NO. COA06-11

NORTH CAROLINA COURT OF APPEALS

Filed: 5 December 2006

STATE OF NORTH CAROLINA

v. Guilford County
No. 04 CRS 24591

FLOYD COLEMAN MCNEAL,
Defendant.

Appeal by defendant from judgment entered 7 April 2005 by Judge William Z. Wood, Jr., in the Superior Court in Guilford County. Heard in the Court of Appeals 11 October 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General Grady L. Balentine, Jr., for the State.

Brian Michael Aus, for defendant-appellant.

HUDSON, Judge.

At the 4 April 2005 criminal session of the superior court in Guilford County, the State tried defendant for second-degree murder. The jury found defendant guilty of voluntary manslaughter, and the parties stipulated that defendant was a level IV offender for sentencing purposes. The court sentenced defendant to an active sentence of 71 to 95 months. Defendant appeals. As discussed below, we find no error.

The evidence tended to show the following: Defendant and a companion, Senita Vanstory, lived at an abandoned flour mill. In the early morning hours of 7 July 2004, as they prepared for bed,

Keith Napolean Smith entered their shelter and began harassing Vanstory. A friend of defendant stopped by and persuaded Smith to leave, but shortly thereafter, Smith returned carrying a large stick. Defendant and Smith struggled and eventually fell to the ground. Although defendant's statements about the event differed in the details, he admitted to stabbing Smith several times with a knife. Smith died of these wounds. The assistant medical examiner testified that Smith was six feet one inch tall, weighed 272 pounds, and had a "pretty significant" blood alcohol level at the time of his death. Defendant testified that he weighed approximately 145-150 pounds at the time of the struggle, and also presented evidence that Smith had been convicted of felonious assault inflicting serious injury. Vanstory testified that Smith had a reputation in the community for being violent.

Defendant argues plain error in the trial court's omission of a phrase from the pattern jury instructions. We conclude that this issue is not properly before us and overrule this assignment of error.

The State requested an instruction on second-degree murder where a deadly weapon is used, including all lesser-included homicide offenses and self-defense; defendant agreed. The court instructed the jury, but did not include the following language from Section 308.45 of the North Carolina Pattern Jury Instructions, Self-defense: "[the jury should consider] the reputation, if any, of the victim for danger and violence." Defendant had made no request for any particular instruction

regarding either self-defense or Smith's reputation for violence, and did not object to the court's instruction at trial. Defendant contends that testimony presented at trial, including Smith's felony assault conviction, large size, and reputation for violence, were legally sufficient to constitute a defense to the crime charged and thus required the trial court to instruct the jury on the defense.

Because defendant failed to object to the instruction, our review is limited to determining whether the instruction in question amounted to plain error. *See* N.C. R. App. P. 10(c)(4); *State v. Hardy*, 353 N.C. 122, 131, 540 S.E.2d 334, 342 (2000), *cert. denied*, 122 S. Ct. 96, 151 L. Ed. 2d 56 (2001). Under plain error analysis, our Supreme Court has noted that:

> [a] defendant is entitled to a new trial only if the error was so fundamental that, absent the error, the jury probably would have reached a different result. Moreover, we remain mindful that when the plain error rule is applied, it is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.

State v. Jones, 355 N.C. 117, 125, 558 S.E.2d 97, 103 (2002) (internal quotation marks and citations omitted). Further, "[i]n deciding whether a defect in the jury instruction constitutes plain error, the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378-79 (1983).

"[W]here error is assigned to the giving or omission of instructions to the jury," Rule 9(a)(3)(f) of the North Carolina Rules of Appellate Procedure requires the record on appeal to contain "a transcript of the entire charge given." N.C.R. App. P. 9(a)(3)(f). "A reviewing court will not consider alleged errors in selected portions of a charge when the entire charge is not before it." *State v. Harrell*, 50 N.C. App. 531, 535, 274 S.E.2d 353, 355-56 (1981); *see also State v. Deese*, 127 N.C. App. 536, 538, 491 S.E.2d 682, 684 (1997). Here, defendant has included in the record on appeal only the self-defense portion of the jury instruction rather than the entire jury charge. Thus, we must overrule this assignment of error.

No error.

Judges HUNTER and CALABRIA concur.

Report per Rule 30(e).