

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA07-1279

NORTH CAROLINA COURT OF APPEALS

Filed: 5 August 2008

STATE OF NORTH CAROLINA,
Plaintiff,

v.

Durham County
No. 03CRS057288

DECARL MARQUES SANDERS,
Defendant.

Court of Appeals

Appeal by defendant from judgment entered 14 April 2007 by Judge Henry W. Hight in Superior Court, Durham County. Heard in the Court of Appeals 21 July 2008.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Kay Ann Muller Hobart, for the State.

J. Clark Fischer, for defendant-appellant.

STROUD, Judge.

Defendant appeals from judgment entered consistent with a jury verdict finding him guilty of voluntary manslaughter. For the following reasons, we find no error.

The evidence tended to show: On the evening of 17 December 2002, defendant and Thomas Bennett ("Bennett"), drove to an Amoco store. Both defendant and Bennett entered the store. Bennett made a purchase and left the store when a man in a car, Carl Cary, ("Cary") asked Bennett if he wanted to buy some marijuana. Although Bennett did not know Cary, he got into the car with him.

Bennett and Cary argued over the amount of marijuana Bennett was going to buy. Bennett told Cary that he should just take the marijuana. Cary started to drive away, and Bennett pulled out a gun. Cary grabbed Bennett's gun, and the two struggled over it. Defendant came out of the store, got into his car, and saw Bennett and Cary struggling over the gun. Defendant opened the car door and shot. Cary died from the gun shot wound.

At trial, Bennett testified that he had known defendant since middle school and that they were good friends. Bennett testified, over defendant's objection, that he and defendant smoked marijuana together. Bennett also testified over objection that he had seen defendant with a weapon prior to 17 December 2002. In particular, Bennett had seen defendant with a .380, .22, and a nine millimeter. When the State sought to introduce photographs of defendant, the trial court held a *voir dire* hearing. The trial court sustained defendant's objections to certain exhibits, but allowed a photograph of Bennett with two guns and a photograph of defendant holding a weapon for the limited purpose of illustrating Bennett's testimony that he and defendant possessed a gun at times.

Defendant testified on his own behalf. Defendant testified that he thought Bennett was in danger when he observed Bennett and Cary fighting over the gun. Defendant testified that he opened the driver's side door, told Cary to get off Bennett, grabbed Cary, and tried to pull him off Bennett. Defendant then pulled out his gun and fired. When defense counsel asked defendant about the two photographs admitted into evidence of Bennett and defendant with

guns, defendant admitted to holding a gun in one photograph. Defendant testified that he and Bennett were holding guns because they were "[y]oung and dumb. Didn't know what we was doing." Defendant also admitted to "sometimes" having a gun. On cross-examination, defendant again testified that he had guns because he was "[y]oung and dumb." Defendant also testified that he and Bennett had gone out together with loaded weapons before the night in question. Defendant admitted to smoking marijuana with Bennett "[e]very now and then" and to having been convicted of possession of drug paraphernalia and possession of a weapon on school property. The jury found defendant guilty of voluntary manslaughter, and the trial court sentenced defendant to 103 to 133 months imprisonment. Defendant appeals.

In his sole argument on appeal, defendant contends the trial court erred in allowing the State to present evidence through Bennett about his history of drug use and gun possession. Defendant asserts the evidence was not relevant and highly prejudicial.

The record, however, reveals that defendant himself testified that he smoked marijuana, had possessed handguns, that the photograph showed him holding a gun, and he had been convicted of possession of drug paraphernalia and possession of a weapon on school property. As is well established, "[w]here evidence is admitted over objection and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost." *State v. Alford*, 339 N.C. 562, 570, 453 S.E.2d

512, 516 (1995) (citations omitted). Defendant therefore waived his right to raise these objections on appeal. This assignment of error is overruled.

NO ERROR.

Chief Judge MARTIN and Judge CALABRIA concur.

Report per Rule 30(e).