NO. COA08-180

NORTH CAROLINA COURT OF APPEALS

Filed: 16 September 2008

STATE OF NORTH CAROLINA

v. Franklin County
No. 06 CRS 51592

TIMOTHY DALE

Appeal by defendant from judgment entered 17 October 2007 by Judge Orlando F. Hudson, Jr. in Franklin County Superior Court. Heard in the Court of Appeals 21 August 2008.

Attorney General Roy A. Cooper III, by Special Deputy Attorney General Dorothy Powers, for the State.

Adrian M. Lapas, for defendant-appellant.

STEELMAN, Judge.

Where the trial court should have charged the jury on self-defense in the home, its omission did not constitute plain error.

I. Factual and Procedural Background

The facts in this case are derived from defendant's statements and trial testimony.

Timothy Dale (defendant) arrived home at 3:00 in the morning on 27 May 2006, after returning from a trip as a long-haul truck driver. He waited in his truck until his family woke up that morning.

While waiting, defendant saw his cousin and invited him to join his family on a beach trip. Defendant and his cousin entered defendant's home and he informed his wife, Shawundra Dale (decedent), that the cousin would be joining them on the family beach trip. Decedent got upset, and an argument ensued. Defendant then went to take a shower.

When defendant finished his shower, the argument resumed and escalated. Decedent went to the kitchen and returned with a knife. She began to swing the knife at defendant. Defendant asked decedent to put the knife back, whereupon she went back into the kitchen and returned with an even larger knife, and proceeded to swing it at the defendant. Defendant struck decedent four times in the face with his fists. Decedent stumbled, dropped the knife and fell to the floor. While decedent was laying on the ground, defendant struck decedent two more times after she was disarmed.

Defendant observed that decedent was non-responsive and asserted that he attempted to perform a cardiopulmonary resuscitation technique upon decedent, even though he was untrained in such procedures. Defendant contends that in the course of this attempt, he put his knee upon the throat of decedent.

Defendant called 911 and told the dispatcher he had a fight with decedent, she charged him with a butcher knife, he hit her, and that she was on the floor bleeding and gagging. Defendant could be heard on the 911 telephone recording saying, "You know this is the f------ end, bitch." Emergency personnel and law

enforcement arrived at the residence. Attempts to revive decedent were unsuccessful.

Defendant was indicted for second degree murder pursuant to N.C. Gen. Stat. § 14-17.

On 17 October 2007, the jury found defendant guilty as charged. Defendant received an active sentence of a minimum of 189 months and maximum of 236 months. Defendant appeals.

II. Self-Defense Instruction

In his only argument, defendant contends the trial court committed plain error in failing to instruct the jury on the defendant's right to self-defense without retreating in his own home. We disagree.

A. Standard of Review

In criminal cases, appeal of the trial court's instructions to the jury as to which no objection was raised at trial level are reviewed under a plain error standard. *State v. Bagley*, 321 N.C. 201, 362 S.E.2d 244 (1987); *State v. Cummings*, 346 N.C. 291, 488 S.E.2d 550 (1997). An appellate court may only apply plain error review to issues involving jury instructions or rulings on the admissibility of evidence. *State v. Jeffery*, 167 N.C. App. 575, 605 S.E.2d 672 (2004). In order to rise to the level of plain error, the error in the trial court's jury instructions must be so fundamental that (i) absent the error, the jury probably would have reached a different verdict; or (ii) the error would constitute a miscarriage of justice if not corrected. *State v. Holden*, 346 N.C. 404, 488 S.E.2d 514 (1997); *State v. Nicholson*, 355 N.C. 1, 558

S.E.2d 109 (2002). In deciding whether a jury instruction constitutes "plain error", the appellate court must examine the entire record and determine if an instructional error had a probable impact on the jury's finding of guilt. *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983); *State v. Connell*, 127 N.C. App. 685, 493 S.E.2d 292 (1997).

B. Law of Self-Defense

At trial, the court instructed the jury on self-defense. Defendant contends the trial court should have given a more specific self-defense instruction.

The trial court is required to instruct the jury on self-defense when that question is raised by evidence. *State v. Anderson*, 40 N.C. App. 318, 253 S.E.2d 48 (1979); *State v. Braxton*, 265 N.C. 342, 144 S.E.2d 5 (1965). In determining whether to submit an instruction on self-defense, the trial court must consider the evidence in the light most favorable to the defendant. *State v. Martin*, 131 N.C. App. 38, 506 S.E.2d 260 (1998); *State v. Willis*, 110 N.C. App. 206, 429 S.E.2d 376 (1993).

This Court has held that a heightened self-defense instruction specifying no duty to retreat is proper where there is competent evidence of defendant properly defending himself while being attacked in his own home by a co-occupant. *State v. Brown*, 117 N.C. App. 239, 450 S.E.2d 538 (1994); *State v. Browning*, 28 N.C. App. 376, 221 S.E.2d 375 (1976).

With regard to the duty to retreat, our courts have stated:

> When a person who is free from fault in bringing on a difficulty, is attacked in his

> own home or on his own premises, the law imposes on him no duty to retreat before he can justify his fighting in self-defense, regardless of the character of the assault, but is entitled to stand his ground, to repel force with force, and to increase his force, so as not only to resist, but also to overcome the assault and secure himself from all harm. This, of course, would not excuse the defendant if he used excessive force in repelling the attack and overcoming his adversary.

State v. Hearn, 89 N.C. App. 103, 105, 365 S.E.2d 206, 208 (1988); *State v. Johnson*, 261 N.C. 727, 729-730, 136 S.E.2d 84, 86 (1964).

In the instant case, Judge Hudson instructed the jury on self-defense as follows:

> The defendant would be excused of second degree murder on the ground of self-defense if: First, it appeared to the defendant and he believed it to be necessary to kill the victim in order to save himself from death or great bodily harm, and Second, the circumstances as they appeared to the defendant at the time were sufficient to create such a belief in the mind of a person of ordinary firmness....The defendant would not be guilty of any murder or manslaughter if he acted in self-defense, as I have just defined it to be, and if he was not the aggressor in bringing on the fight and did not use excessive force under the circumstances....if the State fails to prove either that the defendant did not act in self-defense or was the aggressor, with intent to kill or inflict serious bodily harm, you may not convict the defendant of second degree murder, but you may convict the defendant of voluntary manslaughter if the State proves that the defendant was simply the aggressor without murderous intent...or that the defendant used excessive force.

There was no evidence that defendant retreated and there was nothing in Judge Hudson's instruction relating to retreat. Defendant contends that it was plain error for the trial court not

to instruct that since defendant was in his home, he had no duty to retreat, before using deadly force to defend himself. We agree that the trial court should have so instructed the jury in this case. *State v. Lilley*, 318 N.C. 390, 348 S.E.2d 788 (1980). This leaves for our consideration whether the omission constituted plain error.

We hold that this omission was not plain error. The only difference between the instruction actually given and the one sought by defendant pertains to a duty to retreat. However, even in one's own home, a person is not entitled to use excessive force to repel an attack. *State v. McCombs*, 297 N.C. 151, 253 S.E.2d 906 (1979). Both instructions, the one given by Judge Hudson and the one sought by defendant, prohibit the use of excessive force.

The facts in this case show defendant was entitled to defend himself, but used excessive force after decedent was disarmed. Dr. Cynthia Gardner, who performed the autopsy on decedent, testified during trial that decedent's cause of death was asphyxiation due to compression of the neck. Dr. Gardner stated the compression was not likely caused from fingers or hands because those usually leave characteristic marks. Dr. Gardner continued, "So what that indicates is that the force, pressure, was applied by some – it was applied broadly. It was not focal like fingers or thin rope. It was applied broadly like a bar or something across the neck. A forearm would be a good example." In defendant's statement to the Franklin County Sheriff's Department, he admitted that, "At no time during this did I put my hands or my arm around Shondra's neck.

When she was on the floor, I did put my knee on her neck. The only way she could have gotten the injuries on her neck is when I was doing CPR."

Defendant's statements and actions, together with decedent's cause of death, were sufficient evidence that defendant continued to use unnecessary, excessive force. Neither the self-defense instruction given at trial nor the one sought by defendant excuse defendant if he used excessive force. An instruction on the defendant's right to stand his ground and not retreat when attacked in his own home would not likely have changed the trial result. Therefore, the trial court's omission to instruct the jury on self-defense at home does not constitute plain error.

Remaining assignments of error listed in the record but not argued in the defendant's brief are deemed abandoned. N.C. R. App. P. 28 (b)(6) (2008).

NO ERROR.

Judges GEER and STEPHENS concur.

Report per Rule 30(e).