NO. COA14-372
NORTH CAROLINA COURT OF APPEALS

Filed: 18 November 2014

STATE OF NORTH CAROLINA

v. Alexander County
No. 12CRS000165
12CRS000458

ROCKY LEE DEWALT
Defendant.

Appeal by Defendant from judgments entered 19 December 2013 by Judge W. David Lee in Alexander County Superior Court. Heard in the Court of Appeals on 10 September 2014.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Torrey D. Dixon, for the State.

Marilyn G. Ozer, for Defendant-appellant.

DILLON, Judge.

Rocky Lee Dewalt ("Defendant") appeals from convictions for burning personal property and attaining the status of habitual felon. For the following reasons, we find no error in Defendant's trial.

I. Background

Defendant was indicted for one count of burning personal property and, subsequently, for attaining the status of habitual felon. The State's evidence at trial tended to show the following: At around 4:15 p.m. on 1 November 2011, Alexander Correctional Institution Officer Christopher Murray observed smoke coming through the crack at the top of the door of Defendant's cell. Defendant was the only person in his cell in the prison's segregation unit. Officer Murray was unable to see the source of the fire because Defendant had covered the cell door window with a towel and refused to remove it. The smoke set off a fire alarm.

The supervisor of the prison's segregation unit asked Defendant to remove the towel and he complied. The supervisor then instructed Defendant to "submit to cuffs," but Defendant refused. Defendant demanded that officers come in and get him out, whereupon Defendant was forcibly removed from his cell by an extraction team. The entire wing of the prison was evacuated. Each individual inmate was examined by medical personal for injuries resulting from smoke inhalation.

Following Defendant's removal from his cell, Officer Murray discovered burnt toilet paper and a burnt bed sheet in Defendant's trash can, which had also been burned. Following

this incident, Defendant told a staff psychologist during an evaluation that he was not trying to injure anyone by his actions, but that he burned the items so that he would be moved to a different facility.

The jury found Defendant guilty of the felonious burning of personal property. The trial court then considered Defendant's habitual felon indictment. Defendant attempted to enter a plea of guilty; however, the trial court rejected the plea and submitted the matter for the jury. The jury subsequently found Defendant guilty of obtaining the status of habitual felon. The trial court sentenced Defendant to a prison term of 77 to 102 months. Defendant gave timely written notice of appeal from the trial court's judgment.

II. Analysis

Defendant argues on appeal the trial court erred in (1) admitting into evidence certain testimony; (2) failing to instruct the jury on misdemeanor injury to personal property; and (3) not considering his competency before trying him on his habitual felon indictment.

A. Admission of Testimony

Defendant argues first that the trial court erred in allowing into evidence certain testimony from April Parker, the

assistant unit manager at the prison's segregation unit. Defendant concludes that he should be granted a new trial because he was prejudiced by the introduction of this testimony which only served to bolster the State's "weak evidence" against Defendant, as no one saw the fire or ignition source, and evidence was only presented by photograph.

1. Evidence that Defendant was housed in Maximum Control

Defendant contends that the trial court erred in allowing Ms. Parker's testimony that he was housed in maximum control, which indicated that he had been initially placed in "intensive control" for assault on staff, drugs or gang activity and had been moved to maximum control because he could not adhere to the rules while in "intensive control[.]" Defendant argues that the evidence was irrelevant, unfairly prejudicial, and amounted to inadmissible character evidence.

"'Relevant 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." N.C. Gen. Stat. § 8C-1, Rule 401 (2011). Only relevant evidence is admissible. N.C. Gen. Stat. § 8C-1, Rule 402. Evidence 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." N.C. Gen. Stat. § 8C-1, Rule 404(b). That prohibition is, however, subject to the caveat that such evidence "may . . . be admissible for other purposes, such as . . . intent[.]" *Id.* Our Supreme Court has held that such evidence may be admissible as long as it is relevant to any fact or issue other than the defendant's propensity to commit the crime.'" *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012) (citation omitted). Accordingly,

> [e]vidence, not part of the crime charged but pertaining to the chain of events explaining the context, motive and set-up of the crime, is properly admitted if linked in time and circumstances with the charged crime, or [if it] forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury.

State v. Handy, 331 N.C. 515, 531-32, 419 S.E.2d 545, 554 (1992). The question whether evidence is within the scope of Rule 404(b) is reviewed *de novo*. *Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 159.

In the present case, the State had the burden of proving not only that Defendant had burned the items but that he did so *with the intent* of injuring or prejudicing the Department of Corrections. N.C. Gen. Stat. § 14-66 (2011). We believe that

it could be reasonably inferred from Ms. Parker's testimony that Defendant intended to harm and prejudice the Department by his actions and that her description of being housed in maximum control was "necessary to complete the story of the crime for the jury." *Handy*, *supra*.

Notwithstanding that the testimony was relevant, it may not be admitted if its probative value is outweighed by its prejudicial effect under Rule 403, which states that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." N.C. Gen. Stat. § 8C-1, Rule 403.

> While all evidence offered against a party involves some prejudicial effect, the fact that evidence is prejudicial does not mean that it is necessarily unfairly prejudicial. The meaning of unfair prejudice in the context of Rule 403 is an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one.

State v. Capers, 208 N.C. App. 605, 617, 704 S.E.2d 39, 46 (2010) (citation and quotation marks omitted), *disc. rev. denied and appeal dismissed*, 365 N.C. 187, 707 S.E.2d 236 (2011). We review the trial court's determination under Rule 403 for an abuse of discretion. *State v. Cunningham*, 188 N.C. App. 832, 836-37, 656 S.E.2d 697, 700 (2008). "Abuse of discretion

results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). We believe that given all of the testimony from other witnesses regarding the secure nature of the prison and the need to explain the context and the circumstances in which the crime occurred, we cannot say that Ms. Parker's testimony was introduced in order to produce an emotional response from the jury, see *Capers*, 208 N.C. App. at 617, 704 S.E.2d at 46, or that its probative value was substantially outweighed by the danger of unfair prejudice to Defendant. According, the trial court did not abuse its discretion in overruling Defendant's objections to the admission of this testimony.[1]

2. Testimony regarding Defendant being shackled and guarded

Defendant next contends that the trial court erred in admitting testimony that he was in full restraints and escorted

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[1] We need not address Defendant's N.C. Gen. Stat. § 8C-1, Rule 608(b) arguments as that rule relates to the introduction of evidence regarding a witness' "character for truthfulness or untruthfulness[.]" At trial, no one made the argument that because testimony was presented that Defendant was housed in maximum control and had violated prison policies that he was more or less untruthful. Ms. Parker's testimony was substantive evidence regarding intent and useful to describe the events surrounding the crime, as discussed above.

by two staff members when he was moved in the facility. Defendant argues that this testimony undermined the presumption that he was innocent until proven guilty in violation of his due process rights and the judge failed to give any limiting instruction to mitigate the effect of this testimony. Defendant cites *Deck v. Missouri*, 544 U.S. 622, 161 L.Ed. 2d 953 (2005) and *State v. Tolley*, 290 N.C. 349, 226 S.E.2d 353 (1976) in support of his argument.

We believe *Deck* and *Tolley* are distinguishable from the present case. Those cases dealt with defendants who were shackled in the courtroom in the presence of the jury. For instance, in *Deck*, the United States Supreme Court reasoned that

> [t]he appearance of the offender during the penalty phase [of trial] in shackles, however, almost inevitably implies to a jury, as a matter of common sense, that court authorities consider the offender a danger to the community -- often a statutory aggravator and nearly always a relevant factor in jury decisionmaking, even where the State does not specifically argue the point. . . . It also almost inevitably affects adversely the jury's perception of the character of the defendant.

Id. at 633, 161 L.Ed. 2d at 965. It concluded that unless justified by an essential state interest -- such as courtroom security

> courts cannot routinely place defendants in

> shackles or other physical restraints visible to the jury during the penalty phase of a capital proceeding.

Id.

Likewise, in *Tolley*, our Supreme Court stated that a defendant should not be shackled in the presence of the jury except in rare circumstances because

> (1) it may interfere with the defendant's thought processes and ease of communication with counsel, (2) it intrinsically gives affront to the dignity of the trial process, and most importantly, (3) it tends to create prejudice in the minds of the jurors by suggesting that the defendant is an obviously bad and dangerous person whose guilt is a foregone conclusion.

290 N.C. at 366, 226 S.E.2d at 367 (citations omitted).

In the present case, however, there is no indication that Defendant was shackled during the trial, during the habitual felon phase, or during sentencing. Therefore, the policy reasons regarding constitutional violations based on potential jury bias concerning restraints on a defendant in *Deck* and *Tolley* would be inapplicable. It was an undisputed fact that Defendant was an inmate in a prison in maximum control when the crimes occurred and it would be well understood by the jury that restraints would be used on an inmate from time to time in such a confined setting. Also, Ms. Parker's testimony regarding

restraints was essential to explaining the circumstances surrounding the crime. Therefore, Defendant's argument is overruled.

B. Jury Instruction

Defendant next contends that the trial court erred in denying his request for an instruction on the lesser offense of misdemeanor injury to personal property. Defendant argues that this instruction was required because there was conflicting evidence as to whether Defendant had the intent to injure or prejudice the Department of Corrections, based on the testimony of the prison psychologist that Defendant had stated that he started the fire because he wanted to be transferred to a different facility and that he had no intent to harm anyone.

"It is well-settled that the trial court must submit and instruct the jury on a lesser included offense when, and only when, there is evidence from which the jury could find that defendant committed the lesser included offense." *State v. Porter*, 198 N.C. App. 183, 189, 679 S.E.2d 167, 171 (2009) (citation and quotation marks omitted). We have held that a trial court is not required to instruct on a lesser included offense where "the State's evidence is sufficient to fully satisfy its burden of proving each element of the greater

offense" and where "there is no evidence to negate those elements other than defendant's denial that he committed the offense, defendant is not entitled to an instruction on the lesser offense." *State v. Debiase*, 211 N.C. App. 497, 504, 711 S.E.2d 436, 441 (citations, quotation marks, and brackets omitted), *disc. rev. denied*, 365 N.C. 335, 717 S.E.2d 399 (2011). We apply a *de novo* review to a defendant's challenge of a trial court's ruling regarding instruction on a lesser included offense. *Id.*

Felony burning of personal property requires proof of specific intent to injure or prejudice the owner, see N.C. Gen. Stat. § 14-66, whereas *misdemeanor* injury to personal property does not. N.C. Gen. Stat. § 14-160(a)(2011). Defendant makes an argument identical to the one made in *State v. Jordan*, 59 N.C. App. 527, 296 S.E.2d 823 (1982). In *Jordan*, a defendant was charged with, *inter alia*, felonious burning of personal property. Evidence was presented that he was an inmate in a segregation unit; a corrections officer saw smoke coming from his unit; the defendant was the only person in the cell; when corrections officers opened the unit it was completely filled with smoke; and, after the smoke cleared, they discovered pieces of a burning mattress. *Id.* at 527-28, 296 S.E.2d at 823-24. On

appeal, the defendant argued that "the trial court erred in not allowing defendant's motion to submit the misdemeanor offense of willful and wanton injury to personal property to the jury[,]" because there was conflicting evidence as to his intent to injure the property owner. *Id.* at 529, 296 S.E.2d at 825. In overruling the defendant's argument, the Court noted that "[t]here is, however, no conflicting evidence. The evidence of the torn mattress strips and two fires in the cell is uncontradicted and infers the specific intent." *Id.* at 530, 296 S.E.2d at 825.

In addition to the evidence of intent as discussed above, like *Jordan*, there was uncontradicted evidence the officers found burnt toilet paper, a burned bed sheet, and a burnt trash can. This evidence also infers intent and, based on *Jordan,* satisfies this element of the offense, even when viewed in the light most favorable to Defendant.

As to Defendant's argument regarding the psychologist's testimony that Defendant told him that he only intended to provoke his transfer out of the unit, we note that despite his denial of his intent to injure or prejudice the Department of Corrections, Defendant's method of provoking a transfer, as determined in *Jordan*, established by inference the specific

intent to harm or prejudice the Department of Corrections. *See Debiase*, 211 N.C. App. at 503-04, 711 S.E.2d at 441. As there was uncontroverted evidence of the greater offense, the trial court was not required to give the instruction on the lesser offense. *See id.* Accordingly, the trial court did not err in denying Defendant's instruction on the lesser included offense. Defendant's argument is overruled.

C. Consideration of Defendant's Competency

Lastly, Defendant contends that the trial court erred in not considering his competency before proceeding with the habitual felon phase of the trial after it had refused to accept his plea based on a determination by the trial court that Defendant did not understand "what was going on." He argues that his competency should have been a concern to the trial court since evidence had been presented that Defendant suffered from mental health issues which required daily medications. Defendant concludes that this failure violated his constitutional rights and his conviction should be vacated or a new habitual felon trial should be ordered.

N.C. Gen. Stat. § 15A-1001(a) (2011) states that

> [no] person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object

> of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner. This condition is hereinafter referred to as "incapacity to proceed."

See also Drope v. Missouri, 420 U.S. 162, 171-72, 43 L.Ed. 2d 103, 112-13 (1975). N.C. Gen. Stat. § 15A-1002(b) (2011) states that "[w]hen the capacity of the defendant to proceed is questioned, the court shall hold a hearing to determine the defendant's capacity to proceed." Our Supreme Court has indicated that "[a] trial court has a constitutional duty to institute, *sua sponte*, a competency hearing *if there is substantial evidence before the court* indicating that the accused may be mentally incompetent." *State v. Young*, 291 N.C. 562, 568, 231 S.E.2d 577, 581 (1977) (emphasis in original; citation and quotation marks omitted).

Turning to a trial court's obligation to accept a defendant's plea, our law states that the court can only accept a plea if it is "the product of the informed choice of the defendant and that there is a factual basis for the plea." N.C. Gen. Stat. § 15A-1023(c) (2011). In his discretion a trial judge can reject plea arrangements and he must inform the parties of the reasons he rejected the plea. N.C. Gen. Stat. § 15A-1023(b).

In the present case, when Defendant's plea was offered, the trial court asked Defendant whether counsel had explained the status of becoming an habitual felon by having at least three prior felony convictions. Defendant responded that he had only talked with his counsel "[b]riefly" about it. The trial court continued:

> The Court: Has he explained to you the nature of that status, and do you understand the nature of that status, what is required in order for you to be determined to have the status of habitual felon?
>
> The Defendant: I stated, only three felonies. I had three felonies, and just one they put me would be four felonies, something like that.
>
> The Court: Right. Right.
>
> The Defendant: So I – yeah, I understand, but I don't.
>
> The Court: Well, if you don't understand, I'm going to need to let the jury pass on these things, and I'm glad to do that. . . I cannot accept anything from you, [Defendant], that you don't feel like you understand and appreciate. And I'm, you know, I'm good to go with it either way.
>
> The Defendant: Anyway, I'm going to do some time, but I really don't understand what's really going on, your Honor, and stuff.
>
> The Court: I think better course, then, let's just let the jury hear it.
>
> The Defendant: I let them pass on –go

> ahead, because I don't know what's going on.
>
> The Court: Well if you don't know what's going on, that's the whole problem. I can't take your plea if you don't know what's going on.
>
> The Defendant: But I accept the plea. I don't know ---
>
> The Court: No, I can't let you do that.
>
> The Defendant: I don't know what's going on, I really don't. I don't really know what's going on. I feel like I'm getting railroaded, any way I go I'm getting railroaded.

It appears that the trial court rightly rejected Defendant's plea agreement because he stated that he had only "[b]riefly" talked to his counsel about attaining the status of habitual felon and did not clearly understand it. Because of the trial court's decision to reject his plea, Defendant responded by saying that he was being "railroaded" by continuing to a jury trial instead. Rather than not "understand[ing] the nature and object of the proceedings against him[,]" "comprehend[ing] his own situation[,]" or "assist[ing] in his defense[,]" see N.C. Gen. Stat. § 15A-1001(a); *Drope*, 420 U.S. at 171-72, 43 L.Ed. 2d at 112-13, it appears in context that Defendant understood the proceeding and situation and was assisting in his defense but did not agree with the trial court's decision to reject his

plea. In other words, the trial court's concern was not that Defendant was incompetent, but that he was not fully informed about his plea. He confirmed that he needed three felonies to attain the status of habitual felon, see N.C. Gen. Stat. § 14-7.1 (2011), but was just not clear on this fact because of his "brief" communication with his counsel.

Defendant also points to the following exchange to show that he was confused during the whole proceeding. After he had told the trial court he had taken his mental health medications, the court asked Defendant whether they helped and Defendant explained:

> Like this, it helps to prevent it, but sometimes it gets confusing because I don't understand how I'm getting, why I'm, if I'm getting railroaded or people are doing this out of spite because I don't plead to one of the things, they try to throw the book at me because I need to plead to the case. I don't understand not really what's going on with this stuff, but I feel like it's in my best interest because I only had a year to go. I'm doing so much time now for the charges that I'm at. I'm trying to get back out there. They kept me eight hard years for something I didn't really do. All the drug stuff I did, you know what I'm saying, but some stuff I got set up and I been going all this time in prison.
>
> The misdemeanor time and stuff, it come to prison, the people, they be falsely accusing me, but everybody against me because they planned this out. They said stick to the plan, stick to the plan. They

> going against me and trying to set me up as if I'm the bad person. And sometimes I admit I do get frustrated and get angry, but the time where they doing all this charges and stuff, they can revoked a lot of that stuff they revoked.
>
> Like the trial I had, Bush, he was the man with the camera. He came to my door with the camera and he stated out of his mouth I do not smell no smoke, I do not see no fire in [his] room. I have the camera, and we were there with the camera. I didn't see nothing burnt in the room. But this attorney right here stated they all, all these people's right here[.]

Again, rather than not "understand[ing] the nature and object of the proceedings against him[,]" "comprehend[ing] his own situation[,]" or "assist[ing] in his defense" see N.C. Gen. Stat. § 15A-1001(a); *Drope*, 420 U.S. at 171-72, 43 L.Ed. 2d at 112-13, in context, Defendant, rather than being "confused," is explaining his decision to accept a plea and complaining that he was again being "railroaded" by the judicial system. This does not amount to evidence of incompetence.

Additionally, Defendant confirmed to the trial court that he had taken his mental health medications and, prior to trial, Defendant was given a mental health evaluation and found competent to stand trial. Defendant has failed to show there was "substantial evidence" before the trial court to show that he was incompetent at the time of the habitual felon phase of

his trial. *See Young*, 291 N.C. at 568, 231 S.E.2d at 581. Accordingly, we find no merit in Defendant's arguments.

NO ERROR.

Judges HUNTER, Robert C. and DAVIS concur.

Report Per Rule 30(e).