NO. COA01-616

NORTH CAROLINA COURT OF APPEALS

Filed: 5 February 2002

STATE OF NORTH CAROLINA

v. Durham County
No. 99CRS63955

MICHAEL C. MCNEIL

Appeal by defendant from judgment entered 14 September 2000 by Judge Henry V. Barnette, Jr. in Durham County Superior Court. Heard in the Court of Appeals 31 December 2001.

Attorney General Roy Cooper, by Assistant Attorney General Stewart L. Johnson, for the State.

Miles and Montgomery, by Lisa Miles, for defendant-appellant.

EAGLES, Chief Judge.

Defendant Michael McNeil was charged with first degree arson. The State's evidence tended to show that during the early morning hours of 19 June 1999, Lisa Leathers observed smoke coming from an upstairs window of apartment 4-F Lawson Street, Durham, North Carolina. The apartment was leased to Tamika Bradford, defendant's wife. Leathers then observed a woman and her baby exit the apartment. Soon thereafter, Leathers saw defendant exit, slam the door and say, "'F' it, let the 'B' burn." Leathers called the fire department and alerted other people occupying the apartment

building. Members of the Durham Fire Department subsequently arrived and found a "smoldering fire" which was quickly extinguished.

Captain Lonnie Boone, of the Durham Fire Department, and Fire Investigator Kelley Wimberley examined the apartment and determined that the fire originated from a bed in the apartment's upstairs, front bedroom. Boone and Wimberley also concluded that the fire was not of a natural or accidental origin. There were no electrical cords behind the bed and no evidence of electrical appliances, candles, or smoking materials near the bed. At trial, the fire investigator stated, "[i]t looked like somebody used available materials and caught the bed on fire." There was also other damage, unrelated to the fire, found in the apartment -- holes punched or kicked in the bedroom and bathroom doors, and a bathroom door appeared to have been pulled from the hinges.

Fire Investigator Wimberley was called to the residence of defendant's mother, Mary Stroud Whaley, where she found defendant passed out in a car. Defendant's mother gave a statement to the fire investigator. In her statement, Whaley indicated that defendant had set the fire after damaging some of the doors in the apartment. At trial, however, Whaley testified that she wrote the statement to get her son help and that she did not recall her son saying that he set the apartment on fire. Defendant is schizophrenic and takes medication for his condition. Whaley testified that when defendant arrived at her house, during the early morning hours of 19 June 1999, he was agitated.

Defendant did not present any evidence. At the conclusion of the trial, the jury found defendant guilty as charged, and the trial court sentenced defendant to a term of 107-138 months imprisonment. Defendant appeals.

On appeal, defendant first argues that the trial court erred in allowing the State to present the scientific expert testimony of Fire Investigator Kelley Wimberley. Defendant contends that the testimony should have been excluded, since the State failed to provide the defense with the underlying tests and data therefrom on which Wimberley's testimony was based pursuant to G.S. § 15A-903(e). Defendant contends that the State's failure to provide such evidence deprived him of "his right to due process of law, a fair trial, confrontation, and the right to compulsory process as guaranteed by the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution, and of his rights under Article 1, Sections 19 and 23 of the North Carolina Constitution." We disagree.

G.S. § 15A-903(e) provides:

> Reports of Examinations and Tests. -- Upon motion of a defendant, the court must order the prosecutor to provide a copy of or to permit the defendant to inspect and copy or photograph results or reports of physical or mental examinations or of tests, measurements or experiments made in connection with the case, or copies thereof, within the possession, custody, or control of the State, the existence of which is known or by the exercise of due diligence may become known to the prosecutor.

In *State v. Cunningham*, this Court stated,

> Section 15A-903(e) must be construed as entitling a criminal defendant to pretrial discovery of not only conclusory laboratory reports, but also of any tests performed or procedures utilized by chemists to reach such conclusions.

108 N.C. App. 185, 195, 423 S.E.2d 802, 808 (1992). This Court's decision in *Cunningham* was based upon the guarantees found in Article 1, Section 19 of our state constitution; however, we specifically noted that there was no right to such information under the federal constitution since the information in question was not exculpatory. *Id.* at 195-96, 423 S.E.2d at 808-09.

Here, the evidence tends to show that in response to defendant's motion for discovery, the State gave notice of its intent to introduce into evidence at trial certain "[s]cientific data accompanied by expert testimony" as to the origin of the 19 June 1999 fire. The State, however, noted that there were no test results or reports of the type described in G.S. § 15A-903(e). Defendant then filed a "Motion to Discover Testing Procedures and Data Derived Therefrom" and a "Motion to Suppress Scientific Data and Testimony," alleging that the State had not provided the defense with information about scientific testing. The State responded, explaining that there had not been any scientific testing performed in this case. The State noted that the testimony of Fire Investigator Wimberley would be based on certain information obtained from witnesses to the fire, her personal observations of the crime scene and her experience, which enabled her to recognize the signs of a deliberately set fire. The trial court consequently denied defendant's motion to suppress.

While defendant was entitled to test results or reports of tests, measurements or experiments made in connection with this case, the expert here did not generate that type of evidence during her investigation of the crime scene. It appears that Fire Investigator Wimberley based her testimony upon her observations, her experience and knowledge as a fire investigator, and the statements of others taken during her investigation. That evidence is not discoverable under G.S. § 15A-903(e). We conclude that defendant has shown no violation of his federal or state constitutional rights. Accordingly, the trial court did not err in denying defendant's motion to suppress the testimony of Fire Investigator Wimberley.

Defendant next argues that the trial court erred in denying his motion to dismiss. Specifically, defendant contends that the State failed to produce sufficient evidence that the burning of the apartment was willful and malicious. Again, we disagree.

After viewing the evidence in the light most favorable to the State, "[i]f there is substantial evidence of the essential elements of the offense charged, or of a lesser included offense, and of defendant being the perpetrator, 'the trial court must deny the motion to dismiss . . . and submit [the charges] to the jury . . . .'" *State v. McCoy*, 122 N.C. App. 482, 485, 470 S.E.2d 542, 544 (quoting *State v. McAvoy*, 331 N.C. 583, 589, 417 S.E.2d 489, 493 (1992)), *disc. review denied*, 343 N.C. 755, 473 S.E.2d 622 (1996). "Substantial evidence is that amount of evidence which a reasonable mind might accept as adequate to support a conclusion."

State v. McCullough, 79 N.C. App. 541, 544, 340 S.E.2d 132, 135, *cert. denied*, 316 N.C. 556, 344 S.E.2d 13 (1986). To obtain a conviction for arson, the State must show "the willful and malicious burning of the dwelling house of another[.]" *State v. Allen*, 322 N.C. 176, 196, 367 S.E.2d 626, 637 (1988). "For a burning to be 'wilful and malicious' . . . it must simply be done 'voluntarily and without excuse or justification and without any bona fide claim of right.'" *State v. White*, 291 N.C. 118, 126, 229 S.E.2d 152, 157 (1976) (quoting *State v. White*, 288 N.C. 44, 50, 215 S.E.2d 557, 561 (1975)).

In the light most favorable to the State, the evidence tends to show that during the early morning hours of 19 June 1999, a neighbor saw smoke coming from the upstairs bedroom of the apartment leased to defendant's wife. Thereafter, the neighbor saw a woman and a child leave the apartment, followed by defendant, who slammed the door and said, "'F' it, let the 'B' burn." In addition, defendant's mother made a statement to the fire investigator that defendant told her that he "tore up the place and tore the door off and set it on fire." Further, Captain Boone of the Durham Fire Department and Fire Investigator Wimberley both testified that the fire originated on the bed in one of the apartment's upstairs bedrooms, and that it appeared to have been intentionally set. Corroborating the statement made by defendant's mother on the morning of the fire, the captain and the fire investigator testified that the extraneous damage to several doors in the apartment was unrelated to the fire.

The jury, therefore, had before it plenary evidence of defendant's "willful and malicious" burning of the dwelling. Accordingly, the trial court properly denied defendant's motion to dismiss.

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

No error.

Judges TIMMONS-GOODSON and McCULLOUGH concur.

Report per Rule 30(e).