NO. COA01-518

NORTH CAROLINA COURT OF APPEALS

Filed: 19 March 2002

STATE OF NORTH CAROLINA

v. Guilford County
Nos. 00 CRS 23384, 23597

KARL PATRICK HOUT

Appeal by defendant from judgment entered 28 November 2000 by Judge William Z. Wood, Jr. in Superior Court, Guilford County. Heard in the Court of Appeals 20 February 2002.

Attorney General Roy Cooper, by Assistant Attorney General Dennis P. Myers, for the State.

Clifford, Clendenin, O'Hale & Jones, LLP, by Walter L. Jones, for the defendant-appellant.

WYNN, Judge.

Defendant appeals from his convictions for voluntary manslaughter (00 CRS 23384) and discharging a firearm into occupied property (00 CRS 23597). We find no error.

The evidence at trial tended to show that on the night of 7 February 2000, Anthony Greeson and his brother, Robert Greeson, were smoking crack cocaine and robbing various businesses. Shortly after midnight, Anthony Greeson entered a convenience store where defendant worked as a clerk and demanded money; his brother awaited in a minivan behind the store. Defendant complied with the demand and gave Anthony Greeson money from the store's cash register.

When Anthony Greeson turned to leave the store, defendant picked up a handgun and fired at him. As Anthony Greeson ran outside and around the store, defendant chased after him with his handgun, firing more shots. Anthony Greeson climbed into his brother's minivan, and as the van sped away defendant fired several more shots at it. Anthony Greeson drove the minivan out of the parking lot and away from the convenience store. He soon collapsed, crashed the minivan into some trees and died from a gunshot wound.

Defendant was indicted on charges of second-degree murder under N.C. Gen. Stat. § 14-17 (1999) and firing into an occupied vehicle under N.C. Gen. Stat. § 14-34.1 (1999). Contrary to his pleas of not guilty, a jury convicted him of voluntary manslaughter under N.C. Gen. Stat. § 14-18 (1999) and firing into an occupied vehicle. The trial court, per Judge William Z. Wood, Jr., consolidated the convictions for judgment and sentenced defendant to a term of 77 to 102 months' imprisonment. Defendant appeals.

Defendant first argues that the trial court erred in excluding evidence that the Greeson brothers had committed similar robberies before their robbery of the convenience store. At trial, he attempted to introduce testimony by two witnesses indicating that Anthony Greeson had robbed them in a manner strikingly similar to the convenience store robbery. Billie Mounce and Tameka Coleman worked at a clothing store in Greensboro, which was robbed only a few hours before the convenience store robbery. The trial court heard *voir dire* testimony from both proposed witnesses and excluded their testimony under N.C. Gen. Stat. § 8C-1, Rules 401, 402 and

403 (1999), finding that it was not relevant, and even if it was relevant it would be confusing, cumulative and a waste of time. Defendant contends that the proffered testimony was relevant and admissible to indicate that Anthony Greeson was armed at the time of the convenience store robbery, or that defendant was reasonable in his belief that he was armed. We disagree.

N.C. Gen. Stat. § 8C-1, Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 402 provides that "[e]vidence which is not relevant is not admissible." Even where evidence is relevant, N.C. Gen. Stat. § 8C-1, Rule 403 provides for its exclusion "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Mounce and Coleman testified on *voir dire* that a man entered the clothing store on the evening of 7 February 2000. The man approached the cash register where Mounce and Coleman stood and demanded money. They saw the man's hand in his pocket, believed the man had a gun, and gave him the money out of fear.

In his brief, defendant argues that the proffered evidence was relevant to his claim of self-defense, and his state of mind in fearing and believing that Anthony Greeson possessed a gun at the time of the convenience store robbery. In that regard, the trial

court instructed the jury on the elements of second-degree murder and voluntary manslaughter; the trial court also instructed the jury on self-defense. Defendant did not object to those instructions.

Second-degree murder consists of an unlawful killing with malice, but without premeditation or deliberation. *See State v. Williams*, 288 N.C. 680, 220 S.E.2d 558 (1975); *see also State v. Geddie*, 345 N.C. 73, 478 S.E.2d 146 (1996), *cert. denied*, 522 U.S. 825, 139 L. Ed. 2d 43 (1997). Voluntary manslaughter consists of an unlawful killing without malice, premeditation or deliberation. *See State v. Robbins*, 309 N.C. 771, 309 S.E.2d 188 (1983). As to both offenses of killing, a defendant may be totally exonerated if he demonstrates perfect self-defense, which consists of four elements showing that:

> (1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and
>
> (2) defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary fitness; and
>
> (3) defendant was not the aggressor in bringing on the affray, *i.e.*, he did not aggressively and willingly enter into the fight without legal excuse or provocation; and
>
> (4) defendant did not use excessive force, *i.e.*, did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

State v. Norris, 303 N.C. 526, 530, 279 S.E.2d 570, 572-73 (1981)

(citations omitted).

Where the first two elements are present, but the defendant either was the aggressor, thereby negating the third element; or used excessive force, thereby negating the fourth element; the "defendant will not be totally exonerated of the killing, but is guilty of voluntary manslaughter." *State v. Perez*, 135 N.C. App. 543, 551, 522 S.E.2d 102, 108 (1999), *appeal dismissed and disc. review denied*, 351 N.C. 366, 543 S.E.2d 140 (2000). "The fourth element of self-defense addresses the reasonableness of the defendant's choice of force used to protect himself from death or great bodily harm." *State v. Richardson*, 341 N.C. 585, 592-93, 461 S.E.2d 724, 729 (1995). Moreover, and quite pertinent to our decision in this appeal, where a defendant seeks to use "evidence of a prior . . . act by the victim to prove the defendant's state of mind at the time he killed the victim, the defendant must show that he was aware of the prior act and that his awareness somehow was related to the killing." *State v. Strickland*, 346 N.C. 443, 456, 488 S.E.2d 194, 201 (1997), *cert. denied*, 522 U.S. 1078, 139 L. Ed. 2d 757 (1998); *see* N.C. Gen. Stat. § 8C-1, Rule 404(b) (1999); *see also State v. Smith*, 337 N.C. 658, 447 S.E.2d 376 (1994).

In the instant case, defendant does not contest the fact that he was *unaware* of the Greesons' alleged prior robbery of the clothing store. Furthermore, we find no abuse of discretion in the trial court's determination that the proffered testimony by Mounce and Coleman, even if relevant, was excludable under Rule 403 as its

probativity was substantially outweighed by the danger of confusion of the issues and considerations of wasting time or needlessly presenting cumulative evidence. *See* N.C. Gen. Stat. § 8C-1, Rule 403; *see also State v. Anderson*, 350 N.C. 152, 175, 513 S.E.2d 296, 310 (holding that a decision whether to admit or exclude evidence under Rule 403 is a matter left to the sound discretion of the trial court, and will be reversed only upon a showing that the ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision) (citations omitted), *cert. denied*, 528 U.S. 973, 145 L. Ed. 2d 326 (1999).

Additionally, we note that the jury found defendant guilty of voluntary manslaughter rather than second-degree murder, meaning the jury determined that it appeared to defendant, and defendant believed it, to be necessary to kill Anthony Greeson to save himself from death or great bodily harm; and that this belief was reasonable in that the circumstances as they appeared to defendant at the time of the robbery were sufficient to create such a belief in the mind of a person of ordinary fitness. *See Norris*, 303 N.C. at 530, 279 S.E.2d at 572-73. However, the jury must also have found that, despite this belief, defendant either was the aggressor in the confrontation or used excessive force. *See Perez*. In finding that it appeared to defendant (and defendant believed it) necessary to kill Greeson to save himself from death or great bodily harm, the jury must have accepted defendant's theory that Anthony Greeson was armed (or reasonably appeared so to defendant), even without the testimony of Mounce and Coleman.

Defendant also argues that the trial court erred by allowing the State to offer evidence that defendant violated the policies of the convenience store by resisting the robbery. We disagree.

At trial, the State sought to prove the malice element of second-degree murder by introducing an exhibit bearing defendant's signature acknowledging his awareness of the convenience store's policies, one of which stated that, "In the event of an armed robbery, no resistance is to be exercised." The policies form also provided that "[p]ossession of guns or firearms on any company property" would result in dismissal of the offending employee. Timothy Huffstetler, the convenience store's Human Resources Manager, testified for the State, indicating that the policies form is reviewed with all employees prior to their employment, and they are asked to sign the form indicating they have carefully read and fully understand the policies. Defendant objected at trial to the introduction of the exhibit and to Huffstetler's testimony.

Defendant states in his brief that "the trial court succumbed to the [S]tate's argument that the exhibit went to the issue of malice," and permitted the State "to proceed and contend that [defendant], by violating the store's policies against the use of self-defense, in fact acted with malice and committed second-degree murder." Defendant, however, was convicted of voluntary manslaughter (consisting of an unlawful killing *without malice*, premeditation or deliberation, *see Robbins*) rather than second-degree murder; thus, any alleged error by the trial court in admitting this evidence was harmless as the jury found no malice.

Finally, defendant argues that the trial court erred in declining to give his requested jury instruction on the detention of offenders by private persons. We disagree.

N.C. Gen. Stat. § 15A-404 (1999) provides:

> (b) When Detention Permitted. -- A private person may detain another person when he has probable cause to believe that the person detained has committed in his presence:
>
> (1) A felony,
>
> . . .
>
> (4) A crime involving theft or destruction of property.
>
> (c) Manner of Detention. -- The detention must be in a reasonable manner considering the offense involved and the circumstances of the detention.

In the instant case, defendant requested the pattern jury instruction for detention of an offender by a private person in connection with defendant's firing at the Greesons' van. In his brief, defendant argues that "the instruction should have been given both for the charge dealing with the occupied vehicle and the charge of [second-degree] murder." We do not consider defendant's argument that the requested instruction should have been given in connection with the charge of second-degree murder, as no such request was made before the trial court, and further, defendant was not convicted of that offense. *See* N.C.R. App. P. 10(b)(2) (2002) (a party may not assign error to an omission from the jury charge unless he objects thereto prior to the jury retiring for deliberations, "stating *distinctly* that to which he objects and the grounds of his objection") (emphasis added); *see also Burchette v.*

Lynch, 139 N.C. App. 756, 765, 535 S.E.2d 77, 83 (2000) (requiring specific objection under Rule 10(b)(2) to preserve jury instruction issue for appeal) (citing *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934) (appellant may not argue theory on appeal that was not raised in the trial court)). Furthermore, defendant has not asserted that the trial court's failure to give the requested instruction in connection with the charge of second-degree murder amounted to plain error, and he has therefore waived even plain error review. *See* N.C.R. App. P. 10(c)(4) (2000); *State v. Moore*, 132 N.C. App. 197, 511 S.E.2d 22, *appeal dismissed and disc. review denied*, 350 N.C. 103, 525 S.E.2d 469 (1999).

As to the requested instruction in connection with defendant firing at the Greesons' van:

> [D]efendant was entitled to the requested instruction only if there was evidence that: (1) defendant had probable cause to believe that one or more of the crimes enumerated [in G.S. § 15A-404] had been committed; (2) defendant was trying to "detain" the offender until the police arrived; and (3) the manner of detention was reasonable under the circumstances.

State v. Ataei-Kachuei, 68 N.C. App. 209, 213, 314 S.E.2d 751, 753 *disc. review denied*, 311 N.C. 763, 321 S.E.2d 146 (1984). Our Supreme Court discussed the detention of offenders by private persons in *State v. Wall*, 304 N.C. 609, 286 S.E.2d 68 (1982). In that case, the Court stated that in enacting G.S. § 15A-404, our legislature used the word "detain" intending its ordinary meaning, "To hold or keep in or as if in custody." *Id.* at 615, 286 S.E.2d at 72 (quoting *Webster's Third New International Dictionary* 616

(1976)). In *Wall*, our Supreme Court rejected the defendant's contention that he was within his rights in attempting to detain the victims by firing at their vehicle after they committed a crime in his presence, where:

> By defendant's own testimony, the victim had left the store and was exiting the parking lot when defendant fired the first shot. Once the victim was beyond defendant's control, defendant could no longer "hold or keep" him.

Id. at 616, 286 S.E.2d at 72.

In the instant case, defendant testified at trial that he fired the first shot at Anthony Greeson after he turned to leave the store "Out of fear. Reaction. Just scared." Anthony Greeson was approximately six or seven feet away when defendant first fired at him. He then ran out of the store and defendant lost sight of him momentarily. When defendant exited the convenience store, he saw Anthony Greeson running away and he "fired a couple of shots at him to keep him moving." At the time defendant fired these shots, Anthony Greeson's distance from him was "approximately 60 to 70 feet. Maybe farther." Defendant then came around the corner of the convenience store and fired more shots at the retreating van, "more or less aiming towards the tire or at -- you know, to sort of at least slow it down, disable it somewhat, and at the very least mark it for the police to find." Greensboro Police Officer R.W. Saul testified concerning defendant's statement to police shortly after the incident, stating that defendant shot at the van "to mark it for the police to find." Considering this testimony, the trial court did not err in refusing to instruct the jury on the detention

of offenders by private persons in connection with the charge of firing into an occupied vehicle, as Anthony Greeson was well beyond defendant's control at the time the shots were fired, such that defendant could no longer "detain" him. Furthermore, defendant's own testimony indicates that he was trying to keep Anthony Greeson moving, and fired at the van to mark it for the police.

Additionally, our Supreme Court indicated in *Wall* that a private citizen should not be allowed to employ deadly force to detain an offender in circumstances under which a law enforcement officer could not have employed similar force to effect an arrest under N.C. Gen. Stat. § 15A-401 (1999). 304 N.C. at 616, 286 S.E.2d at 73. G.S. § 15A-401(d) provides that a law enforcement officer is justified in using deadly force in certain situations, but states that "Nothing in this subdivision . . . shall . . . be construed to excuse or justify the use of unreasonable or excessive force." Defendant's statement to Officer Saul indicated that "At no time did the robber threaten me." Furthermore, as noted above, in finding defendant guilty of voluntary manslaughter rather than second-degree murder on the basis of imperfect self-defense, the jury implicitly found that defendant was either the aggressor in the confrontation or used excessive force, rendering the manner of detention unreasonable. *See Ataei-Kachuei*, 68 N.C. App. at 213, 314 S.E.2d at 753 (defendant is entitled to instruction under G.S. § 15A-404 only where the manner of detention was reasonable under the circumstances).

In sum, we conclude that defendant received a fair jury trial,

free from prejudicial error.

No error.

Judges TIMMONS-GOODSON and TYSON concur.

Report per Rule 30(e).