STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1226

State of Minnesota,
Respondent

vs.

Errick Lorenzo Holley,
Appellant.

Filed April 6, 2010
Affirmed
Crippen, Judge[*]

Clay County District Court
File No. 14-CR-08-3148

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Brian J. Melton, Clay County Attorney, Heidi M. F. Davies, Chief Assistant County Attorney, Moorhead, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Susan J. Andrews, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Schellhas, Judge; and Crippen, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

CRIPPEN, Judge

Challenging his conviction for first-degree arson, appellant Errick Holley argues that his defense counsel's concession on an element of the offense without his personal, informed waiver requires reversal and a new trial. Because we conclude that the concession by appellant's counsel did not constitute a stipulation to an element of the crime, and because none of appellant's arguments in his supplemental pro se brief warrant reversal, we affirm.

FACTS

On the night of January 19, 2005, appellant's clothing store caught fire. The building containing appellant's store also housed a tobacco and video store, and both store owners lived in their office spaces in the same building. Appellant had exhausted nearly $40,000 of his investor's money, owed back rent to his previous landlord, was behind in his rent payment to his current landlord, and owed money for his utility bills. Appellant's business was not going well and he was planning to close it at the end of January.

At trial, the owner of the other store and his father, who was also staying in the building, testified that they saw two separate small fires inside appellant's store. A firefighter who responded to the fire, the fire marshal, and an agent from the federal Bureau of Alcohol, Tobacco, Firearms, and Explosives testified that the fires were deliberately set, noting the intensity of the fire, the two separate points of origin without a reasonable ignition source, and distinctive burn patterns on the floor. In a pretrial

conference with the district court and in his opening statement, appellant's attorney stated that appellant was not contesting that the fire was started by someone, but argued that the fire was not started by appellant. The jury found appellant guilty of first-degree arson.

D E C I S I O N

Appellant argues that his conviction must be reversed and he must be granted a new trial because his attorney's concession that the fire was set intentionally amounted to a stipulation and he did not personally waive his right to a jury trial on this element. Defendants have the right to a jury trial on every element of the charged offense. U.S. Const. amend. VI; Minn. Const. art. I, § 6; *State v. Wright*, 679 N.W.2d 186, 191 (Minn. App. 2004), *review denied* (Minn. June 29, 2004).

A defendant may waive a jury determination on a particular element by stipulating to its truth. *State v. Hinton*, 702 N.W.2d 278, 281 (Minn. App. 2005), *review denied* (Minn. Oct. 26, 2005). But because a stipulation is a waiver of the defendant's right to a jury trial on the element, the defendant must personally execute a written or oral waiver of rights. *Wright*, 679 N.W.2d at 191.

A person is guilty of arson in the first degree when he "unlawfully by means of fire or explosives, intentionally destroys or damages any building that is used as a dwelling at the time the act is committed." Minn. Stat. § 609.561, subd. 1, (2004). As part of proving the element that the defendant caused the fire, the state must prove that the fire was incendiary and not the result of accidental causes. *See State v. Hansen*, 286 Minn. 4, 9, 174 N.W.2d 697, 700 (1970) (stating that "jury must find the fire to have been intentionally ignited").

The state presented testimony to prove the fire was intentionally set through two expert witnesses certified in investigating fires. Both were unequivocal in their opinions that the fire was started by someone based on the two points of origin and the burn patterns on the floor. A third expert with lengthy experience fighting fires and training others believed that accelerants were used, based on the fire's intensity, indicating that someone set it. The jury received instructions that it must find that each element of the crime was proven beyond a reasonable doubt, including the element that appellant caused the fire or explosion. In these circumstances, there was no stipulation that removed evidence or an element of the offense from the jury's consideration.

The state eliminated one expert witness from its list after learning that appellant was not contesting that the fire was incendiary, but the state was not relieved of its burden on this element and the jury heard extensive testimony on the cause of the fire. Appellant's attorney made a tactical decision on what arguments to pursue, but the jury tried appellant on all elements of the charge. Consequently, the district court did not err in failing to advise appellant of his right to a jury trial on this element or in failing to secure his personal waiver.

Even if the district court permitted appellant's attorney to stipulate to the fact that the fire was incendiary, the stipulation would be harmless. If the district court accepts a stipulation on an element of the charge without a defendant's personal waiver, the court applies a harmless-error test to determine whether it was prejudicial to the defendant. *Wright*, 679 N.W.2d at 191; *Hinton*, 702 N.W.2d at 281-82.

This court recently reaffirmed that waiver errors in *Lothenbach* trials require reversal, and we did not assess harmlessness. *State v. Antrim*, 764 N.W.2d 67, 70-71 (Minn. App. 2009). But in a *Lothenbach* trial the defendant stipulates to the state's evidence to obtain review of a pre-trial issue and he foregoes his right to testify, cross-examine the state's witnesses, and compel favorable witnesses to testify on his behalf. Minn. R. Crim. P. 26.01, subds. 3, 4. In contrast, a defendant who stipulates to an element of a charge does not give up these rights and commonly enters a stipulation for his own benefit. *Hinton*, 702 N.W.2d at 282 n.1. For these reasons, on a waiver error when a defendant stipulated to an element, we review for harmlessness, although other errors under rule 26.01 require reversal.

On appeal, the state bears the burden of establishing beyond a reasonable doubt that the error was harmless and that a new trial is therefore unwarranted. *Wright*, 679 N.W.2d at 191. An error is harmless beyond a reasonable doubt if the verdict was "surely unattributable to the error." *State v. Jones*, 556 N.W.2d 903, 910 (Minn. 1996) (stating standard for constitutional error).

The state presented several expert witnesses to testify on the cause of the fire. They were subject to cross-examination but no doubts surfaced on their conclusions that the fire was intentionally set. The testimony of the state's witnesses established this part of the element, although the state would have likely called an additional expert witness to add to the evidence on the issue. The jury was told that, based on the evidence presented, not the attorneys' statements, it must find beyond a reasonable doubt that appellant intentionally caused the fire, which entails finding that the fire was incendiary and not

accidental. The jury did so. Thus, the jury verdict is surely unattributable to appellant's attorney's concession, and the error, if any, was harmless.

In his supplemental, pro se brief, appellant challenges the sufficiency of the evidence to support his conviction. Arson convictions often rely on circumstantial evidence because typically no one is at the scene when the fire is discovered. *State v. Jacobson*, 326 N.W.2d 663, 665 (Minn. 1982). Whether the accused had the motive, means, and opportunity to commit arson is important in determining guilt when the sufficiency of the evidence is challenged. *State v. Conklin*, 406 N.W.2d 84, 87 (Minn. App. 1987).

Circumstantial evidence is entitled to the same weight as direct evidence. *State v. Bauer*, 598 N.W.2d 352, 370 (Minn. 1999). Circumstantial evidence viewed as a whole "must form a complete chain that . . . leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt." *State v. Taylor*, 650 N.W.2d 190, 206 (Minn. 2002). A possibility of innocence does not require reversal of a jury verdict if the evidence taken as a whole makes the possibility seem unreasonable. *State v. Tscheu*, 758 N.W.2d 849, 858 (Minn. 2008).

The state presented evidence of appellant's debts to his investors and additional debts to his landlords. Appellant stated that his business was doing poorly and he was planning to close it at the end of the month. Appellant purchased insurance to cover his business and merchandise. This testimony establishes appellant's motive to set the fire. Appellant stated that he returned to the shop before midnight on the night of the fire and was present when the fire started, establishing his opportunity to set the fire. Evidence

that the front door was broken from inside the shop and the absence of fresh footprints leading away from the building also point toward appellant's guilt.

The store had very little inventory and was in disarray on the day of the fire. Appellant's ex-girlfriend testified that shortly after the fire, appellant threatened to kill her if he went to jail. Appellant also made several inconsistent statements about whether he saw an intruder that night and why he did not call 911 himself. In light of the circumstantial evidence establishing appellant's motive, opportunity, suspicious behavior, and inconsistent statements, the record supports appellant's conviction for first-degree arson.

In his supplemental, pro se brief, appellant also argues that the district court erred in denying his pre-trial motion to dismiss. Once convicted, a defendant's probable cause challenge is irrelevant because if there is sufficient evidence to confirm the conviction, there was necessarily probable cause to proceed on the charges. *State v. Holmberg*, 527 N.W.2d 100, 103 (Minn. App. 1995), *review denied* (Minn. Mar. 21, 1995). Because there is sufficient evidence to support the conviction, the district court correctly concluded there was probable cause.

Affirmed.