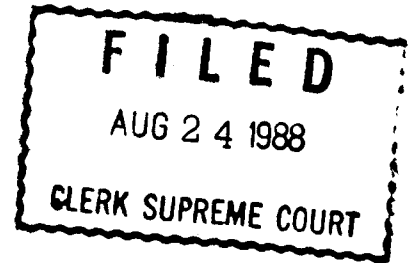


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,)
Plaintiff-Appellee,)
vs.)
DALE EUGENE ROYER,)
Defendant-Appellant.)

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8-272
87-848

Appeal from the Iowa District Court for Story County
(No. 12306), Carl D. Baker, Judge.

Defendant appeals his convictions following a jury
trial for two counts of first-degree murder and one count
of first-degree arson. **AFFIRMED.**

Raymond E. Rogers, Acting Chief Appellate Defender, for
defendant-appellant.

Thomas J. Miller, Attorney General; Ann E. Brenden,
Assistant Attorney General; Mary E. Richards, Story County
Attorney; and Douglas R. Marek, Assistant Story County
Attorney, for plaintiff-appellee.

Considered by Donielson, P.J., and Schlegel and Hayden,
JJ.

DONIELSON, P.J.

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Defendant appeals from his conviction for two counts of first-degree murder and one count of first-degree arson. He contends the district court erred by refusing to submit various lesser-included offenses to the jury.

Defendant was a graduate student at Iowa State University. He took a class from Dr. Sidhu in the spring of 1985. Sidhu was also defendant's major advisor. An academic problem arose during the semester which developed into a long-term dispute.

On the night of December 1, 1986, a fire occurred at the home of Dr. Sidhu. Two of the professor's children died in the fire. Defendant was charged with one count of arson and two counts of murder in the first degree as a result. Defendant presented an insanity defense to these charges.

A jury found the defendant guilty of all the crimes charged. Defendant appeals this conviction on the grounds that the district court erred by refusing to submit lesser-included offenses to the jury. Our review is for correction of errors at law. Iowa R. App. P. 4.

There are two steps in determining whether to submit a lesser-included offense: 1) the legal test and 2) the factual test. State v. Millspaugh, 257 N.W.2d 513, 516 (Iowa 1977). The legal test is when the elements of the lesser offense are an elementary part of the greater offense.

Id. The factual test requires a factual basis in the record for submitting the included offense to the jury.

Id.

Murder Charge. For the charge of murder, defendant contends that the district court should have submitted the lesser-included offenses of both types of involuntary manslaughter. The state asserts that no factual basis exists for submission of the involuntary manslaughter charge and therefore the court was not in error. We agree with the State.

First, involuntary manslaughter satisfies the legal test. Iowa Code section 707.5(2) (1987) explicitly states that involuntary manslaughter is an included offense under indictment for murder in the first degree. The only theory of murder submitted was felony murder, which is murder in the first degree. Id. Therefore, involuntary manslaughter satisfies the first step in determining whether an instruction on the lesser-included offenses is required.

The second step asks whether there is a factual basis in the record to support the lesser offenses. This step requires analysis of the elements of involuntary manslaughter.

707.5 Involuntary Manslaughter

1. A person commits a class "D" felony when the person unintentionally causes the death of another person by the commission of a public offense other than a forcible felony or escape.

2. A person commits an aggravated misdemeanor when the person unintentionally causes the death

of another person by the commission of an act in a manner likely to cause death or serious injury.

To factually support involuntary manslaughter as described in subsection 1, there would have to be evidence that defendant Royer participated in a public offense other than the charged felony of arson. See State v. Ware, 338 N.W.2d 707, 715 (Iowa 1983). Arson in the first degree is by definition a forcible felony. Iowa Code § 702.11.

The only theory of murder advanced is felony murder. A person who commits murder when the person kills another person while participating in a forcible felony is guilty of murder in the first degree. Iowa Code § 707.2(2). If defendant did not commit a forcible felony, then he cannot be found guilty of felony murder. If he did commit the forcible felony, he cannot be charged with involuntary manslaughter (1) since the statute says other than a forcible felony. Iowa Code § 707.5(1). Therefore, defendant could under the evidence only be found guilty of first-degree murder or acquitted. See State v. Conner, 241 N.W.2d 447, 461 (Iowa 1976).

Involuntary manslaughter as defined in subsection (2) also lacks factual support. It has been held that the term "act" in section 707.5(2) means an act that is neither connected with a "public offense" nor with a "forcible felony or escape." Ware, 338 N.W.2d at 715. Forcible felonies are excluded from both definitions of involuntary man-

slaughter. Id. No theory other than felony murder was advanced. Therefore, defendant could only be found guilty or not on the evidence presented.

This conclusion is consistent with other recent decisions. In State v. Morgan, 322 N.W.2d 68 (Iowa 1982), we held that if a major offense consists of three elements, with the lesser offense consisting of only two of those elements, the lesser offense need not be submitted if the record does not contain substantial evidence from some quarter controverting the elevating element. Id. at 69-70. In Ware, the charge was felony murder and the felony was robbery. There was no evidence controverting the fact that the victim was killed during a robbery. "If the killing was not directly connected with the robbery, nothing in the record told the jury how the homicide occurred." Ware, 338 N.W.2d at 716.

In the present case there is no evidence in the record controverting that the two deaths occurred as a result of the fire in Sidhu's home. If there was evidence controverting the felony, then defendant should have been acquitted of felony murder. Id.

Defendant argues that the Ware case is distinguishable and applicable only to cases relying on an alibi defense. The question in Ware was only a matter of who pulled the trigger. Id. In the present case, defendant asserts that there are two elements elevating involuntary manslaughter

based on second-degree arson to first-degree felony murder. These two elements are participating in arson in the first degree and having malice aforethought.

The State is required to prove malice aforethought under the felony murder rule. State v. Ragland, 420 N.W.2d 791, 794 (Iowa 1988). However, malice aforethought may be implied from a finding defendant intentionally or deliberately set the fire that caused the deaths. State v. Veverka, 271 N.W.2d 744, 747 (Iowa 1978). There is no evidence to contradict that defendant intentionally or deliberately set the fire. There is no evidence that the fire was accidental in nature. Therefore, the element of malice aforethought does not require the submission of the lesser-included offense.

Defendant asserts that character evidence introduced shows that he was not a person who acted out of malice. Malice was defined by the trial court as acting out of spite, hatred, ill will, or with an evil, wicked, or unlawful purpose. But the relevant evidence is how defendant acted toward Sidhu, not how he acted in general. Malice aforethought was defined by the trial court as "a fixed purpose or design to do some physical harm to another which exists prior to the act committed." There is no evidence controverting that defendant was not getting along with Sidhu or that he had a fixed purpose when he went over to Sidhu's house that night.

The evidence showed that defendant drove to Sidhu's house in a residential section of Ames. A car was in Sidhu's driveway and the snow had been removed. Defendant cut the telephone wires to the house before he broke in with the help of a crowbar. The fire was started with the two point four gallons of fuel defendant brought with him. There is no evidence suggesting any other purpose for defendant's outing that night. Because there was no evidence from which a jury could reasonably conclude that either kind of involuntary manslaughter took place, the trial court did not err by refusing to submit these lesser-included offenses to the jury.

Arson Charge. Defendant also requested that second-degree arson and reckless use of fire be submitted as lesser-included offenses of first-degree arson. Again, the two-step approach needs to be applied.

The legal test is met "if it is impossible to commit the greater offense without also committing the lesser." State v. Aswegan, 331 N.W.2d 93, 97 (Iowa 1983). The elements of first-degree arson relevant to this case are:

- 1) causing a fire;
- 2) which defendant intends will destroy or damage property;
- 3) in which the presence of one or more persons can be reasonably anticipated.

Iowa Code §§ 712.1 and 712.2.

The elements of arson in the second degree are:

- 1) causing a fire;

- 2) defendant intends to destroy or damage property or which defendant knowingly endangers;
- 3) which is a building or a structure or real property of any kind, or is personal property the value of which exceeds five hundred dollars.

Id. § 712.3.

Since one cannot commit first-degree arson without also committing second-degree arson, the legal test is satisfied. However, there is no obligation to instruct on a lesser-included offense when there is no evidence that the offense committed was less than charged. Conner v. State, 362 N.W.2d 449, 457 (Iowa 1985).

To satisfy the second test, there would have to be evidence in the record controverting that the presence of people could reasonably have been anticipated. Morgan, 322 N.W.2d at 69-70. Although it is sufficient to merely disbelieve some of the testimony, Cuevas v. State, 415 N.W.2d 630, 633 (Iowa 1987), there was no testimony suggesting the house looked empty or that Royer knew that Sidhu was out of town. Since arson in the second degree is arson which is not arson in the first degree, Iowa Code § 712.3, and there is no evidence that people were not reasonably expected to be in the house, there is no evidence that the offense committed was less than charged. A reasonable person viewing the evidence could only conclude that the major offense or no offense has been committed. State v. Mount, 422 N.W.2d 497, 501 (Iowa 1988). Therefore, the trial court was under

no obligation to submit the charge of arson in the second degree.

Reckless use of fire occurs when one uses fire or any incendiary or explosive device or material as to recklessly endanger the property or safety of another. Iowa Code § 712.5. One cannot commit arson in the first degree without also committing reckless use of fire. Even though the wording of the elements appears to be different, a closer analysis reveals that they form an elementary part of the greater offense.

The second element of first-degree arson, intending to destroy or damage property, is satisfied because reckless conduct is ordinarily conscious and intentional. State v. Keines, 262 N.W.2d 602, 605 (Iowa 1978). The first element of first-degree arson as charged, causing a fire, must be compared to "use fire or any incendiary or explosive device or material." We fail to find any material difference between these two elements. While it is possible to "use" fire without "causing" it, it is not possible to cause fire without using fire or any incendiary or explosive device. Therefore, we find the legal test satisfied.

However, the factual test fails for the reasons asserted for second-degree arson. There is no evidence controverting the elevating element of anticipating the presence of people.

This decision is consistent with other cases interpreting lesser-included offenses. For example, the reasoning used in Ware for the murder statute applies here. As discussed previously, Ware compared involuntary manslaughter to felony murder. The court said the purpose of the legislature was to provide a gradation of culpability commensurate with the punishment. The court found it entirely reasonable to infer from the statutory scheme in Chapter 707 that a person who causes death during the reckless commission of a forcible felony cannot be found guilty of the lesser offense of involuntary manslaughter. Ware, 338 N.W.2d at 715.

Similarly, the statutory scheme in Chapter 712 reflects a gradation of crimes with different degrees of punishment. One who recklessly causes a first-degree arson cannot be punished for reckless use of fire. There is no evidence suggesting that people were not reasonably anticipated to be present. Therefore, it was not error to refuse to submit the lesser-included offenses of second-degree arson and reckless use of fire. We affirm defendant's convictions for two counts of first-degree murder and one count of first-degree arson.

AFFIRMED.