NO. COA11-490
NORTH CAROLINA COURT OF APPEALS

Filed: 15 November 2011

STATE OF NORTH CAROLINA,

v. Robeson County
No. 08CRS057239

HENRY LEE STEPHENS,
Defendant.

Appeal by defendant from judgment entered on or about 2 November 2010 by Judge Robert F. Floyd, Jr. in Superior Court, Robeson County. Heard in the Court of Appeals 10 October 2011.

Roy A. Cooper, III, by Kay Linn Miller Hobart, for the State.

Geoffrey W. Hosford, for defendant-appellant.

STROUD, Judge.

On 15 June 2009, defendant was indicted for first degree murder. Defendant was tried by a jury and found guilty of involuntary manslaughter. The trial court determined that defendant had a prior record level of I and sentenced him to 16 to 20 months imprisonment. Defendant appeals.

I. Character Evidence

During his trial, defendant testified that at the time of the incident the decedent came to his home "extremely angry[,]" and he "sounded like he might have been under the influence of something." Defendant claimed that he shot decedent by accident in the course of trying to defend himself or others against decedent. After defendant's testimony, the State recalled the decedent's girlfriend who testified the decedent was a "silly drunk" rather than an angry one:

> Q. Based upon your experience and your knowledge of [the decedent], when he would socialize and consume alcoholic beverages, would he become aggressive and what we might call an angry drunk?
>
> . . . .
>
> THE WITNESS: No, ma'am, he was like a silly drunk.

Defendant now argues that the trial court erred in allowing "the State to introduce inadmissible good character evidence of the decedent in rebuttal, despite the fact that . . . [defendant] had not offered any bad character evidence of the decedent in his case-in-chief." (Original in all caps.) Defendant states:

> The evidence is impermissible good character evidence of the decedent, packaged as rebuttal evidence for the State. That evidence, however, does not rebut any of the defense evidence. It fails to rebut the

> evidence that [the decedent] was angry about his payment and his perceived loss of his bonus pay. Instead, it is offered to leave the jury with the impression that [the decedent] could not have been angry because he was some jovial character when under the influence of alcohol.
>
> It is also the State's effort to make [the decedent] appear more sympathetic as the light-hearted, clown-like cherub who could not have been the hostile, aggressive combatant . . . .
>
> The evidence is not "pertinent" or "relevant" to the crime charged. It does not reflect [the decedent's] character trait of peacefulness[.]

Whether evidence that one is a "silly drunk" is "good character evidence" is an intriguing question, but nonetheless one this Court need not consider to resolve this issue. N.C. Gen. Stat. § 8C-1, Rule 404 states that

> [e]vidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except . . .
>
> > . . . evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor[.]"

N.C. Gen. Stat. § 8C-1, Rule 404(a)(2) (2005). Our Supreme Court has previously stated that "the plain meaning of the 'first aggressor' exception is abundantly clear: if a defendant presents evidence that the victim was the first aggressor in the

confrontation which led to the victim's death, the State can offer evidence of the victim's peacefulness." *State v. Faison*, 330 N.C. 347, 354-55, 411 S.E.2d 143, 147 (1991).

Defendant "present[ed] evidence that the victim was the first aggressor[;]" defendant concedes as much in his brief when he describes the decedent as "the hostile, aggressive combatant who appeared at the [defendant's] home on that October morning." Thus, the State was allowed to "offer evidence of the victim's peacefulness." *Id.* We conclude that upon being asked if the decedent was "aggressive and what we might call an angry drunk," a response that he was a "silly drunk" is "evidence of the victim's peacefulness" as silliness would rebut evidence that defendant was aggressive. *Id.* Accordingly, this argument is overruled.

II. Motion to Dismiss

Defendant next contends that the trial court erred in denying his motion to dismiss. Defendant stated in support of his "motion to dismiss the charge of first degree murder" that "there is no evidence that would support a verdict of first degree murder or second degree murder" due to the lack of evidence that defendant intentionally shot the decedent. Defendant failed to move to dismiss the charge of involuntary

manslaughter, the crime with which he was ultimately convicted. The record is clear that defendant did not raise any challenge to the sufficiency of the evidence to prove involuntary manslaughter at trial, as immediately after the trial court's ruling on the motion to dismiss, defendant requested that jury instructions be given as to only "voluntary manslaughter and involuntary manslaughter" and not as to any greater charges, "on the same grounds that I cited in my motion to dismiss." Accordingly, defendant has waived this issue on appeal. *See* N.C.R. App. P. 10(a)(3) ("In a criminal case, a defendant may not make insufficiency of the evidence to prove the crime charged the basis of an issue presented on appeal unless a motion to dismiss the action, or for judgment as in case of nonsuit, is made at trial.")

III. Conclusion

For the foregoing reasons, we find no error.

NO ERROR.

Chief Judge MARTIN and Judge GEER concur.

Report per Rule 30(e).