NO. COA01-132

NORTH CAROLINA COURT OF APPEALS

Filed: 5 February 2002

STATE OF NORTH CAROLINA

v. Sampson County
Nos. 99 CRS 52200,
99 CRS 52202

SHIRLEY CHANCE COLPAERT,
Defendant.

Appeal by defendant from judgment entered 24 August 2000 by Judge Charles Henry in Sampson County Superior Court. Heard in the Court of Appeals 28 November 2001.

Attorney General Roy Cooper, by Assistant Attorney General Sandra Wallace-Smith, for the State.

Philip E. Williams, for defendant-appellant.

HUDSON, Judge.

Defendant appeals her conviction and sentence for one count of assault with a deadly weapon with intent to kill inflicting serious injury and one count of first-degree arson. We find no prejudicial error.

The evidence at trial tends to show that on 16 April 1999, John Paul Phillips ("J.P.") and his cousin, Jeff Miller, went to visit J.P.'s father, John McKerry Phillips, the victim in this case. The victim was living with Defendant, his girlfriend of many years. The victim and Defendant regularly consumed alcohol,

and were drinking on the night of 16 April 1999. During that evening, they began arguing, and Defendant threatened to burn the victim, a threat J.P. and Anthony Loving, one of the victim's nephews, had heard Defendant make on previous occasions. Due to his drinking, the victim was passing in and out of consciousness: He would awaken, continue to drink and argue with Defendant, and then would pass out again. J.P. eventually went to sleep. Later, Miller heard a noise and went into the kitchen to see his uncle lying on the floor, and Defendant standing over him, spraying lighter fluid on his back and head and threatening him. Miller grabbed the lighter fluid from Defendant, and Defendant asked for a lighter and matches. Miller awakened J.P. The two collected all the lighters and matches and stayed the night to keep watch. At daybreak, now 17 April 1999, things had calmed down, and they left. When J.P. and Miller left, Defendant had gone to bed, and the victim was sitting in a chair in the living room, semi-conscious.

On the afternoon of 17 April 1999, Anthony Loving was going to a pond near his mother's house, which was next door to the victim's house, when he saw Defendant sitting on a picnic table outside his mother's house. He approached Defendant and asked her what she was doing. She told Loving that he needed to go get his "damn uncle," because "he's done set himself on fire." Loving went to his uncle's house, and, when he opened the front door, smoke and flames came out. The house was too hot to enter, so Loving went to a neighbor's house and told her to call 911.

The fire department arrived, and a fireman found the victim

under the kitchen table. The victim was taken to the hospital with third-degree burns over thirteen to sixteen percent of his body. He also suffered life-threatening injury from smoke inhalation. Defendant also was taken to the hospital. A rescue worker at the hospital observed that Defendant was laughing, and was loud and jovial. Defendant said, "Yoo-hoo, I have had fun today."

A fire investigation and arson agent with the State Bureau of Investigation, who was admitted as an expert in the field of cause and origins of fires and arson, testified that the fire was intentionally set. There were two points of origin: the chair where the victim had been sitting when last seen, and a place next to the front door of the house.

The victim testified that on a previous occasion he had set the bed on fire while he was smoking. Additionally, he testified that he had lost two houses to fire. The victim had little memory of the events leading up to the fire of 17 April 1999. He remembered that his son and nephew were at the house the night before and that he had been drinking heavily. He stated that he had been smoking. He recalled waking up, seeing smoke in the room, and trying to get out. The court sustained an objection by the State, and the victim was not allowed to testify that he did not believe Defendant set the fire.

Herman Loving, another of the victim's nephews, was allowed to testify over Defendant's objection that in the summer of 1995, he and his girlfriend, Maria, lived with the victim and Defendant. On one occasion during that period, the victim and Maria went to

Fayetteville together. Defendant got angry and set a bundle of Maria's clothes on fire. Loving also testified that in 1995 he had heard Defendant say to the victim, "I'll set your ass on fire." Additionally, Loving testified that the victim's houses had burned two or three times.

Barbara Williams testified over Defendant's objection that in 1995, she was living with a man named Irvin Hepler. Defendant claimed that Hepler had taken her money from her. On 5 September 1995, Defendant set fire to Williams's trailer. Although Defendant did not know it, Williams was inside the trailer when Defendant set it on fire. Williams left the trailer, and when she returned, she observed that the back room of the trailer had been badly burned. Defendant later pled guilty to two counts of burning a dwelling; the dates of offense were listed on the judgment as 5 and 6 September 1995.

Defendant assigns as error the trial court's admission of: Herman Loving's testimony that in 1995 he heard Defendant say to the victim, "I'll set your ass on fire"; Loving's testimony that in 1995 he saw Defendant burning some clothes and heard her say, "I set the clothes on fire"; Barbara Williams's testimony that in 1995 Defendant set her trailer on fire; and a certified copy of the judgment of conviction of Defendant showing two counts of "burning a dwelling." Defendant argues that this evidence should have been excluded pursuant to N.C. Gen. Stat. § 8C-1, Rule 404(b) (1999). The State argues that the evidence fits within exceptions listed in Rule 404(b), namely to show identity and absence of accident. *See*

id. Assuming *arguendo* that the court erred in admitting all of the evidence identified above, we hold that Defendant is not entitled to a new trial because the error was not prejudicial.

A defendant is prejudiced by an error in an evidentiary ruling "when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached." N.C. Gen. Stat. § 15A-1443(a) (1999). We do not believe there is a reasonable possibility that, without the evidence in question, the jury would have acquitted Defendant.

First we note that both Miller and Anthony Loving testified, without objection, that they had heard Defendant threaten to burn the victim. Thus, Herman Loving's testimony to the same effect was redundant. Regarding the evidence about prior conduct, we hold that there is no reasonable possibility that it affected the outcome of the trial.

The State presented evidence that the night before the fire, Defendant and the victim had been drinking heavily and fighting, and Defendant threatened to burn the victim. Defendant sprayed lighter fluid over the victim, then asked for a lighter and matches. J.P. and Miller took all matches and lighters away and stayed with Defendant and the victim through the night. When J.P. and Miller left, the victim was still in a semi-conscious state. The fire was set the next day, after J.P. and Miller had gone. Anthony Loving found Defendant sitting outside near the house while the fire burned. She did not appear upset and had not summoned help. A volunteer rescue worker testified that she later heard

Defendant say in a loud and jovial voice, "Yoo-hoo, I have had fun today." Upon investigation, it was determined that the fire was intentionally set. We believe it is unlikely that, had the court excluded the evidence that Defendant set two fires and was convicted of burning a dwelling in 1995, the jury would have acquitted Defendant. Accordingly, the admission of the evidence does not constitute prejudicial error.

Defendant also argues that the trial court erred in refusing to allow the victim to testify that he did not believe Defendant started the fire. The victim would have testified for the defense as follows:

> Q. Do you think Ms. Colpaert started that fire, in your heart?
>
> A. In my heart, I don't think she did.

The State objected, and, after conducting *voir dire*, the court sustained the objection. We review the trial court's ruling for abuse of discretion. *See State v. Shuford*, 337 N.C. 641, 650, 447 S.E.2d 742, 747 (1994).

Rule 701 of the North Carolina Rules of Evidence provides that

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

N.C. Gen. Stat. § 8C-1, Rule 701 (1999).

Here, the trial court refused to admit the victim's testimony because the victim's "recollection [of the events leading up to the fire] is very sketchy, at best, and this opinion would be

speculation on his part." Further, the court found that the victim's "opinion as to whether the defendant would have done this to him, is not based upon any perception or anything he observed and can recall from that afternoon," but rather was "based upon his emotional ties to the defendant."

Defendant argues that the victim's opinion is probative and relevant to the issue of whether Defendant set the fire. We do not believe the trial court abused its discretion by excluding this testimony. The trial court found that the victim had no independent recollection of how the fire started, and thus had no knowledge of whether Defendant set the fire. The victim's subjective belief that Defendant was not capable of hurting him does not tend to make it any less likely that Defendant set the fire. Additionally, the victim's opinion regarding whether Defendant was capable of setting the fire would not have been helpful to understanding his testimony, nor would it have been helpful to the jury in its determination of the facts at issue. Thus, the trial court did not abuse its discretion in refusing to admit the opinion testimony. *See State v. Owen*, 130 N.C. App. 505, 515-16, 503 S.E.2d 426, 433, *disc. review denied*, 349 N.C. 372, 525 S.E.2d 188 (1998). Accordingly, this assignment of error is overruled.

No prejudicial error.

Judges TIMMONS-GOODSON and TYSON concur.

Report per Rule 30(e).