

Issues in Self-Defense Law in North Carolina

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Contents

Retreat

Self-Defense and Retreat from Places Where the Defendant Has a “Lawful Right to Be”
(Aug. 29, 2017)

Home

Defensive Force in the Home (Aug. 7, 2018)

Contemporaneous Felonies

A Lose-Lose Situation for “Felonious” Defendants Who Act in Self-Defense (May 1, 2018)
Court of Appeals Approves Justification Defense for Firearm by Felon (Aug. 21, 2018)

Intent

Another Self-Defense Decision on a Troublesome Doctrine (Jul. 2, 2019)
Some Clarity on Self-Defense and Unintended Injuries (Jun. 5, 2018)
Self-defense, Intent to Kill and the Duty to Retreat (Sept. 18, 2018)

Immunity

Self-Defense Provides Immunity from Criminal Liability (Oct. 4, 2016)

Evidence

Evidence about the “Victim” in Self-Defense Cases (Feb. 5, 2019)

Statutory Principles

Fundamental Principles of Statutory Self-Defense (Aug. 6, 2019)
The Statutory Law of Self-Defense in North Carolina (Jun. 4, 2019)

Earlier blog posts, cited in the above posts but not reprinted here:

[A Warning Shot about Self-Defense](#) (Sept. 7, 2016)

[Is “Justification” a Defense to Possession of a Firearm by a Person with a Felony Conviction?](#)
(Aug. 2, 2016)

[The Statutory Felony Disqualification for Self-Defense](#) (June 7, 2016)

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

Author : John Rubin

Categories : [Crimes and Elements](#), [Uncategorized](#)

Tagged as : [lawful place](#), [retreatself-defense](#)

Date : August 29, 2017

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

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

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

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

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

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

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

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

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

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

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

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

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

Defensive Force in the Home

Author : John Rubin

Categories : [Crimes and Elements](#), [Uncategorized](#)

Tagged as : [curtilage](#), [Deadly Force](#), [defense of home](#), [habitation](#), [self-defense](#)

Date : August 7, 2018

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

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

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

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

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

The Conflict in *Kuhns*

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

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

home and watched him to be sure he complied.

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

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

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

The Meaning of Entry and Home

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

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

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

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

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

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

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

A Lose-Lose Situation for “Felonious” Defendants Who Act in Self-Defense

Author : John Rubin

Categories : [Crimes and Elements](#), [Uncategorized](#)

Tagged as : [defensive force](#), [felony disqualification](#), [self-defense](#)

Date : May 1, 2018

I previously wrote [here](#) about the statutory felony disqualification for self-defense in North Carolina, adopted in 2011 by the General Assembly alongside expanded castle protections and clearer stand-your-ground rights for law-abiding citizens. The felony disqualification, in G.S. 14-51.4, states that a person loses the right of self-defense if he or she “[w]as attempting to commit, committing, or escaping after the commission of a felony.” A literal interpretation of the provision places “felonious” defendants in a lose-lose situation: if they defend themselves, they can be prosecuted for their use of force even if the force is otherwise permissible; if they don’t defend themselves, they could suffer injury or even death. In my earlier blog post, I suggested that the felony disqualification may include a “nexus” requirement—that is, that the disqualification applies only if the defendant’s felony in some way creates or contributes to the assault on the defendant and the resulting need for the defendant’s use of force. The Court of Appeals in the recent case of [State v. Crump](#) took a literal approach, appearing to make the felony disqualification an absolute bar to self-defense if the defendant contemporaneously engages in a felony.

The evidence in *Crump*. The facts of the case aren’t pretty. The State’s evidence, detailed in the Court of Appeals’ opinion (Slip Opinion at 2–3), was that the defendant and the co-defendant robbed several patrons at an illegal poker game a few days earlier on September 24. The defendant was charged with several counts of armed robbery and second-degree kidnapping as well as possession of a firearm by a felon, which were joined for trial with the incident that occurred a few days later. The later incident, on September 29, led to the defendant’s claim of self-defense. An acquaintance of one of the patrons who was robbed on September 24 began receiving text messages from one of the stolen cell phones indicating that the people believed to be the robbers were looking for another poker game to rob. The acquaintance invited them to a fake poker game and, when they arrived, called 911. He told the emergency operator that there were two men in a car with loaded guns and that he thought they were intending to rob someone. The police arrived on the scene, an office complex, in the early hours of the morning on September 29.

The Court of Appeals’ opinion doesn’t describe what happened next, but the appellate briefs by the State and defendant largely agree on the facts (available [here](#) on the North Carolina Supreme Court and Court of Appeals Electronic Filing Site and Document Library). The State’s evidence was that two police officers observed the defendant’s car parked at the back of the office complex. The officers stepped toward the car, threading their way through a gap between two dump trucks, also parked at the back of the complex. The officer in front had shouldered his shotgun, the officer behind had drawn his service revolver. They were in uniform but had not yet announced that they were officers. The State’s evidence was that the occupants of the car fired several times at them, and the officers returned fire.

The defendant’s evidence was that he loaned his car to the co-defendant on September 24, which he frequently did; that the co-defendant and co-defendant’s brother committed the robbery that day; and that the defendant was unaware until after the September 29 incident that the co-defendant and co-defendant’s brother had used his car in the robbery. The defendant also offered evidence that the co-defendant and co-defendant’s brother wanted to go to a poker game on September 29 and asked him to drive them there. After arriving at the office complex, the defendant waited in the car while the co-defendant’s brother unsuccessfully tried to gain entry into the building. While waiting, the defendant saw a shadowy figure pointing a long gun at them. The defendant felt the impact of two shots on his car and,

unaware that the officers were officers, fired several shots at them to give himself time to start the car up and drive off.

The Court of Appeals' opinion picks up the September 29 incident from there. A low-speed pursuit ensued, ending when the defendant drove over stop sticks placed by the police. On searching the car, the police found several of the items stolen during the previous robbery. Based on the September 29 incident, the defendant was charged with two counts of assault with a deadly weapon with intent to kill, two counts of assault with a firearm on a law enforcement officer, and possession of a firearm by a felon. Slip Op. at 3–4.

The trial court dismissed the robbery and second-degree kidnapping charge involving one of the victims and the robbery charge involving another of the victims during the September 24 robbery. The jury found the defendant not guilty of assault with a firearm on a law-enforcement officer during the September 29 incident. The opinion does not indicate the basis for the acquittal, but the offense requires proof that the defendant knew that the officer was an officer. The jury convicted the defendant of all other charges. Slip Op. at 4.

The self-defense instructions given in *Crump*. Based on this evidence, the trial court gave the pattern jury instruction on self-defense in N.C.P.I.—Crim. 308.45, which applies to assaults involving deadly force. The instruction repeated verbatim the statutory felony disqualification in G.S. 14-51.4. The defendant requested that the judge instruct the jury that a disqualifying felony must have some connection to the need to use defensive force—specifically, that a felony is disqualifying only when the “felonious acts directly and immediately caused the confrontation that resulted in the deadly threat to him.” Slip Op. at 8. The trial court declined to modify the instruction.

The Court of Appeals upheld the trial court's instruction. It recognized that the statutory felony disqualification requires a *temporal* connection—that is, the felony must occur contemporaneously with the need to act in self-defense. Thus, the earlier robbery would not be disqualifying. In the Court's view, however, the statute does not require a *causal* connection. The trial court therefore did not err in refusing to include the language requested by the defendant. The Court held further that the defendant was not entitled to self-defense instructions at all because he was committing the offense of possession of a firearm by a felon during the September 29 incident and no causal connection between that felony and the defendant's use of force was required.

The Court of Appeals gave two basic reasons for its interpretation. First, the Court stated that the plain language of the statute did not require a causal connection. That observation doesn't necessarily end the argument, however. In an opinion last year interpreting the self-defense statutes, [State v. Holloman](#), 369 N.C. 615 (2017), the North Carolina Supreme Court addressed the aggressor disqualification in G.S. 14-51.4(2). That statute provides that a person who provokes the use of force against himself or herself may use force in return, including deadly force, if the person reasonably believes that he or she faces death or great bodily injury and has no reasonable means of escape. The defendant in *Holloman* argued that this provision applied even when the defendant begins a conflict with deadly force—that is, when the defendant is an aggressor with “murderous” intent. The Supreme Court recognized that the literal language of the statute did not distinguish between aggressors with or without “murderous intent.” The Court held, however, that the General Assembly could not have intended to allow aggressors with “murderous intent” to rely on self-defense when the other person justifiably uses deadly force to meet the defendant's unjustified use of deadly force. Despite the literal language of the above exception to the aggressor disqualification, the Court concluded that it did not apply to aggressors with murderous intent. *See also State v. Jones*, 353 N.C. 159 (2000) (holding that despite literal language, felony murder statute did not apply to DWI as underlying felony).

Second, the Court of Appeals in *Crump* compared the felony disqualification in G.S. 14-51.4(1) to the wording of G.S. 14-51.2(c)(3). The latter provision is part of the statute on defensive force in one's home, workplace, or vehicle, which establishes a presumption of reasonableness when the defendant uses force against an unlawful, forcible entry into those places. The specific provision denies that presumption if the defendant is engaged in “any criminal offense that involves the use or threat of physical force or violence against any individual.” The Court found that the inclusion of this language shows that the General Assembly intended to limit the denial of the presumption to offenses involving force or violence, while the absence of such language in the felony disqualification shows that the General Assembly

intended to impose no limits.

A difficulty with this interpretation is that it gives with one hand and takes away with the other. If a defendant is engaged in an offense that does not involve force or violence in one of the specified locations (home, workplace, vehicle), the defendant gets the presumption of reasonableness; however, if the offense is a felony, the defendant loses the right of self-defense entirely in those places, whether or not the offense involves force or violence. That's because G.S. 14-51.4 states that the justification in G.S. 14-51.2, which applies to self-defense within one's home, workplace, or vehicle, as well as the justification in G.S. 14-51.3, which applies to defense of person, is unavailable if the felony disqualification applies. The opinion in *Crump* does not address this issue.

Potential impact of holding in *Crump*. In light of the evidence of the earlier robbery and the shooting at the police, the jury in *Crump* might have decided that the defendant did not have the right of self-defense, even with the defendant's requested modification of the instruction. The Court of Appeals' discussion of the facts in *Crump* suggests that the Court had reservations about the defendant's version of the events. The trial court's literal instruction regarding the statutory felony disqualification, however, considerably narrowed the jury's ability to consider the defendant's claim of self-defense, if not effectively precluding it.

Moreover, a literal application of the statute may bar self-defense in a broader array of circumstances than presented in *Crump*. Here are a couple of examples that come to mind:

- Joan, a domestic violence victim, is addicted to opioids from medication previously prescribed to her for pain from her injuries. She is in illegal possession of opioids, a felony, when she is violently assaulted by her boyfriend for reasons that have nothing to do with the felony she was committing. She defends herself to avoid death or serious injury.
- Roger was convicted several years ago of a nonviolent property felony. Although unlawful, he keeps a gun in his home to protect himself and his family. Armed intruders break into his home one night. He shoots to defend himself and his family.

Suppose in these examples that the police and prosecutor believe a different version of what transpired and pursue charges against Joan and Roger. I wonder whether our General Assembly really intended to preclude them from defending themselves when attacked and from telling their side of the story at trial. See *Perkins v. State*, 576 So. 2d 1310, 1314 (Fla. 1991) (concurring opinion) (stating that precluding self-defense for unrelated felony would violate a defendant's fundamental right to defend his or her life and liberty in court by asserting a reasonable defense and would violate the fundamental right to meet force with force in the field when attacked illegally and without justification, the "right to life itself"); see also R. Christopher Campbell, *Unlawful/Criminal Activity: The Ill-Defined and Inadequate Provision for a "Stand Your Ground" Defense*, 20 Barry L. Rev. 43 (Fall 2014) (discussing limits on right of person engaged in unlawful activity to use force without retreating). But see *Dawkins v. State*, 252 P.2d 214 (Okla. Crim. App. 2011) (refusing to require nexus when defendant used illegally modified shotgun in defense of another).

Other questions. The statutory felony disqualification raises additional questions, not specifically addressed in *Crump*.

- In its instructions, the trial court listed uncharged felonies as disqualifying the defendant from acting in self-defense, including the uncharged offenses of attempted robbery with a dangerous weapon and possession of stolen goods during the September 29 incident. Is that permissible? If so, what instructions does the judge have to give the jury on the uncharged crimes? See generally N.C.P.I.—Crim. 214.10 n.5 (directing for a first-degree burglary charge that the judge define the felony that the defendant intended to commit, an element of burglary).
- The trial court also listed as disqualifying felonies the charged offenses of assault with a deadly weapon with intent to kill (AWDWIK) and assault with a firearm on a law enforcement officer. The Court of Appeals recognized that AWDWIK could not be a disqualifying felony because it was the very act that the defendant claimed was in self-defense. The State in *Crump* agreed that the inclusion of this charge in the felony disqualification instructions was a "circularity error." The Court of Appeals indicated that assault with a firearm

on an officer was a disqualifying felony, but that statement seems incorrect because it too involved the act that the defendant claimed was in self-defense. A different issue is whether the jury can base a felony disqualification on an offense for which it acquits the defendant. It seems not.

- *Crump* did not discuss potential defenses to disqualifying felonies, such as a necessity defense to the offense of possessing a firearm by a felon. Presumably, the jury would have to be instructed on defenses to a disqualifying felony, which, if found by the jury, would allow the jury to consider self-defense.
- An additional issue [which I did not identify in my initial post] is the extent to which common law defensive force principles survive the adoption of the defensive force statutes. *Crump* considered the impact of the statutory felony disqualification on the defendant's statutory right of self-defense. Slip op. at 6 (stating that defendant raised statutory justifications to AWDWIK charge). It did not specifically address any rights under the common law. See, e.g., G.S. 14-51.2(g) (stating that section does not repeal any other defense that may exist under common law); *State v. Lee*, ___ N.C. ___, 811 S.E.2d 563 (2018) (Martin, C.J., concurring) (querying whether defensive force statutes partially abrogate or completely replace common law on defensive force).
- As discussed in my [earlier blog post](#) on this subject, the statutory felony disqualification, when applicable, bars self-defense to assault charges such as those in *Crump*. In a homicide case, it probably does not bar imperfect self-defense, which reduces murder to manslaughter under North Carolina law. This is so because G.S. 14-51.4 states that the felony disqualification bars the "justification" in G.S. 14-51.2 (defense within home, workplace, or vehicle) and G.S. 14-51.3 (defense of person). Imperfect self-defense is not typically considered a justification defense so the disqualification would not apply.

These and other questions will need to be addressed in applying the felony disqualification. Should our Supreme Court grant review, however, the first question will be whether the felony disqualification includes a causal nexus requirement.

Court of Appeals Approves Justification Defense for Firearm by Felon

Author : Phil Dixon

Categories : [Crimes and Elements](#), [Uncategorized](#)

Tagged as : [defense](#), [justification](#), [possession of firearm by felon](#), [State v. Mercer](#)

Date : August 21, 2018

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

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

The test set out in *Deleveaux* requires a criminal defendant to produce evidence of the following to be entitled to an instruction on justification as a defense to a charge of possession of firearm by felon: (1) that the defendant was under unlawful and present, imminent and impending threat of death or serious bodily injury; (2) that the defendant did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct; (3) that the defendant had no reasonable legal alternative to violating the law; and (4) that there was a direct causal relationship between the criminal action and the avoidance of the threatened harm. *Edwards* at 393-94.

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

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

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

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

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

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

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

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

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

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

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

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

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

Another Self-Defense Decision on a Troublesome Doctrine

Author : John Rubin

Categories : [Crimes and Elements](#), [Uncategorized](#)

Tagged as : [self-defense](#)

Date : July 2, 2019

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Posted on [Sep. 18, 2018, 9:44 am](#) by [Phil Dixon](#) • [2 comments](#)



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

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

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

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

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

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

Update
Che on New Legislation
Regarding the
Restoration of Felons’
Gun Rights
News Roundup – North
Carolina Criminal
LawNorth Carolina
Criminal Law on News
Roundup
Appellate Attorney on
What Happens When the
Jury Is Instructed on the
Wrong Theory?

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

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

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

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

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

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

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

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

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

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

Retreat"

John Rubin

September 18, 2018 at 10:43 am

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

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

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

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

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

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

Reply

Some Clarity on Self-Defense and Unintended Injuries

Author : John Rubin

Categories : [Crimes and Elements](#), [Uncategorized](#)

Tagged as : [involuntary manslaughter](#), [self-defense](#)

Date : June 5, 2018

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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.

Evidence about the “Victim” in Self-Defense Cases

Author : John Rubin

Categories : [Uncategorized](#)

Date : February 5, 2019

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

Background

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

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

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

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

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

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

Evidence about the Victim

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

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

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

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

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

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

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

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

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

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

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

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

Fundamental Principles of Statutory Self-Defense

Author : John Rubin

Categories : [Crimes and Elements](#), [Uncategorized](#)

Tagged as : [defense of habitation](#), [defense of home](#), [defense of others](#), [self-defense](#)

Date : August 6, 2019

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

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

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

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

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

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

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

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

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

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

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

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

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

The Statutory Law of Self-Defense in North Carolina

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

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

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

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

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

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

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

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

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

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

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

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