Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2007-150

OCTOBER TERM, 2007

In re S.M.	}	APPEALED FROM:
	}	
	}	
	}	Franklin Family Court
	}	
	}	
	}	DOCKET NO. 102-7-06 Frjv
		Trial Judge: Linda Levitt

In the above-entitled cause, the Clerk will enter:

S.M. appeals from the family court's order, adjudicating him delinquent for acts constituting first-degree arson in violation of 13 V.S.A. § 502. He argues that the State failed to prove that he willfully and maliciously started the fire. We affirm.

S.M. was charged as a delinquent for first-degree arson in July 2006 after his house burned down. After a merits hearing, the court issued its decision, finding as follows. S.M. was twelve years old at the time of the fire, and he was home alone. He retrieved a barbeque lighter from the kitchen and lit something flammable under the couch in the living room. He burned two fingers of his right hand. He may have later tried to put out the growing fire, but in the end, the house was destroyed. After rescuing one of the family pets, S.M. reported the fire at a convenience store across the street. He told his mother that the fire had started under the couch, which burn patterns confirmed. A fire investigator found the barbeque lighter next to the fire's origin. Days after the fire, S.M. lied to his mother about how the fire started. He stated that while he was in the bathroom, he heard a spark and was unable to put out the fire he saw spreading under the couch. At the merits hearing, S.M. testified that that he lit a candle and his footsteps caused the candle to fall to the floor and roll under the couch. The court found both explanations not credible, and it concluded that S.M. was delinquent for acts constituting first-degree arson. After a disposition hearing, the court issued an order placing S.M. on probation until age eighteen. This appeal followed.

S.M. argues that the State failed to prove that he willfully and maliciously started the fire. He maintains that that the only evidence presented by the State as to the fire's origin was the testimony of Detective Gerald Charbonneau, and the detective did not testify that the fire was of criminal origin. S.M. also points to other evidence he believes contradicts the court's finding that the fire was intentionally set, such as the fact that he did not have a serious history of fire

setting, reported the fire, and successfully rescued one of the family pets. He maintains that the State failed to rebut the presumption that the fire was accidental. S.M. also asserts that even if the family court found his explanation incredible, the finding of delinquency was unjustified because the State failed to meet its initial burden of production.

It is true, as S.M. asserts, that "[t]he mere fact of the burning of a building" is insufficient to establish that a fire is of incendiary origin, and "if nothing more appears, it will be presumed that the fire was the result of accident or some providential cause, rather than the result of a criminal design." State v. Lizotte, 109 Vt. 378, 385 (1938); see also State v. Bessette, 129 Vt. 87, 89-90 (1970) (same). This presumption is rebutted, however, by any evidence that fairly and reasonably tends "to show that the real fact is not as presumed," at which point, the presumption "disappears." In re Hawk Mt. Club, 149 Vt. 179, 186 (1988). As we have repeatedly recognized, the incendiary nature of a fire "may be proved by circumstantial evidence." Bessette, 129 Vt. at 90.

In this case, the State rebutted the presumption, and it presented sufficient evidence to prove that S.M. willfully and maliciously started the fire in violation of 13 V.S.A. § 502. The State's evidence showed that S.M. was home alone. There had been no previous fires or short circuits in the home. S.M. admitted using the grill lighter shortly before the fire started, and fire officials discovered the grill lighter under the couch, where the fire had originated. Fire officials found no other potential causes for the fire in the house. S.M. told conflicting stories about how the fire started, which the court found not credible. The evidence was sufficient to establish that the fire was not the result of accidental or natural causes, but instead was caused by a willful act of S.M. See Lizotte, 109 Vt. at 385 (reaching similar conclusion); see also State v. Bishop, 127 Vt. 11, 15 (1968) (explaining that "[t]he requisite willfulness and malicious intent [is] established by the performance of the act charged"). None of S.M.'s arguments undermine this conclusion. We reject his assertion that the detective was required to specifically state that the fire was criminal in origin. See State v. Kerr, 143 Vt. 597, 603 (1983) (stating that "proof of facts includes reasonable inferences properly drawn therefrom"). His remaining arguments rely upon modifying evidence that the family court found unpersuasive. See Bessette, 129 Vt. at 89 (in reviewing challenges to the sufficiency of the evidence, Court excludes all modifying evidence and views the evidence in light most favorable to the State modifying evidence). We find no error.

S.M. next asserts that the court committed reversible error by admitting hearsay testimony from Detective Charbonneau. The record shows that as part of his testimony regarding his investigation into the fire's origin, Detective Charbonneau stated that he had found a chair upside down on top of the sofa. He testified that he had learned a day earlier that the firemen had not "toss[ed] anything around" in their efforts to put out the fire. Counsel for S.M. objected to this last statement, although he did not specify any grounds for his objection, and the objection was overruled. Defendant maintains that the State was attempting to prove the necessary intent through this hearsay testimony and was implying that S.M. had deliberately rearranged the furniture to start a fire under the sofa. Defendant argues that although this implication hardly suffices to prove that S.M. "willfully and maliciously" started the fire, in the absence of more compelling evidence, this testimony could have been a significant factor upon which the family court based its determination that S.M. was not credible in his explanation of

how the fire started, and ultimately, its conclusion that he committed acts constituting first degree arson.

These arguments are without merit. Even assuming this statement was admitted in error, any error was harmless beyond a reasonable doubt. See State v. Oscarson, 2004 VT 4, ¶¶ 30-32, 176 Vt. 176 (in evaluating whether error was harmless, Court considers the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of the cross-examination otherwise permitted, and the overall strength of the prosecution's case). Not only was the statement marginally relevant, as S.M. essentially concedes, but it was also cumulative. Detective Charbonneau testified without objection that his own examination of the burn patterns on the chair led him to believe that the chair was not upright at the time of the fire, but rather, was on top of the couch. The family court does not mention the placement of the chair in its decision, and we fail to see how the admission of the statement at issue could have had a determinative impact on the court's assessment of S.M.'s credibility, particularly in light of S.M.'s multiple, contradictory, versions of how the fire started. As discussed above, the State presented ample credible evidence to establish S.M.'s guilt, and we conclude beyond a reasonable doubt that the court would have found that S.M. committed acts constituting first degree arson even without the evidence at issue. See id., ¶ 30 (error considered harmless where reviewing court finds beyond a reasonable doubt that factfinder would have returned guilty verdict regardless of error).

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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John A. Dooley, Associate Justice

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Marilyn S. Skoglund, Associate Justice