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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-592

Filed: 15 September 2020

Wake County, No. 17 CRS 217859

STATE OF NORTH CAROLINA

v.

MAURICIO JAVIER RIVERA, Defendant.

Appeal by Defendant from judgments entered 7 December 2018 by Judge Carl R. Fox in Wake County Superior Court. Heard in the Court of Appeals 5 December 2019.

*Attorney General Joshua H. Stein, by Assistant Attorney General Adrian W. Dellinger, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katy Dickinson-Schultz, for defendant-appellant.*

YOUNG, Judge.

Defendant failed to provide “detailed proof” to support his basis for a continuance, therefore, the trial court did not err in denying the motion to continue. Accordingly, we find no error.

I. Factual and Procedural History

Appellant-Defendant, Mauricio Rivera (“Defendant”), was found guilty of first-degree arson, felonious breaking or entering, and two counts of violating a domestic violence protective order. Factually, the trial centered around the events of 14 September 2017. Defendant is the ex-boyfriend of the victim, Nyisha Diggs, who lived in an apartment in Raleigh. The two are parents of a son, who also lived in the apartment.

Prior to the events of 14 September 2017, an incident occurred in January of 2017 at Wal-Mart between Diggs, Diggs’ new boyfriend, and Defendant. After the incident at Wal-Mart, Diggs sought a domestic violence protective order (“DVPO”) against Defendant. Under this DVPO Defendant was not to initiate any contact with Diggs or their son. Six months after the DVPO was entered, however, Defendant and Diggs came up with an agreement where Defendant could see their son and walk him to the bus stop before school. Typically, before Defendant would arrive at Diggs’ apartment to walk their son to the bus stop, he would text and let her know that he was on his way and again when he arrived.

On 14 September 2017, Diggs’ apartment was broken into, property was destroyed, and her belongings were set on fire. Earlier that morning, Defendant went to Diggs’ home to walk their son to the bus stop. Per their arrangement, Defendant texted Diggs that he was on his way, but he received no response. When he arrived

at the apartment, Defendant saw Diggs' boyfriend's car in the driveway and he still had not received a response from Diggs.

Defendant became angry and started banging on the apartment door and windows. The only text Defendant ever received from Diggs was "911." After receiving this text, Defendant left the apartment and waited by the bus stop, where eventually his sister, whose daughter had also stayed at Diggs' apartment the night before, drove by. Defendant's sister rolled down her window to tell him that Diggs had called the police and that he needed to call his lawyer.

Defendant testified that, instead of following his sister's advice, he went back to his car and then drove to a convenience store to buy a tea and cigarettes. While sitting in the parking lot, he began calling his son to check on him; the police officer who responded to Diggs' 911 call answered the phone. This further upset Defendant, so he decided to wait until everyone "cleared [Diggs'] neighborhood" to go back to Diggs' apartment and break in.

Defendant admitted he used kitchen knives to cut into Diggs' furniture and bed; he threw her clothes all around the apartment; he smashed eggs against the wall; he destroyed electronics; and he threw toilet paper rolls all around the apartment. Defendant testified to doing all these things inside Diggs' apartment; however, Defendant claimed he did not mean to set the apartment on fire.

The State tried the case under the theory that Defendant intentionally set the apartment on fire by creating a “bonfire” with Diggs’ clothing and furniture in the middle of the living room. Defendant’s contention was the fire started toward the end of him “trash[ing]” the apartment when he took a smoke break inside and “flicked” his cigarette toward the living room. He presumes this act is what must have started the fire.

The State called as expert witnesses two fire investigators with the Raleigh Fire Department. Both testified the fire was not accidental based upon burn patterns, which indicated the living room was the most burnt area of the home. Lieutenant John Sealey, one of the State’s fire investigators, testified that:

[Sealey:] During the examination, we’ll look at the whole totality of the scene itself. And then we sort of condense everything that we find and what we see into finding where the point of origin would be, which we found blankets, clothes, home items, items you would find in a residential home piled up next to this, to this love seat, if you will, on its side up against the wall with burn patterns that indicated that it started at near the arm of the chair and progressed up and caught the rest of the furnishings on the couch and burned the couch.

...

[State:] And what is your opinion as to what the cause of the fire was?

...

[Sealey:] It was an incendiary fire.

[State:] What, again, do you mean by incendiary fire?

[Sealey:] There was fire in the area that you would not normally -- a typical person would not normally expect to find a fire, where a fire was at.

In determining the cause of the fire, the State's experts ruled out the cause as electrical or due to plug-in air fresheners.

At the beginning of trial, before the jury was selected, Defendant informed the trial court that it needed to address his motion to compel and his motion to suppress. While arguing the motions, Defendant mentioned, for the first time, continuing the case:

[DEFENSE COUNSEL]: I was unable to obtain any type of affidavit. And if you were inclined to dismiss my motion for that reason, I would ask that this court consider continuing this case so that I would have proper time to give the notice that is necessary, to file the proper motions in this case and to properly prepare to try this case.

*The other thing I wanted to add is that I believe an arson expert is necessary for this gentlemen here, that the expert testimony in this case is going to be on a negative corpus, Your Honor, and that is there is nothing there, so this is why it happened.*

*And I believe an expert would assist him in combating any opinion that you let through with regard to that and that is another reason I would suggest we are not ready to go forward, although I am prepared to go forward.*

(Emphasis added). After the State responded to Defendant's motions, the following exchange between the trial court and Defendant occurred:

[THE COURT]: Are you making a motion to anyone in this case, [Defense Counsel]?

[DEFENSE COUNSEL]: Your Honor, I would make the motion merely because I believe there -- to continue

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because I think the defendant should have the opportunity to have an expert, arson expert in this case, as I have gone through this evidence in this case.

For that reason, yes, sir.

[THE COURT]: How long have you been in this case, [Defense Counsel]?

[DEFENSE COUNSEL]: Just under three weeks ago – or four. Just under four weeks.

[THE COURT]: And you at that point knew it was an arson case, I take it?

[DEFENSE COUNSEL]: That is true, Your Honor.

[THE COURT]: When did you discuss the need for this expert with whomever employed you early on in this case, knowing that it was an arson case?

[DEFENSE COUNSEL]: Your Honor, I think only through my reading of the arson investigative report and my reading of these rules which I had to go through first could I determine whether an expert would be of any assistance.

...

[THE COURT]: So what are those rules that you are speaking of?

[DEFENSE COUNSEL]: It's National Fire Prevention Association, Your Honor. It's basically, I am sure the gentleman they have in here, it's the Bible that the arson investigators – investigators go by in conducting an investigation. And NFPA fire explosion investigation, a guide for it.

...

[THE COURT]: Well, let me ask you a question, [Defense Counsel].

[DEFENSE COUNSEL]: Yes sir.

[THE COURT]: Is this case, in your opinion, a case about whether or not the defendant did this case, this, or whether or not this is arson?

[DEFENSE COUNSEL]: This case is whether there was an arson, whether there was an intentional setting of the fire, Your Honor, in my view.

[THE COURT]: So the question is whether the defendant set a fire in someone's apartment accidentally?

[DEFENSE COUNSEL]: Whether a fire occurred accidentally, yes, sir, not whether he set it or how it occurred, Your Honor.

[THE COURT]: What would the arson expert do?

[DEFENSE COUNSEL]: Well, the expert in this case, has -- that the [S]tate is going to present -- and I am going to obviously make some objections on this -- he is going to want to give the opinion that this was a flame started by hand and that it was intentional.

The question is whether that opinion meets the standard in the fire investigation area and that is what I would want our expert to testify to, whether given the evidence in this case and the evidence which is stated by their expert, can he reach that conclusion using the standards in the NFPA 921.

The trial court denied the motion. The jury convicted the Defendant as noted.

Defendant gave oral notice of appeal in open court on 7 December 2018 and. raises only one issue on appeal. Defendant asserts the trial court erred by denying his motion to continue when his counsel had been retained for only four weeks prior

to trial and he needed more time to find an arson expert. Defendant argues on appeal that “[b]y denying [Defendant’s] counsel time to prepare and present [Defendant’s] defense, the trial court effectively prevented [Defendant] from mounting the only possible defense to the arson charge against him.”

II. Standard of Review

“Ordinarily, a motion to continue is addressed to the discretion of the trial court, and absent a gross abuse of that discretion, the trial court’s ruling is not subject to review.” *State v. Taylor*, 354 N.C. 28, 33, 550 S.E.2d 141, 146 (2001), *cert. denied*, 535 U.S. 934, 152 L. Ed. 2d 221 (2002).

III. Motion to Continue

“A motion for continuance must be supported by ‘detailed proof’ which ‘fully establishes’ the reasons for the delay, and a party is entitled to a continuance only upon a showing of material prejudice if its motion is denied.” *State v. Cody*, 135 N.C. App. 722, 726, 522 S.E.2d 777, 780 (1999) (quoting *State v. Jones*, 342 N.C. 523, 531–32, 467 S.E.2d 12, 17–18 (1996)).

The ‘detailed proof’ may be in the form of an unsworn statement by the movant’s attorney or an affidavit by the attorney which establishes the reason for delay and how the movant will be prejudiced if its motion is denied. While it is the better practice to support a motion for continuance with an affidavit, an affidavit is not required.

*Id.* (internal citations omitted).



Here, Defendant did not support his motion to continue with an affidavit. Yet, *Cody* indicates that an affidavit is not a requirement. *Id.* Unlike in *Cody*, Defendant did indicate why he desired to find an arson expert: to testify whether the opinion of the State's experts met the standard in the National Fire Prevention Association. Defendant also explained how he would be materially prejudiced—because without an arson expert, Defendant was prevented from asserting his only defense.

However, although Defendant did indicate the reasons an arson expert was necessary, he did not establish reasons for delay. There is no indication or “detailed proof” that had the motion been granted, Defendant would be able to find an arson expert or the arson expert's testimony would provide a defense. There is no suggestion that Defendant had looked for or spoken to a potential arson expert.

Defendant's oral motion at trial only surmises what he *hopes* an arson expert would testify. The motion to continue, was not supported by “detailed proof” which “fully establishe[d] the reasons for the delay.” *Id.* Accordingly, the trial court did not err in denying Defendant's motion to continue.

#### IV. Conclusion

Defendant's oral motion to continue at trial was not supported by detailed proof which fully established the reasons for the requested delay. The trial court did not err in denying Defendant's motion to continue.

NO ERROR.

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Judges MURPHY and TYSON concur.

Report per Rule 30(e).