NO. COA08-97

NORTH CAROLINA COURT OF APPEALS

Filed: 21 October 2008

STATE OF NORTH CAROLINA

v. Wake County
No. 06 CRS 46098

COREY DEVON SHAW

Appeal by defendant from judgment entered 13 June 2007 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 15 September 2008.

Attorney General Roy Cooper, by Assistant Attorney General John F. Oates, Jr., for the State.

Irving Joyner, for defendant-appellant.

ELMORE, Judge.

Defendant appeals from judgment entered consistent with a jury verdict finding him guilty of first-degree arson. For the following reasons, we find no error.

At trial, the State introduced evidence tending to show the following: Gloria Howard (Howard) and defendant began dating in June of 2005. The relationship deteriorated in December of 2005, and Howard ended the relationship in April of 2006 when defendant punched her in the face. Afterwards, defendant called Howard numerous times and made threatening statements.

In May of 2006, Howard lived with her aunt in a townhouse in Raleigh, North Carolina. On the evening of 24 May 2006, defendant again phoned Howard and attempted to convince her to dismiss the charges she had filed against him as a result of the punching incident. Howard refused. Howard also told defendant that she believed he was the person who had broken into the townhouse approximately two weeks earlier, and poured bleach all over her bedroom, including on her clothes and her bed. During this phone call, defendant told Howard that he did not care if she died and that if he could not have her, no one could. This conversation with defendant scared Howard.

After speaking with her new boyfriend, Howard tried to call defendant back. As she attempted to call defendant, Howard heard "a big crash." She then got dressed to go downstairs and discovered that the house was on fire. Howard, her aunt, and a guest in the house exited the townhouse and then alerted the neighbors. The fire damaged Howard's town home as well as three adjacent town homes. Following an investigation, the arson investigator concluded that the fire had been intentionally set with gasoline and that the fire started outside at ground level near the back window on the patio.

Detective David Little and Officer M.J. Macario of the Raleigh Police Department arrived at the scene. Howard told the police officers that defendant had recently threatened her and that defendant was the most likely suspect to have started the fire. Officer Macario ran a check on defendant and discovered there were

two outstanding warrants for his arrest. Consequently, the officers drove to the house where defendant lived with his parents. Officer Macario noticed that the engine of defendant's vehicle was still warm and "ticking" when they arrived at the home. Defendant was placed under arrest and transported to the police station.

Upon reaching the police station, defendant was taken to a holding room and advised of his *Miranda* rights by Detective David Little. When Detective Little began to question defendant about his involvement in the fire, defendant told the detective that he wanted the detective to call him a lawyer. Detective Little informed defendant he could not call a lawyer for defendant but stated that he knew defendant's father, who was also a police officer, and said that he would call defendant's father. As Little left the interview room, he told defendant that "whoever did this hurt a lot of people." In response, defendant asked Little "what would a person be looking at for doing something like that?" Little responded that the person could possibly be charged with multiple counts of arson and attempted murder but that the arson detective could provide defendant with more accurate information. Defendant responded by requesting to speak with the arson detective. Detective Little then left the room.

Shortly thereafter, both defendant's father and Arson Detective Scott Hume arrived at the police station. After speaking with his son for about twenty minutes, defendant's father informed Detective Little and Detective Hume that he had advised defendant to get a lawyer but that defendant had refused. Detective Hume then

went to the interview room where the defendant was being held. Defendant, who appeared to be upset, asked Detective Hume several questions. Defendant's father entered the room, again advised defendant not to make any statements, then left the room. Detective Hume and defendant resumed talking and, at some point, defendant told Hume he would tell him what happened if Hume could find him a cigarette.

After smoking the cigarette, defendant admitted to starting the fire, but claimed it was an accident. Defendant stated that he was upset with Howard but did not mean to hurt anyone. Defendant stated that he drove to a convenience store and purchased some gasoline which he put into a glass drink bottle. He then drove to Howard's home intending to light the bottle on fire and put it in the grass. He further claimed that he had inadvertently spilled some of the gasoline on his shoe, and while smoking a cigarette behind the townhouses, he set his shoe and shirt sleeve on fire. This caused him to drop the bottle which broke and spread the fire. Defendant then left the scene, and claimed he threw his shirt out the window of his car. Detective Hume did not observe any injuries on the defendant during the interview that morning nor had he observed any burnt area on the grass next to the patio where the fire started.

A jury found defendant guilty of first-degree arson, and the trial court sentenced defendant to 60 to 81 months imprisonment. Defendant appeals.

Defendant first contends the trial court erroneously denied his motion to suppress his statements to police because they were obtained in violation of his *Miranda* rights. We disagree.

In an appeal from a ruling on a motion to suppress, this Court is required to treat the trial court's findings of fact as conclusive if supported by competent evidence, even if the evidence is conflicting. *State v. Mahatha*, 157 N.C. App. 183, 191, 578 S.E.2d 617, 622, *disc. review denied*, 357 N.C. 466, 586 S.E.2d 773 (2003). However, the trial court's conclusions of law are subject to a full review by this Court. *Id.*

Defendant contends that after he asked Detective Little to call a lawyer for him, Detective Little made a statement which constituted impermissible continuance of the interrogation after he invoked his right to counsel.

We have recently explained:

> While we acknowledge "there are no 'magic words' which must be uttered in order to invoke one's right to counsel," *id.* at 528, 412 S.E.2d at 26, we have, since *Torres*, held that "[a] suspect must unambiguously request counsel to warrant the cessation of questions and 'must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.'" *State v. Barnes*, 154 N.C. App. 111, 118, 572 S.E.2d 165, 170 (2002) (*quoting Davis v. United States*, 512 U.S. 452, 459, 114 S. Ct. 2350, 129 L. Ed. 2d 362, 371 (1994)), *disc. review denied*, 356 N.C. 679, 577 S.E.2d 892 (2003). Until a suspect makes such an unambiguous request, the police may continue to question him. *Id.*

State v. Shelly, 181 N.C. App. 196, 201, 638 S.E.2d 516, 521, *disc. review denied,* 361 N.C. 367, 646 S.E.2d 768 (2007). "Police may continue to question suspects until the individual suspect 'actually requests' an attorney. *State v. Barnes*, 154 N.C. App. 111, 118, 572 S.E.2d 165, 170 (2002)

Here, defendant asked Detective Little if Little could call an attorney for him. Consistent with department policy, Detective Little told him that he could not make such a call but, out of professional courtesy to defendant's father, he agreed to call defendant's father for him. Defendant's statement did not communicate a refusal to answer questions without an attorney present, and defendant indicated a desire to speak to another officer. Further, a review of the totality of the circumstances reveals that defendant not only failed to make any other requests regarding an attorney, but later informed his father in front of an officer that he did not want an attorney. From these facts, we conclude that defendant never made an unambiguous request for an attorney. Accordingly, defendant's assignment of error is overruled.

Defendant also contends the trial court erred in denying his motion to dismiss based upon insufficient evidence. In ruling on a motion to dismiss, the trial court views "the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Morgan*, 359 N.C. 131, 161, 604 S.E.2d 886, 904 (2004), *cert. denied*, 546 U.S. 830, 163 L. Ed. 2d 79 (2005). A trial court may properly deny a motion to dismiss

where "substantial evidence exists to support each essential element of the crime charged and that defendant was the perpetrator[.]" *Id.* "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984).

In North Carolina, the crime of arson is defined by the common law definition as the willful and malicious burning of the dwelling house of another person. *State v. Allen*, 322 N.C. 176, 196, 367 S.E.2d 626, 637 (1988). Further,

> [f]or a burning to be "wilful and malicious" in the law of arson, it must simply be done "voluntarily and without excuse or justification and without any bona fide claim of right. An intent or animus against either the property itself or its owner is not an element of the offense" of common law arson.

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)). The distinction between first- and second-degree arson is created by statute and is based on whether the building was occupied at the time of the offense. *See* N.C. Gen. Stat. § 14-58 (2007).

Defendant asserts the State failed to show that he willfully or maliciously burned the town homes. Defendant asserts that there was insufficient evidence to prove that he intentionally set the fire as opposed to the fire's being accidental. We disagree.

The State presented evidence that defendant had threatened Howard immediately prior to the incident; that Howard, her aunt,

and a neighbor heard a crash or the sound of breaking glass just before the fire started; that the fire was set using gasoline as an accelerant; and that defendant fled the scene without calling the fire department or attempting to warn any of the occupants of the affected town homes. Although defendant stated to Detective Hume that he accidentally dropped the bottle in the grass, the evidence showed that the fire started on the patio just beneath a window. Further, despite defendant's statement that he set his shoe and shirt on fire, Detective Hume did not observe any injury to defendant, and defendant never produced any burnt clothing. We conclude that this evidence is sufficient to support the inference that defendant intentionally set fire to the town homes. Consequently, the assignment of error is overruled.

No error.

Judges WYNN and GEER concur.

Report per Rule 30(e).