COURT OF APPEALS
DECISION
DATED AND FILED

May 27, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3313-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEE DONALD SCOTT RIGBY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Eau Claire County: THOMAS H. BARLAND, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

PER CURIAM. Donald Rigby appeals his conviction for arson under § 943.02(1)(a), STATS., of a trailer home, after a jury trial. He argues that the prosecution did not sustain its burden to prove nonconsent beyond a reasonable doubt. He points out that nonconsent is an element of the crime and that the trailer owner never testified to that element. Rigby's argument is flawed. The

prosecution may prove nonconsent by circumstantial evidence. *See, e.g.,* ***LaTender v. State***, 77 Wis.2d 383, 394-95, 253 N.W.2d 221, 227 (1977). In most cases, the prosecution simply introduces evidence demonstrably incompatible with consent, and that suffices in the absence of counterevidence. *See* CLARK & MARSHALL, CRIMES § 5.14, at 353 (7th ed. 1967). After reviewing the record, we are satisfied there is circumstantial proof of nonconsent. We therefore affirm Rigby's conviction.

The prosecution's evidence, viewed as a whole with common sense inferences, was fully incompatible with the owner's consent to the arson. First, Rigby was purchasing the trailer home and was having financial problems. This gave him a motive to burn the trailer incompatible with consent by the owner. Second, Rigby did not know the owner's whereabouts. This implied that he never secured the owner's consent. Third, he told the police that he had discussed the impending fire with his wife, implying no discussions with the owner. Fourth, Rigby did not make a final decision to burn the trailer until he stepped inside the trailer; this implied no advance permission by the owner. Fifth, Rigby expressed remorse to the police, behavior incompatible with consent and close to an admission of nonconsent. He told the police that he would undo it if he could.

Last, Rigby initially denied involvement, telling police that young people or the trailer park owner must have started the fire; this implied an attempt to obstruct the police. *See* ***Price v. State***, 37 Wis.2d 117, 132, 154 N.W.2d 222, 229 (1967); MCCORMICK ON EVIDENCE § 271, at 655 (2d ed. 1972). This obstruction was incompatible with the owner's consent. If Rigby had consent, he would have no reason to falsely cast blame elsewhere. In short, the prosecution proved, through the use of circumstantial evidence, nonconsent beyond a reasonable doubt. Under these circumstances, the prosecution did not need to

introduce the owner's direct testimony on nonconsent to prove that element of the crime. The prosecution's proof fully comported with the principal United States Supreme Court cases on the prosecution's burden of proof. *See, e.g.,* ***Patterson v. New York***, 432 U.S. 197 (1977); ***Mullaney v. Wilbur***, 421 U.S. 684 (1975); ***In re Winship***, 397 U.S. 358 (1970).

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.