NO. COA01-1029

NORTH CAROLINA COURT OF APPEALS

Filed: 6 August 2002

STATE OF NORTH CAROLINA

v. Pender County
No. 99 CRS 50651

JOHN DANIEL MCGINNIS

Appeal by defendant from judgment entered 20 January 2000 by Judge W. Allen Cobb, Jr. in Pender County Superior Court. Heard in the Court of Appeals 16 May 2002.

Attorney General Roy Cooper, by Senior Deputy Attorney General James C. Gulick and Special Deputy Attorney General J. Allen Jernigan, for the State.

Geoffrey W. Hosford, for defendant-appellant.

CAMPBELL, Judge.

On 19 January 2000, defendant was indicted by the Pender County Grand Jury for first-degree arson of a trailer inhabited by Cheryl Civatte ("Civatte"). Defendant pled not guilty and was tried before a jury (also on 19 January 2000) at the Criminal Session of the Pender County Superior Court. The following evidence was introduced at trial:

The State's evidence tended to show that Civatte and her roommate, Russell Catell ("Catell"), were renting a trailer from defendant's sister located at 815 Shepards Road in Pender County. Defendant (who lived with his mother) was Civatte's neighbor, and

the two had been acquaintances for approximately five years. However, at the time of the incident for which defendant was indicted, Civatte believed that defendant was obsessed with her and jealous because she would not become romantically involved with him.

On 5 September 1999, Civatte was dropped off at her trailer by a female friend. Before the female friend left, defendant came from the back of the trailer and told her to "watch out." After Civatte entered the trailer and started watching television in the bedroom with a male friend, she heard a knock at the door. Upon learning that the visitor was defendant, Civatte did not answer the door because she believed he might harass her. Approximately thirty minutes later, Civatte noticed lights flashing from a fire truck outside her bedroom window. When Civatte opened her bedroom door, she found "the whole place was filling up with smoke." Since her smoke alarm did not go off, Civatte believed someone had disconnected it because the alarm had gone off two days earlier while she was cooking. She further testified that as she exited the trailer, defendant approached her and said that if she "hadn't been laying on [her] back" she would have known the trailer was on fire. A fireman eventually pulled defendant away from Civatte after defendant continued to insult her.

Leonard Hurst ("Hurst"), another neighbor of Civatte's who lived approximately eleven yards away from her trailer, testified that he saw defendant knock on Civatte's door two or three times. When Civatte did not answer, defendant kicked a dog off of her

porch and returned to his home.[1] A few minutes later, Hurst saw defendant walk back over to Civatte's trailer. Thereafter, as Hurst was leaving his home, he saw smoke coming from the end of Civatte's trailer. Hurst returned home to call defendant's mother and notify her about the fire. She replied that defendant had already called the fire department. Hurst then proceeded to watch from his front porch as defendant untangled a water hose and attempted to put the fire out while waiting for the fire department to arrive.

Deputy Chief Larry Charles Steffie ("Deputy Chief Steffie") was accepted by the court as an expert in the field of fire investigation. He testified that the fire's point of origin was a plastic pail containing petroleum liquid (either kerosene or diesel fuel) located at the corner of Civatte's trailer. He further testified that the fire was caused by someone placing a lighted object into the pail. Fire Marshal Carson Henry Smith, Jr. ("Fire Marshal Smith") assisted Deputy Chief Steffie with investigating the fire. He was also accepted as an expert in the field of fire investigation, and his testimony corroborated Deputy Chief Steffie's assessment of the fire's origin and cause. Civatte had previously testified that only she, defendant, and Tim Hinnett ("Hinnett"), her estranged boyfriend, were aware of the location of the pail (which actually contained kerosene) behind the trailer.

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[1] Hurst's daughter, Roxie, also saw defendant's actions and corroborated her father's testimony at the trial.

Detective Jim Hock ("Detective Hock") investigated the fire scene and spoke with defendant on the day of the fire. Detective Hock testified that defendant told him that Hinnett probably started the fire because Hinnett and Civatte argued frequently and had a "falling out" a week before the fire. However, Hinnett was later ruled out as a suspect by the detective after Catell stated that he had seen Hinnett leave a bar with the bar's female owner around the time of the fire.

Defendant testified on his own behalf. Defendant's testimony tended to show that he performed the yard upkeep and maintenance work on his sister's trailer rented by Civatte. Prior to the day of the fire, defendant testified that Civatte and Hinnett often fought and that she would send her children to defendant's house to call the police when Hinnett hit her. After noticing the trailer on fire, defendant knocked on Civatte's door to inform her; however, when no one answered, he used Civatte's fire hose to put the fire out himself. Only the ground was still burning when the fire department arrived.

At the close of all the evidence, the jury unanimously found defendant guilty of first-degree arson on 20 January 2000. Defendant was sentenced from sixty-nine to ninety-two months in the North Carolina Department of Corrections. On 28 December 2000, defendant filed a petition for writ of certiorari to this Court. An order was issued on 16 January 2001 granting defendant's petition and his request for appointment of counsel.

Before reaching the merits of defendant's argument, we note that defendant's brief contains two violations of our rules of appellate procedure. First, the "Statement of Facts" contained in defendant's brief is comprised of numerous arguments despite our rule requiring that this statement "be a non-argumentative summary of all material facts . . . ." N.C. R. App. P. Rule 28(b)(4). Second, defendant presented all of his "Assignments of Error" in the record as "plain error." However, in his brief, defendant only argues one of his assigned errors on this ground thereby violating another of our appellate rules that confines "the scope of review on appeal . . . to a consideration of those assignments of error set out in the record on appeal . . . ." N.C. R. App. P. Rule 10(a). Nevertheless, we shall address defendant's arguments pursuant to Rule 2. *See* N.C. R. App. P. Rule 2.

I.

By defendant's first assignment of error, he argues the trial court erred in denying his motion to dismiss the charge for first-degree arson based on insufficiency of evidence. Specifically, defendant contends that even though the State presented substantial evidence as to each essential element of arson, its evidence failed to establish that he was the perpetrator of the crime. We disagree.

When ruling on a defendant's motion to dismiss a criminal action, the trial court is to consider the evidence in the light most favorable to the State, which entitles the State "to every

reasonable intendment and every reasonable inference to be drawn from the evidence[.]" *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 653 (1982) (citing *State v. McKinney*, 288 N.C. 113, 117, 215 S.E.2d 578, 581-82 (1975)). The evidence considered must be "substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense." *Id.* at 65-66, 296 S.E.2d at 651. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). Whether the evidence presented is substantial is a question of law for the court. *State v. Stephens*, 244 N.C. 380, 384, 93 S.E.2d 431, 433 (1956). If the court answers this question in the affirmative, defendant's motion to dismiss is properly denied. *Earnhardt*, 307 N.C. at 66, 296 S.E.2d at 651-52 (citing *State v. Roseman*, 279 N.C. 573, 580, 184 S.E.2d 289, 294 (1971)).

The evidence, when viewed in the light most favorable to the State, was sufficient to allow the case *sub judice* to go to the jury. The State offered evidence that defendant desired a romantic relationship with Civatte and was jealous of her relationships with other men. Defendant was aware of the kerosene pail located on the corner of the trailer and was seen by two witnesses behind the trailer just moments prior to the fire's discovery. The evidence further showed that defendant confronted Civatte after she exited the trailer and had to be removed by a fireman when he began insulting her.

While we agree with defendant's contention that all the evidence against him is circumstantial because no one testified to actually seeing defendant start the fire, "the rule for determining the sufficiency of evidence is the same whether the evidence is completely circumstantial, completely direct, or both." *State v. Wright*, 302 N.C. 122, 126, 273 S.E.2d 699, 703 (1981) (citations omitted). Moreover, our Supreme Court has previously upheld a conviction of arson based on circumstantial evidence that established defendant as having both a motive and opportunity to commit the crime. *See id.* Here, the State's evidence clearly establishes defendant's jealousy as his motive and defendant's knowledge of and close proximity to the source of the fire as his opportunity to commit arson. Although neither motive nor opportunity is an element of the crime for which defendant was convicted, both were certainly facts of consequence to the determination of this action. *See State v. Riddick*, 315 N.C. 749, 758, 340 S.E.2d 55, 60 (1986). Thus, the trial court did not err in denying defendant's motion to dismiss.

II.

By his second assignment of error, defendant argues he was deprived a fair trial due to ineffective assistance of defense counsel. We disagree.

A defendant's constitutional right to counsel includes the right to effective assistance of counsel. *State v. Beckham*, 145 N.C. App. 119, 125, 550 S.E.2d 231, 236 (2001) (citation omitted).

"To establish a claim for ineffective assistance of counsel, a defendant must show that his counsel's assistance was deficient under the circumstances, and that such deficiencies prejudiced the defense." *Id.* "Where the strategy of trial counsel is 'well within the range of professionally reasonable judgments,' the action of counsel is not constitutionally ineffective." *State v. Campbell*, 142 N.C. App. 145, 152, 541 S.E.2d 803, 807 (2001) (quoting *Strickland v. Washington*, 466 U.S. 668, 699, 80 L. Ed. 2d 674, 701 (1984)).

In the present case, defendant contends that defense counsel's assistance was deficient because he: (1) waived objection to having the trial of this matter on the same day defendant was indicted; (2) decided not to give an opening statement; (3) allowed Civatte to offer testimony establishing jealousy as a possible motive for defendant's actions; and (4) elicited hearsay statements corroborating an alibi defense for Hinnett. Despite these tactics not resulting in a favorable outcome for defendant, we cannot conclude that defense counsel's actions or inactions were not within the range of reasonable judgments. Counsel made a strategic decision to proceed with the trial as he did, and this Court has no intention of "promot[ing] judicial second-guessing on questions of strategy" in the absence of clear prejudice to defendant. *See generally Sallie v. North Carolina*, 587 F.2d 636, 640 (4th Cir. 1978). Therefore, defendant has failed to meet his burden of demonstrating that counsel's assistance was constitutionally ineffective.

III.

By defendant's final assignment of error, he argues the trial court committed (1) reversible error by allowing Fire Marshal Smith to testify, and (2) plain error by allowing Deputy Chief Steffie to testify as experts because the State failed to establish the reliability of their scientific evidence. Once again, we disagree.

It is generally well established that North Carolina courts are "afforded wide latitude of discretion when making a determination about the admissibility of expert testimony." *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984). Our statutes provide that "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." N.C. Gen. Stat. § 8C-1, 702(a) (2001). Simply stated, the "test for admissibility is whether the jury can receive 'appreciable help' from the expert witness." *State v. Knox*, 78 N.C. App. 493, 495, 337 S.E.2d 154, 156 (1985) (citation omitted). However, when considering the admissibility of expert scientific testimony, our Supreme Court also "requires a preliminary assessment of whether the reasoning or methodology underlying the testimony is sufficiently valid and whether that reasoning or methodology can be properly applied to the facts in issue." *State v. Goode*, 341 N.C. 513, 527, 461 S.E.2d 631, 639 (1995).

Here, we note that defendant raised no objection to Fire Marshal Smith being tendered and accepted as an expert witness. With respect to Deputy Chief Steffie, defendant's only basis for objection was that the testimony of another expert witness would be "superfluous." Thus, having waived his objection to the specific qualifications of these two witnesses as experts, our review of the court's admission of their testimony is limited to "plain error." *See State v. Riddick*, 315 N.C. 749, 758, 340 S.E.2d 55, 60 (1986).

"This Court has held many times that an objection to . . . an offer of evidence must be made as soon as the party objecting has an opportunity to discover the objectionable nature thereof; and unless objection is made, the opposing party will be held to have waived it." *State v. Black*, 308 N.C. 736, 739, 303 S.E.2d 804, 805-06 (1983). However, to prevent the potential harshness of a rigid application of this rule, the "plain error" rule was adopted by our State. *Id.* at 740, 303 S.E.2d at 806. This rule:

> '[I]s always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of fundamental right of the accused," or the error has "'resulted in a miscarriage of justice or in the denial to appellant of a fair trial[.]'"'

Id. at 740, 303 S.E.2d at 806 (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)).

No "plain error" was committed by the trial court in the instant case. Prior to being qualified as an expert, Deputy Chief

Steffie testified that he had nearly thirty years of service as a fireman and had received approximately 368 hours of college training in fire forensic investigation. Prior to Fire Marshal Smith being qualified as an expert, he testified that he had been the fire marshal for Pender County for six years and had investigated approximately 120 fires during that time. He also testified that he was a fire prevention inspector and had received advanced training in detecting arson fires and determining the cause and origin of fires. Both witnesses further testified that they followed standard procedures used by fire investigators to determine the cause and origin of the trailer fire, which included working as a team to take photographs, draw sketches, and examine burn patterns of the trailer and surrounding areas so as not to overlook any potential evidence. Upon hearing testimony regarding the experience, knowledge, and procedures followed by these witnesses, the trial court accepted both Deputy Chief Steffie and Fire Marshal Smith as experts in the area of fire investigations. After having considered the transcript containing this testimony and the trial court's acceptance of these witnesses as experts, we do not find that the court abused its discretion in doing so. The reasoning and methodology underlying each witness' testimony (based on their knowledge, experience, and adherence to standard procedures) was sufficiently valid to establish the reliability of the scientific evidence they offered and likely provided the jury with appreciable help in reaching a verdict.

Accordingly, for the aforementioned reasons, we conclude that defendant's conviction for first-degree arson should be upheld.

No error.

Judges MARTIN and TIMMONS-GOODSON concur.

Report per Rule 30(e).