

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Durend Randall,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

February 25, 2022

Court of Appeals Case No.
21A-CR-1454

Appeal from the Vigo Superior
Court

The Honorable John T. Roach,
Judge

Trial Court Cause No.
84D01-1911-MR-4391

Bailey, Judge.

Case Summary

- [1] Durend Randall (“Randall”) appeals his conviction for Unlawful Possession of a Handgun by a Serious Violent Felon, a Level 4 felony.¹ He presents the sole issue of whether the trial court’s failure to sua sponte instruct the jury upon the defense of self-defense in the second phase of the bifurcated trial was fundamental error. We affirm

Facts and Procedural History

- [2] During November of 2019, Randall lived in Terre Haute, Indiana, with his brother, Antwan Randall (“Antwan”), Antwan’s girlfriend, Lameeka Williams (“Williams”), and Antwan’s three children. On the evening of November 8, Antwan’s friend, Evan Pershing (“Pershing”), came over to the residence to visit.
- [3] Antwan, Williams, Randall, and Pershing had some drinks while the children slept. At around 3:00 a.m., Randall and Pershing were intensely discussing past events when Pershing took out his gun and chambered a bullet. Antwan took the gun away from Pershing, removed the clip and bullet, and instructed Pershing to put the bullet away. When Pershing pocketed the bullet, Antwan returned the gun, with the clip inside. Conversation resumed, and Pershing

¹ Ind. Code § 35-47-4-5(c). He does not challenge his conviction for Resisting Law Enforcement, as a Class A misdemeanor. I.C. § 35-44.1-3-1.

again pulled out the gun, prompting Antwan to take away the gun and hide it in a living room sofa console. At some point, Pershing retrieved the gun and pointed it at Randall. Antwan instructed Pershing to take the gun outside and put it in his vehicle; Pershing then exited the residence and appeared to comply with Antwan's instruction.

[4] About thirty minutes later, Antwan was in the bathroom when he heard a gunshot. Antwan ran out into the living room where he saw Randall and Pershing wrestling for control of the gun that was in Pershing's hand. Antwan grabbed for the gun, and it discharged, striking Antwan in the hand and leg. The struggle continued and several more shots were fired. Antwan fell to the ground, as did Pershing. The gun landed between Pershing's legs and Randall picked it up.

[5] Antwan called to Williams to take him to the hospital and she did so. At first, Williams and Antwan advised authorities that Antwan had been shot outside a nightclub. A few hours later, when police learned that there was another shooting victim, they entered the Randall residence. Pershing was found deceased, having sustained multiple gunshot wounds. Randall was found in bed, with his eyes closed. When officers attempted to handcuff Randall, he engaged them in a struggle. After Randall was subdued, officers found Pershing's gun in Randall's pants pocket.

- [6] On November 14, 2019, the State charged Randall with Murder,² Aggravated Battery, as a Level 3 felony (for the shooting of Antwan),³ Unlawful Possession of a Firearm by a Serious Violent felon, and Resisting Law Enforcement. During the first phase of the bifurcated jury trial, Randall raised the defense of self-defense and the jury was instructed accordingly. The trial court granted Randall's motion for a directed verdict as to the Aggravated Battery count. The jury acquitted Randall of Murder and the lesser-included offense of Voluntary Manslaughter⁴ but found him guilty of Resisting Law Enforcement.
- [7] In the second phase of the trial, the State presented evidence that Randall had previously been convicted of robbery and asked the jury to consider the prior testimony that Randall had a gun in his pocket when he was arrested. Randall did not request a self-defense instruction in the second phase of the trial. The jury found Randall guilty of the possession charge. He was sentenced to four years imprisonment for that conviction, to be served concurrently with a one-year sentence for Resisting Law Enforcement. Randall now appeals.

Discussion and Decision

- [8] In the first phase of the bifurcated trial, Randall requested an instruction on self-defense. In the second phase, when the jury was to determine whether Randall,

² I.C. § 35-42-1-1.

³ I.C. § 35-42-2-1.5.

⁴ I.C. § 35-42-1-3.

had the status of a serious violent felon and had unlawfully possessed a handgun, Randall did not request a self-defense instruction. He now argues that the trial court's failure to sua sponte give such an instruction was fundamental error. "The 'fundamental error' exception is extremely narrow and applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process." *Mathews v. State*, 849 N.E.2d 578, 587 (Ind. 2006).

[9] To prevail on a self-defense claim, a defendant must demonstrate he was in a place he had a right to be; did not provoke, instigate, or participate willingly in the violence; and had a reasonable fear of death or great bodily harm. *Harmon v. State*, 849 N.E.2d 726, 730 (Ind. Ct. App. 2006.) The State urged the jury to find Randall guilty of the possession charge because "he had [the gun] in his pocket of his pants" and a detective "pulled it out of his pocket" at the time of arrest. (Tr. Vol. IV., pg. 32.) Randall argued to the jury that he had a continuing right of self-defense.

[10] Randall and the State agree that a serious violent felon is not prohibited from raising a defense of self-defense or requesting an instruction thereon, where there is evidentiary support for such an instruction.

A valid claim of self-defense is a legal justification for an act that is otherwise defined as criminal. . . . [Here, the] possession of the firearm was temporary and lasted only for the period of time necessary to abate the danger. Under these circumstances, we conclude, as did the *King* majority [*People v. King*, 22 Cal. 3d 12;

582 P.2d 1000, 1005 (1978)] and as was suggested by our Supreme Court in *Johnson* [256 Ind. 497, 506; 269 N.E.2d 879, 884 (1971)], that Indiana's prohibition against a felon possessing a firearm was not intended to affect his or her right to use a firearm in self-defense, but was intended only to prohibit members of the affected classes from arming themselves with firearms or having such weapons in their custody or control in circumstances other than those in which the right to use deadly force in self-defense exists or reasonably appears to exist.

Harmon v. State, 849 N.E.2d 726, 731-34 (Ind. Ct. App. 2006).

[11] However, as explained by our Supreme Court, a trial court is not required to give such an instruction sua sponte:

The appellant next argues the trial court had a duty to instruct the jury sua sponte on the issue of self-defense and a failure to do so constituted fundamental error. The appellant did not tender an instruction on self-defense or object to the instructions given by the trial court. The trial rules require that a party specifically object to deficiencies in jury instructions in order to preserve that issue on appeal. Ind. Crim. P. 8(b); *Kelsie v. State*, (1976) Ind., 354 N.E.2d 219. The trial court's failure to give sua sponte an instruction on self-defense even though there was some evidence which might support a self-defense claim, does not constitute fundamental error. The burden to request such an instruction is clearly upon the defendant. The appellant failed to object to the trial court's instructions and has therefore waived that issue on appeal.

Harris v. State, 268 Ind. 594, 596-97; 377 N.E.2d 632, 634 (1978). Here, a self-defense instruction specific to the second phase of Randall's trial was not warranted by the evidence. Randall did not tender an instruction or object to

the instructions given. Nor did he argue that he had a reasonable fear of death or great bodily harm as he lay sleeping with a gun in his pocket and Pershing lay dead in another room. As such, there was no error – much less fundamental error – when the trial court failed to sua sponte instruct the jury on self-defense during the second phase of the bifurcated trial.

Conclusion

[12] Randall has not shown that fundamental error occurred during the second phase of his bifurcated trial.

[13] Affirmed.

Mathias, J., and Altice, J., concur.