NO. COA14-295
NORTH CAROLINA COURT OF APPEALS

Filed: 2 December 2014

STATE OF NORTH CAROLINA

v. Mecklenburg County
No. 11CRS244995

STEPHEN MORRIS LONG,
Defendant.

Appeal by defendant from judgment entered on 4 October 2013 by Judge James W. Morgan in Superior Court, Mecklenburg County. Heard in the Court of Appeals 25 September 2014.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Rajeev K. Premakumar, for the State.

Richard J. Costanza, for defendant-appellant.

STROUD, Judge.

Defendant appeals from judgment convicting him of malicious use of an explosive or incendiary device damaging property. Defendant contends the trial court erred by admitting hearsay testimony that rebutted his alibi. For the following reasons, we find no error.

I. Background

The State's evidence tended to show that on 24 September 2011, a police officer gave defendant a speeding ticket in Cornelius, North Carolina. On 28 September 2011, at 8:50 a.m., in the Microtel Inn in Cornelius, a video camera recorded defendant taking a milk jug from the breakfast area. A short time later, defendant left the hotel with the milk jug. At approximately 10:30 a.m., a defendant entered a Rite Aid near the police department carrying a brown paper bag that was dripping a clear liquid; defendant also picked up a vaccination flyer while he was in the Rite Aid. The Rite Aid store manager noticed the store smelled like gasoline; a carpet sample from the Rite Aid tested positive for gasoline.

Around noon, a police car parked in the Rite Aid parking lot caught on fire. According to a fire investigator, the fire was intentionally set and originated from a milk jug filled with gasoline and ignited by a vaccination flyer. A video showed defendant nearby, looking in the direction of the burning car.

When police canvassed the area immediately after the fire, an officer encountered defendant in the town hall parking lot across the street from the Rite Aid parking lot. Defendant told the officer he was packing his car for a return trip home. When an officer contacted defendant by telephone, defendant claimed

he was in a coin shop at the time the fire started; when the officer contacted the owner of the coin shop, the shop owner could not recall whether defendant had been in the shop. Defendant was indicted for burning of personal property and malicious damage by explosives.

A jury found defendant guilty of both charges. The trial court arrested judgment on the burning personal property conviction and sentenced defendant to 12 to 15 months imprisonment for malicious use of an explosive damaging property. Defendant appeals.

II. Hearsay Testimony

Defendant contends "the trial court erred in allowing the introduction of hearsay testimony that contradicted . . . [his] alibi" when an officer testified that the owner of the coin shop where defendant claimed to be at the time the fire was set could not remember if defendant was there or not. The contested testimony was as follows:

> Q. Were you able to develop any sort of information from the coin shop or whoever you spoke with at that coin -- strike that. Who did you speak with at the coin shop, do you remember?
>
> A. Mike, I think it's Mike or Michael Young. He's the owner. It's kind of a one man show.

> Q. And after speaking with him and doing your investigation, did you ever make any sort of determination about whether or not the Defendant had actually been there?
>
> A. Mike could not say that.
>
> [DEFENSE COUNSEL]: Objection, your Honor.
>
> THE COURT: Overruled.
>
> . . . .
>
> Q. Were you able to determine if the Defendant had been there?
>
> A. No.
>
> Q. So did you follow up on that lead?
>
> A. Yes.
>
> Q. And come to a dead end?
>
> A. Yes.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2011). "Hearsay is not admissible except as provided by statute or by these rules." N.C. Gen. Stat. § 8C-1, Rule 802 (2011). However, even "[t]he erroneous admission of hearsay is not always so prejudicial as to require a new trial. The defendant must still show that there was a reasonable possibility that a different result would have been

reached at trial if the error had not been committed." *State v. Hickey*, 317 N.C. 457, 473, 346 S.E.2d 646, 657 (1986) (citation omitted). Thus, even if we assume *arguendo* that the trial court erred in allowing inadmissible hearsay testimony we must still review the hearsay statement to determine if "there was a reasonable possibility that a different result would have been reached at trial if the error had not been committed." *Id.*

Here, we do not believe that without the officer's contested testimony "there was a reasonable possibility that a different result would have been reached at trial[.]" *Id.* We first note that contrary to defendant's argument, the officer's testimony does not *contradict* his alibi. The officer testified that the coin shop owner "could not say" whether defendant had been in the coin shop. The testimony merely shows that the police investigated the alibi claim and that the shop owner was unable to support or refute it; such testimony from the officer is as likely to be prejudicial against the State as against defendant, as jurors were informed the coin shop owner did not state defendant had not been there.

But even further assuming *arguendo* that hearsay testimony was presented that directly contradicted defendant's alibi, we still do not conclude that "there was a reasonable possibility

that a different result would have been reached at trial[.]" *Id.* The elements of malicious use of explosive or incendiary are "[(1) [a]ny person [(2)] who willfully [(3)] and maliciously [(4)] damages any real or personal property of any kind or nature [(5)] belonging to another [(6)] by the use of any explosive or incendiary device[.]" N.C. Gen. Stat. § 14-49(b) (2011). The State's evidence tended to show that on the morning of the fire, defendant had a milk jug filled with a clear liquid and a Rite Aid vaccination flyer, the very items used to start the fire. A Rite Aid employee testified the liquid smelled like gasoline, and the carpet in Rite Aid tested positive for gasoline. Video evidence documented defendant's presence near the scene of the fire, and an officer spoke to defendant near the scene of the fire when he canvassed the area. In light of the State's evidence, we do not conclude that defendant has shown that without the contested hearsay evidence "there was a reasonable possibility that a different result would have been reached at trial[.]" *Id.* As such, we overrule this argument.

III. Conclusion

For the foregoing reasons, we find no prejudicial error.

NO ERROR.

Chief Judge MCGEE and Judge GEER concur.

Report per Rule 30(e).