NO. 196P21 **DISTRICT TWENTY-NINE B**

SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA	**)**	
	)	
v.	**)**	**From Henderson County**
	)	
SHERRY LEE LANCE	**)**	

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STATE'S RESPONSE TO DEFENDANT'S PETITION FOR DISCRETIONARY REVIEW

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TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF NORTH CAROLINA

NOW COMES the State of North Carolina, by and through Thomas J. Felling, Assistant Attorney General, and respectfully requests that this Court deny Defendant's Petition for Discretionary Review pursuant to N.C. Gen. Stat. § 7A-31. In support of this response, the State shows the Court the following:

PROCEDURAL HISTORY

This case commenced on 3 February 2017 when a Henderson County grand jury returned true Bills of Indictment against Sherry Lee Lance (hereinafter "Defendant") on the charges of felony second-degree arson, felony conspiracy to commit second-degree arson, and felony insurance fraud. (R pp 8-10) Defendant pled not guilty and was tried by jury in Henderson County Superior Court, the honorable Athena Brooks presiding, on 5 November 2019. (T pp 1-3) At the close of the State's evidence, Defendant made a motion to dismiss the State's case, which the trial court denied. (T pp 315-323) On 4 November 2019, the jury returned unanimous verdicts finding Defendant guilty on all three charges. (R pp 104-106) The trial court sentenced Defendant in the presumptive range to ten (10) to twenty-one (21) months incarceration, with credit given for fourteen (14) days previously spent in confinement. (R pp 112-113) Defendant was ordered to pay $40,000 in restitution to the victim of the crime. (R pp 107) Defendant, through counsel, gave oral notice of appeal in open court on 7 November 2019. (R p 114, T p 388) On 1 June 2021, the Court of Appeals issued its unanimous opinion in this case finding that the trial court did not err in denying Defendant's motion to dismiss the State's case, that the trial court did not err in admitting the testimony of the State's fire investigation expert witness,

that the trial court did not err in its instructions to the jury on the charge of insurance fraud, and vacating the restitution order of the trial court and remanding the matter for further proceedings. *State v. Lance*, __ N.C. App.__, 2021-NCCOA-236.

FACTUAL HISTORY

The pertinent facts of this case are fully set forth in the State's brief to the Court of Appeals and in the opinion of the Court of Appeals. (State's Brief pp 3-15) *State v. Lance*, __N.C. App. __, 2021-NCCOA-236, ¶¶ 6-16. The State respectfully refers this Court to those facts as fully set forth in the State's brief and in the opinion of the Court of Appeals.

In sum, the State notes that on two separate occasions, Defendant confessed, or at the very least insinuated, to close family members that she burned down the home that she shared with her mother, Jonnie Turner, for the purposes of collecting insurance proceeds. (T p 303, T p 310) The State presented evidence at trial that Defendant, along with her mother, leased a storage unit the day before the fire and accessed the unit three times before the fire was set. (T pp 231-232) After the fire, a detective searched the storage unit where he found numerous valuable personal possessions belonging to Defendant. (T p 234) Defendant submitted a loss inventory form to State Farm of things she claimed were lost in the fire on 7 September

2016. (T p 283) Defendant told State Farm that she thought that an electrical problem caused the fire. (T p 290) There was no evidence presented at trial that Defendant's mother actually participated in the burning of the home.

The trial court also heard substantial testimony from the State's expert witness in the field of fire investigation, Casey Silvers, during *voir dire* on the Defendant's Motion to Disqualify (T pp 110-149), and during the State's case in chief. (T pp 172-224) The trial court heard testimony regarding Mr. Silvers' background, training, and expertise in the field of fire investigation. (T pp 110-113, 172-174) Mr. Silvers gave the trial court a detailed explanation of his method for investigating fires and of his observations and findings at Defendant's home. (T pp 120-128, 177-204) Mr. Silvers testified that he followed the scientific method recommended by NFPA 921 in investigating the fire that occurred at Defendant's home, and in testing and eliminating hypotheses as to origin and cause of the fire. (T pp 117-118, 174, 185-186, 214) Mr. Silvers was scientifically able to eliminate all potential ignition sources for the fire except for an incendiary ignition source. (T p 206) He could not disprove an incendiary cause because other physical evidence at the scene, such as burn patterns and other observable evidence, was consistent with ignitable liquids being present. (T p 213) He did not conclude that the

fire had an incendiary cause, he concluded only that an incendiary cause could not be excluded through science and the data he observed at the scene. (T p 206, R p 37) There was no evidence or testimony presented to the trial court that Mr. Silvers used a disfavored method of fire investigation.

REASONS WHY THIS COURT SHOULD DENY DEFENDANT'S PETITION FOR DISCRETIONARY REVIEW

Defendant has failed to establish that any of the three factors required by N.C. Gen. Stat. § 7A-31(c) for discretionary review apply to this case. This Court should therefore deny Defendant's Petition for Discretionary Review. The Court of Appeals correctly determined that the State presented sufficient evidence at trial to convict Defendant of the crime of second-degree arson because the dwelling house in question was also occupied by Defendant's mother who was someone other than Defendant for the purposes of second-degree arson. The Court of Appeals also correctly determined that the trial court properly applied Rule of Evidence 702(a), and thus did not err in admitting the testimony of the State's fire investigator expert witness.

Defendant has failed to identify specific cases from this Court that conflict with the Court of Appeals opinion below. Defendant has also argued that this Court should grant discretionary review so the Court can "reaffirm the principles asserted in *State v. McGrady*." (*See* Def. PDR at pp 3, 4, 33.)

These are not appropriate reasons for this Court to issue discretionary review. The opinion of the Court of Appeals in this case is consistent with prior decisions of this Court on the issue of second-degree arson, with the application of Rule of Evidence 702, and with the holding of *State v. McGrady*, 368 N.C. 880, 787 S.E.2d 1 (2016). This case does not involve a matter of significant public interest, legal principals of major significance, and the decision of the Court of Appeals is not in conflict with a decision of this Court as required by N.C. Gen. Stat. § 7A-31(c).

I. DEFENDANT HAS NOT ESTABLISHED HOW HER CONVICTION FOR SECOND-DEGREE ARSON MEETS ANY OF THE FACTORS IDENTIFIED IN N.C. GEN. STAT. § 7A-31(c).

Defendant contends that the Court of Appeals erred in upholding her conviction on the charge of second-degree arson because she argues the home was not the home of another for the purposes of common law arson when it was occupied by an alleged co-conspirator. Defendant's argument on this issue is without merit. Defendant's contention that the home in question was not occupied by someone other than Defendant because it was occupied by Defendant's mother, who was a mere co-conspirator to the arson at some unknown point before the fire was set, is without any supporting legal precedent. A co-conspirator, at some point prior, has only agreed to commit a

crime, their agreement to commit a crime does not guarantee that they will participate in the actual crime with the perpetrator. The well-reasoned unanimous opinion of the Court of Appeals clearly established that the evidence at trial and by the precedent of this Court supported Defendant's conviction on the charge of second-degree arson.

North Carolina General Statute § 7A-31(c) provides that this Court may certify an issue for discretionary review when in this Court's opinion:

> (1) The subject matter of the appeal has significant public interest, or
>
> (2) The cause involves legal principles of major significance to the jurisprudence of the State, or
>
> (3) The decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court.

N.C. Gen. Stat. § 7A-31(c). Defendant has not shown how any of these factors apply to Defendant's conviction on the charge of second-degree arson and to the facts of this case. "Under this statute this Court is to review only those cases of substantial general or legal importance or in which review is necessary to preserve the integrity of precedent established by this Court. Denial of Certiorari does not mean that this Court has determined that the decision of the Court of Appeals is correct." *Peaseley v. Virginia Iron, Coal & Coke Co.*, 282 N.C. 585, 592, 194 S.E.2d 133, 139 (1973).

Defendant has not established how the subject matter of this case involving a single defendant to an arson and insurance fraud case involves a matter of significant public interest. Considering the record before the Court, the subject matter of this case, in the context of Defendant's conviction of the crime of second-degree arson does not involve a matter that could be generally understood to involve the public interest. Simply put, Defendant's conviction for a nonviolent low-level felony is not a matter of significant public interest that warrants discretionary review. N.C. Gen. Stat. § 7A-31(c)(1).

Defendant has not established how her conviction on the charge of second-degree arson involves "legal principles of major significance to the jurisprudence of the State." N.C. Gen. Stat. § 7A-31(c)(2). On this issue, Defendant has explained why she believes her conviction is incorrect based on the premise that a home is not the home of another for the purposes of second-degree arson when it is also occupied by a co-conspirator who is cohabitating with a defendant. The Court of Appeals, applying longstanding precedent of this State, has rejected Defendant's argument in its well-reasoned and detailed opinion. *See* State v. Lance, __N.C. App. __, 2021-NCCOA-236, ¶¶ 20-25. Defendant desires this Court to deviate from established clear precedent to create a new exception that would apply only

to situations involving arsonists who cohabitate with their conspirators. It is unlikely that circumstances such as these are common enough to constitute a significant jurisprudential issue in this State. Defendant has not shown how the straightforward application of the long standing precedent of this State on second-degree arson to the facts of this case involves "legal principles of major significance to the jurisprudence of this case." N.C. Gen. Stat. § 7A-31(c)(2).

Defendant cannot show how the "decision of the Court of Appeals" regarding her conviction on the charge of second-degree arson "appears likely to be in conflict with a decision" of this Court. N.C. Gen. Stat. § 7A-31(c). Defendant, in a conclusory statement, contends that the opinion of the Court of Appeals on this issue is in conflict with a decision of this Court. *See* Def. PDR p 4. However, Defendant never argues which opinion of this Court is at issue. To the contrary, the Court of Appeals correctly relied on this Court's holding in *State v. Shaw*, 305 N.C. 327, 289 S.E.2d 325 (1982), to inform its opinion in this case. The Court of Appeals determined that the central question on this issue was "whether Lance's mother, Jonnie Turner, qualifies as 'another' person under the elements" of second-degree arson. *State v. Lance*, __N.C. App.__, 2021-NCCOA-236, ¶ 20. To decide this issue, the Court of Appeals explicitly quoted the holding in *Shaw* "that the 'arson requirement

that the dwelling burned be that of 'another' is satisfied by a showing that some other person or persons, together with the Defendant, were joint occupants of the same dwelling unit." State v. Lance, __N.C. App.__, 2021-NCCOA-236, ¶ 19, *quoting State v. Shaw*, 305 N.C. 327, 338, 289 S.E.2d 325, 331 (1982).

The Court of Appeals went on to note that "the elements of this offense and our existing precedent do not provide any exception for co-conspirators, nor do they require that the other person living in the home be unaware or uninvolved in the plan to burn the home." *Id*. at ¶ 21. This conclusion is entirely consistent with the holding of this Court in *Shaw* and with the elements of common law arson. The holding of the Court of Appeals is consistent with and not in conflict with *Shaw*.

Defendant attempts to argue that Defendant's conviction on the charge of second-degree arson is inconsistent with the purpose of second-degree arson as established by precedent of this Court. Defendant argues that "the purpose of common law arson is to protect another's safety, not property." *See* Def. PDR p 13. For this proposition, Defendant cites *State v. Jones*, 296 N.C. 75, 248 S.E.2d 858 (1978). While the protection of another's safety is one purpose of common law arson, it is not the only purpose. This Court has held that first-degree arson, a similar statutory derivation of common law arson,

"is an offense against both persons and property." *State v. Allen*, 322 N.C. 176, 200, 367 S.E.2d 626, 639 (2016). The Court of Appeals accounted for the gravamen of the offense of arson that is explained in the opinions of this Court in *Shaw* and *State v. White* when it concluded that "[k]knowledge or, or participation in, a plan to commit arson does not remove the danger that the other person could be injured or killed when the burning occurs." *Lance* at ¶ 25; *State v. Shaw*, 305 N.C. 327, 337, 289 S.E.2d 325, 331 (1982); ("the gravamen of the offense of common law arson is the danger that results to the persons who are or might be in the dwelling . . ." *State v. White*, 288 N.C. 44, 50, 215 S.E.2d 557, 561 (1975)). The conclusion by the Court of Appeals that the gravamen of the offense of arson is satisfied by upholding Defendant's conviction under these circumstances is consistent with the prior decisions of this Court in *Shaw* and *White*.

Defendant also contends that the opinion of the Court of Appeals "resulted in an unprecedented expansion of common law arson" and created "law that unconstitutionally places a burden of proof on defendants." (Def. PDR p 18) Defendant argues that the holding "shifted the burden onto Ms. Lance… to establish that no one else was endangered by the fire." (Def. PDR p 20) This argument is incorrect, misstates the holding of the Court of

Appeals, and is explicitly contradicted by the opinion of the Court of Appeals. The opinion of the Court of Appeals creates no such requirements.

To the contrary, the Court of Appeals, when evaluating the gravamen of the offense of arson as established in *Shaw* and *White,* concluded that "[k]nowledge of, or participation in, a plan to commit arson does not remove the danger that the other person could be injured or killed when the burning occurs." *Lance* at ¶ 25. This was meant to show that Defendant's conviction, which involved an alleged co-conspirator who was only involved in an agreement or plan, and not the commission of the crime, is consistent with the purpose of common law arson. Nothing in that lone conclusion created an explicit requirement on a defendant to prove that the occupants of the home were not endangered by the fire. The Court of Appeals, consistent with existing case law, found that evidence that there was a "a person living in that dwelling who could have been in the home at the time it was burned" is "all that is required to satisfy this element of the arson offenses in this case." *Lance* at ¶ 25.

Contrary to Defendant's position, the Court of Appeals declined to expand the elements of common law arson to include considerations of the state of mind of a co-conspirator, or whether the joint occupants of a burned home were in actual danger or were aware of the plan to burn the home.

Such considerations would impose new requirements upon the State and make prosecution of arson cases more complex. The Court of Appeals, consistent with *Shaw*, found that the elements of second-degree arson do not "require that the other person living in the home be unaware or uninvolved in the plan to burn the home." *Lance* at ¶ 21. Nothing in the well-reasoned opinion of the Court of Appeals can be interpreted to expand the jurisprudence of common law arson beyond what this Court has previously established. The Court of Appeals has created no new requirements or shifted burdens on defendants charged with second-degree arson.

Defendant has failed to establish how any of the factors contained in N.C. Gen. Stat. § 7A-31(c) apply to the affirmance of Defendant's conviction on the charge of second-degree arson by the Court of Appeals. N.C. Gen. Stat. § 7A-31(c). This Court should therefore deny Defendant's petition for discretionary review on this issue.

II. DEFENDANT HAS NOT ESTABLISHED THAT THE ADMISSION OF THE TESTIMONY OF THE STATE'S FIRE INVESTIGATOR EXPERT WITNESS MEETS ANY OF THE FACTORS IDENTIFIED IN N.C. GEN. STAT. § 7A-31(c).

Defendant contends that the trial court failed "to analyze the State's proffered expert testimony under Rule 702" and that the testimony of the State's expert was "premised on an unreliable method repudiated by fire

experts; negative corpus." (Def. PDR p 28) Both of these arguments were rejected by the Court of Appeals in well-reasoned analysis of each issue that was based on the jurisprudence of this Court. On this issue, Defendant presents the same arguments that she presented to the Court of Appeals, and again argues why she believes the trial court erred in admitting the testimony of Casey Silvers. She does not; however, establish, or even argue, how this case meets any of the factors identified in N.C. Gen. Stat. § 7A-31(c). This Court should therefore reject Defendant's Petition for Discretionary Review on this issue.

Defendant has not established how the subject matter of this issue involving admission of testimony from the State's fire investigator expert witness involves a matter of "significant public interest." N.C. Gen. Stat. § 7A-31(c)(1). Defendant does not argue that the admission of expert testimony, fire investigations, or section 921 of the National Fire Protection Association (NFPA) are matters of public concern. Defendant does not, and cannot, show that the Court should grant discretionary review of this issue under N.C. Gen. Stat. § 7A-31(c)(1).

Defendant has not established how the routine admission of testimony from an expert witness by a trial court involves "legal principles of major significance to the jurisprudence of the State." N.C. Gen. Stat. § 7A-31(c)(2).

The admission of the expert testimony in this case does not involve an issue of major significance to the jurisprudence of the State. Defendant argues that the trial court did not conduct a proper Rule 702 analysis, and that the testimony was based on unreliable methods. These issues are already well settled by Rule 702(a) and by *Daubert* and *McGrady*. *See Daubert v. Merrell Dow Pharmaceuticals, Inc*., 526 U.S. 137 (1999); *State v. McGrady*, 368 N.C. 880, 787 S.E.2d 1 (2016). The opinion of the Court of Appeals, as the State will explain in the next section of this Response, correctly analyzes the decision by the trial court under Rule 702 and applies the standard set by this Court in *McGrady*. Defendant does not explain why the Court needs to consider this case for discretionary review as a matter of major significance to the jurisprudence of this State. The Court should deny Defendant's Petition for Discretionary Review on this issue because it does not involve a matter of major significance under N.C. Gen. Stat. § 7A-31(c)(2).

Defendant cannot show how the "decision of the Court of Appeals" affirming the trial court's admission of testimony from the State's expert witness "appears likely to be in conflict with a decision" of this Court. N.C. Gen. Stat. § 7A-31(c). Defendant challenges the decision of the Court of Appeals on both the admission of the testimony under Rule 702(a) and on the reliability of the expert testimony. Defendant bases this challenge on her

incorrect view that the expert witness used a disfavored method of fire investigation known as negative corpus. The Court of Appeals, in evaluating Defendant's arguments on the admission of the testimony under Rule 702, heavily cited, and properly applied the rationale of *McGrady*. The decision of the Court of Appeals is not in conflict with *McGrady* or any other opinion of this Court.

Defendant contends that the trial court "abdicated [] its gatekeeping function, manifesting an abuse of discretion" and did not apply the complete reliability test under Rule 702(a). (Def. PDR p 30) Defendant also contends that the Court of Appeals erred in affirming the trial court's decision because "the trial court did not consider the three prongs of Rule 702(a)." *Id.* As explained by the Court of Appeals in reliance on *McGrady*, Defendant's argument is without merit.

In its opinion, the Court of Appeals summarized the extensive testimony that the trial court heard from Casey Silvers during *voir dire*. *Lance* at ¶ 30. The Court of Appeals found that "Silvers's extensive *voir dire* testimony covered all three prongs of the Rule 702 reliability test." *Id.* at ¶ 33. The Court of Appeals also noted that "the trial court ruled that, 'under the three prong reliability test,' it would allow Silvers to testify" about his conclusions. *Id*. at ¶ 32. The Court of Appeals, consistent with *McGrady*,

correctly determined that the trial court "was not required to make detailed findings addressing each prong of Rule 702[]" and that the court's statement regarding the three prong test "is sufficient to show the trial court understood the applicable standard and exercised its discretion." *Id.* at ¶ 33. This is consistent with *McGrady* because this Court found that the "trial court has discretion in determining how to address the three prongs of the reliability test" and that "the trial court 'must have the same kind of latitude in deciding how to test an expert's reliability ... as it enjoys when it decides whether that expert's relevant testimony is reliable.'" *State v. McGrady*, 368 N.C. at 890, 787 S.E.2d at 9 (*quoting Kuhmo Tire Co., v. Carmichael*, 526 U.S. 137, 152, 119 S.Ct. 1167 (1999)). This Court in *McGrady* also concluded that Rule 702(a) "does not mandate particular 'procedural requirements for exercising the trial court's gatekeeping function over expert testimony.'" *Id.* at 893, *quoting* Fed. R. Evid. 702 advisory committee's note to 2000 amendment. The opinion of the Court of Appeals on the trial court's admission of the expert testimony under Rule 702 was well reasoned, correct, and consistent with the jurisprudence of this Court.

Defendant also contends that the admission of the testimony of Casey Silvers under Rule 702 "prejudiced Ms. Lance because it permitted Silvers to offer scientifically unreliable testimony that gave the State's theory… the

ostensible appearance of scientific rigor." (Def. PDR p 32) Defendant contends that Casey Silvers offered "testimony based on an unreliable principle method (negative corpus)." *Id*. Defendant's arguments are not supported by the record or the testimony presented at trial, and the Court of Appeals properly rejected these arguments.

Defendant moved to exclude the testimony of Casey Silvers and conducted a *voir dire* examination of Mr. Silvers to explore his method of investigation, his understanding of NFPA 921, his investigation and observations at the scene, and his conclusions regarding causation. (T pp 110-149) Other than cross examining Mr. Silvers and asking if he was aware of a particular study, Defendant offered no competing evidence or testimony regarding Mr. Silvers' qualifications or conclusions as an expert, or showing that he used a disfavored method of fire investigation. The trial court even noted that the study referenced by the Defendant on *voir dire* "was never identified as any learned treatise." (T p 161) Counsel for Defendant asked Mr. Silvers a total of three questions regarding negative corpus, and Mr. Silvers, dismissing that method, explained that he declined to "say this is an incendiary fire based on classification" and that "this is a hypothesis that I considered and that I cannot exclude." (T pp 144-145)

The Court of Appeals found that the trial court heard testimony that Mr. Silvers "understood the negative corpus approach," that "he did not rely on negative corpus in reaching his conclusion about the cause of the fire," and that he testified that "he applied the scientific method and process of elimination to rule out various hypothesis on the cause of the fire" in accordance with the NFPA. *Lance* at ¶ 35. Based on this, the Court of Appeals concluded that "the trial court was within its sound discretion to conclude that the testimony was admissible under Rule 702." *Id.* at ¶ 36. The opinion of the Court of Appeals on this issue is consistent with *McGrady* because this Court found that "the trial court 'must have the same kind of latitude in deciding how to test an expert's reliability ... as it enjoys when it decides whether that expert's relevant testimony is reliable.'" *State v. McGrady*, 368 N.C. App at 890, 787 S.E.2d at 9.

The trial court found that the testimony of Casey Silvers was based on reliable scientific methods and the Court of Appeals affirmed the trial court in the exercise of its discretion on that issue. Defendant now seeks to present evidence and arguments on appeal in an attempt undermine the credibility of the State's expert. As the Court of Appeals correctly noted "there were means to challenge Silvers's testimony through contrary evidence and cross examination – for example, by underscoring that Silvers' analysis did not

establish causation." *Lance* at ¶ 36. However, when considering the propriety of a discretionary decision of a trial court on appeal, it is not appropriate to consider additional information that goes to the credibility of a witness that was not before the trial court. The Court of Appeals, in reliance on *McGrady*, properly decided that the trial court did not abuse its discretion in allowing Casey Silvers to offer expert testimony at trial after conducting a proper Rule 702 analysis. Defendant has not shown that the opinion of the Court of Appeals is in conflict with any opinion of this Court on this issue. This Court should deny Defendant's Petition for Discretionary Review on this issue because it does not conflict with an opinion of this Court as required by N.C. Gen. Stat. § 7A-31(c)(3).

The unanimous opinion of the Court of Appeals in this matter is well reasoned, correct, and is derived from precedent set by this Court on the issues presented. Defendant has not shown that the issues presented to this Court meet any of the factors identified in N.C. Gen. Stat. § 7A-31(c). These issues are not of "significant public interest," they are not issues of "major significance to the jurisprudence of the State," and most importantly, the opinion of the Court of Appeals is consistent with and not "in conflict with" the decisions of this Court. N.C. Gen. Stat. § 7A-31(c)(1), (2) and (3). There is no cause to issue Defendant's requested review by this Court.

CONCLUSION

WHEREFORE, Defendant's Petition for Discretionary Review should be denied.

This the 19th day of July, 2021.

JOSHUA H. STEIN
ATTORNEY GENERAL

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing RESPONSE TO DEFENDANT'S PETITION FOR DISCRETIONARY REVIEW upon the DEFENDANT by electronic mail, addressed to his ATTORNEY OF RECORD as follows:

Warren Hynson
Email: warren@hynsonlaw.com

This the 19th day of July, 2021.

/s/ Thomas J. Felling
Thomas J. Felling
Assistant Attorney General