NO. COA07-1513

NORTH CAROLINA COURT OF APPEALS

Filed: 1 July 2008

STATE OF NORTH CAROLINA

v. Wake County
No. 06 CRS 37197

TRAVIS MCLEAN

Appeal by defendant from judgment entered 14 February 2007 by Judge Paul G. Gessner in Wake County Superior Court. Heard in the Court of Appeals 16 June 2008.

Attorney General Roy Cooper, by Assistant Attorney General Thomas H. Moore, for the State.

Eric A. Bach, for defendant-appellant.

MARTIN, Chief Judge.

Defendant was charged with first degree murder. He was found guilty by a jury of involuntary manslaughter. He appeals from the judgment entered upon the verdict.

The State presented evidence tending to show that during the early evening hours of 30 April 2006, defendant and Hassan Gannaway visited Kenneth Bray (hereinafter "victim") at the boarding house where the victim resided in Raleigh. Gannaway knocked on the victim's door and when the victim opened the door, defendant appeared and demanded that the victim pay a debt owed to defendant. The victim and defendant argued. Defendant struck the victim one

or more times in the face. Gannaway and defendant then left the boarding house.

Another resident of the boarding house checked on the victim and found him bleeding from the mouth and ear. Later in the evening, complaining of having a severe headache, the victim went to bed. The residents subsequently heard a thumping sound coming from the victim's room. A resident saw that the victim had fallen out of his bed. The resident and another man lifted the victim and placed him back on the bed. Two other residents later checked on the victim. Finding the victim non-responsive, the residents called for an ambulance.

Emergency personnel arrived and found the victim was in cardiac arrest. An autopsy subsequently revealed that the victim died as a result of a bilateral subdural hematoma caused by a blow to his head.

Defendant did not present any evidence.

Defendant first contends that the court erred in its instruction to the jury on the offense of involuntary manslaughter by omitting the following language:

> If the victim died by accident or misadventure, that is, without wrongful purpose or criminal negligence on the part of the defendant, the defendant would not be guilty. The burden of proving accident is not on the defendant. His assertion of accident is merely a denial that he has committed any crime. The burden remains on the State to prove the defendant's guilt beyond a reasonable doubt.

Defendant objected to the omission of this language, and thus preserved the issue for appellate review.

When a request is made for an instruction which is legally correct and supported by evidence, the court must give the instruction at least in substance. *State v. Hooker*, 243 N.C. 429, 431, 90 S.E.2d 690, 691 (1956). "The defense of accident is triggered in factual situations where a defendant, without premeditation, intent, or culpable negligence, commits acts which bring about the death of another." *State v. Lytton*, 319 N.C. 422, 425, 355 S.E.2d 485, 487 (1987). "A killing will be excused as an accident when it is unintentional and when the perpetrator, in doing the homicidal act, did so without wrongful purpose or criminal negligence while engaged in a lawful enterprise." *State v. Riddick*, 340 N.C. 338, 342, 457 S.E.2d 728, 731 (1995). "[T]he evidence does not raise the defense of accident where the defendant was not engaged in lawful conduct when the killing occurred." *Id.*

The evidence in the case at bar is uncontradicted that "defendant voluntarily created the volatile situation which resulted in the victim's death." *Id.* at 343, 457 S.E.2d 731. The evidence shows that defendant came to the victim's residence for the purpose of collecting a drug debt owed to him by the victim. Defendant struck the victim more than once in the face, causing the victim to bleed from his mouth and ear. The victim subsequently complained of having a severe headache. Within hours of being struck in the head by defendant, the victim died from a bilateral subdural hematoma caused by the blow to his head. We hold the court did not err by failing to give the instruction on the defense of accident.

Defendant's remaining contention is that the court erred by admitting hearsay testimony. Defendant argues the court should not have allowed Gannaway to testify about a statement made by the victim to defendant in which the victim referred to an incident which occurred between the victim and defendant a week earlier. The specific testimony was as follows:

> [Prosecutor]: Okay. What else did Ken say to Travis?
>
> [Gannaway]: He said something about what happened, they got into it last week or whatever, and didn't want that to happen or whatever, that's it.

Later, during voir dire on defendant's objection, Gannaway testified that as he was walking away he heard the victim say, "Don't hit me."

The court subsequently admitted evidence, without objection, that defendant gave a statement to law enforcement officers that he and the victim "had a squabble about a week or two weeks ago." By failing to object to the admission of this evidence of similar import, defendant waived his right to full appellate review. *State v. Alford*, 339 N.C. 562, 569-70, 453 S.E.2d 512, 516 (1995). "[W]hen . . . 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. Maccia*, 311 N.C. 222, 229, 316 S.E.2d 241, 245 (1984). Review is thus under the plain error standard. *State v. O'Hanlan*, 153 N.C. App. 546, 553, 570 S.E.2d 751, 756 (2002), *cert. denied*, 358 N.C. 158, 593 S.E.2d 397 (2004). Under this standard, relief is available only if it is shown "(1) that a different result probably would

have been reached but for the error or (2) 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 conclude that the admission of the challenged testimony, even if erroneous, did not likely affect the outcome of trial given the strong and uncontradicted evidence of defendant's guilt.

We hold defendant received a fair trial, free of prejudicial error.

No error.

Judges CALABRIA and STROUD concur.

Report per Rule 30(e).