E.2d 194, 203 (1997) ("[E]vidence of prior violent acts by the victim or of the victim's reputation for violence may . . . prove that a defendant had a reasonable apprehension of fear of the victim." (citation omitted)); *see also* N.C. Gen. Stat. § 14-51.3(a).

Prior to the shooting, defendant offered evidence that Nelson stood outside Apartment 14E, where defendant lived, with two other individuals and was waiting to confront defendant about allegedly shooting a gun towards Nelson's daughter. Defendant also testified he borrowed a gun from Smith for protection. When Nelson noticed defendant walking towards his apartment, Nelson told defendant "this is war, empty your pocket"; continued to advance upon defendant after defendant fired two warning shots; and eventually lunged at defendant while reaching behind his back towards his waistband.

By viewing the evidence in the light most favorable to defendant, a jury could conclude that defendant actually and reasonably believed that Nelson was about to

shoot him and that it was necessary for defendant to use deadly force to protect himself. The fact that defendant armed himself and did not affirmatively avoid the altercation does not make defendant the initial aggressor. *See State v. Vaughn*, 227 N.C. App. 198, 204, 742 S.E.2d 276, 279-80 (2013). Further, defendant's earlier conduct towards Williams does not make him an aggressor against Nelson.

When law enforcement officers searched Nelson's body, they did not find a gun. However, evidence presented at trial, when viewed in the light most favorable to defendant, suggested that Nelson may have been armed. Law enforcement officers testified that neither Nelson's wallet or cell phone were found on his person. Yet, Nelson had used his cell phone earlier that evening, and a receipt from Walmart was found in Nelson's pocket. Witnesses also reported seeing an unidentified female fleeing the area that night with a gun.

From this evidence, a jury could reasonably infer that defendant reasonably believed Nelson was armed at the time of the altercation. Therefore, defendant was still entitled to protect himself if he reasonably believed Nelson was armed and intended to inflict death or serious bodily injury on defendant. *See State v. Spaulding*, 298 N.C. 149, 157, 257 S.E.2d 391, 396 (1979) (noting that "an action by the victim as if to reach for a weapon was sufficient to justify an instruction on self-defense" (citation omitted)).

The State further contends that defendant's testimony was inconsistent and, thus, insufficient. However, "if the defendant's evidence, taken as true, is sufficient to support an instruction for self-defense, it must be given *even though the State's evidence is contradictory*." *Moore*, 363 N.C. at 796, 688 S.E.2d at 449 (emphasis added) (citation omitted); *see also State v. Dooley*, 285 N.C. 158, 163, 203 S.E.2d 815, 818 (1974) ("Where there is evidence that defendant acted in self-defense, the court must charge on this aspect even though there is contradictory evidence by the State or [there are] discrepancies in defendant's evidence." (citations omitted)). Because the evidence, when viewed in the light most favorable to defendant, supports an instruction on self-defense, the trial court correctly gave the self-defense instruction under N.C.P.I.–Crim. 206.10. *See Allred*, 129 N.C. App. at 235, 498 S.E.2d at 206.

However, the trial court erred by failing to include the relevant no duty to retreat and stand-your-ground provisions after agreeing to provide the instructions. We initially note that this issue is preserved for appellate review. *See Lee*, 370 N.C. at 676, 811 S.E.2d at 567 ("When a trial court agrees to give a requested pattern instruction, an erroneous deviation from that instruction is preserved for appellate review without further request or objection."). Here, the trial court agreed to give the pattern jury instruction under N.C.P.I.–Crim. 206.10, which includes the relevant no duty to retreat and stand-your-ground provisions; however, the trial court failed to

include these provisions in its charge to the jury. Therefore, pursuant to *Lee*, this issue is preserved. *See id.*

Our Supreme Court recently affirmed that "a defendant entitled to *any* self-defense instruction is entitled to a *complete* self-defense instruction, which includes the relevant stand-your-ground provision." *State v. Bass*, ___ N.C. ___, ___, ___ S.E.2d ___, ___ (Oct. 26, 2018) (No. 208A17) (emphasis in original). Failure to include the relevant stand-your-ground provision constitutes prejudicial error and warrants a new trial. *Lee*, 370 N.C. at 671-72, 811 S.E.2d at 564 (holding the omission of the stand-your-ground provision amounted to an "inaccurate and misleading statement of the law[,]" requiring a new trial). Defendant is entitled to a new trial with proper jury instructions.

III. Conclusion

The trial court committed prejudicial error by failing to include the relevant no duty to retreat and stand-your-ground provisions in the agree-upon jury instructions on self-defense. Therefore, we reverse the judgment of the trial court and remand for a new trial. *See id.* Because we have reversed and remanded for a new trial, we need not address defendant's remaining arguments on appeal.

NEW TRIAL.

Judges TYSON and ZACHARY concur.

Attachment B

Imagery ©2019 Google, Map data ©2019 10 ft

INCIDENT/INVESTIGATION REPORT

Attachment C

INCIDENT DATA

Agency Name	ASHEVILLE POLICE DEPARTMENT
ORI	NC 0110100
OCA	15-026537
Date / Time Reported (Month Day Yr Time)	10 | 13 | 2015 | 09:38 Hrs.

	Crime Incident(s)	Att/Com	At Found (Month Day Yr Time)	Last Known Secure (Month Day Yr Time)
#1	Breaking Or Entering - Misdemeanor - Residence -	☐ Att ☒ Com	10 | 13 | 2015 | 09:38 Hrs.	10 | 13 | 2015 | 09:38 Hrs.
#2	Crime Incident	☐ Att ☐ Com	Location of Incident: 15 Future Dr, Asheville NC 28803	Offense Tract: APD
#3	Crime Incident	☐ Att ☐ Com	Premise Type: HOME OF VICTIM - OTHER	Victim Residence Type: ☐Single Family ☒Multi Family

MO

How Attacked or Committed	Forcible	Weapon / Tools
	☐Yes ☐N/A ☐No	Unknown/not Stated

VICTIM

# of Victims	Type	Injury	Drug/Alcohol Use:
1	☒Person ☐Business ☐Society ☐Government ☐Financial Institute ☐Religious ☐L.E. Officer Line of Duty ☐Other/Unknown	☒None ☐Minor ☐Loss of Teeth ☐Broken Bones ☐Severe Lacerations ☐Internal ☐Unconscious ☐Other Major	☐Yes ☐Unknown ☒No ☐N/A

	Victim/Business Name (Last, First, Middle)	Victim of Crime #	DOB / Age	Race	Sex	Relationship To Offender	Resident Status
V1	MILLS, JUANEISHA LESEAN	1,	11/19/1993	B	F	ST	☐Resident ☒Non-Resident ☐Unknown

Home Address	Home Phone
15 FUTURE DR - 15F, Asheville, NC 28803	828-974-6731

Employer Name/Address	Business Phone	Mobile Phone
WENDYS ASHEVILLE,NC	828- -	828-702-5131

VYR	Make	Model	Style	Color	Lic/Lis	VIN

OTHERS INVOLVED

CODES: V- Victim (Denote V2, V3) O = Owner (if other than victim) R = Reporting Person (if other than victim)

Type: ☐Person ☐Business ☐Society ☐Government ☐Financial Institute ☐Religious ☐L.E. Officer Line of Duty ☐Other/Unknown

Code	Name (Last, First, Middle)	Victim of Crime #	DOB / Age	Race	Sex

Home Address	Home Phone

Employer Name/Address	Business Phone	Mobile Phone

Type: ☐Person ☐Business ☐Society ☐Government ☐Financial Institute ☐Religious ☐L.E. Officer Line of Duty ☐Other/Unknown

Code	Name (Last, First, Middle)	Victim of Crime #	DOB / Age	Race	Sex

Home Address	Home Phone

Employer Name/Address	Business Phone	Mobile Phone

PROPERTY

Status Codes L = Lost S = Stolen R = Recovered D = Damaged Z = Seized B = Burned C = Counterfeit / Forged F = Found
(Check "OJ" column if recovered for other jurisdiction)

Victim #	DCI	Status	Value	OJ	QTY	Property Description	Make/Model	Serial Number
1	34	S	$400.00		1	TV	RCA	4509LE55C55C114794
1	34	S	$400.00		1	TV	TOSHIBA	9E3S0AAR079R1542
1	34	S	$200.00		1	PS3	SONY	

Number of Vehicles Stolen 0 Number Vehicles Recovered 0 Total Stolen Value: $1,000.00

ID

Officer ID#	Officer Signature	Supervisor Signature
CHANCEY, B. R. (PATR, AES) (A2480)		HAWKINS, J. L. (ADMN) (A2141)

Status

Complainant Signature	Case Status	Case Disposition:
	☐Further Investigation ☒Inactive ☐Closed/Cleared ☐Closed/Leads Exhausted	☐Unfounded ☐Located ☐Extradition Declined ☐Cleared by Arrest ☐Refuse to Cooperate ☐Cleared by Arrest by Another Agency ☐Death of Offender ☐Prosecution Declined

r_cslnc DCI-600F

INCIDENT/INVESTIGATION REPORT

Asheville Police Department

OCA
15-026537

Status Codes L = Lost S = Stolen R = Recovered D = Damaged Z = Seized B = Burned C = Counterfeit / Forged F = Found

DRUGS

DCI	Status	Quantity	Type Measure	Suspected Type	Check up to 3 types of activity for each: Possess	Buy	Sale	Mfg	Importing	Operating

OFFENDER

Offender Used
Alcohol/Drugs ☐ Yes ☐ Unk ☐ No ☒ N/A
Computer ☐ Yes ☐ Unk ☐ No ☒ N/A

Offender 1 Age: Race: Sex:

Offender 2 Age: Race: Sex:

Offender 3 Age: Race: Sex:

Offender 4 Age: Race: Sex:

Offender 5 Age: Race: Sex:

Offender 6 Age: Race: Sex:

Primary Offender Resident Status
☐ Resident
☐ Non-Resident
☐ Unknown

SUSPECT

Name (Last, First, Middle) | Also Known As | Home Address

Occupation | Business Address

DOB. / Age	Race	Sex	Hgt	Wgt	Build	Hair Color	Hair Style	Hair Length	Eye Color	Glasses

Scars, Marks, Tattoos, or other distinguishing features (i.e. limp, foreign accent, voice characteristics)

Hat	Jacket	Shirt/Blouse	Tie/Scarf	Coat/Suit	Pants/Dress/Skirt	Socks	Shoes

Was Suspect Armed? | Type of Weapon | Direction of Travel | Mode of Travel

VYR	Make	Model	Style	Color	Lic/Lis	VIN

WITNESS

Name (Last, First, Middle) | D.O.B. | Age | Race | Sex | Mobile Phone

Home Address | Home Phone | Employer | Phone

Suspect Hate / Bias Motivated: ☐ Yes ☒ No *Unknown (Offender's motivation not known)*

NARRATIVE

APD responded to 15 Future drive in reference to a breaking or entering.

On 10/13/2015 I, Officer Chancey, was dispatched to 15 Future Dr apartment 15F in reference to a breaking or entering.

When I arrived I met the complainant and renter of the apartment, Juaneisha Mills. She had not been home since 10/11/15 and when she and I arrived, her door was unlocked. I cleared the apartment and found no one inside. It appeared that someone had entered the apartment and ransacked it. Furniture was flipped over, food was spilled, and clothes littered the floor.

Mills stated that she left her apartment on 10/10/15 and came back on 10/11/15 to gather some belongings. She stated that she left and locked the door. Yesterday, 10/12/15, at 1830 she got a text from Jerome Smith, her baby's father, which stated that he heard from his sister that someone had broken into her apartment and stolen the TV.

Mills stated that no one else lives there and no one else has a key. No signs of forced entry were observed.

I called dispatch to have forensics come out for photos. Forensic Tech Scholtz arrived and took photos of the apartment.

I gave Mills the report number and informed her that I would be doing a report.

Incident Report Related Property List

Asheville Police Department

OCA: *15-026537*

1

Property Description	Make	Model	Caliber
TV	*RCA*		

Color	Serial No.	Value	Qty	Unit	Jurisdiction
	4509LE55C55C114794	*$400.00*	*1.000*		*Locally*

Status	Date	NIC #	State #	Local #	OAN
Stolen	*10/13/2015*				

Name (Last, First, Middle)	DOB	Age	Race	Sex
Mills, Juaneisha Lesean	*11/19/1993*	*21*	*B*	*F*

Notes

2

Property Description	Make	Model	Caliber
TV	*TOSHIBA*		

Color	Serial No.	Value	Qty	Unit	Jurisdiction
	9E3S0AAR079R1542	*$400.00*	*1.000*		*Locally*

Status	Date	NIC #	State #	Local #	OAN
Stolen	*10/13/2015*				

Name (Last, First, Middle)	DOB	Age	Race	Sex
Mills, Juaneisha Lesean	*11/19/1993*	*21*	*B*	*F*

Notes

3

Property Description	Make	Model	Caliber
PS3	*SONY*		

Color	Serial No.	Value	Qty	Unit	Jurisdiction
		$200.00	*1.000*		*Locally*

Status	Date	NIC #	State #	Local #	OAN
Stolen	*10/13/2015*				

Name (Last, First, Middle)	DOB	Age	Race	Sex
Mills, Juaneisha Lesean	*11/19/1993*	*21*	*B*	*F*

Notes

CASE SUPPLEMENTAL REPORT

Printed: 01/18/2017 09:46

Asheville Police Department OCA: ***15026537***

THE INFORMATION BELOW IS CONFIDENTIAL - FOR USE BY AUTHORIZED PERSONNEL ONLY

Case Status: *INACTIVE* **Case Mng Status:** *INACTIVE - NCIC STOLEN* **Occurred:** *10/13/2015*

Offense: *BREAKING OR ENTERING - MISDEMEANOR - RESIDENCE - NO FORCE*

Investigator: *CHANCEY, B. R. (A2480)* **Date / Time:** *10/13/2015 11:57:15, Tuesday*

Supervisor: *AARDEMA, S. T. (A2139)* **Supervisor Review Date / Time:** *10/13/2015 16:26:58, Tuesday*

Contact: **Reference:** *Investigative Follow-up*

Contacted dispatch to have the two TVs put into NCIC.

Investigator Signature Supervisor Signature

Asheville Police Department OCA: ***15026537***

THE INFORMATION BELOW IS CONFIDENTIAL - FOR USE BY AUTHORIZED PERSONNEL ONLY

Case Status: *INACTIVE* **Case Mng Status:** *INACTIVE - NCIC STOLEN* **Occurred:** *10/13/2015*

Offense: *BREAKING OR ENTERING - MISDEMEANOR - RESIDENCE - NO FORCE*

Investigator: *SCHOLTZ, M. R. (A1144)* **Date / Time:** *10/13/2015 14:44:11, Tuesday*

Supervisor: *BROWN, J. D. (A2177)* **Supervisor Review Date / Time:** *10/13/2015 15:22:12, Tuesday*

Contact: **Reference:** *Forensic Report*

Arrived 1030
Cleared 1040

On 10/13/15 FST Scholtz responded to 15 Future Dr., Apt. 15F, reference a residential B&E. It was advised that it was unknown as to how entry was gained but that it was possible the front door was left unlocked. Most of the entire residence was ransacked to include overturned furniture and displaced clothing. Nothing was believed to have been removed from the residence.

Photos: 13 (SD card 069, frames 449-461)
views of residence and damage [10/13/2015 14:48, SCHOLTZM, 2523, APD]

Investigator Signature Supervisor Signature

Asheville Police Department OCA: ***15026537***

THE INFORMATION BELOW IS CONFIDENTIAL - FOR USE BY AUTHORIZED PERSONNEL ONLY

Case Status: *INACTIVE* **Case Mng Status:** *INACTIVE - NCIC STOLEN* **Occurred:** *10/13/2015*

Offense: *BREAKING OR ENTERING - MISDEMEANOR - RESIDENCE - NO FORCE*

Investigator: *GREEN, M. S. (A1283)* **Date / Time:** *10/15/2015 16:03:28, Thursday*

Supervisor: *SILBERMAN, J. E. (A2194)* **Supervisor Review Date / Time:** *10/15/2015 16:40:29, Thursday*

Contact: **Reference:** *Investigative Follow-up*

On 10/15/15, Victim Services Volunteer Hailey Shade attempted a follow-up call to Juaneisha Mills at #(828)974-6731 and #(828)702-5131. The first number attempted was no longer a working number. Ms. Mills did not answer at the second number attempted and a voicemail was left with VSU contact information. [10/15/2015 16:03, GREENM, 8780, APD]

Investigator Signature Supervisor Signature

Date: 10/13/2015 Time: 14:58

Officer:	1144:	Case Report #:
MARK SCHOLTZ	1144	15-026537

Copied the following 13 images:

J:\DCIM\100D3200\DSC_0449.JPG to H:\Crime 2015\05\15-026537\15-026537-001.JPG
J:\DCIM\100D3200\DSC_0450.JPG to H:\Crime 2015\05\15-026537\15-026537-002.JPG
J:\DCIM\100D3200\DSC_0451.JPG to H:\Crime 2015\05\15-026537\15-026537-003.JPG
J:\DCIM\100D3200\DSC_0452.JPG to H:\Crime 2015\05\15-026537\15-026537-004.JPG
J:\DCIM\100D3200\DSC_0453.JPG to H:\Crime 2015\05\15-026537\15-026537-005.JPG
J:\DCIM\100D3200\DSC_0454.JPG to H:\Crime 2015\05\15-026537\15-026537-006.JPG
J:\DCIM\100D3200\DSC_0455.JPG to H:\Crime 2015\05\15-026537\15-026537-007.JPG
J:\DCIM\100D3200\DSC_0456.JPG to H:\Crime 2015\05\15-026537\15-026537-008.JPG
J:\DCIM\100D3200\DSC_0457.JPG to H:\Crime 2015\05\15-026537\15-026537-009.JPG
J:\DCIM\100D3200\DSC_0458.JPG to H:\Crime 2015\05\15-026537\15-026537-010.JPG
J:\DCIM\100D3200\DSC_0459.JPG to H:\Crime 2015\05\15-026537\15-026537-011.JPG
J:\DCIM\100D3200\DSC_0460.JPG to H:\Crime 2015\05\15-026537\15-026537-012.JPG
J:\DCIM\100D3200\DSC_0461.JPG to H:\Crime 2015\05\15-026537\15-026537-013.JPG

Sign Here _____

05 10/13/15

15 Future Dr. 15F 15-026537

A 1030 Juaneisha Mills

C. 1046 Entry was gained through unknown area.

Furniture was flipped over and clothing was strewn throughout residence → nothing taken.

449-461

Stephen Coon

From: Lynn Aly
Sent: Wednesday, January 18, 2017 9:01 AM
To: Stephen Coon; Forensics
Subject: RE: Pictures

Done

Steve, I put the photo CD in a yellow envelope in the outbox on our door for you

Lynn

From: Stephen Coon
Sent: Wednesday, January 18, 2017 8:52 AM
To: Forensics
Subject: Pictures

Can I get the pictures for case number 15-026537.

Thank you,

Detective Steve Coon
Asheville Police Department
Major Case Investigations
828-271-6135
828-777-1176 (Cell)
828-350-0109 (Fax)
scoon@ashevillenc.gov

From: Mark Scholtz
To: Stephen Coon
Subject: RE: Pictures Case Number 15-026303
Date: Tuesday, November 24, 2015 4:42:55 PM

These are ready.

From: Stephen Coon
Sent: Tuesday, November 24, 2015 4:27 PM
To: Forensics
Subject: Pictures Case Number 15-026303

Can I get pictures 001-008 submitted by Lynn and 102-123 submitted by Mark. It looks like I already have 001-101 submitted by Nicole and Leigh. If you will get the disk ready I will pick it up.

Thank you,

Detective Steve Coon
Asheville Police Department
Major Case Investigations
828-271-6135
828-777-1176 (Cell)
828-350-0109 (Fax)
scoon@ashevillenc.gov

15-026537 - 13 pictures


Pizza Hut
GREAT PIZZA
ARE BUILT ON
GREAT CRUSTS
Thank You for Your Business
Payment Due
Amount Enclosed
Final Notice


PORT AUTHORITY


Walgreens
Walgreens
FREE
$14.99


BURGER KING


WARNING
MAKE SURE LOCKS ARE ENGAGED AND WORKING PROPERLY BEFORE ALLOWING CHILD TO
AMISE EN GARDE
ADVERTENCIA


twinkle, twinkle little star...
how I wonder what

INCIDENT/INVESTIGATION REPORT

Attachment D

INCIDENT DATA

Agency Name	ASHEVILLE POLICE DEPARTMENT
ORI	NC 0110100
OCA	15-027051
Date / Time Reported (Month Day Yr Time)	10 | 17 | 2015 | 16:52 Hrs.

	Crime Incident(s)	Att/Com	At Found (Month Day Yr Time)	Last Known Secure (Month Day Yr Time)
#1	Breaking Or Entering - Felony - Residence - With	☐ Att ☒ Com	10 | 17 | 2015 | 16:52 Hrs.	10 | 17 | 2015 | 16:52 Hrs.
#2	Crime Incident	☐ Att ☐ Com	Location of Incident: 15 Future Dr Apt. 14E, Asheville NC 28803	Offense Tract: APD
#3	Crime Incident	☐ Att ☐ Com	Premise Type: HOME OF VICTIM - OTHER	Victim Residence Type: ☐Single Family ☒Multi Family

MO

How Attacked or Committed	Forcible	Weapon / Tools
Weapon/Handgun, Gang Firearms/Pistol, Firearm Feature/Automatic, Firearm	☒ Yes ☐ No ☐ N/A	Handgun

VICTIM

# of Victims	Type	Injury	Drug/Alcohol Use:
2	☒ Person ☐ Business ☐ Society ☐ Government ☐ Financial Institute ☐ Religious ☐ L.E. Officer Line of Duty ☐ Other/Unknown	☒ None ☐ Minor ☐ Loss of Teeth ☐ Broken Bones ☐ Severe Lacerations ☐ Internal ☐ Unconscious ☐ Other Major	☐ Yes ☐ Unknown ☒ No ☐ N/A

	Victim/Business Name (Last, First, Middle)	Victim of Crime #	DOB / Age	Race	Sex	Relationship To Offender	Resident Status
V1	ROBINSON, SHAMICA DOMINIQUE	1,	09/04/1992 23	B	F	OK	☒ Resident ☐ Non-Resident ☐ Unknown

Home Address	Home Phone
546 CARIBOU RD , Asheville, NC 28803	

Employer Name/Address	Business Phone	Mobile Phone
RHA ASHEVILLE, NC		828-747-0397

VYR	Make	Model	Style	Color	Lic/Lis	VIN

OTHERS INVOLVED

CODES: V- Victim (Denote V2, V3) O = Owner (if other than victim) R = Reporting Person (if other than victim)

Type: ☒Person ☐Business ☐Society ☐Government ☐Financial Institute ☐Religious ☐L.E. Officer Line of Duty ☐Other/Unknown

Code	Name (Last, First, Middle)	Victim of Crime #	DOB / Age	Race	Sex
VI 2	WILLIAMS, DENISE NICOLE	1,	09/27/1991 24	B	F

Home Address	Home Phone
15 Future Dr - Apt 14e Asheville, NC 28803	828-582-8741

Employer Name/Address	Business Phone	Mobile Phone
Unemployed	828- -	828-777-3275

Type: ☒Person ☐Business ☐Society ☐Government ☐Financial Institute ☐Religious ☐L.E. Officer Line of Duty ☐Other/Unknown

Code	Name (Last, First, Middle)	Victim of Crime #	DOB / Age	Race	Sex
IO	PEREZ, BRANDY ALEASHEA		10/30/1997 17	B	F

Home Address	Home Phone
120 Baity Dr Asheville, NC 28806	828-280-6654

Employer Name/Address	Business Phone	Mobile Phone
Kfc, Fairview Rd,asheville,nc	828- -	828-242-0330

PROPERTY

Status Codes L = Lost S = Stolen R = Recovered D = Damaged Z = Seized B = Burned C = Counterfeit / Forged F = Found
(Check "OJ" column if recovered for other jurisdiction)

Victim #	DCI	Status	Value	OJ	QTY	Property Description	Make/Model	Serial Number
1	72	D	$300.00		1	WALL		
1	77	D	$100.00		1	INTERIOR DOOR		
1	72	D	$50.00		1	EXTERIOR DOOR		
2	34	S	$550.00		1	XBOX ONE	MICROSOFR/Xbox	
2	34	S	$50.00		1	VIDEO GAME		
2	34	S	$50.00		1	VIDEO GAME		
2	34	S	$400.00		1	TV	VISIO	
2	64	S	$10.00		1	WIC CARD/VOUCHER		

Number of Vehicles Stolen 0 Number Vehicles Recovered 0 Total Stolen Value: $1,060.00

ID

Officer / ID#	Officer Signature	Supervisor Signature
COLLINS, J. D. (PATR, AES) (A2370)		CRISP, R. R. (PATR, AES) (A2223)

Status

Complainant Signature	Case Status	Case Disposition
	☐ Further Investigation ☐ Inactive ☒ Closed/Cleared ☐ Closed/Leads Exhausted	☐ Unfounded ☐ Located ☐ Extradition Declined ☐ Cleared by Arrest ☒ Refuse to Cooperate ☐ Cleared by Arrest by Another Agency ☐ Death of Offender ☐ Prosecution Declined

r_cs1nc DCI-600F

INCIDENT/INVESTIGATION REPORT

Asheville Police Department

OCA: *15-027051*

Status Codes L = Lost S = Stolen R = Recovered D = Damaged Z = Seized B = Burned C = Counterfeit / Forged F = Found

DRUGS

DCI	Status	Quantity	Type Measure	Suspected Type	Check up to 3 types of activity for each: Possess	Buy	Sale	Mfg	Importing	Operating

OFFENDER

Offender Used
Alcohol/Drugs ☐ Yes ☐ Unk ☐ No ☒ N/A
Computer ☐ Yes ☐ Unk ☐ No ☒ N/A

Offender 1 Age: Race: Sex:

Offender 2 Age: Race: Sex:

Offender 3 Age: Race: Sex:

Primary Offender Resident Status ☐ Resident ☐ Non-Resident ☐ Unknown

Offender 4 Age: Race: Sex:

Offender 5 Age: Race: Sex:

Offender 6 Age: Race: Sex:

SUSPECT

Name (Last, First, Middle)	Also Known As	Home Address
Occupation	Business Address	

DOB. / Age	Race	Sex	Hgt	Wgt	Build	Hair Color	Hair Style	Hair Length	Eye Color	Glasses

Scars, Marks, Tattoos, or other distinguishing features (i.e. limp, foreign accent, voice characteristics)

Hat	Jacket	Shirt/Blouse	Tie/Scarf	Coat/Suit	Pants/Dress/Skirt	Socks	Shoes

Was Suspect Armed?	Type of Weapon	Direction of Travel	Mode of Travel

VYR	Make	Model	Style	Color	Lic/Lis	VIN

WITNESS

Name (Last, First, Middle)	D.O.B.	Age	Race	Sex	Mobile Phone

Home Address	Home Phone	Employer	Phone

Suspect Hate / Bias Motivated: ☐ Yes ☒ No *None*

NARRATIVE

On 10-17-15 a disturbance was reported.

On 10-17-15 the victims Shamica Robinson and Denise Williams contacted the Asheville Police Department regarding individuals outside of their apartment in Ledgewood Village located at 15 Future Dr. The victims advised that several people were dropped of by Brandy Perez who then left the scene. These individuals began to yell outside of the building creating a disturbance attempting to get both Robinson and Williams to come outside. Robinson and Williams remained inside with their front door locked.

Several members attempted to break in the front door with bodily force after being unable to get the victims to come outside of the residence. The suspects were unable to gain entry through the front door but left several dents and damaged the dead bolt lock. The suspects then went to the rear of the apartment and located a sliding glass door to the apartment which was unlocked. Williams and Robinson watched as multiple people entered the residence including several black males with red bandannas around their hand one of which was brandishing a black semi automatic handgun. Williams and Robinson retreated to an upstairs bedroom where they barricaded the door. The assailants followed the victims up the stairs and attempted to kick in the bedroom door where Williams and Robinson were hiding. While trying to kick the door in they also damaged a wall at the top of the stairs. Several suspects remained downstairs ransacking it, and taking several items. The suspects then fled through the backdoor prior to officers arriving.

Responding officers encountered a large crowd upon arrival and due to the number of suspects and lack of description were unable to stop anyone involved. Once the crowd was dispersed I SPO Collins made contact with the victims inside the residence. Williams advised me that the event stemmed from the murder of their friend Dondre Nelson at their apartment on 10-10-15. Williams advised that family members of Nelson along with Nelsons former gang associates are upset with Robinson and herself for not being able to stop him from dying. A television and Xbox One that was taken from the residence originally belonged to the deceased. Williams advised she was warned by someone earlier in the week on Facebook by an individual whose name on the website was listed as "Huckaboo Skoob" that she should not be in the "Oak" refering to Oak Knoll an old name for Ledgewood Village on Saturday at all, and that "Dre" referring to Dondre Nelson would want her to know that.

Williams could not advise the names of many of the suspects but advised that they were "Bloods" gang members. When questioned on this she advised that they operated out of Woodridge Apartments located at 61 Bingham Heights. Williams also advised that APD had arrested a "Dmoney" from a residence in Woodridge earlier in the week where several of the members were present. I was familiar with the arrest of a wanted subject Darius Royal from the Woodridge Apartment Complex who is a member of a hybrid street gang known as Waveii/8B2. I believe that several of the suspects are members of 8B2. She identified one member as having a Facebook name of Scoob Laguines, but could not advise a real name. This individual has since changed names on Facebook or deleted his account.

Robinson, and Williams both left the address and traveled to Greenville SC to stay with family. Forensics responded reference pictures of the scene

Incident Report Related Property List

Asheville Police Department

OCA: *15-027051*

1

Property Description	Make	Model	Caliber
XBOX ONE	*MICROSOFR*	*XBOX ONE*	

Color	Serial No.	Value	Qty	Unit	Jurisdiction
		$550.00	*1.000*		*Locally*

Status	Date	NIC #	State #	Local #	OAN
Stolen	*10/17/2015*				

Name (Last, First, Middle)	DOB	Age	Race	Sex
Williams, Denise Nicole	*09/27/1991*	*24*	*B*	*F*

Notes

2

Property Description	Make	Model	Caliber
VIDEO GAME			

Color	Serial No.	Value	Qty	Unit	Jurisdiction
		$50.00	*1.000*		*Locally*

Status	Date	NIC #	State #	Local #	OAN
Stolen	*10/17/2015*				

Name (Last, First, Middle)	DOB	Age	Race	Sex
Williams, Denise Nicole	*09/27/1991*	*24*	*B*	*F*

Notes

thief

3

Property Description	Make	Model	Caliber
VIDEO GAME			

Color	Serial No.	Value	Qty	Unit	Jurisdiction
		$50.00	*1.000*		*Locally*

Status	Date	NIC #	State #	Local #	OAN
Stolen	*10/17/2015*				

Name (Last, First, Middle)	DOB	Age	Race	Sex
Williams, Denise Nicole	*09/27/1991*	*24*	*B*	*F*

Notes

call of duty advanced warfare.

4

Property Description	Make	Model	Caliber
WALL			

Color	Serial No.	Value	Qty	Unit	Jurisdiction
		$300.00	*1.000*		*Locally*

Status	Date	NIC #	State #	Local #	OAN
Damaged/destroye	*10/17/2015*				

Name (Last, First, Middle)	DOB	Age	Race	Sex
Robinson, Shamica Dominique	*09/04/1992*	*23*	*B*	*F*

Notes

Drywall damaged.

Incident Report Related Property List

Asheville Police Department

OCA: *15-027051*

5

Property Description	Make	Model	Caliber
INTERIOR DOOR			

Color	Serial No.	Value	Qty	Unit	Jurisdiction
		$100.00	*1.000*		*Locally*

Status	Date	NIC #	State #	Local #	OAN
Damaged/destroye	*10/17/2015*				

Name (Last, First, Middle)	DOB	Age	Race	Sex
Robinson, Shamica Dominique	*09/04/1992*	*23*	*B*	*F*

Notes

bedroom door damaged

6

Property Description	Make	Model	Caliber
EXTERIOR DOOR			

Color	Serial No.	Value	Qty	Unit	Jurisdiction
		$50.00	*1.000*		*Locally*

Status	Date	NIC #	State #	Local #	OAN
Damaged/destroye	*10/17/2015*				

Name (Last, First, Middle)	DOB	Age	Race	Sex
Robinson, Shamica Dominique	*09/04/1992*	*23*	*B*	*F*

Notes

Deadbolt damaged.

7

Property Description	Make	Model	Caliber
TV	*VISIO*		

Color	Serial No.	Value	Qty	Unit	Jurisdiction
Black		*$400.00*	*1.000*		*Locally*

Status	Date	NIC #	State #	Local #	OAN
Stolen	*10/17/2015*				

Name (Last, First, Middle)	DOB	Age	Race	Sex
Williams, Denise Nicole	*09/27/1991*	*24*	*B*	*F*

Notes

8

Property Description	Make	Model	Caliber
WIC CARD/VOUCHER			

Color	Serial No.	Value	Qty	Unit	Jurisdiction
		$10.00	*1.000*		*Locally*

Status	Date	NIC #	State #	Local #	OAN
Stolen	*10/17/2015*				

Name (Last, First, Middle)	DOB	Age	Race	Sex
Williams, Denise Nicole	*09/27/1991*	*24*	*B*	*F*

Notes

vouchers were in a folder which was stolen also. [10/19/2015 15:41, ALLENJA, 4852, APD[

CASE SUPPLEMENTAL REPORT

Printed: 01/18/2017 10:13

Asheville Police Department OCA: ***15027051***

THE INFORMATION BELOW IS CONFIDENTIAL - FOR USE BY AUTHORIZED PERSONNEL ONLY

Case Status: *CLOSED/CLEARED* **Case Mng Status:** *CLOSED - VICTIM REFUSED* **Occurred:** *10/17/2015*

Offense: *BREAKING OR ENTERING - FELONY - RESIDENCE - WITH FORCE*

Investigator: *ALY, L. F. (A1062)* **Date / Time:** *10/17/2015 20:41:07, Saturday*

Supervisor: *AARDEMA, S. T. (A2139)* **Supervisor Review Date / Time:** *10/19/2015 11:42:50, Monday*

Contact: **Reference:** *Forensic Report*

05
15 Future Dr Apt 14E
10/17/15
Victim: Shamica Robinson 09/04/92
Denise Williams 09/27/91
Suspect(s): Numerous; unknown

15-027051
Arrived: 1802 hrs
Cleared: 1824 hrs

I, FST Lynn Aly, responded to the above location in reference to breaking and entering of and larceny from the residence. Officer J. Collins advised that several subjects entered the apartment through an unlocked sliding glass door in the living room. The apartment was ransacked on the lower level and a television and X-Box were taken. Upstairs, at the top of the stairs, the wall had a hole punched into it, and one of the bedrooms doors was also damaged. The victims were at home during the time this took place. It is thought to possibly be some sort of retaliation for a homicide that occurred in front of this apartment on 10/10/15.
Officer Collins advised several subjects were involved in this incident but could not provide names other than one subject who may go by the name Brandi Perez.
Photographs taken as listed below. The sliding glass door was examined for latent prints with negative results.

Latent Lifts: No

Digital photographs: 13 (090) 338-350
338-Identifier of apartment
339-342 Overall of ransacked living room and hallway to kitchen
343- Sliding glass door from exterior
344-346 Overall ransacked kitchen
347-348 Damage to wall, upstairs, top of staircase
349-350 Damage to upstairs bedroom door

Evidence: No
[10/17/2015 20:41, ALYL, 740, APD]

Investigator Signature Supervisor Signature

Asheville Police Department OCA: ***15027051***

THE INFORMATION BELOW IS CONFIDENTIAL - FOR USE BY AUTHORIZED PERSONNEL ONLY

Case Status: *CLOSED/CLEARED* **Case Mng Status:** *CLOSED - VICTIM REFUSED* **Occurred:** *10/17/2015*

Offense: *BREAKING OR ENTERING - FELONY - RESIDENCE - WITH FORCE*

Investigator: *ALLEN, J. P. (A2296)* **Date / Time:** *10/20/2015 09:04:32, Tuesday*

Supervisor: *AARDEMA, S. T. (A2139)* **Supervisor Review Date / Time:** *10/20/2015 09:42:34, Tuesday*

Contact: **Reference:** *Investigative Follow-up*

On 10/19/15 at 1036hrs Det. Allen attempted to make contact with victim Denise Williams at the listed number in RMS. Det. Allen was unable to make contact with Ms. Williams and left a message on the voicemail.

At 1512hrs Ms. Williams contacted Det. Allen back to let him know that she had discovered that some other things had been stolen during the break in. Ms. Williams said that a folder with paperwork had been taken during the break in and that her WIC voucher had been in that folder. Ms. Williams said that without the WIC voucher she would not be able to purchase milk for her child.

Det. Allen added the property to the report, and Ms. Williams said that she would be by later to obtain a copy of the report. [10/20/2015 09:07, ALLENJA, 4852, APD] [10/20/2015 09:07, ALLENJA, 4852, APD]

Investigator Signature Supervisor Signature

Asheville Police Department OCA: ***15027051***

THE INFORMATION BELOW IS CONFIDENTIAL - FOR USE BY AUTHORIZED PERSONNEL ONLY

Case Status: *CLOSED/CLEARED* **Case Mng Status:** *CLOSED - VICTIM REFUSED* **Occurred:** *10/17/2015*

Offense: *BREAKING OR ENTERING - FELONY - RESIDENCE - WITH FORCE*

Investigator: *ALLEN, J. P. (A2296)* **Date / Time:** *10/20/2015 09:07:34, Tuesday*

Supervisor: *AARDEMA, S. T. (A2139)* **Supervisor Review Date / Time:** *10/20/2015 09:44:45, Tuesday*

Contact: **Reference:** *Investigative Follow-up*

On 10/19/15 at 1700hrs Det. Allen made contact with Ms. Williams in the lobby of the police department.
Det. Allen asked Ms. Williams what had happened between her and Ms. Perez since she last spoke with Det. Coon and himself last week, when they were together.

Ms. Williams said that she had spoken with Jenna Ray, who said she had received a text message from Ms. Perez and she recognized the phone number as that of Dondra Nelson`s.
Ms. Williams said that she had been having problems with Mr. Nelson`s family who had thought she had possession of his cell phone which went missing after his murder.

Ms. Williams said that Mr. Nelson`s mother had called her and apologized once she found that Ms. Perez actually had the phone.
Det. Allen asked Ms.Williams about the incident at her residence. Ms. Williams said that it was Ms. Perez who was responsible. Ms. Williams said that Ms. Perez had drove a black SUV into Ledgewood and had several occupants with her.

Ms. Williams said that Ms. Perez had come into the home, and asked to retrieve her jacket and after she left, only a couple of minutes later people began to break into the residence.
Ms. Williams said she thought it was a female with long dreads with the name of Collington that got into the back door.

Ms. Williams also mentioned a male named Quinn and a female named Dyasia Robinson that may have been there also.
Ms. Williams said that they did not have there faces covered and that she was upset that they had pulled up stuff all around her baby who was in its baby carrier.

Ms. Williams also said that she was sure Ms. Perez had taken Mr. Nelson`s wallet which she had kept in a cereal box in the cabinet.
Ms. Williams then said that Quinn had not been in the home, but that he had sent a subject named Young Seek into the residence and that he had a sister named Morgan Sloan.
Ms. Williams then said that she had also noticed her jewelry box had been stolen.

Det. Allen advised Ms. Williams to get a list of items that were stolen and provide the values and email them to him.
Det. Allen asked if anyone had witnessed this and she said all of her neighbors had seen it. Det. Allen asked she provide them with his contact information so that he may be able to follow up with them also. [10/20/2015 09:26,

Asheville Police Department OCA: ***15027051***

THE INFORMATION BELOW IS CONFIDENTIAL - FOR USE BY AUTHORIZED PERSONNEL ONLY

Case Status: *CLOSED/CLEARED* **Case Mng Status:** *CLOSED - VICTIM REFUSED* **Occurred:** *10/17/2015*

Offense: *BREAKING OR ENTERING - FELONY - RESIDENCE - WITH FORCE*

Investigator: *ALLEN, J. P. (A2296)* **Date / Time:** *10/20/2015 09:07:34, Tuesday*

Supervisor: *AARDEMA, S. T. (A2139)* **Supervisor Review Date / Time:** *10/20/2015 09:44:45, Tuesday*

Contact: **Reference:** *Investigative Follow-up*

ALLENJA, 4852, APD] [10/20/2015 09:27, ALLENJA, 4852, APD]

Investigator Signature Supervisor Signature

Asheville Police Department OCA: ***15027051***

THE INFORMATION BELOW IS CONFIDENTIAL - FOR USE BY AUTHORIZED PERSONNEL ONLY

Case Status: *CLOSED/CLEARED* **Case Mng Status:** *CLOSED - VICTIM REFUSED* **Occurred:** *10/17/2015*

Offense: *BREAKING OR ENTERING - FELONY - RESIDENCE - WITH FORCE*

Investigator: *GREEN, M. S. (A1283)* **Date / Time:** *10/21/2015 17:27:17, Wednesday*

Supervisor: *AARDEMA, S. T. (A2139)* **Supervisor Review Date / Time:** *10/22/2015 15:54:33, Thursday*

Contact: **Reference:** *Investigative Follow-up*

On 10/21/15 I, Meagan Green, made a follow-up call to Shamica Robinson at #(828)242-0899. Ms. Robinson answered, verified her Asheville address to send a mailing to, and asked about housing resources in Asheville. Ms. Robinson was informed of the Buncombe County housing guide, as well as 211 as resources for finding available housing. Ms. Robinson was also informed of utility assistance through Eblen charities if she needs to utilizes this service when looking for a new place to live. [10/21/2015 17:27, GREENM, 8780, APD] [10/21/2015 17:27, GREENM, 8780, APD]

Investigator Signature Supervisor Signature

Asheville Police Department OCA: ***15027051***

THE INFORMATION BELOW IS CONFIDENTIAL - FOR USE BY AUTHORIZED PERSONNEL ONLY

Case Status: *CLOSED/CLEARED* **Case Mng Status:** *CLOSED - VICTIM REFUSED* **Occurred:** *10/17/2015*

Offense: *BREAKING OR ENTERING - FELONY - RESIDENCE - WITH FORCE*

Investigator: *ALLEN, J. P. (A2296)* **Date / Time:** *11/05/2015 22:52:31, Thursday*

Supervisor: *RIDDLE, S. J. (A2135)* **Supervisor Review Date / Time:** *11/06/2015 08:46:09, Friday*

Contact: **Reference:** *Case Synopsis*

EXC2 Victim Refused to Cooperate

Det. Allen last made contact with Denise Williams on 10/19 at which time she was going to email Det. Allen a list of items that had been stolen during the break in.
Det. Allen has not received any email from Ms. Williams of any further information on the case. [11/05/2015 22:56, ALLENJA, 4852, APD]

Investigator Signature Supervisor Signature

From: Kenneth Patton
To: Stephen Coon
Subject: Damage to property report.
Date: Tuesday, October 20, 2015 1:48:55 AM

I received a call for service reference damage to a vehicle at 342 Depot St on 10/16/2015. The driver was 16 year old female named Jenna Ray. She states the damage to her vehicle was in retaliation of something pertaining to Nelson. Jenna's mother states that Jenna may have further information if you would like to contact her. Her information is located in the report as well as further information I collected for the report. I do not have the report number handy at this time.

Sent from my iPhone

Check report - Send it
look Supplement for Kay and her mother

Stephen Coon

From: Lynn Aly
Sent: Wednesday, January 18, 2017 11:14 AM
To: Stephen Coon; Forensics
Subject: RE: Pictures

Done

Waiting for you in our outbox, Steve!

From: Stephen Coon
Sent: Wednesday, January 18, 2017 10:25 AM
To: Forensics
Subject: Pictures

I need the pictures for case number 15-027051.

Thank you,

Detective Steve Coon
Asheville Police Department
Major Case Investigations
828-271-6135
828-777-1176 (Cell)
828-350-0109 (Fax)
scoon@ashevillenc.gov


14


16 PIECE TUSCAN RED DINNERWARE SET
Safe & Durable for All Microwaves & Dishwashers
Stoneware Service for Four
4 Dinner Plates 4 Salad Plates 4 Bowls 4 Mugs - 16 Pieces Total
Better Homes and Gardens
ELITE SERIES

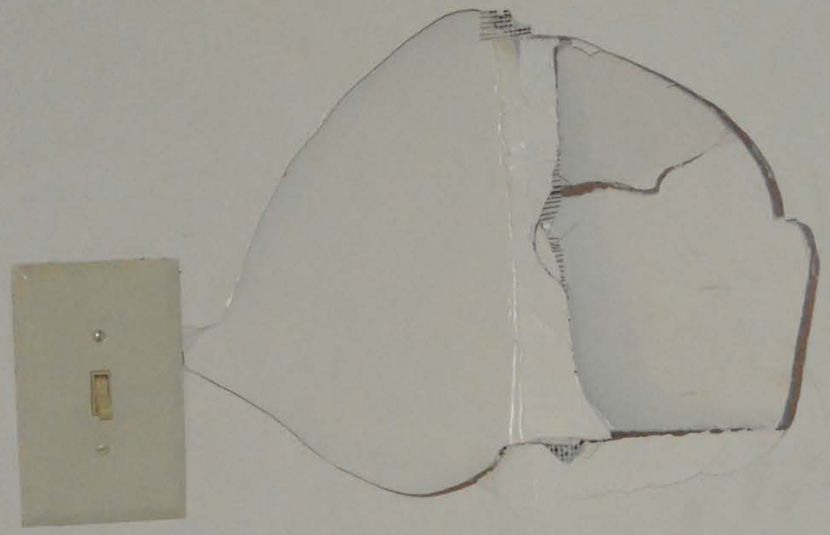

Chex
Rice
FAMILY SIZE
FROOT LOOPS
Safe & Durable for All Microwaves & Dishwashers
Stoneware Service for Four
4 Salad Plates 4 Bowls 4 Mugs - 16 Pieces Total
Beefy
CARNE DE
SERVE DRY or ADD WARM WATER
TO MAKE RICH GRAVY
Psoriasis Control

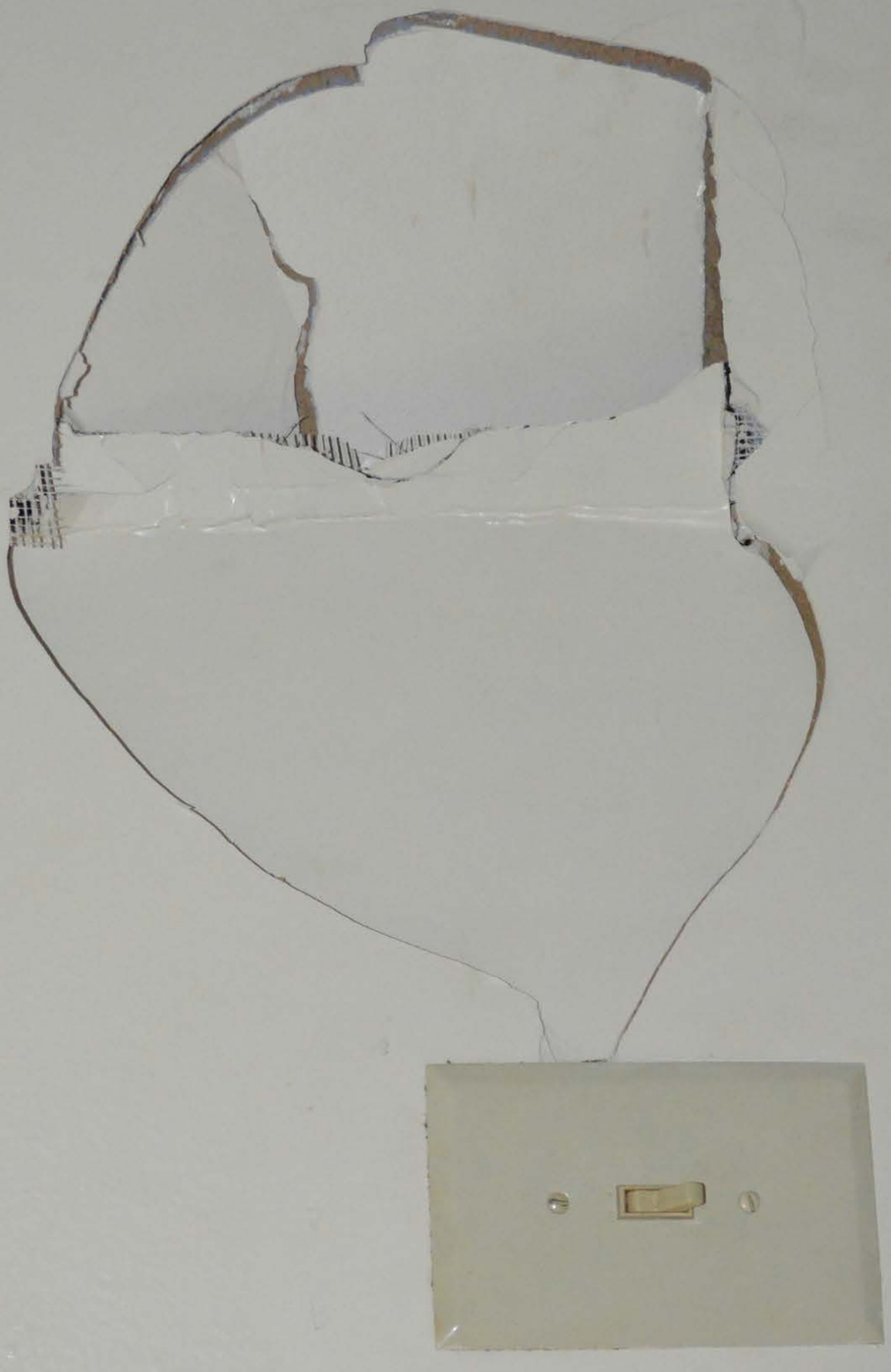

Chex
Rice
Safe & Durable for All Microwaves & Dishwashers
Stoneware Service for Four
4 Salad Plates 4 Bowls 4 Mugs - 16 Pieces Total


Shine Light 10 Inspirational Movies
DVD
ELITE SERIES
10
Glade
Cotton Fresh
Scented Oil Refill
Fits Glade Plugins & Air Wick Scented Oil Warmer Units
IMPORTANT INFORMATION
KEEP OUT OF REACH OF CHILDREN & PETS
CAUTION: USE & OPEN WATER
FIRST AID TREATMENT
Instructions For Use:
Installation:


Libbey
4 OCCASIONS
Cheerios
Nutrition Facts
Rice Chex
GLUTEN FREE
FAMILY SIZE
Cinnamon Toast Crunch
Little HUG
Fruit Barrel


Hunts
RIVAL
PURE GROUND
Black
Pepper
TWIST
Spectra





INCIDENT/INVESTIGATION REPORT Attachment E

** Contains Restricted Names **

INCIDENT DATA

Agency Name	ASHEVILLE POLICE DEPARTMENT
ORI	NC 0110100
OCA	15-027058
Date / Time Reported (Month Day Yr Time)	10 | 17 | 2015 | 18:08 Hrs.

	Crime Incident(s)	Att/Com	At Found (Month Day Yr Time)	Last Known Secure (Month Day Yr Time)
#1	Damage To Personal Property	☐ Att ☒ Com	10 | 17 | 2015 | 18:08 Hrs.	10 | 17 | 2015 | 18:08 Hrs.
#2	Crime Incident	☐ Att ☐ Com	Location of Incident: 342 Depot St, Asheville NC 28801	Offense Tract: APD
#3	Crime Incident	☐ Att ☐ Com	Premise Type: PARKING LOT/AREA	Victim Residence Type: ☐ Single Family ☐ Multi Family

MO

How Attacked or Committed	Forcible	Weapon / Tools
Weapon/Other Blunt Instrument	☐ Yes ☐ N/A ☒ No	Blunt Object (club, Hammer, Et

VICTIM

# of Victims	Type	Injury	Drug/Alcohol Use:
1	☒ Person ☐ Business ☐ Society ☐ Government ☐ Financial Institute ☐ Religious ☐ L.E. Officer Line of Duty ☐ Other/Unknown	☒ None ☐ Minor ☐ Loss of Teeth ☐ Broken Bones ☐ Severe Lacerations ☐ Internal ☐ Unconscious ☐ Other Major	☐ Yes ☐ Unknown ☒ No ☐ N/A

	Victim/Business Name (Last, First, Middle)	Victim of Crime #	DOB / Age	Race	Sex	Relationship To Offender	Resident Status
V1	CODY, MONICA LYNN	1,	07/10/1968 / 47	W	F	OK	☐ Resident ☒ Non-Resident ☐ Unknown

Home Address	Home Phone
400 FLAT CREEK VILLAGE DR - 102, Weaverville, NC 28787	828-380-9975

Employer Name/Address	Business Phone	Mobile Phone

VYR	Make	Model	Style	Color	Lic/Lis	VIN
2008	MERZ	C300	4S	BLK	DAJ4908, NC	WDDGF54X68F107098

OTHERS INVOLVED

CODES: V- Victim (Denote V2, V3) O = Owner (if other than victim) R = Reporting Person (if other than victim)

Type: ☒ Person ☐ Business ☐ Society ☐ Government ☐ Financial Institute ☐ Religious ☐ L.E. Officer Line of Duty ☐ Other/Unknown

Code	Name (Last, First, Middle)	Victim of Crime #	DOB / Age	Race	Sex
IO	RAY, JENNA CASSIDY		12/04/1998 / 16	W	F

Home Address	Home Phone
400 Flat Creek Village Dr Weaverville, NC 28787	828-380-9975

Employer Name/Address	Business Phone	Mobile Phone
Unemployed	828- -	828-380-9975

Type: ☐ Person ☐ Business ☐ Society ☐ Government ☐ Financial Institute ☐ Religious ☐ L.E. Officer Line of Duty ☐ Other/Unknown

Code	Name (Last, First, Middle)	Victim of Crime #	DOB / Age	Race	Sex

Home Address	Home Phone

Employer Name/Address	Business Phone	Mobile Phone

PROPERTY

Status Codes: L = Lost S = Stolen R = Recovered D = Damaged Z = Seized B = Burned C = Counterfeit / Forged F = Found
(Check "OJ" column if recovered for other jurisdiction)

Victim #	DCI	Status	Value	OJ	QTY	Property Description	Make/Model	Serial Number
1	PC	D	$4,000.00		1	2008 BLK, DAJ4908 NC	MERZ C300	WDDGF54X68F107098
	PC	NONR	$0.00		1	2010 BLK, CJB8287 NC	CHEV Traverse Lt	IGNLVGED3AS119368

Number of Vehicles Stolen 0 Number Vehicles Recovered 0

ID

Officer ID#	Officer Signature	Supervisor Signature
PATTON, K. R. (PATR, ANC) (A2483)		WELLS, C. P. (CID, CID) (A2235)

Status

Complainant Signature	Case Status	Case Disposition:
	☐ Further Investigation ☐ Inactive ☒ Closed/Cleared ☐ Closed/Leads Exhausted	☐ Unfounded ☐ Located ☐ Extradition Declined ☐ Cleared by Arrest ☒ Refuse to Cooperate ☐ Cleared by Arrest by Another Agency ☐ Death of Offender ☐ Prosecution Declined

r_cslnc DCI-600F

Rev. 3/92

INCIDENT/INVESTIGATION REPORT

Asheville Police Department

** *Contains Restricted Names* **

OCA: *15-027058*

Status Codes L = Lost S = Stolen R = Recovered D = Damaged Z = Seized B = Burned C = Counterfeit / Forged F = Found

DRUGS

DCI	Status	Quantity	Type Measure	Suspected Type	Check up to 3 types of activity for each: Possess	Buy	Sale	Mfg	Importing	Operating

OFFENDER

Offender Used
Alcohol/Drugs ☐ Yes ☐ Unk ☒ No ☐ N/A
Computer ☐ Yes ☐ Unk ☒ No ☐ N/A

Offender 1	Offender 2	Offender 3
Age: *17* Race: *W* Sex: *F*	Age: Race: Sex:	Age: Race: Sex:
Offender 4	**Offender 5**	**Offender 6**
Age: Race: Sex:	Age: Race: Sex:	Age: Race: Sex:

Primary Offender Resident Status
☒ Resident ☐ Non-Resident ☐ Unknown

SUSPECT

Name (Last, First, Middle)	Also Known As	Home Address
PEREZ, BRANDY ALEASHEA		*120 Baity Dr, Asheville NC 28806*

Occupation	Business Address
SERVICE	*KFC, FAIRVIEW RD,ASHEVILLE,NC 828- -*

DOB. / Age	Race	Sex	Hgt	Wgt	Build	Hair Color	Hair Style	Hair Length	Eye Color	Glasses
10/30/1997 19	*B*	*F*	*509*	*173*		*BRO*			*BRO*	

Scars, Marks, Tattoos, or other distinguishing features (i.e. limp, foreign accent, voice characteristics)
TATT: RIGH CHEST CROWN, RIGH SHOULDER DREAM CATCHER, RIGH SHOULDER FOOT PRINTS, RIGH HIP

Hat	Jacket	Shirt/Blouse	Tie/Scarf	Coat/Suit	Pants/Dress/Skirt	Socks	Shoes

Was Suspect Armed?	Type of Weapon	Direction of Travel	Mode of Travel

VYR	Make	Model	Style	Color	Lic/Lis	VIN

WITNESS

Name (Last, First, Middle)	D.O.B.	Age	Race	Sex	Mobile Phone

Home Address	Home Phone	Employer	Phone

Suspect Hate / Bias Motivated: ☐ Yes ☒ No *Unknown (Offender's motivation not known)*

NARRATIVE

Officers responded to a damage to property call at 342 Depot St.

Officer K Patton responded to a call for service reference Damage to Property.

Officer Patton met with the driver of the vehicle (Jenna Ray) who states that she was traveling W/B on Depot St when a black SUV got behind her and attempted to run her off the roadway while chase after her. She pulled into the PVA located at 342 Depot St. The SUV pulled in behind her and Brandy Perez along with 3 other individuals exited the suspect vehicle and began to damage her vehicle (DAJ-4908). While Brandy was damaging the vehicle, an unknown B/M stood in front of Jenna`s vehicle holding his waist band causing Jenna to believe that he possessed a firearm. Another unknown B/M was grabbing the drivers door of the vehicle an trying to gain entry to the car yelling something about his Nephew (believed to be Dondre Nelson who was recently killed). Jenna believes that she would have been seriously injured and/or killed if they gain entry to the vehicle. After a brief attempt to gain entry to the vehicle all individuals from the suspect vehicle returned to the vehicle and fled the seen.

Jenna was able to obtain the license plate number displayed on the suspect vehicle (CJB-8287). The tag matched the description given by Jenna.

The vehicle driven by Jenna sustained an estimated $4000 worth of damage(vehicle damage has not been sent to a repair center for professional estimate at this time). The passenger side mirror was busted, the rear windshield of the vehicle was busted and scratches were placed into the passenger side of the vehicle.

Officer K Patton made contact with Jenna`s Mother (Monica Cody) on 10/19/2015. She states that Jenna was terrified and could not sleep due to the encounter. She continues by stating that Jenna had a relationship with Dondre Nelson and the encounter was based on her and Dondre`s relationship. Jenna told her mother that she was just friends with Dondre and Brandy was in a dating relationship with Dondre at the time of his murder.

Monica and Jenna are unsure at this time if they will obtain warrants against Brandy due to fear of retaliation. Jenna is still receiving threatening phone calls and text messages. Brandy has called her on the phone and apologized for the encounter and began to asks questions to determine if Jenna was going to seek Warrants against her.

Incident Report Additional Suspect List

Asheville Police Department

OCA: *15-027058*

SUSPECT

Name (Last, First, Middle): *Perez, Brandy Aleashea*	Also Known As					Home Address: *120 BAITY DR ASHEVILLE, NC 28806*
Empl/Occu: *KFC 828- - , SERVICE, FAIRVIEW*				Business Address: *FAIRVIEW RD,ASHEVILLE,NC*		
DOB. / Age: *10/30/1997*	Race	Sex	Eth	Hgt	Wgt	Physical Char
Scars, Marks, Tattoos, or other distinguishing features: *TATT RIGH HIP / KEY; TATT RIGH SHOULDER / FOOT PRINTS; TATT RIGH SHOULDER / DREAM CATCHER; TATT RIGH CHEST*						
Type of Weapon						
Dir of Travel	Mode of Travel					

VehYr/Make/Model	Style	Color	Lic/Lis	Vin

CASE SUPPLEMENTAL REPORT

Printed: 01/18/2017 11:55

Asheville Police Department OCA: ***15027058***

THE INFORMATION BELOW IS CONFIDENTIAL - FOR USE BY AUTHORIZED PERSONNEL ONLY

Case Status: *CLOSED/CLEARED* **Case Mng Status:** *CLOSED - VICTIM REFUSED* **Occurred:** *10/17/2015*

Offense: *DAMAGE TO PERSONAL PROPERTY*

Investigator: *ALLEN, J. P. (A2296)* **Date / Time:** *10/19/2015 09:19:35, Monday*

Supervisor: *AARDEMA, S. T. (A2139)* **Supervisor Review Date / Time:** *10/19/2015 11:47:01, Monday*

Contact: **Reference:** *Investigative Follow-up*

On 10/19/15 at 0915hrs Det. Allen attempted to make contact with Brandy Perez at 280-6654. The phone was answered by an older female and upon Det. Allen asking to speak with Brandy, she said that he had the wrong number. Det. Allen then attempted to make contact with Ms. Perez at 242-0330. Det. Allen was unable to make contact with Ms. Perez at this number as well or leave a message as an automated message advised that the customer was unavailable at this time. [10/19/2015 09:21, ALLENJA, 4852, APD]

Investigator Signature Supervisor Signature

Asheville Police Department OCA: ***15027058***

THE INFORMATION BELOW IS CONFIDENTIAL - FOR USE BY AUTHORIZED PERSONNEL ONLY

Case Status: *CLOSED/CLEARED* **Case Mng Status:** *CLOSED - VICTIM REFUSED* **Occurred:** *10/17/2015*

Offense: *DAMAGE TO PERSONAL PROPERTY*

Investigator: *ALLEN, J. P. (A2296)* **Date / Time:** *11/04/2015 21:11:38, Wednesday*

Supervisor: *RIDDLE, S. J. (A2135)* **Supervisor Review Date / Time:** *11/05/2015 17:56:07, Thursday*

Contact: **Reference:** *Case Synopsis*

EXC2 Victim Refused to Cooperate

On 10/20/15 Det. Coon made contact with Monica Cody. Det. Coon asked about the incident as it pertained to the incident in Ledgewood Village.
Ms. Cody advised that she did not want to get her daughter, Jenna Ray caught in the middle of this, and they did not wish to pursue any criminal charges in the matter. [11/04/2015 21:14, ALLENJA, 4852, APD] [11/04/2015 21:14, ALLENJA, 4852, APD]

Investigator Signature Supervisor Signature

C

FILED
2019 JUL -9 PM 2:
BUNCOMBE COUNTY C.S.C.

STATE OF NORTH CAROLINA COUNTY OF BUNCOMBE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION FILE NOS. 16CRS149
STATE OF NORTH CAROLINA BY v. KELVIN OYAKHILOME IRABOR	**MOTION FOR SANCTIONS DUE TO LOSS OF MATERIAL AND POTENTIALLY EXCULPATORY EVIDENCE**

NOW COMES the defendant, by and through his undersigned counsel, and pursuant to N.C.G.S § 15A-954(a)(4) moves the Court to dismiss the discharging a weapon into occupied property indictment as material and potentially exculpatory evidence has been lost and in support the defendant alleges:

FACTS

1. The following background facts relevant to this motion are taken from the Court of Appeals decision of this matter:

> In October 2015, defendant lived in apartment 14E in the Oak Knoll apartment complex [real name Ledgewood Village Apartments] in Asheville, along with his child, London, London's mother, Denise Williams ("Williams"), and Williams's sister, Shamica Robinson ("Robinson"). Sometimes Dondre Nelson ("Nelson"), who was a friend of one of Robinson's other sisters, stayed with them in apartment 14E.
>
> ...
>
> **[First Incident]**
>
> On 9 October 2015, defendant rode with Nelson to an ABC store, where they met Jenna Ray ("Ray"), with whom Nelson apparently had a relationship. After defendant and Nelson returned to Oak Knoll, Ray also arrived. Williams was angry when she saw Ray and was prepared to attack her. When defendant stopped her from attacking Ray, Williams became angry with defendant. Williams's niece, Gelisa Madden ("Madden"), attempted to intervene, striking defendant, who struck her back.
>
> While defending himself from Madden, defendant released Williams, who went into apartment 14E and returned with a broomstick, with which she struck defendant. Defendant responded by drawing a firearm and chasing Williams. While chasing her, he fired three shots. Williams fled into apartment 14E, and a neighbor called Nelson. One of defendant's shots *allegedly struck the door* of apartment 14E, where Nelson's daughter was staying at the time. [See **Attachment A** for a picture of the alleged damage to the door.]
>
> **[Second Incident]**

After chasing Williams, defendant left Oak Knoll for several hours. He called multiple people asking for a ride and eventually reached Nelson. Nelson was furious and refused to give him a ride. Defendant decided to walk back to Oak Knoll instead. When defendant returned to Oak Knoll, he saw Nelson and two others standing outside apartment 14E. Fearing what Nelson might do to him, defendant went to another apartment first, where he talked with Jerome Smith ("Smith"). Smith told defendant that Nelson was upset with defendant for firing a shot into apartment 14E, where Nelson's daughter was staying, and warned defendant to be careful. Defendant borrowed Smith's gun for protection.

After defendant left Smith's apartment, he walked along the sidewalk, heading back to apartment 14E. As defendant approached the apartment, Nelson called out to defendant and accused him of shooting at Nelson's daughter, which defendant denied. Nelson responded by telling defendant "this is war, empty your pocket," while advancing towards defendant. Fearing Nelson would attack and rob him, defendant pulled the gun out of his pocket, "racked it," and told Nelson to back up. Nelson continued to advance, and defendant fired two warning shots into the ground; however, Nelson remained undeterred. Nelson then lunged at defendant, and defendant fatally shot Nelson. Defendant then fled, dropping Smith's gun into the bushes.

State v. Irabor, 822 S.E.2d 421, 422-23 (N.C. Ct. App. 2018)(emphasis added).

See **Attachment B** for an illustrative map of the scene.

2. This first incident led to the following charges against the defendant:

   a. an assault by pointing a gun in 15CRS90838, and an assault on a female in 16CRS147 against Madden. The assault by pointing a gun was dismissed at the close of the state's evidence and the defendant was found not guilty of the assault on a female, and

   b. an assault with a deadly weapon with intent to kill in 16CRS148, and a discharging a weapon into occupied dwelling in 16CRS149 against and involving Williams. The defendant was found guilty of a misdemeanor assault with a deadly weapon, a Class A1 misdemeanor, and discharging a weapon into occupied dwelling, a Class D felony.

DIFFERENT GUNS USED IN THE INCIDENTS

3. The gun used in the first incident was a .380 semi-automatic pistol purchased and legally possessed by the defendant.

4. The gun used in the second incident was a 9 mm semi-automatic pistol belonging to Jerome Smith.

5. Both guns were recovered following the second incident.

INVESTIGATION OF THE FIRST INCIDENT

6. Asheville Police Department officers came to the scene after the first incident and before the second incident but gathered no physical evidence and took no statements due to a lack of cooperation according to the discovery released in this matter.

7. The information for the official report of the first incident was gathered following the second incident.

8. No testimony was received in the trial of this matter from law enforcement witnesses indicating witnesses cooperated in the initial investigation following the first incident.

9. Shamica Robinson testified that the police came following the first incident but she testified that she did not offer an explanation of the incident nor did she observe any explanation of the incident from any witness. Transcript page 426.

10. However, an alleged eyewitness Eddie Floyd Haggins testified that he told the police what he observed in that initial investigation. He also testified that Denise Williams did not cooperate with the police in that initial investigation. Transcript page 798.

11. Denise Williams testified that she did cooperate in that initial investigation and that the police peeled paint surrounding the alleged bullet hole in the door to 14E. Transcript page 631.

12. Brandy Perez testified that the police took a statement following the first incident and left. Transcript page 329.

EVIDENCE PRESENTED OF THE FIRST INCIDENT

13. The defendant testified and admitted to firing his .380 pistol three times in the air in the first incident. He denied firing the pistol at Williams and firing the pistol into the door of Apartment 14E. Transcript pages 904-905.

14. No bullets or shell casings from a .380 pistol were recovered from the scene.

15. Brandy Perez testified that the defendant fired the final shot from just outside the front entrance to apartment 14E and hit the upper-left portion of the front door as the front door was open and Williams was coming into the apartment. Transcript page 328.

16. Perez testified that she was in the apartment and saw the expression on Williams's face as she entered the apartment. Transcript page 328.

17. Denise Williams testified that no one was in the apartment when the defendant fired the final shot into door of 14E. Transcript page 582.

18. Perez testified that Shamica Robinson was present when the incident happened but that Gelisa Madden was not present. Transcript pages 322-323

19. Madden testified but did not testify about shots being fired in the first incident.

20. Madden testified that Shamica Robison took her to the magistrate and the hospital after her altercation with the defendant. Transcript page 443.

21. Shamica Robinson testified that she was present during the shooting in the first incident.

22. She testified that she heard shooting outside the apartment and she said that Williams came through the rear sliding glass door of the apartment not the front door. Transcript page 390.

23. She testified that the defendant fired the final shot through the open sliding glass door in the rear of the apartment hitting the same spot in the upper-left portion of the front door. Transcript page 391.

24. Another witness, Eddie Floyd Haggins, testified that he saw the defendant shoot at Williams but he did not testify that the defendant shot into the Apartment 14E. Transcript pages 787-788.

EVIDENCE OF THE SECOND INCIDENT

25. This incident took place on the sidewalk in front of apartment 14E.

26. The gun used in that incident was a 9 mm semi-automatic pistol. It was recovered later the same day and its magazine contained three 9 mm, copper-jacketed, bullets.

27. The defendant admitted that he fired the gun three times.

28. The defendant testified that he fired two warning shots into the ground/sidewalk of the immediate area. Transcript page 918.

29. The defendant testified that he fired the third shot at Nelson in self-defense hitting him in the abdomen. Transcript page 918. A 9 mm projectile was recovered from Nelson's body according to the autopsy. It was taken into evidence.

EVIDENCE COLLECTED FROM THE SCENE

30. The evidence collected at the scene related to this motion is as follows:

    a. A deformed copper jacket of a 9 mm bullet found on the sidewalk in front of 14E.
    b. Two 9 mm shell casings.
    c. Photographs of damage to the door of 14E, Attachment A, and damage to the 14 building.

EVIDENCE NOT COLLECTED FROM THE SCENE

31. The door to 14E was not taken into evidence.

32. No bullet or bullet fragment was extracted from the door of 14E.

THE DOOR TO 14E HAS BEEN REMOVED AND DISPOSED

33. In preparation for the first trial of this matter, the defendant photographed the door to 14E in December 2016. See **Attachment C**.

34. It appeared to be the same door. The damage to the upper left portion of the door was visible but it had been patched and painted.

35. For the retrial of this matter, the defendant made efforts to examine the door to 14E.

36. The defendant learned from Ledgewood Village's building superintendent, Jerry Dale, that the door to 14E had been replaced as part of a large renovation project and taken to the landfill.

37. Dale worked at Ledgewood Village at the time of these incidents in 2015.

38. A worker at the landfill said that waste such as the doors from the renovation project would have been dumped at the construction waste section and buried by compacting equipment.

LEGAL ARGUMENT

1. N.C.G.S § 15A-954(a)(4) states that the court on motion of the defendant must dismiss the charges stated in a criminal pleading if it determines that the defendant's constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution.

2. An excavation of the hole in the upper left of the door would have likely yielded a bullet or a bullet fragment if the hole was made by a bullet.

3. The fact that two different caliber guns were used in the two incidents adds further relevance to the examination of the door to determine whether the hole was made during the first incident, the second incident or neither incident.

4. The fact that the final incident occurred directly in front of 14E and involved the probable ricochet of at least one 9 mm bullet makes the examination of the door all the more relevant as the ricochet contributes to the probability that the hole was made during the second incident.

5. The defendant denied shooting into the door of 14E, making the inability to examine the door tantamount to the loss of exculpatory evidence and a denial of due process.

6. Law enforcement had the opportunity to collect evidence immediately following the first incident and it failed to do so.

7. Law enforcement had the opportunity to collect this evidence following the second incident and failed to do so.

8. This evidence has been irrevocably lost due to the willful inaction of the investigators.

WHEREFORE, the Defendant respectfully requests

1. That the court dismiss this matter.

2. For such other relief deemed just and proper.

This the 9th day of July, 2019.

SAMUEL A. SNEAD
Assistant Capital Defender
31 College Place, D203
Asheville, NC 28801
828-259-3434
samuel.a.snead@nccourts.org

STATE OF NORTH CAROLINA COUNTY OF BUNCOMBE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION FILE NOS. 16CRS149

STATE OF NORTH CAROLINA v. KELVIN OYAKHILOME IRABOR	**AFFIDAVIT**

The undersigned, being first duly sworn, deposes and says the following:

1. I am attorney duly licensed and authorized to practice law in the State of North Carolina and that I work as an Assistant Capital Defender in the Office of the Capital Defender.

2. I was appointed to represent Mr. Irabor in October 2015.

3. I received discovery in these matters up to the first trial of these matters, which began January 23, 2017.

4. The sworn testimony referenced in this motion is taken from the transcript of the first trial.

5. Attachment B of this motion was not provided in discovery. It was printed to a pdf file from Google Earth and labeled using Adobe Acrobat.

6. Attachment C of this motion was a photograph of the door to Apartment 14E taken December 8, 2016, by undersigned counsel in preparation for the first trial.

7. The inquiries regarding the disposition of the door to apartment 14E were made by the defense within the past 30 days of this motion and would be supported if the need arose through the testimony of Jerry Dale, the building superintendent at Ledgewood Village and Yvonne Cobourn, investigator for the defense.

8. This affidavit accompanies a Motion filed this date.

9. I have read the foregoing Motion and knows the contents thereof to be true of my own knowledge except as to those matters and things alleged upon information and belief and as to those matters and things I believe them to be true.

10. Further affiant sayeth naught.

SAMUEL A. SNEAD, Affiant

I certify that this person personally appeared before me this day acknowledging to me that he signed the foregoing document.

SWORN to and SUBSCRIBED before me, this the 9th day of July, 2019.

NOTARY PUBLIC

My Commission Expires: 7/7/23

LAURA A BENSON-GREER
Notary Public
Buncombe
County
My Comm. Exp.
07-17-2023
NORTH CAROLINA

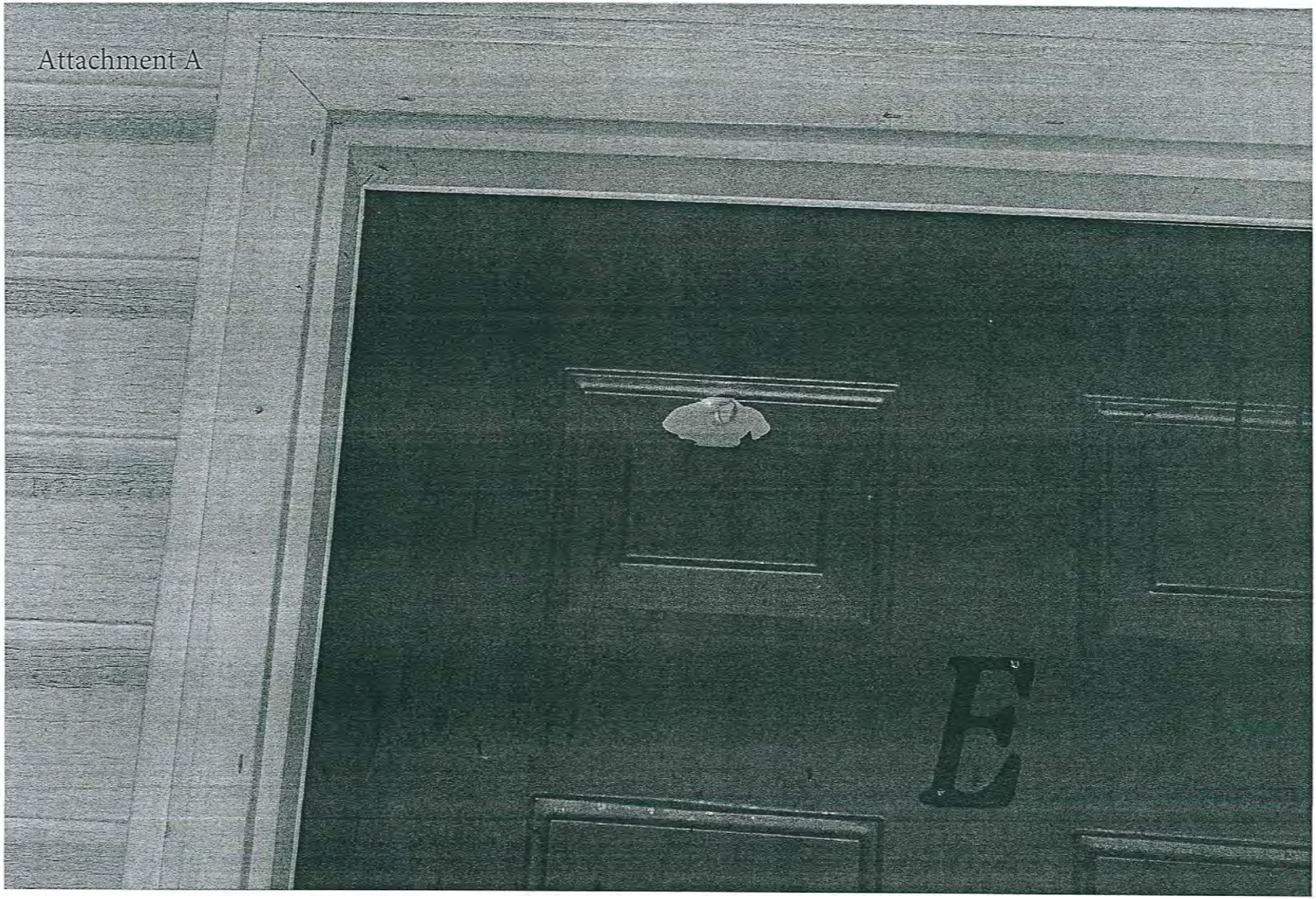
CERTIFICATE OF SERVICE

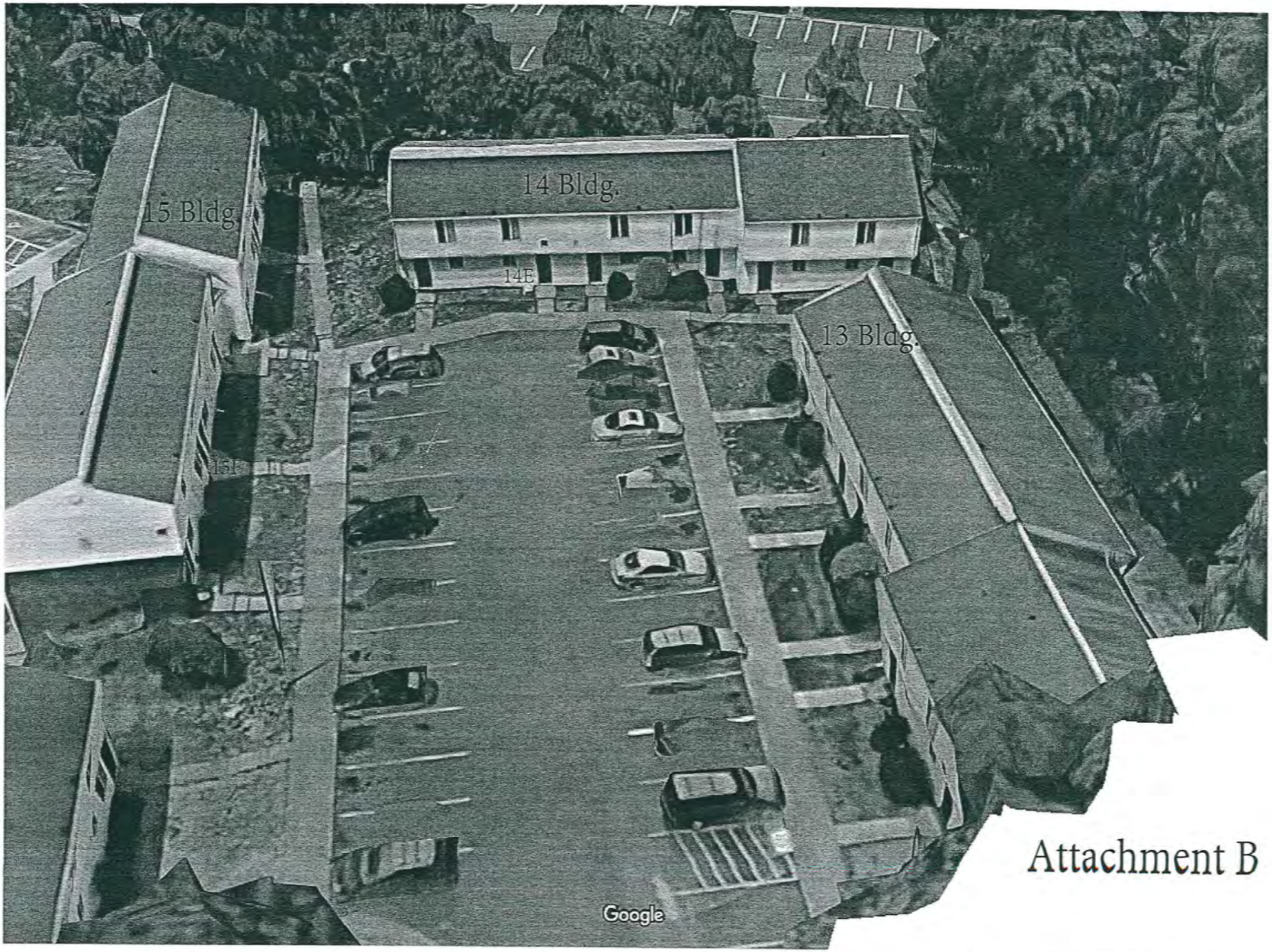
I hereby certify that a copy of the foregoing has been served on the District Attorney's Office for Buncombe County, by leaving a copy at the office with an associate or employee.

This, the 9th day of July, 2019.

SAMUEL A. SNEAD
Assistant Capital Defender
Asheville, NC

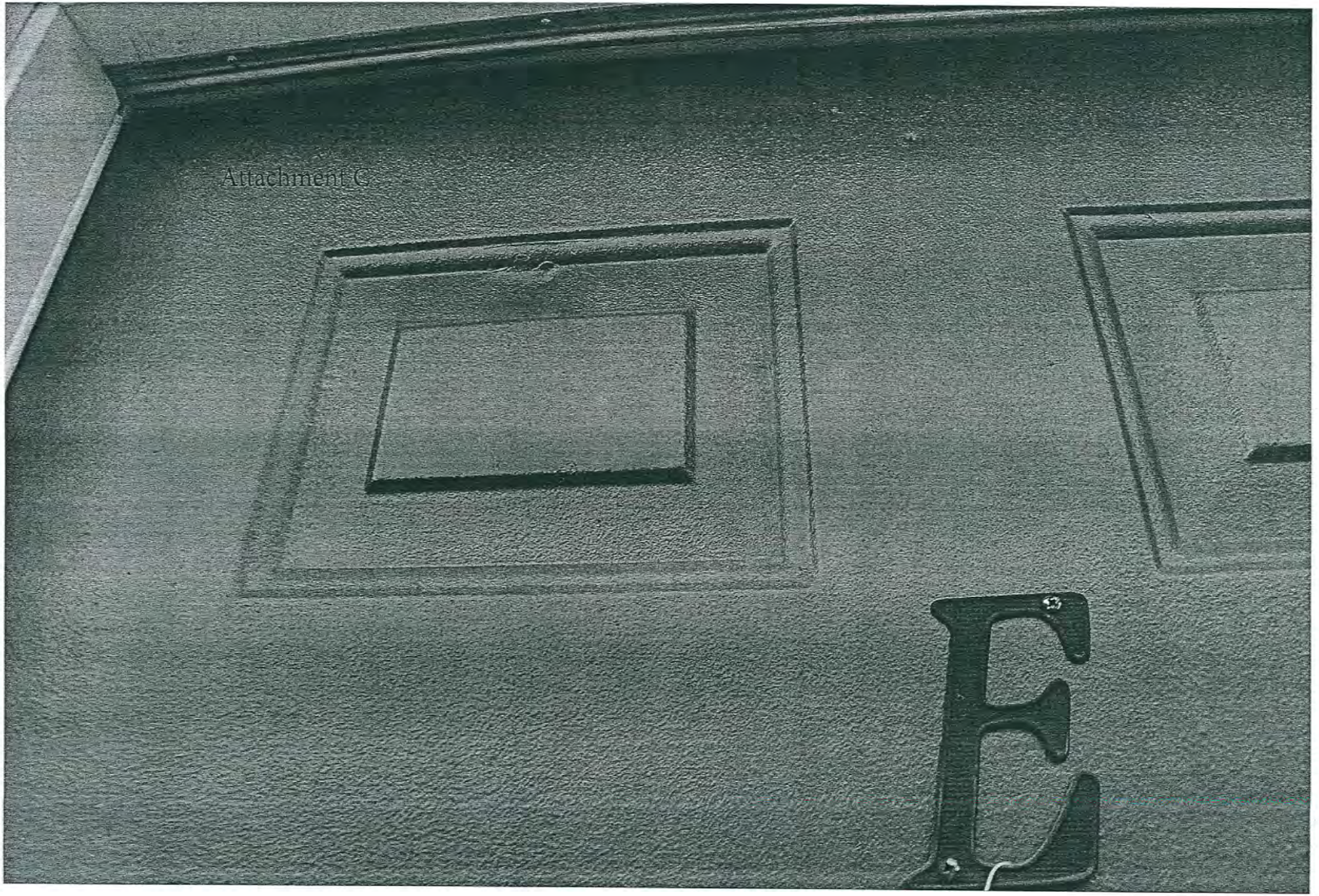
Attachment A





Attachment B

Imagery ©2019 Google, Map data ©2019 10 ft


Attachment C
E

Litigating Common Law, Statutory, and Constitutional Claims of Defensive Force

By Andrew DeSimone and Amanda Zimmer
Assistant Appellate Defenders
Durham, North Carolina
(919)354-7210

I. Overview

For offenses committed on or after December 1, 2011, North Carolina adopted an expanded version of the Castle Doctrine and other statutes relating to the use of defensive force. The new statutes contain important justification defenses, presumptions, disqualifications, and immunity provisions. Whether and how the new statutes abrogate or expand the common law of defensive force are still open questions. The answers to those questions will depend upon how we litigate these complex cases. Thus, it is absolutely vital to thoroughly research and present all available **common law**, **statutory**, and **constitutional claims** for the use of defensive force. Part II briefly discusses certain common law, statutory, and constitutional defensive force claims. Parts III through V analyze the statutory presumptions, disqualifications, and immunity provisions. Part VI provides practical advice for litigating defensive force cases. Finally, Part VII lists some resources available to you.

II. The Three Categories of Defensive Force Claims: Common Law, Statutory, and Constitutional.

A. Common Law Defensive Force

i. Common law perfect self-defense has four elements:

(1) it appeared to defendant and he/she/they believed it to be necessary to kill the deceased (or use non-deadly force) in order to save himself/herself/themself or others from death or great bodily harm (or bodily injury/offensive physical contact);

(2) defendant's belief was reasonable in that the circumstances as they appeared to the defendant at that time were sufficient to create such a belief in the mind of a person of ordinary firmness;

(3) defendant was not the aggressor in bringing on the affray, *i.e.,* he/she/they did not aggressively and willingly enter into the fight without legal excuse or provocation; and

(4) defendant did not use excessive force, *i.e.*, did not use more force than was necessary or reasonably appeared to him/her/them to be necessary under the circumstances to protect himself/herself/themself from death or great bodily harm.

State v. Lyons, 340 N.C. 646, 661, 459 S.E.2d 770, 778 (1995); *State v. Clay*, 297 N.C. 555, 563, 256 S.E.2d 176, 182 (1979).

ii. Common law defense of habitation:

"[U]nder the defense of habitation, the defendant's use of force, even deadly force, before being physically attacked would be justified to prevent the victim's entry provided that the defendant's apprehension that he was about to be subjected to serious bodily harm or that the occupants of the home were about to be seriously harmed or killed was reasonable and further provided that the force used was not excessive."

State v. Blue, 356 N.C. 79, 88, 565 S.E.2d 133, 139 (2002).

B. Statutory Defensive Force

i. Statutory Self-Defense

N.C.G.S. §14-51.3(a) provides that **non-deadly force** can be used 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." It also provides a person may use **deadly force** and there is **no duty to retreat** if:

- He/she/they reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself/herself/themself or another, OR

- Under the circumstances permitted by N.C.G.S. § 14-51.2.

ii. Statutory Defense of Home, Motor Vehicle, or Workplace

Under N.C.G.S. § 14-51.2(b), a 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/herself/themself or another when using deadly defensive force, *i.e.* defensive force that is intended or likely to cause death or serious bodily harm, if both of the following apply:

- 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

AND

- 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.

Subsection (d) further provides, "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."

Subsection (e) provides, "A person who uses force as permitted by this section is justified in using such force[.]" Unfortunately, none of the other subsections expressly permit the use of force at all. However, it would be absurd to interpret the statute as not permitting the use of force as that would render section 14-51.2(e) completely meaningless. Also, section 14-51.3 states a person is justified in using deadly force "under the circumstances permitted pursuant to G.S. 14-51.2." Moreover, section 14-51.4 refers to the "justification described in G.S. 14-51.2." A conservative interpretation of the statute would that if the presumptions in 14-51.2(b) and (d) apply and none of the exceptions in 14-51.2(c) or 14-51.4 apply, then the use of force, including deadly force, is justified.

Be aware that the statute defines "home" to include the curtilage. N.C.G.S. § 14-51.2(a)(1). Therefore, if something happens in a driveway, yard, free-standing garage, or an outbuilding sufficiently close to the home, it is legally the same as if it took place within the four walls of the home.

Additionally, the same protection that applies when there is an entry to the home applies when there is an entry to a workplace or motor vehicle as defined by N.C.G.S. § 14-51.2(a).

iii. Recent Case Law

In *State v. Lee*, 370 N.C. 671, 811 S.E.2d 563 (2018), the defendant's cousin, Walker, and the decedent argued a few times on New Year's Eve. The defendant and Walker later met the decedent in the street. Walker and the decedent continued to argue. Walker punched the decedent in the face, and the decedent shot Walker and continued to shoot him as Walker fled. The decedent then turned and pointed the gun at the defendant and the defendant shot the decedent, killing him. The State charged the defendant with first-degree murder.

Our Supreme Court recognized that under N.C.G.S. §14-51.3(a), "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 … [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." The Court held the trial court erred by failing to instruct the jury that the defendant had no duty to retreat. The Court also found the error entitled the defendant to a new trial because the omission "permitted the jury to consider defendant's failure to retreat as evidence that his use of force was unnecessary, excessive, or unreasonable."

In *State v. Bass*, 371 N.C. 535, 819 S.E.2d 322 (2018), the defendant was convicted of AWDWISI. The defendant's evidence showed that the victim approached the defendant on the grounds of the apartment complex where the defendant lived. The victim reached for a large knife in a sheath attached to his pants and the defendant shot him and ran. The Supreme Court recognized that "wherever an individual is lawfully located—whether it is his home, motor vehicle, workplace, or any other place where he has the lawful right to be—the individual may stand his ground and defend himself from attack when he reasonably believes such force is necessary to prevent imminent death or great bodily harm to himself or another." *Bass*, 371 N.C. at 541, 819 S.E.2d at 326. It further stated, "it is clear that a defendant entitled to any self-defense instruction is entitled to a complete self-defense instruction, which includes the relevant stand-your-ground provision." *Id.* at 542, 819 S.E.2d at 326. A new trial was required due to the failure to include this portion of the instruction.

It is clear that under the statutes including the instruction on habitation is more favorable to defendants than an instruction limited to self-defense alone since it includes the statutory presumptions. *See State v. Kuhns*, 260 N.C. App. 281, 288, 817 S.E.2d 828, 832 (2018) (recognizing that a jury instruction on the common-law defense of habitation would be more favorable to a defendant than would an instruction limited to self-defense and that "[t]his remains true pursuant to N.C. Gen. Stat. §§ 14-51.2 and 14-51.3").

C. Constitutional Claims of Self-Defense

Constitutionalize your requests for jury instructions on both common law and statutory forms of self-defense. Our Supreme Court has recognized that "'[t]he first law of nature is that of self-defense[;]'" it is "a 'primary impulse' that is an 'inherent right' of all human beings." *State v. Moore*, 363 N.C. 793, 796, 688 S.E.2d 447, 449 (2010) (quoting *State v. Holland*, 193 N.C. 713, 718, 138 S.E. 8, 10 (1927)). Thus, (1) argue self-defense instructions are required under state and federal **substantive due process**. Also, (2) argue self-defense instructions are required in order to effectuate the **right to present a defense** pursuant to the state and federal constitutions. Finally, if the use of defensive force involves a firearm, (3) argue self-defense instructions are also required under the **Second Amendment**. *McDonald v. Chicago*, 561 U.S. 742, 177 L. Ed. 2d 894 (2010); *District of Columbia v. Heller*, 554 U.S. 570, 171 L. Ed. 2d 637 (2008).

III. Statutory Presumptions

As stated above, section 14-51.2(b) creates a presumption that a lawful occupant of a home, vehicle or workplace has a reasonable fear of imminent death or great bodily harm when using deadly defensive force if: (1) the person against whom the force is used was in the process of unlawfully and forcefully entering, had unlawfully and forcibly entered, or was trying to remove another against their will from a covered location; and (2) the person using defensive force knew or had reason to know of the unlawful and forcible entry or act.

Section 14-51.2(c) states that the presumption discussed in subsection (b) is rebuttable and does not apply in five enumerated circumstances, including use of force against LEOs, other lawful residents, or intruders who have abandoned the intrusion and left the premises, and where the defendant is engaged in or using the place to further any criminal offense "that involves the use or threat of physical force or violence against any individual."

Section 14-51.2(d) creates a second presumption that the unlawful and forcible intruder is presumed to intend to commit an unlawful act involving force or violence. Unlike the presumption in subsection (b), nothing in the statute says this presumption is rebuttable.

IV. Statutory Disqualifications

A. Statutory justifications unavailable to a person who was "attempting to commit, committing, or escaping after the commission of a felony."

N.C.G.S. § 14-51.4(1) provides that "[t]he justification described in G.S. 14-51.2 and G.S. 14-51.3 is not available" if the person using defensive force "[w]as attempting to commit, committing, or escaping after the commission of a felony."

In *State v. Crump*, 259 N.C. App. 144, 815 S.E.2d 415 (2018), *rev'd on other grounds*, 376 N.C. 375, 380, 851 S.E.2d 904, 909 (2020), the defendant was tried for, *inter alia*, AWDWIK and "raised the statutory justifications of protection of his motor vehicle and self-defense pursuant to N.C.G.S. §§ 14-51.2, -51.3[.]" The trial court instructed the jury that under N.C.G.S. § 14-51.4, statutory self-defense was not available to a person who was attempting to commit, committing, or escaping after the commission of a felony.

On appeal, the defendant argued the trial court erred by failing to instruct the jury that commission of a felony only disqualifies statutory self-defense when a defendant's "felonious acts directly and immediately caused the confrontation that resulted in the deadly threat to him." The Court of Appeals rejected that argument. The Court recognized that N.C.G.S. § 14-51.4(1) does not contain any qualifying or limiting language modifying the word "felony." That absence contrasts with N.C.G.S. §14-51.2(c)(3), which denies the presumption of reasonableness of the perceived need to use force to safeguard the home, workplace, or vehicle to one using that place "to further any criminal offense *that involves the use of threat of physical force or violence against any individual*." Thus, the Court held that under the plain language of § 14-51.4(1), there was no requirement of a causal nexus between the commission of a felony and the perceived need to use defensive force.

In *Crump*, the State also claimed the defendant was disqualified from using defensive force because he was committing AWDWKI at the time. The defense argued, this was "circular, triggering both the consideration and

disqualification of his self-defense claim and thereby negating it." *Crump*, 259 N.C. App. at 151, 815 S.E.2d at 420-21. The State conceded this was "circularity error" and the Court agreed. *Id.* The Court later stated, "It seems common sense that the felony to which self-defense is asserted as a justification cannot also be the felony rendering self-defense unavailable to defendant. To hold otherwise would render the self-defense justification futile." *State v. Gates*, 257 N.C. App. 952, 809 S.E.2d 405 (2018) (unpublished).

Be prepared to distinguish *Crump*. *Crump* should only be read to preclude *statutory* claims of self-defense. Thus, the felony disqualification should not apply to common law and constitutional claims of self-defense. The Court of Appeals has extended *Crump* in an unpublished opinion to claims of common law self-defense. *State v. McLymore*, No. COA19-428, 2020 N.C. App. LEXIS 333 (May 5, 2020) (unpublished), *discretionary review allowed*, No. 270P20 (N.C. March 12, 2021). Be aware of *McLymore*, but because it is unpublished, argue it is not binding.

Be prepared to preserve arguments. It seems like the obvious intent of the statute was to prevent a robber, rapist, or burglar who meets with armed resistance to rely on the statute to overcome that resistance. However, under *Crump*, the felony disqualification could prevent a defendant who was committing tax fraud from defending against a home invasion. Or, it could prevent a person who constructively possessed cocaine in his home from defending himself if someone punched him in a bar. That would be absurd. Review of *Crump* was allowed by the Supreme Court, but the Court ultimately decided the case without reaching the defensive force issue. *State v. Crump*, 376 N.C. 375, 380, 851 S.E.2d 904, 909 (2020). Discretionary review is pending in *State v. McLymore* on the issue of "Whether the Court of Appeals erred by concluding the trial court did not err in instructing the jury that Mr. McLymore was not entitled to self-defense if he was committing the felony of possession of a firearm by a felon because the instruction was not a complete and correct statement of the law?" *State v. McLymore*, No. 270P20 (PDR granted, N.C. March 12, 2021).

B. Statutory justifications unavailable to a person who "[i]nitially provokes the use of force against himself or herself."

N.C.G.S. § 14-51.4(2) provides the statutory justifications are unavailable to a person who "[i]nitially provokes the use of force against himself or herself." However, a person who provoked the use of force is justified if

(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," there was no reasonable means to retreat, and the use of deadly force was the only way to escape the danger.

OR

(b) the person who used defensive force withdraws from physical contact with the person who was provoked and clearly indicates the desire to withdraw and terminate the use of force, but the person who was provoked continues or resumes the use of force.

In *State v. Holloman*, 369 N.C. 615, 799 S.E.2d 824 (2017), the State's evidence showed that the defendant approached the decedent with a gun and fired before the decedent could retrieve his gun. Under that view of the evidence, the Court held the defendant was an aggressor using deadly force.

The Court stated that under N.C.G.S. § 14-51.4, an aggressor can regain the right to use self-defense where, *inter alia*, "[t]he 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 Court first recognized that the statute does not "distinguish between situations in which the aggressor did or did not utilize deadly force." However, the Court ultimately interpreted the statute to mean that only an aggressor using non-deadly force could regain the right to self-defense; an aggressor using deadly force could not. As a result, the Court held the trial court correctly instructed the jury that an aggressor using deadly force forfeits the right to use deadly force in self-defense.

The Court also recognized the defendant's evidence showed that the defendant walked up to the decedent with his gun at his side to determine if the decedent had assaulted his girlfriend. Under that view of the evidence, the Court held the defendant was not an aggressor at all. Thus, the Court held the trial court did not err by failing to instruct the jury that the defendant could have regained the right to self-defense if it found he was an aggressor using non-deadly force because the instruction "would not have constituted an accurate statement of the law arising upon the evidence."

V. Statutory Immunity

A. Statutory Immunity Provisions

N.C.G.S. §§ 14-51.2(e) and 14-51.3(b) both provide: "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."

Under N.C.G.S. § 15A-954(a)(9), "The court on motion of the defendant must dismiss the charges stated in a criminal pleading if it determines that … (9) The defendant has been granted immunity by law from prosecution." N.C.G.S. § 15A-954(c) provides: "A motion to dismiss for the reasons set out in subsection (a) may be made at any time."

B. Overview

Assuming the North Carolina Supreme Court recognizes a right to a pretrial determination of immunity under the statues (as every other State Supreme Court opinion addressing similar statutes in other states has), this represents a major departure from prior North Carolina procedure regarding self-defense. Although N.C.G.S. § 14-51.2 (the Castle doctrine statute) is relatively narrow, N.C.G.S. § 14-51.3 is extremely broad – essentially covering every case of self-defense unless one of the enumerated exceptions applies (i.e., not against a law enforcement officer or bail bondsman acting lawfully, or if N.C.G.S. § 14-51.4 applies either because the defendant was committing a felony or was the initial aggressor). These immunity provisions are not limited to homicide charges and apply in assault cases as well.

The question of whether defendants are entitled to a pretrial determination of immunity was raised in the case of *State v. Austin*, 294PA17. The Supreme Court found that certiorari was improvidently granted in this case and the appeal following Ms. Austin's conviction is now pending in the Court of Appeal in *State v. Austin*, 20-198. The pleadings in both cases are available at www.ncappellatecourts.org.

C. Tactical Considerations

There are a number of tactical benefits to filing a pretrial motion for immunity in an appropriate case. In addition to the obvious opportunity to get charges dismissed prior to trial, other potential advantages include: (1) the opportunity to pin down witness testimony and to preview the State's case – an immunity hearing should be an evidentiary hearing and you should have the right to call any necessary witnesses to establish the client's right to immunity, including law enforcement witnesses (e.g., CSI, officers taking statements) as well as eye witnesses to the use of defensive force (including the victim in an assault case); (2) even if the judge does not dismiss on immunity grounds, the hearing may be a time to get a judge to set a realistic bond; and (3) gaining leverage for plea negotiations.

The downsides include: (1) previewing your own case for the State; (2) the possibility that you may need to put the client on the stand to establish immunity, especially if you are proceeding exclusively under section 14-51.3 and the client will not be entitled to the benefit of the statutory presumption of reasonable fear under section 14-51.2(b).

D. Practice Tips

i. Drafting the motion

The legal basis for the motion is simple. You should be citing N.C.G.S. §§ 14-51.2(e) (if applicable), 14-51.3(b) (always), and 15A-954(a)(9) and (c) (always). Sections 14-51.2(e) and 14-51.3(b) establish the substantive right to immunity, while § 15A-954(a)(9) provides the procedural mechanism for obtaining a dismissal on immunity grounds. Section 15A-954(c) says your motion under § 15A-954(a)(9) can be raised "at any time." Even if you think the Castle doctrine statute, § 14-51.2, applies, you should also cite to § 14-51.3(b). This gives you a fallback position even if there is some evidentiary problem or question regarding whether § 14-51.2 applies.

The factual basis portion of the motion should be fairly detailed. If you are proceeding under § 14-51.2, you need to include sufficient details to show: (1) how the client was a lawful occupant of the home, vehicle, or workplace where the defensive force was used; (2) how the intruder's entry onto or into the property in question was both unlawful and forcible; (3) that the defendant was aware of the unlawful and forcible intrusion (usually this should be obvious); and (4) that none of the exceptions in § 14-51.2(c)(1-5) apply.

With respect to § 14-51.3, your motion should explicitly assert that the defendant actually and reasonably believed the use of non-deadly force was necessary to defend the defendant or another from the imminent use of unlawful force, or that the defendant actually and reasonably believed it was necessary to use deadly force to prevent imminent death or great bodily harm. You must also allege enough factual background to back up your assertion – enough so that a judge reading the motion will have a sufficient understanding of your client's side of the story to agree that the defendant had an actual and reasonable belief in the necessity to use defensive force.

To the extent possible, it may be advantageous to base your factual allegations exclusively or almost exclusively on materials received from the State during discovery. This avoids revealing factual information the State might not have and has the additional benefit that it will be hard for the State to challenge the authenticity of the information.

ii. Conducting a hearing

At an evidentiary hearing, you should expect to have the burden of proof by a preponderance of the evidence. Although there are no cases specifically interpreting § 15A-954(a)(9), cases interpreting other subsections of 15A-954(a) have said that this is the defendant's burden. *E.g., State v. Williams*, 362 N.C. 628, 669 S.E.2d 290 (2008) (defendant has burden of proof under preponderance standard for claims under 15A-954(a)(4)). There is no reason to expect § 15A-954(a)(9) to work differently.

Give very careful consideration to what witnesses to call, and especially whether or not to call the client as a witness for the hearing. If you are proceeding under § 14.51.2 and can establish through discovery materials that the presumptions under sections 14-51.2(b) and (d) unquestionably apply, it may not be necessary to call the defendant. On the other hand, if you are proceeding under § 14-51.3 without the benefit of the presumptions, a judge (like many juries) may want to hear from the defendant before determining that he or she actually feared imminent death or injury.

Also consider whether you expect the State to hotly contest the underlying facts or whether the underlying facts are largely uncontested and the case turns on whether those facts do or do not show lawful defensive force. If the facts will be hotly contested, consider calling many or all of the State's fact witnesses. If you can show the State's witnesses lack credibility, you may increase the willingness of the judge to rule in your favor, even if it requires

the judge to resolve contested factual issues against the State. If nothing else, though, you get a "free" deposition of the State's witnesses.

VI. Practical Advice

A. Make separate and distinct arguments under the common law, the statutes, and the federal and state constitutions. The extent to which the statutes abrogate or expand the common law of defensive force is still an open question. In *Lee*, Chief Justice Martin filed a concurring opinion recognizing that N.C.G.S. §§ 14-51.3 and 14-51.4 "at least partially abrogated—and may have completely replaced—our State's common law concerning self-defense and defense of another." The Court of Appeals has since stated, "We acknowledge the extent to which our general statutes codifying the right to self-defense, including Section 14-51.3, supplements or supersedes *Richardson* and its progeny is unsettled." *State v. Leaks*, 270 N.C. App. 317, 324, 840 S.E.2d 893, 898-99 (2020), *discretionary review allowed*, No. 149PA20 (N.C. March 12, 2021). Also, be aware that § 14-51.2(g) provides, "This section is not intended to repeal or limit any other defense that may exist under the common law." However, § 14-51.3 does not contain such a provision. With that said, you can argue that interpreting § 14-51.3 as abrogating the common law of self-defense would render § 14-51.2(g) meaningless—because there would not be any common law of defensive force to preserve. The main take home message is to ensure that you make separate and distinct arguments under the common law, the statutes, and the federal and state constitutions.

B. Be very careful when your client testifies. In *State v. Cook*, 802 S.E.2d 575 (2017), *aff'd per curiam*, 370 N.C. 506, 809 S.E.2d 566 (2018), the defendant was charged with assault with a firearm on a law enforcement officer. The Court of Appeals held that "where a defendant fires a gun as a means to repel a deadly attack, the defendant is not entitled to a self-defense instruction where he testifies that he did not intend to shoot the attacker." Because the defendant testified he did not intend to shoot anyone when he fired his gun, he was not entitled to a self-defense instruction.

The Court further recognized that the Castle doctrine under N.C.G.S. § 14-51.2 "is an affirmative defense provided by statute which supplements other affirmative defenses that are available under our common law." However, the Court stated in dicta that "a defendant who testifies that he did not intend to shoot the attacker is not entitled to an instruction under N.C.G.S.

§ 14-51.2 because his own words disprove the rebuttable presumption that he was in reasonable fear of *imminent* harm."

C. Excessive force under the statutes. Nothing in the statutes explicitly discusses the common law concept of excessive force. None of the exceptions in §§ 14-51.2(c) or 14-51.4 say a person who uses excessive force does not get the statutory defense. However, § 14-51.2(c)(5) states that the presumption of a reasonable fear of imminent death or serious bodily harm does not apply if the intruder has discontinued all efforts to unlawfully and forcibly enter and has exited. This provision establishes an outer limit on the use of deadly force.

D. Request special jury instructions. Several of the pattern jury instructions contain errors. They are also long and complicated. Many sections may not apply to the circumstances of your case. Therefore, you should ask the judge to modify them when appropriate. Also, consider drafting written requests for special jury instructions.

VII. Contact the Office of the Appellate Defender

Feel free to call us any time at (919) 354-7210. Every week, we have two attorneys on call to consult with trial attorneys across the state. We are happy to discuss potential issues or record preservation whenever you need a sounding board.