NO. COA09-261

NORTH CAROLINA COURT OF APPEALS

Filed: 20 October 2009

STATE OF NORTH CAROLINA

v. Vance County
No. 06 CRS 54685
SHELBY VONDELL VALENTINE 07 CRS 799

Appeal by Defendant from judgment entered 31 July 2008 by Judge Paul C. Ridgeway in Vance County Superior Court. Heard in the Court of Appeals 2 September 2009.

Attorney General Roy Cooper, by Special Deputy Attorney General Kay Linn Miller Hobart, for the State.

Appellate Defender Staples Hughes, by Assistant Appellant Defender Charlesena Elliott Walker, for Defendant.

ERVIN, Judge.

Shelby Vondell Valentine (Defendant) appeals from a judgment entered 31 July 2008 based on jury verdicts convicting him of second degree burglary, felony larceny and having attained the status of an habitual felon. We vacate in part, find no prejudicial error in part, and remand to the trial court for correction of the judgment and resentencing.

Substantive Factual Background

In November 2006, Catherine Leonard (Leonard) lived directly across from George Anderson (Anderson) on East Rock Spring Street in Henderson. Leonard and Anderson had known each other for six

years. After falling asleep in her living room watching television, Leonard was awakened in the early morning hours of Sunday, 26 November 2006, by a loud noise. Leonard immediately looked out of her living room window toward Anderson's home. Leonard knew Anderson was not home that night, because he typically "le[ft] every Saturday or Friday night" to go to Virginia. Anderson confirmed that he had left Henderson for South Hill, Virginia, on Friday, 24 November 2006, and returned home late on Sunday, 26 November 2006.

As she looked across the street toward Anderson's home, Leonard saw an "extremely tall man, dressed in dark clothing, standing at [Anderson's] door, holding the door open and ringing the bell." Leonard "kept watching" and saw the man "move right behind the hedges of [Anderson's home][,]" after which she "heard the glass break at the window." According to Leonard, the sound came from "George's front window." At this point, Leonard called 911 and reported that "someone was breaking in [at Anderson's home]."

After speaking with the 911 operator, Leonard peeked out of her blinds again, this time seeing "George's window up[,] . . . maybe four feet . . . [a]nd the lights [in his home turned] on." At the time that she initially looked in the direction of Anderson's residence, the lights were off, as they always were when "he's gone from home." As Leonard continued to watch, she saw "a black Jeep pull up" and "a [heavyset] black man r[un] . . . behind George's apartment[.]" Leonard then saw a "marked" police car

"shining a light . . . onto the apartments[.]" After that, Leonard saw the "black man" and the tall man together.

Upon returning home Sunday evening, Anderson noticed that "a DVD player" and some "DVD tapes" were missing. Anderson's "window pane was [also] broken." Upon searching the house, Anderson found the missing DVD player and tapes "in the back bedroom[;]" however, he had not put these items there. Anderson also discovered that certain meats had been removed from his freezer and placed "in the back bedroom, by the back door[.]" Nothing was actually removed from his house. Anderson testified that he had not given anyone permission to "come into [his] house and move those items[.]"

Anderson testified that he did not know Defendant's name and denied that he and Defendant were friends. According to Anderson, Defendant came to his house "two weeks prior" to the alleged break-in and sold him some meat. However, "the meat [in Anderson's back bedroom] when [Anderson] came home from Virginia" was not the same meat that Anderson "bought from [Defendant][.]" Anderson had never given Defendant permission to enter his residence. Defendant had never been inside Anderson's home prior to the alleged break-in; he had "only [been] to the door" for the purpose of selling meat.

Officer K.M. Riddick (Officer Riddick) was notified of a breaking and entering on East Rock Spring Street in the early morning hours of Sunday, 26 November 2006, and responded within thirty to forty-five seconds. Officer Riddick arrived in a black Jeep Cherokee, which was "one of our patrol vehicles . . . used for drug enforcement."

At the time of his arrival, Officer Riddick was with Detective Pulley. Officer Riddick did not see anyone outside the residence or in the vicinity of the apartment complex. Detective Pulley "went to the front of the residence" while Officer Riddick "went to the back[.]" At the rear of the residence, Officer Riddick heard "some scruffling around from inside of the residence." Shortly thereafter, Officer Riddick "heard the back door being unlocked"; "the back door came open and a suspect [came] out of the back door[.]" Officer Riddick "ordered [the suspect] to the ground." The person who exited Anderson's back door was Defendant, who was wearing "a toboggan on his head, and . . . a set of coveralls, dark coveralls." No one else was present in Anderson's residence at the time that Defendant was taken into custody.

Defendant told Officer Riddick that "three or four people [were] walking down the street near [Anderson's] residence, [and] then he heard a gunshot[;] [s]o, he went inside to check on his friend." A search of Defendant's pockets resulted in the seizure of "an A-V cable, a cigarette lighter, a pair of scissors, and a cell phone." The A-V cable would be "used to connect . . . a DVD player or a VCR to a television." Officer C.D. Ball (Officer Ball) also noticed that Defendant "had a cut on his left palm[,]" which was "still bleeding." For this reason, Officer Ball did not fingerprint Defendant.[1]

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[1] Antwan Rice (Rice), who was employed in the Vance County Jail, testified that Defendant did not have any cuts on his hand and that if any such cuts had existed at the time that Defendant was incarcerated at the Vance County Jail, the facility would have refused to take him into its custody and "asked the arresting

Procedural History

On 26 November 2006, Magistrate's Orders were issued charging Defendant with second degree burglary and misdemeanor larceny. On 12 February 2007, the Vance County Grand Jury indicted Defendant for second degree burglary and misdemeanor larceny. Defendant was also indicted on the same date for having attained the status of an habitual felon. The cases against Defendant came on for trial at the 28 July 2008 session of the Vance County Superior Court. On 30 July 2008, the jury returned verdicts convicting Defendant of second degree burglary and felonious larceny. The following day, the jury found Defendant guilty of having attained the status of an habitual felon. At the sentencing hearing, the trial court found Defendant to have a prior record level of VI based on the accumulation of 19 prior record points. The trial court consolidated the charges for which Defendant had been convicted for judgment, imposed a sentence within the presumptive range, and ordered that Defendant be imprisoned for a minimum term of 168 months and a maximum term of 221 months in the custody of the North Carolina Department of Correction. Defendant noted an appeal to this Court from the trial court's judgment.

Analysis

Larceny Indictment:

First, Defendant contends that the second count of the indictment returned against him contained a fatal variance and that the trial court committed plain error by instructing the jury that

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officer to seek medical care[.]"

it could convict Defendant of felonious larceny if it found that Defendant took property pursuant to a burglary or breaking and entering. More specifically, Defendant argues that, because the second count of the indictment returned against him failed to allege that the property he allegedly took was stolen during a breaking and entering, the indictment charged no more than misdemeanor larceny and that the trial court erred by allowing the jury to convict him of an offense that was more serious than the one which he had been charged with committing. After a careful examination of the record in light of the applicable law, we agree with the essential thrust of Defendant's contention.

According to N.C. Gen. Stat. § 15A-924(a)(5), an indictment must contain:

> A plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.

Id. "[T]he caption of an indictment, whether on the front or the back thereof, is not a part of it and the designation therein of the offense sought to be charged can neither enlarge nor diminish the offense charged in the body of the instrument." *State v. Allen*, 112 N.C. App. 419, 428, 435 S.E.2d 802, 808 (1993) (quoting *State v. Bennett*, 271 N.C. 423, 425, 156 S.E.2d 725, 726 (1967)).

A "trial court lacks subject matter jurisdiction to try, or enter judgment on, an offense based on an indictment that only charges a lesser-included offense." *State v. Scott*, 150 N.C. App.

442, 453-54, 564 S.E.2d 285, 294, *appeal dismissed and disc. review denied,* 356 N.C. 443, 573 S.E.2d 508 (2002). "While it is permissible to convict a defendant of a lesser degree of the crime charged in the indictment[,] . . . an indictment will not support a conviction for an offense more serious than that charged." *Scott*, 150 N.C. App. at 454, 564 S.E.2d at 294; *see also* N.C. Gen. Stat. § 15-170 (stating that, "[u]pon the trial of any indictment[,] the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime").

> An indictment will not support a conviction for an offense more serious than that charged. Where an indictment or information charges only a misdemeanor, accused may not be convicted of a felony. One charged with simple larceny cannot be convicted of robbery or of larceny from the person, merely because the proof discloses the commission of the greater crime; nor can one charged with petit larceny be convicted of grand larceny, however great the proved value of the stolen property may be. Under an indictment for assault with intent to rob, accused cannot be convicted of robbery.

State v. Hare, 243 N.C. 262, 264, 90 S.E.2d 550, 552 (1955) (quoting 42 C.J.S. Indictments and Informations § 300, at 1330).

"The essential elements of larceny are: (1) the taking of the property of another; (2) carrying it away; (3) without the owner's consent; and (4) with the intent to permanently deprive the owner of the property." *State v. Barbour*, 153 N.C. App. 500, 502, 570 S.E.2d 126, 128 (2002). Pursuant to N.C. Gen. Stat. § 14-72, larceny is "considered a felony, rather than a misdemeanor, only if

the value of the property he took was more than $ 1,000.00 or if he committed the larceny in the course of a felonious breaking and entering." *State v. Matthews*, 175 N.C. App. 550, 556, 623 S.E.2d 815, 820 (2006); N.C. Gen. Stat. § 14-72.

The second count of the indictment returned against Defendant alleges, in pertinent part, "that on or about the date of offense shown (26 November 2006) and in the county named above (Vance) the defendant named above (Shelby V. Valentine) unlawfully, willfully and feloniously did steal, take, and carry away a DVD player, assorted DVD's, and a quantity of frozen chicken, the personal property of George Anderson, 209 E. Rockspring St., Henderson, North Carolina, such property having a value of $500.00." Although the caption indicates that the Vance County Grand Jury sought to charge Defendant with felonious larceny, "the caption of an indictment . . . is not a part of it and the designation therein of the offense sought to be charged can neither enlarge nor diminish the offense charged in the body of the instrument." *Allen*, 112 N.C. App. at 428, 435 S.E.2d at 808. In order to charge the commission of felonious larceny, a criminal pleading must state the factor that gives the crime its status as a felony: either that "the value of the property he took was more than $1,000.00 or [that] he committed the larceny in the course of a felonious breaking and entering[.]" N.C. Gen. Stat. § 14-72; *Matthews*, 175 N.C. App. at 556, 623 S.E.2d at 820. Since the second count of the indictment returned against Defendant did not allege either that the value of the property that Defendant allegedly took exceeded

$1000.00 or that Defendant took the property in the course of a felonious breaking or entering, the second count of the indictment merely charged Defendant with the commission of misdemeanor larceny. By charging the jury that it could convict Defendant of felonious larceny, by accepting the jury's verdict convicting Defendant of felonious larceny, and by entering judgment based on the understanding that Defendant had been convicted of felonious larceny, the trial court erred, since a "trial court lacks subject matter jurisdiction to try, or enter judgment on, an offense based on an indictment that only charges a lesser-included offense." *Scott*, 150 N.C. App. at 453-54, 564 S.E.2d at 294. Obviously, however, the fact that Defendant was impermissibly convicted of felonious larceny has no impact on the validity of his conviction for second degree burglary. As a result, we vacate Defendant's felonious larceny conviction and remand this case to the trial court for the entry of a corrected judgment showing the Defendant was convicted of misdemeanor rather than felonious larceny and for resentencing.

Other Bad Acts Evidence:

Defendant next contends that the trial court erred by allowing the admission of testimony that had no relevance other than tending to show that he had a criminal history and was a person of bad character. After careful consideration of the record in light of the applicable law, we conclude that the trial court did not err by allowing the admission of the disputed evidence.

The first portion of the testimony to which Defendant objects was delivered by Officer Riddick, who testified as follows after describing Defendant's exit from Anderson's residence:

> Q: And what happened next?
>
> A: He – We got him down the steps and on the ground. At that time, Lieutenant Pulley came around, and I had the suspect on the ground. Lieutenant Pulley actually handcuffed him. And that's when Officer Ball and several other city officers showed up.
>
> Q: Did you know the man who walked out of the door?
>
> A: Yes. I did.
>
> Q: How did you know him?
>
> Defense Counsel: Objection.
>
> The Court: I will allow limited response to that. Go ahead, sir.
>
> A: I have had past experiences with Mr. Valentine.
>
> Defense Counsel: Objection.
>
> The Court: Overruled.
>
> Q: And so did you know his name?
>
> A: Yes. I did.
>
> Q: And what was it?
>
> A: Shelby Valentine.
>
> Q: And do you see that person in the courtroom today?
>
> A: Yes. I do.
>
> Q: And where is he?
>
> A: Right there [pointing].

> Q: So, did you point to the man seated at the table to your left.
>
> A: Yes.
>
> Q: Sitting beside his attorney?
>
> A: Yes.
>
> Q: And that was the man you saw coming out of the house there at 209 East Rock Spring Street.
>
> A: Yes, ma'am.

In addition, Defendant challenges the admission of certain testimony by Officer Ball, who stated on direct examination that:

> Q: And you say Shelby Valentine, did you know Shelby Valentine?
>
> A: From previous occasions in my law enforcement experiences, I've had dealings with Mr. Valentine.
>
> Q: And is that who Officer Riddick had on the ground?
>
> A: Yes, ma'am.
>
> Q: And do you see the man in the courtroom today that was on the ground there at 209 East Rock Spring Street?
>
> A: Yes, ma'am, it's Mr. Valentine [pointing].
>
> Q: And is that him sitting at the table beside his attorney?
>
> A: Yes, ma'am.

As we understand Defendant's brief, this portion of his challenge to the trial court's judgment is directed at these two components of the evidentiary record.

In challenging the admission of this evidence, Defendant argues that the challenged testimony could only have been construed

by the jury as proof that he had a criminal history. In essence, Defendant contends that "the testimony undoubtedly suggested that the officers' familiarity with [Defendant] resulted from criminal acts on his part and their interactions with him as law enforcement officers." According to Defendant, such an attack on Defendant is prohibited by N.C. Gen. Stat. § 8C-1, Rule 404(a), which effectively provides that "character evidence is admissible [only] when the defendant has first 'opened the door' to a pertinent trait of his character[,]" *State v. Stafford*, 150 N.C. App. 566, 571, 564 S.E.2d 60, 64 (2002), *cert. denied*, 357 N.C. 169, 581 S.E.2d 444 (2003) (citing *State v. Taylor*, 117 N.C. App. 644, 651, 453 S.E.2d 225, 229 (1995)), or "when the evidence is relevant for some purpose other than proving character." Since he did not "open the door" to the presentation of character evidence and since the testimony in question was not relevant to any other material issue, Defendant contends that "the *sole* purpose of the testimony was to suggest that [Defendant] was a bad person who had committed other criminal acts" and that the trial court erred by admitting this evidence.[2] We disagree.

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[2] Defendant also contends that the admission of the disputed evidence implicates his federal and state right to be presumed innocent until proven guilty. As we understand Defendant's argument, allowing the State to impermissibly attack his character in violation of N.C. Gen. Stat. § 8C-1, Rule 404(a) inappropriately chilled his right to testify in his own behalf. However, since we have concluded, for the reasons set forth in the text, that the trial court properly admitted the challenged evidence pursuant to N.C. Gen. Stat. § 8C-1, Rule 404(b), we need not address this aspect of Defendant's argument.

Although Defendant may not have "opened the door" to the admission of character evidence pursuant to N.C. Gen. Stat. § 8C-1, Rule 404(a), we do not believe that the admissibility of the evidence in question is properly evaluated under N.C. Gen. Stat. § 8C-1, Rule 404(a), which deals with the admissibility of evidence directly relating to an individual's character. Assuming, without in any way deciding, that Defendant has correctly characterized the testimony in question,[3] the admissibility of the disputed evidence is properly analyzed under N.C. Gen. Stat. § 8C-1, Rule 404(b), rather than N.C. Gen. Stat. § 8C-1, Rule 404(a). As a result, we will proceed to evaluate the admissibility of the challenged testimony under N.C. Gen. Stat. § 8C-1, Rule 404(b).

According to N.C. Gen. Stat. § 8C-1, Rule 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." N.C. Gen. Stat. § 8C-1, Rule 404(b) is a "general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its

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[3] It is not entirely clear to us that Defendant has correctly characterized the disputed evidence. According to the record, both Officer Riddick and Officer Ball testified that they knew Defendant through their work in law enforcement. Law enforcement officers come into contact with individuals for a variety of reasons. As a result, we do not believe that the members of the jury would have inevitably assumed that Defendant had a history of criminal activity based solely on the testimony of Officers Riddick and Ball.

exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature charged." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990) (emphasis in original). Even so, given "the perils inherent in introducing [evidence of] prior crimes under Rule 404(b), several constraints have been placed on the admission of such evidence." *State v. Carpenter*, 361 N.C. 382, 388, 646 S.E.2d 105, 109 (2007).

As an initial matter, "other bad acts" evidence must be relevant to the issue of the defendant's guilt of the crime charged. N.C. Gen. Stat. § 8C-1, Rule 401 (stating that "'[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"). However, in order to be admissible, "other bad acts" evidence must be relevant to some issue other than the defendant's "propensity or disposition to commit an offense of the nature charged." *Coffey*, 326 N.C. at 279, 389 S.E.2d at 54.[4] In addition, otherwise relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading

[4] In most instances, "the rule of inclusion described in *Coffey* is constrained by the requirements of similarity and temporal proximity" as well. *State v. al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002). However, "similarity" and "remoteness" have limited relevance to the admissibility of "other bad acts" evidence for the purposes of showing that Officers Riddick and Ball knew Defendant, so we will forego a discussion of those factors in this instance.

the jury . . . or [by] needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403. The decision to admit or exclude evidence under N.C. Gen. Stat. § 8C-1, Rule 403 is committed to the trial court's sound discretion. *Coffey*, 326 N.C. at 281, 389 S.E.2d at 56. A discretionary decision made by a trial judge pursuant to N.C. Gen. Stat. § 8C-1, Rule 403 will generally not be disturbed on appeal unless it "is manifestly unsupported by reason or is so arbitrary it could not have been the result of a reasoned decision." *State v. Syriani*, 333 N.C. 350, 379, 428 S.E.2d 118, 133 (1993). Finally, "the defendant . . . [has the] burden under N.C. [Gen. Stat.] § 15A-1443(a) to establish any resulting prejudice by showing a reasonable possibility that a different result would have been reached at trial had the error not been committed." *State v. Groves*, 324 N.C. 360, 371, 378 S.E.2d 763, 771 (1989); *see also State v. Willis*, 332 N.C. 151, 168, 420 S.E.2d 158, 166 (1992) (holding that, "[a]lthough it was error to admit this testimony, . . . [i]n light of the strong substantive evidence against the defendant[,] . . . we cannot hold that the result would have been different had this testimony been excluded," so that the admission of this evidence "was harmless").

As we have already noted, N.C. Gen. Stat. § 8C-1, Rule 404(b) specifically permits the admission of "other bad act" evidence for the purpose of proving "identity." *See State v. Anderson*, 350 N.C. 152, 174, 513 S.E.2d 296, 310, *cert. denied*, 528 U.S. 973, 145 L. Ed. 2d 326 (1999) (upholding admission of evidence to prove defendant's identity under N.C. Gen. Stat. § 8C-1, Rule 404(b)).

Even if the challenged testimony does, as Defendant contends, tend to show that he had run afoul of the law on prior occasions, it was still admissible for the purpose of proving how Officers Riddick and Ball knew who he was. *State v. Reid*, 175 N.C. App. 613, 624, 625 S.E.2d 575, 584 (2006) (holding that evidence that a witness and the defendant had "sold drugs together" was "properly admitted for the purpose of establishing how [the witness] would identify defendant"); *State v. Taylor*, 117 N.C. App. 644, 651, 453 S.E.2d 225, 229 (1995) (holding that police officer's testimony that "he knew defendant personally from previous dealings with defendant in a law enforcement capacity" was relevant to show the defendant's identity). Despite the fact that Defendant did not contest his identity as the individual who emerged from Anderson's residence, the State was still required to establish Defendant's identity as the perpetrator of the alleged burglary and larceny and was entitled to prove Defendant's guilt using any admissible evidence. *State v. Holden*, 346 N.C. 404, 421, 488 S.E.2d 514, 523 (1997), *cert. denied*, 522 U.S. 1126, 140 L. Ed. 2d 132 (1998) (stating that "Defendant's offer to stipulate to intent did not preclude the State from introducing evidence which tended to establish defendant's intent to rape the victim"); *State v. French*, 342 N.C. 863, 866, 467 S.E.2d 412, 414 (1996) (stating that "[t]he State may introduce [photographs of the decedent in a homicide case] although the defendant stipulates the cause of death") (citations omitted). Finally, given the strength of the evidence against Defendant and the fact that neither Officer Riddick nor Officer Ball explicitly

testified that Defendant had previously been involved in any sort of unlawful conduct, we do not believe that there is "a reasonable possibility that," had the challenged testimony not been admitted, "a different result would have been reached at trial." N.C. Gen. Stat. § 15A-1443(a). As a result, these assignments of error are overruled.

Comments Before the Magistrate:

Next, Defendant contends that the trial court erred by failing to instruct the jury to disregard evidence that he called the magistrate a "f***ing white cracker," a statement that led the magistrate to hold the Defendant in contempt, and that the trial court erred by failing to declare a mistrial following the presentation of evidence concerning that incident. After careful consideration of the record in light of the applicable law, we conclude that Defendant is not entitled to any relief on appeal as a result of the manner in which the trial court handled this incident.

Prior to the beginning of the trial, Defendant's trial counsel submitted a number of motions to the trial court, including a request that the trial court preclude the State from presenting evidence relating to certain events that occurred at the time that Defendant was taken before a magistrate following his arrest. In attempting to persuade the trial court to grant one of those motions, Defendant's trial counsel stated that:

> Defense Counsel: The third motion in limine I have, Your Honor, is – the first is that you ask to exclude any evidence of a magistrate's finding of him – of Mr. Valentine in contempt

the night of the arrest. I don't think that's relevant to any part of this proceeding and would be prejudicial.

Court: All right, Mr. Capps?

Prosecutor: Your Honor, I don't have a problem with not going to the area that he was found in contempt, but I do believe that the State has the right, and it would be relevant to question the officer about Mr. Valentine's behavior after he was arrested on this night.

The Court: Mr. DeCillis?

Defense Counsel: I just think anything that deals with the contempt charge.

The Court: Okay . . . I would be inclined to grant the motion as it relates to the charge of contempt. I do agree that it may be relevant - his conduct on the night of arrest may be relevant to the proceedings, so I would be inclined not to grant your motion with respect to description of his conduct.

On direct examination, Officer Ball testified that:

Q: And if you will, Detective Ball, describe the - to the jury Mr. Valentine's behavior while he was being processed?

A: . . . [W]e took his photograph. We didn't fingerprint him, due to the cut on his hand. We took him over to the magistrate's office.

Q: And what happened once you got to the magistrate's office?

A: In magistrate's office he became very upset, and pardon the Court, he called the magistrate a . . . f***ing white cracker. And the magistrate held him in contempt for ten days.

Defense Counsel: Objection.

The Court: Sustained.

Out of the presence of the jury, Defendant's trial counsel requested the trial court to "dismiss the case; [d]ismiss it with prejudice." In response, the prosecutor argued that, "I believe that this can be cured by an instruction telling the jury to disregard what they have heard." The trial court denied Defendant's motions for dismissal and for a mistrial, stating that, "I am going to instruct the jury that they are to strike that portion of the witness's response related to any action taken by the magistrate, and instruct them that it's irrelevant to these proceedings." When the jury reentered the courtroom, the trial court stated:

> All right, members of the jury, I thank you again for your patience. I'm instructing you that you are to strike from your consideration - If you will recall before trial, or as I instructed you at the beginning of the trial about a motion to strike. This is one of those instances, and I'm instructing you to strike from your consideration, any consideration in response - that was elicited from this witness about what the magistrate did or did not do. That is totally irrelevant to this proceeding. You're [sic] consideration is based on the evidence that is before you, not what the magistrate did or did not do. And Mr. Valentine is entitled to your consideration of the evidence relating to offenses with which he [is] charged. And so I am instructing you to strike and disregard any evidence about what the magistrate did or did not [do] after Mr. Valentine was arrested.

The record does not contain any request on the part of Defendant that the jury be instructed to disregard Officer Ball's testimony that the defendant called the magistrate was a "f***ing white cracker" or any other objection to the trial court's curative instruction.

On appeal, Defendant argues that "[t]he court's instruction to jurors *specifying* that they were to strike the testimony about what the *magistrate* did . . . necessarily implied that the testimony about what *Mr. Valentine* did . . . was proper evidence for consideration." According to Defendant, "evidence that Mr. Valentine called the magistrate a 'f***ing white cracker' on the night he was arrested was not relevant[.]" In addition, Defendant argues that the foregoing testimony "constituted bad character evidence[,]" "violated Mr. Valentine's due process rights to a fair trial[,]" and "was so inherently prejudicial that his convictions should be vacated and he should be given a new trial." Although the exact nature of Defendant's challenge to the validity of the trial court's judgments based on this portion of Officer Ball's testimony is not entirely clear, it appears to us from a careful review of Defendant's brief that he has advanced two basic arguments on appeal.[5] First, Defendant appears to be contending that the trial court erred by failing to instruct the jury to disregard Officer's Ball's testimony to the effect that he called the magistrate a "f***ing white cracker." Secondly, Defendant

[5] A considerable portion of the section of Defendant's brief addressing this issue focuses on the admissibility of Defendant's "white cracker" comment. However, it is not clear to us that the trial court allowed the admission of this testimony at trial or that Defendant ever specifically objected to the admission of this testimony at trial. The trial court sustained the only objection that Defendant ever made to the portion of Officer Ball's testimony in which this statement appeared. In addition, it does not appear that Defendant ever specifically requested the trial court to instruct the jury to disregard Defendant's "white cracker" comment. Thus, the only two issues that might conceivably be before the Court on appeal are those discussed in the text.

appears to contend that the trial court erred by failing to grant his request for a mistrial. After careful consideration, we conclude that both arguments lack merit.

According to well-established North Carolina law, "[a] trial court does not err by failing to give a curative jury instruction when, as here, it is not requested by the defense." *State v. Williamson*, 333 N.C. 128, 139, 423 S.E.2d 766, 772 (1992) (citing *State v. Locklear*, 322 N.C. 349, 359, 368 S.E.2d 377, 383 (1988)). A careful review of the record demonstrates that Defendant never requested the trial court to instruct the jury to disregard Officer Ball's testimony concerning Defendant's reference to the magistrate as a "f***king white cracker." In addition, Defendant never explicitly argues that the failure to deliver such an instruction constituted "plain error." *See State v. Braxton*, 352 N.C. 158, 196, 531 S.E.2d 428, 451 (2000), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001) (citing N.C. R. App. P. 10(c)(4) and stating that because the "defendant fails to argue plain error[,] . . . [he] thereby waiv[es] appellate review"); *State v. Call*, 349 N.C. 382, 415, 508 S.E.2d 496, 517 (1998) (citing N.C. R. App. P. 10(c)(4) and stating that because the "defendant fails to argue plain error, [he] thereby waiv[es] appellate review"). As a result, assuming for purposes of discussion that Officer Ball's testimony concerning this comment was inadmissible, Defendant has waived his argument that the trial court committed plain error by failing to instruct the jury to disregard it.

In addition, the trial court "must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." N.C. Gen. Stat. § 15A-1061. "'Whether a motion for mistrial should be granted . . . rests in the sound discretion of the trial judge, and a mistrial is appropriate only when there are such serious improprieties as would make it impossible to attain a fair and impartial verdict under the law.'" *State v. McCollum*, 157 N.C. App. 408, 415, 579 S.E.2d 467, 471 (2003), *a'ffd*, 358 N.C. 132, 591 S.E.2d 519 (2004) (quoting *State v. Calloway*, 305 N.C. 747, 754, 291 S.E.2d 622, 627 (1982) (internal citations omitted)).

> On appeal, the decision of the trial judge . . . is entitled to the greatest respect. He is present while the events unfold and is in a position to know far better than the printed record can ever reflect, just how far the jury may have been influenced by the events occurring during the trial and whether it has been possible to erase the prejudicial effect. . . . Therefore, unless his ruling is so clearly erroneous as to amount to a manifest abuse of discretion, it will not be disturbed on appeal.

State v. Newton, 82 N.C. App. 555, 559, 347 S.E.2d 81, 84 (1986), *disc. review denied*, 318 N.C.699, 351 S.E.2d 756 (1987) (quoting *State v. Sorrells*, 33 N.C. App. 374, 377, 235 S.E.2d 70, 72 (1977), *disc. review denied*, 293 N.C. 257, 237 S.E.2d 539 (1977). A careful review of the record establishes that the trial court did not abuse its discretion by denying Defendant's request for a mistrial. The trial court immediately sustained the only objection

Defendant lodged against Officer Ball's testimony. In addition, the trial court instructed the jury to disregard the fact that the magistrate held Defendant in contempt. As a general proposition, "it is presumed that the jury followed [a curative] instruction and the admission [of evidence later struck from the record] is not held to be reversible error unless it is apparent from the entire record that the prejudicial effect of it was not removed from the minds of the jury by the court's admonition." *State v. Newcomb*, 36 N.C. App. 137, 140, 243 S.E.2d 175, 177 (1978) (quoting *Smith v. Perdue*, 258 N.C. 686, 690, 129 S.E.2d 293, 297 (1963)). Defendant did not request the trial court to instruct the jury to disregard the evidence pertaining to the "white cracker" comment. Nothing in the record suggests that the jury considered Defendant's "white cracker" comment in arriving at its verdict. In view of the fact that the trial court acted promptly to correct any prejudice that might have resulted from Officer Ball's testimony and the fact that the record does not reflect that the trial court's efforts to protect Defendant from any adverse impact resulting from this incident might have been unsuccessful, we are unable to say that the trial court abused its discretion by denying Defendant's request for a mistrial. As a result, these assignments of error are overruled.

Testimony Concerning Defendant's Invocation of Right to Counsel:

Next, Defendant argues that the trial court erred by admitting testimony that informed the jury that Defendant had invoked his federal and state constitutional right to counsel during a

conversation with Officer Ball. Assuming that the testimony in question was improper, we conclude that the trial court's error was harmless beyond a reasonable doubt.

At trial, Officer Ball provided the following description of his conversation with Defendant in the magistrate's office:

> As soon as [I] sat down, Shelby wanted to tell me that "six or seven guys were out and he was there to check on George." I don't know how he knew about George. . . . We were talking about George's name, and he may have overheard us say George's name. . . . [H]e said he was on his way from Party Pickup. As I - As he kept on talking, I told [him], "Hold on, let me read you your rights." I had a rights waiver. I read him his rights, and he said he wanted to talk to a lawyer.

Although Defendant's trial counsel objected to Officer Ball's testimony and moved for mistrial, the trial court denied Defendant's request for a mistrial.

"[A] defendant's exercise of his constitutionally protected rights to remain silent and to request counsel during interrogation may not be used against him at trial." *State v. Elmore*, 337 N.C. 789, 792, 448 S.E.2d 501, 502 (1994) (citing *State v. Ladd*, 308 N.C. 272, 283-84, 302 S.E.2d 164, 171-72 (1983) (stating that "the State may not introduce evidence that a defendant exercised his fifth amendment right to remain silent")). The Fifth Amendment right to counsel exists "to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process." *Miranda v. Arizona*, 384 U.S. 436, 469, 16 L. Ed. 2d 694 (1966). "Therefore, a defendant must be permitted to invoke this right with the assurance that he will not later suffer

adverse consequences for having done so." *Ladd*, 308 N.C. at 283-84, 302 S.E.2d at 172. "[T]here are 'no special circumstances that would justify use of a constitutional privilege to discredit or convict a person who asserts it[;] [t]he value of constitutional privileges is largely destroyed if persons can be penalized for relying on them.'" *Id.*, 308 N.C. at 284, 302 S.E.2d at 172 (quoting *Grunewald v. United States*, 353 U.S. 391, 425, 1 L.Ed. 2d 931, 955 (1956) (Black, J., concurring)). Even an error of constitutional magnitude does not necessitate a new trial in the event that the error was harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A-1443(b); *see also Elmore*, 337 N.C. at 792, 448 S.E.2d at 502.

Assuming that Officer Ball's testimony constituted an impermissible comment about Defendant's invocation of his right to the assistance of counsel, the only issue we need to address is whether the trial court's erroneous refusal to sustain Defendant's objection was harmless beyond a reasonable doubt. Before this Court, Defendant argues that the trial court's refusal to take action in response to Officer Ball's comment could not be harmless beyond a reasonable doubt because "the State produced scant evidence of Mr. Valentine's intent in entering the apartment;" because Defendant "entered [Anderson's residence] to help his friend 'George'[,] whom he believed to be in trouble;" and because "the evidence that he 'wanted a lawyer' impermissibly suggested he had something to hide." We find Defendant's argument unpersuasive.

Despite the fact that the investigating officers indicated that Defendant told them at the time of his arrest that he had entered Anderson's residence to help Anderson after having seen a group of men in the street, no direct evidence of Defendant's intent at the time that he entered the apartment was adduced at trial. Even though Leonard heard Anderson's window break and even though the police arrived within less than one minute after she dialed 911, no one else claimed to have seen a group of men in the vicinity of Anderson's residence on the night of the alleged burglary and larceny. As a result, the evidence tending to support an acquittal is less than compelling.

On the other hand, the evidence tending to show Defendant's guilt is overwhelming. Anderson, the person whom Defendant claimed to be intending to help, testified that he barely knew Defendant. Leonard saw the burglary in process and heard a window break. A number of law enforcement officers witnessed Defendant leaving the rear of Anderson's residence. The investigating officers observed a cut on Defendant's hand, an injury that presumably resulted from his alleged breaking of the living room window. The investigating officers also discovered an A-V cable on Defendant's person and a DVD player, some DVD tapes, and some meat in the back bedroom next to the back door from which Defendant made his exit.

In addition, despite the fact that the trial court did not grant the mistrial that Defendant requested, there is no evidence in the present record tending to show that the State made any effort to exploit Officer Ball's reference to Defendant's

invocation of his right to counsel. Officer Ball's reference to Defendant's request to be provided with counsel was relatively brief and does not appear to have been repeated. Defendant does not suggest that the prosecutor made any mention of this subject in his argument to the jury or attempted to elicit similar evidence in questioning other witnesses. Instead, the record simply reflects that a single, brief reference to Defendant's request for a lawyer occurred during Officer Ball's testimony and that this brief reference was the end of the matter.

The circumstances present here are remarkably similar to those at issue in *Elmore*, 337 N.C. at 792-93, 448 S.E.2d at 502-03, in which the Supreme Court explained:

> [A]ny violation of the defendant's rights was *de minimis*. The challenged testimony came in response to a question that requested a chronology of the events surrounding the defendant's arrest and processing in Atlanta. The reference to the defendant invoking his rights went beyond the information sought by the prosecutor's innocuous question. The reference was not further emphasized by additional questions or comments during Green's testimony. The record indicates that the testimony at issue was not solicited by the prosecutor and the remark apparently was offered by Agent Green simply to explain why he discontinued his questioning of the defendant. In light of the context in which this arose and the single brief mention by one witness of this matter, this was a *de minimis* violation.

Id., 337 N.C. at 792-93, 448 S.E.2d at 503. As was the case in *Elmore*, the reference to Defendant's invocation of his right to counsel in this case occurred when Officer Ball's testimony exceeded the scope of the information sought in the prosecutor's

question, which inquired, "And when you sat down with Mr. Valentine, and he started talking, did he say anything else about the incident other than there was (sic) just six to seven guys out there?" Furthermore, Officer Ball appears to have mentioned Defendant's invocation of his right to counsel for the purpose of explaining why he discontinued his discussion with Defendant. *Id.*, 337 N.C. at 792, 448 S.E.2d at 503. Finally, as we have already mentioned, the prosecutor does not appear to have made any effort to exploit this portion of Officer Ball's testimony during the remainder of the trial. Therefore, "[i]n light of the context in which this arose and the single brief mention by one witness of this matter, this was a *de minimis* violation." *Id.*, 337 N.C. at 793, 448 S.E.2d at 503. As a result, given all of these factors and given the overwhelming evidence of Defendant's guilt, we conclude that any error that may have occurred at the time that Officer Ball made reference to Defendant's invocation of his right to remain silent was harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A-1443(b). Thus, this assignment of error is overruled.

"Leg Brace":

Finally, Defendant contends that the trial court erred by allowing the jurors to see Defendant restrained in a leg brace, failing to instruct the jurors to disregard the brace, and denying his motion for mistrial. After a careful review of the record, we fail to detect any error on the part of the trial court with respect to this issue.

"[I]n the absence of a showing of necessity therefor, compelling the defendant to stand trial while shackled is inherently prejudicial in that it so infringes upon the presumption of innocence that it interfere[s] with a fair and just decision of the question of . . . guilt or innocence." *State v. Tolley*, 290 N.C. 349, 366, 226 S.E.2d 353, 367 (1976) (citations omitted). "[B]ecause of the inherent prejudice engendered by the use of shackles, the rule since the earliest cases has been that the burden of showing necessity for such measures rests upon the State." *Tolley*, 290 N.C. at 366-67, 226 S.E.2d at 367.

> To say, as a general rule, that trial in shackles is inherently prejudicial is not to conclude, however, that every such trial is fundamentally unfair. In certain instances, shackling the defendant may be justified, not because no prejudice is engendered thereby, but because it is shown by the State to be necessary notwithstanding any such prejudice.

Id., 290 N.C. at 367, 226 S.E.2d at 367. "Thus, the rule against shackling is subject to the exception that the trial judge, in the exercise of his sound discretion, may require the accused to be shackled when such action is necessary to prevent escape, to protect others in the courtroom or to maintain order during trial." *Id.* As a result, the courts of this State have always regarded the shackling of a criminal defendant during the course of a trial as a very serious matter that should only be undertaken when rendered necessary by surrounding circumstances.

In this case, neither Defendant nor the State address the extent, if any, to which the trial court abused its discretion in light of the principles announced in *Tolley* and its progeny.

Instead, the appellate dispute between Defendant and the State centers on the issue of whether Defendant was actually shackled at all. The record on this issue is, at best, unclear. During the jury's deliberations, the foreperson inquired of the trial court, "Did Mr. Valentine have the brace on his leg in November 2006?" In discussing a proposed response to the jury's question with counsel, the trial court stated, "[w]ith respect to [this question,] my suggestion would be . . . that we simply inform the jury that they are to consider matters that are in evidence and reasonable inferences therefrom, and that the Court cannot provide any more specific response." Defense counsel stated, "I'm going to again have to make a motion for a mistrial. I mean, that's tantamount to them seeing my client in shackles." The trial court responded to Defendant's trial counsel's comment by stating that, "[w]ell, it seems to me it's tantamount to them assuming that the defendant has a brace on his leg. . . . Motion for a mistrial is denied on that basis."

The ultimate problem that we face in attempting to address these assignments of error is that we simply do not know exactly what happened in the trial court. The record does not explicitly indicate that Defendant was ever shackled. Furthermore, as best as we can tell from our examination of the record, neither Defendant's trial nor appellate counsel have ever flatly stated that Defendant was shackled at trial. Instead, Defendant simply relies on the jury's inquiry with respect to Defendant's "leg brace" to support his contention that he was shackled at trial. Despite Defendant's

contention to the contrary, the jury's question is readily susceptible to an interpretation that does not involve shackling in any way. As posed, the jury's question made reference to the issue of whether the Defendant needed the "leg brace" that he apparently wore at the time of trial at the time of the alleged burglary. In the event that Defendant was wearing a leg brace at the time of trial for reasons of medical necessity and had also been wearing such a leg brace at the time of the alleged burglary and larceny, that fact might create doubt in the jury's mind that Defendant actually burglarized and committed larceny in Anderson's residence in the manner contended by the State. As a result, the record simply does not establish that Defendant was shackled at trial.

A convicted criminal defendant seeking to rely on *Tolley* and its progeny must first show that he or she was, in fact, shackled, handcuffed, or otherwise restrained at trial. *See Ingram v. Easley*, 227 N.C. 442, 444, 42 S.E.2d 624, 626 (1947) (stating that "[t]he Court will not assume the existence of [facts] about which there is no proof but will decide the case upon the facts appearing of record"); *United States Trust Co., N.A. v. Stanford Group Co.*, __ N.C. App. __, __ S.E.2d __ (2009) (stating that an appellate court should not initially decide questions of fact); *Hobbs Staffing Servs. v. Lumbermens Mut. Cas. Co.*, 168 N.C. App. 223, 226, 606 S.E.2d 708, 711 (2005) (citation omitted) (stating that an appellate court should not initially decide questions of fact). In this jurisdiction, the trial court is presumed to have acted properly until the contrary is established. *See King v. King*, 146

N.C. App. 442, 445-46, 552 S.E.2d 262, 265 (2001) (stating that this Court will not presume error by the trial court when none appears on the record); *Hocke v. Hanyane*, 118 N.C. App. 630, 635, 456 S.E.2d 856, 861 (1995) (stating that "[w]e are required, absent a showing to the contrary, to presume the trial court's determination was proper"); *see also State v. Young*, 60 N.C. App. 705, 711, 299 S.E.2d 834, 838 (1983) (stating that, "[t]he charge of the trial court not being included in the record, it is presumed that such proper instructions were given"); *State v. Farrington*, 40 N.C. App. 341, 345, 253 S.E.2d 24, 27 (1979) (stating that, since the full charge is not included in the record on appeal, this Court must therefore assume that the trial court had originally given proper instructions). Under our rules of appellate procedure, the burden is on the appealing party to establish the factual and legal basis for any claim that he or she wishes to assert on appeal. *State v. Davis*, 191 N.C. App. 535, 539, 664 S.E.2d 21, 24 (2008) (stating that "[i]t is the duty of the appellant to ensure that all documents and exhibits necessary for an appellate court to consider his assignments of error are part of the record or exhibits") (citing *State v. Berryman*, 360 N.C. 209, 216, 624 S.E.2d 350, 356 (2006)). As a result, when the appealing party fails to provide adequate legal or factual support for the claims he or she advances on appeal, we have no choice except to uphold the result reached at trial. *See State v. Partin*, 48 N.C. App. 274, 285, 269 S.E.2d 250, 257, *appeal dismissed and disc. review denied*, 301 N.C. 404, 273 S.E.2d 449 (1980) (concluding that "[a]bsent any evidence to

support [the defendant's] contention, the trial judge" did not err in denying his motion). As a result, since Defendant has failed to demonstrate that he was, in fact, shackled at trial, these assignments of error are overruled.

Conclusion

Thus, for the reasons set forth above, we vacate Defendant's conviction of felony larceny and remand this case to the Vance County Superior Court for correction of the judgment entered against Defendant so as to reflect that he was convicted of misdemeanor larceny rather than felonious larceny and for resentencing. With that exception, we find that Defendant received a fair trial that was free from prejudicial error.

NO ERROR, in part; VACATED and REMANDED, in part.

Judges GEER and STROUD concur.

Report per Rule 30(e).