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NO. COA06-480

NORTH CAROLINA COURT OF APPEALS

Filed: 21 November 2006

STATE OF NORTH CAROLINA

v.

Macon County
No. 03 CRS 52262

RODNEY KEITH WATTS

Appeal by defendant from judgment entered 7 April 2005 by Judge James L. Baker, Jr., in Macon County Superior Court. Heard in the Court of Appeals 13 November 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General Daniel D. Addison, for the State.

Donald Joseph Willey, for defendant-appellant.

LEVINSON, Judge.

Rodney Keith Watts (defendant) appeals his conviction for second degree murder. We find no error.

The State adduced evidence tending to show the following: Raymond Watkins died in the hospital on 16 December 2003 from complications arising from multiple blunt force injuries inflicted by defendant. When Watkins was found in defendant's house by two of Watkins' friends on 8 December 2003, Watkins was "badly bruised" all over his body and had "very black" eyes, blood on his face and nose, and a swollen abdomen. Defendant told the friends that he

"got beat" by someone but "didn't fight back." He told the sheriff's deputy who responded to the scene that a "buddy had beat him up" with his fists and a cane. The doctor who treated Watkins at Asheville VA Medical Center found that he had a fractured forearm, several fractured ribs, and blunt force injuries, bruises and cuts covering head, face and body. Because Watkins' liver and kidneys had failed, the doctor determined that he had "no chance" to survive his injuries. Watkins' autopsy revealed that he sustained bruising around his small intestine and omentum and a subdural hemorrhage in his head. The pathologist labeled his death a homicide.

Detective William Harrell of the Macon County Sheriff's Department interviewed defendant in his residence on 10 December 2003. Defendant told the detective that Watkins assaulted him three times while they were having conversations about defendant's ex-girlfriend. On the first occasion, Watkins swung at defendant with his walking cane. Defendant blocked the blow and placed Watkins' cane on the floor. Watkins later picked up the cane and hit defendant, bloodying his lip. Defendant grabbed the cane, struck Watkins with it once on the arm, and placed it beyond Watkins' reach. The two men apologized to each other. Several minutes later, Watkins started talking "out of his head, being drunk and then attacked" defendant a third time. Wanting to make Watkins stop fighting, defendant "whipped his a[]" and "beat [him] until he knew [he] had enough." Although he suspected that the fight occurred "probably because they were drinking[,]" defendant

told Harrell that neither he nor Watkins was drunk. Defendant expressed regret for the incident, because Watkins "was in bad shape, was crippled and could hardly walk and was fighting hepatitis C." Following his arrest, defendant gave a statement at the Macon County Sheriff's Department, providing additional details of the incident.

The trial court instructed the jury on second-degree murder, voluntary manslaughter, involuntary manslaughter, and the law of self-defense. During its deliberations, the jury submitted the following question to the court:

To what extent, if any, can we consider such issues as drunkenness or under the influence of drugs?

Noting that defendant had not raised a defense of intoxication at trial, the court suggested that "intoxication or drugs would only be of relevance then if it is the contention of either side that second-degree murder is a specific intent crime." The State averred that second-degree murder did not include the element of a specific intent to kill and, therefore, "voluntary intoxication is no defense to this charge." When asked by the court for his position, defense counsel "agree[d] with the State's assertion on specific intent."

The court announced its intention to instruct the jury that voluntary intoxication or drug use did not provide a legal excuse for crime. The court proposed explaining to the jury that intoxication would have been an issue for consideration if defendant had been charged with a crime involving the specific

intent to kill. Absent any element of specific intent, the court proposed the instruction that "intoxication or a voluntary drug condition is not relevant in this case." The State expressed its satisfaction with the instruction. The court then addressed defense counsel as follows:

THE COURT: What says defense?

[COUNSEL]: Satisfied, Your Honor.

After instructing the jury that "the defendant's intoxication or the drug condition, should you find that it exists, can have no bearing upon your determination of the defendant's guilt or innocence of the charges[,]" the court asked the parties if they requested "corrections or additions to the instructions I've just given the jury[.]" Defense counsel replied, "No additional requests[.]"

Upon the jury's verdict finding defendant guilty of second degree murder, the trial court sentenced him to a presumptive term of 251-311 months' imprisonment. Defendant gave notice of appeal in open court.

____On appeal, defendant claims the trial court committed plain error by instructing the jury that evidence of intoxication could not be considered in its deliberations. While he concedes that voluntary intoxication provides no defense to the general intent crimes of second-degree murder and manslaughter, defendant asserts that evidence of his and Watkins' intoxication was relevant to the issue of whether he acted with malice. He insists that "[t]he jury was entitled to consider the evidence of the victim's intoxication

and conduct as well as the defendant's in evaluating whether the defendant, as he perceived the situation at the time, acted in the heat of passion upon adequate provocation."

Plain error review is available for errors in the admission of evidence and jury instructions. *State v. Wolfe*, 157 N.C. App. 22, 33, 577 S.E.2d 655, 663 (2003). To establish plain error, a defendant must demonstrate "(i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial." *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997). We "must examine the entire record and determine if the . . . error had a probable impact on the jury's finding of guilt." *State v. Pullen*, 163 N.C. App. 696, 701, 594 S.E.2d 248, 252 (2004) (internal quotation marks omitted).

We conclude that defendant's assignment of plain error is not properly before this Court. Defendant did not merely fail to object to the challenged jury instruction as contemplated by N.C.R. App. P. 10(c)(4); he expressly assented to the instruction on two separate occasions. See *State v. Wilkinson*, 344 N.C. 198, 235-36, 474 S.E.2d 375, 396 (1996); *State v. Weddington*, 329 N.C. 202, 210, 404 S.E.2d 671, 674 (1991). Accordingly, "[i]f there was error in the charge, it was invited error and we shall not review it." *Wilkinson*, 344 N.C. at 236, 474 S.E.2d at 396 (quotation marks omitted).

The record on appeal includes additional assignments of error not addressed by defendant in his brief to this Court. They are, therefore, abandoned. See N.C.R. App. P. 28(b)(6).

No error.

Judges TYSON and BRYANT concur.

Report per Rule 30(e).