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NO. COA05-1309

NORTH CAROLINA COURT OF APPEALS

Filed: 20 June 2006

STATE OF NORTH CAROLINA

v. Pasquotank County
No. 03 CRS 52017

LLOYD DOUGLAS MOSS

Appeal by defendant from judgment entered 14 April 2005 by Judge Milton F. Fitch, Jr. in Pasquotank County Superior Court. Heard in the Court of Appeals 11 May 2006.

*Attorney General Roy Cooper, by Assistant Attorney General Alvin W. Keller, Jr., for the State.*

*Sofie W. Hosford, for defendant-appellant.*

STEELMAN, Judge.

Defendant and Donald Figgs (Figgs) were drinking and preparing to barbeque at the Elizabeth City apartment of defendant's girlfriend, Moneca Saunders (Saunders) on the evening of 11 September 2003. A dispute arose between defendant and Figgs concerning whether Figgs accidentally knocked over the grill. Defendant asked Figgs to leave, and when Figgs refused, defendant called the police. Two officers (Etheridge and Chivers) arrived, and spoke with both men. Defendant appeared to be under the influence of alcohol, but Figgs did not appear to be intoxicated.

Figgs denied having knocked over the grill, and rode away on his bicycle before the officers left.

Later that evening, defendant left the apartment to dispose of garbage in a dumpster. Figgs rode up on a bicycle, and the two men got into a "scuffle" in which defendant contended that Figgs ripped his shirt. Defendant called the police a second time, and Officer Etheridge returned and spoke with both men before leaving. Saunders told defendant that she felt it would be best if he left her apartment, so he went to a friend's house for approximately twenty minutes. Defendant then returned to Saunders' apartment for a short while before once again leaving. Figgs was outside the apartment, and another altercation ensued.

According to defendant, Figgs said "mother f***er, I told you I was coming back[,]" to which defendant responded "[if] it's a fight you want with me, come on. Let's go ahead on with it." Defendant testified that Figgs picked up a plastic chair and hit him in the forehead before breaking the chair across his head and back. Defendant testified that he picked up a piece of the chair, but then threw it off to the side. At that point the two men threw punches at each other. Saunders came out and broke up the fight, but according to defendant, Figgs came around her and the fight started anew. After more punches were thrown, defendant testified that Figgs stopped and "I seen him go for his back right pocket" with his right hand as he held defendant by the collar with his left. Defendant testified that he knew Figgs to keep a knife in that pocket, and he believed he was about to draw it. Believing he

was about to be attacked with a knife, defendant reached for his own knife. "When I got my knife, we were struggling, he was struggling. And I some how got my knife open cutting my finger, my right pinky." "And I - - once I got it open[,] I swung it at him. It did hit him and I stuck him one time. I wasn't trying to kill this man. I was only trying to get this man off of me." After defendant "stuck" Figgs, Figgs fell to the ground.

Defendant testified that Figgs never verbally threatened to kill him or to hurt him. Officer Chivers testified that she responded to the report of the stabbing that night, and helped identify defendant when he was located at a nearby apartment complex. Defendant was placed in the back of Officer Chivers' cruiser and transported to the police station. According to Officer Chivers, while in the back of her cruiser, defendant "was very angry and I think he recognized me from the first time we came out. Because he started saying things to me like, how many times did I call you-all? How much was I supposed to take? Would I put up with that? He went so far as to say that, yeah, I stabbed the mother f***er. And this is bull s**t and I wasn't going to take that kind of disrespect."

Saunders, her cousin, Danea Sampson (Sampson), and a friend, Latrice Chamblee (Chamblee), witnessed part of the final fight. Saunders testified that she saw Figgs holding defendant in a "headlock" just before she saw defendant hitting Figgs in the side, then saw defendant drop his knife just before Figgs collapsed. Sampson testified that she saw defendant drop his knife, pick it

back up off the ground, then start swinging it at Figgs as Figgs attempted to block the blows. Chamblee testified that she saw defendant pull the knife from his pocket, drop it, pick it back up and stab Figgs with it three or four times on his side. None of these witnesses saw Figgs with anything in his hands, and all of them saw defendant leave the scene immediately after the stabbing. No knife or weapon of any sort was found on Figgs. Figgs died of the wounds he received that night. Dr. M. G. F. Gilliland, a medical examiner, testified that Figgs sustained one major stab wound, five lesser puncture wounds, and four cuts or scratches, all consistent with injury from a knife.

The trial court submitted possible verdicts of second-degree murder, voluntary manslaughter, and not guilty to the jury. The trial court also instructed the jury on self-defense. Defendant was found guilty of voluntary manslaughter, and given an active prison sentence of 103 to 133 months. From this judgment, defendant appeals.

In defendant's first argument, he contends that the trial court erred in failing to instruct the jury on involuntary manslaughter. We disagree.

> The trial court must give a requested instruction, at least in substance, if a defendant requests it and the instruction is correct in law and supported by the evidence. In determining whether the evidence supports an instruction requested by a defendant, the evidence must be interpreted in the light most favorable to him. The trial judge making the decision must focus on the sufficiency of the evidence, not the credibility of the evidence. Failure to give the requested instruction where required is a reversible error.

*State v. Reynolds*, 160 N.C. App. 579, 581, 586 S.E.2d 798, 800 (2003) (citations omitted). "Involuntary manslaughter is 'the unintentional killing of a human being without malice, proximately caused by (1) an unlawful act not amounting to a felony nor naturally dangerous to human life, or (2) a culpably negligent act or omission.'" *State v. Evans*, 149 N.C. App. 767, 775, 562 S.E.2d 102, 107 (2002). Defendant clearly fails under the first prong of this test, so we are left to determine whether defendant unintentionally killed Figgs without malice as a result of a "culpably negligent act or omission." Defendant's own testimony is that he stabbed Figgs intentionally, albeit in response to a perceived threat. The evidence interpreted in the light most favorable to defendant does not support a finding that the stabbing of Figgs was the result of a culpably negligent act, and thus the evidence does not support an instruction on involuntary manslaughter. *See State v. Eubanks*, 151 N.C. App. 499, 504, 565 S.E.2d 738, 741-42 (2002). This argument is without merit.

In defendant's second argument, he contends that the trial court erred by denying his motion to dismiss at the close of all the evidence because the State failed to refute his evidence of self-defense. We disagree.

> The State bears the burden of proving that defendant did not act in self-defense. To survive a motion to dismiss, the State must therefore present sufficient substantial evidence which, when taken in the light most favorable to the State, is sufficient to convince a rational trier of fact that defendant did not act in self-defense.

*State v. Ammons*, 167 N.C. App. 721, 725, 606 S.E.2d 400, 403 (2005), quoting *State v. Hamilton*, 77 N.C. App. 506, 513, 335 S.E.2d 506, 511 (1985). "'Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve.'" *Id.*, 606 S.E.2d at 404, quoting *State v. Fritsch*, 351 N.C. 373, 378-79, 526 S.E.2d 451, 455 (2000).

> Perfect self-defense, which provides a complete excuse for a killing, is established when the following elements are found:
>
> "(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 that time were sufficient to create such a belief in the mind of a person of ordinary firmness; 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. Ammons*, 167 N.C. App. 721, 725-726, 606 S.E.2d 400, 404 (2005), quoting *State v. Reid*, 335 N.C. 647, 670, 440 S.E.2d 776, 789 (1994). The legal defense of self-defense is completely lost if the trier of fact determines either of the first two elements has not been established by the evidence, or has been disproved beyond a reasonable doubt by the State. The defendant may still be entitled to a finding of imperfect self-defense if the trier of

fact finds the first two elements, but not the second two. Imperfect self-defense may reduce a murder conviction to manslaughter. *State v. Reid*, 335 N.C. 647, 670, 440 S.E.2d 776, 789 (1994).

We hold that the State presented sufficient evidence to allow a rational trier of fact to conclude that any belief defendant might have had that his life was in danger or he was at risk of great bodily harm was not reasonable, thus negating the second prong of the test. There is no evidence that Figgs ever told defendant that he was carrying a knife, and defendant never saw Figgs with a knife that day. Saunders testified that Figgs was holding defendant in a "headlock" when he began swinging at Figgs, just before defendant dropped a knife and Figgs staggered away. Defendant testified that he was struggling with Figgs while attempting to remove the pocket knife from his back pocket, and cut his finger as he struggled to open the blade. Saunders further testified defendant was "punching" Figgs in the side multiple times just before defendant dropped the knife. Sampson saw defendant pick his knife up off the ground, swing it at Figgs three or four times as Figgs attempted to block defendant's swings, then run off as Figgs "kind of staggered a little bit then he sat down on the porch and then he just laid out." Sampson testified that "it really didn't look like [Figgs] was trying to fight back at all." Chamblee saw defendant draw his knife, drop it, pick it up once again, then stab Figgs three or four times. None of the witnesses ever saw anything in Figgs' hands during the fight, nor did they

ever testify to seeing Figgs reach for something in his right back pocket. From this testimony, it appears Figgs' hands were either busy holding defendant in a "headlock" or busy trying to ward off defendant's knife blows during the final moments of the altercation. Further, Chamblee's testimony shows that between the time defendant claims to have seen Figgs reaching for his back pocket and when he began stabbing Figgs, defendant had the time, while still fighting with Figgs, to pull out his pocketknife, open it up, drop it to the ground, recover it, and then commence stabbing. This testimony would allow reasonable triers of fact to determine defendant should have noticed Figgs did not, in fact, have a knife, and thus had no reasonable apprehension of imminent death or great bodily harm.

We hold that this substantial evidence, viewed in the light most favorable to the State, raises sufficient questions about the reasonableness of any belief defendant might have had that he was in imminent danger of death or great bodily harm from Figgs. The trial court did not err in denying defendant's motion to dismiss at the close of all the evidence based upon self-defense. *State v. Gilreath*, 118 N.C. App. 200, 208-09, 454 S.E.2d 871, 876 (1995). Because defendant does not argue in his brief that the State failed to present sufficient evidence of all the elements required to find him guilty of voluntary manslaughter, we do not address that issue. *State v. Hatcher*, 136 N.C. App. 524, 526-27, 524 S.E.2d 815, 817 (2000). This argument is without merit.

Because defendant has not argued his other assignment of error in his brief, it is deemed abandoned. N.C. R. App. P. Rule 28(b)(6) (2005).

NO ERROR.

Judges McGEE and ELMORE concur.

Report per Rule 30(e).