FILED
MAR 23 1982
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,) Filed March 23, 1982

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vs.)

CHARLES LEE MILLER,) 2-64
66763

Defendant-Appellant.)

Appeal from Webster District Court - Russell J. Hill, Judge.

Defendant appeals from his conviction of arson in the third degree in violation of sections 712.1 and 712.4, The Code, asserting (1) trial court erred in refusing to instruct the jury that circumstantial evidence must be entirely consistent with guilt and exclude every rational hypothesis of defendant's innocence; (2) trial court erred in submitting the lesser included offense of arson in the third degree to the jury; (3) chapter 712, The Code, is unconstitutionally vague and overbroad; (4) there was insufficient evidence to substantiate defendant's conviction; and (5) defendant's sentence of incarceration is excessive in light of all the facts and circumstances of this case. AFFIRMED.

David J. Lawler, Fort Dodge, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and John P. Messina, Assistant Attorney General, for plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendant, Charles Lee Miller, appeals from his conviction of arson in the third degree in violation of sections 712.1 and 712.4, The Code. He asserts (1) trial court erred in refusing to instruct the jury that circumstantial evidence must be entirely consistent with guilt and exclude every rational hypothesis of defendant's innocence; (2) trial court erred in submitting the lesser included offense of arson in the third degree to the jury; (3) chapter 712, The Code, is unconstitutionally vague and overbroad; (4) there was insufficient evidence to substantiate defendant's conviction; (5) defendant's sentence of incarceration is excessive in light of all the facts and circumstances of this case. We affirm.

Defendant was arrested on May 9, 1980, and charged with intoxication and assault, and was incarcerated in the Fort Dodge City Jail at approximately 9:30 p.m. At approximately 12:30 a.m. the next day, a fire consisting of burning blankets was discovered in the jail outside defendant's cell. Defendant was the only internee who had access to blankets, and matches were found upon his person. He was charged with arson in the first degree by a county attorney's information and trial to a jury resulted in a verdict of guilty of arson in the third degree. Defendant thereafter was sentenced to two years in prison. From this conviction and sentence, defendant appeals.

I. Scope of Review. Since this is an action at law, our review is for correction of errors only. Iowa R. app. P. 4; Rinehart v. State, 234 N.W.2d 649, 658 (Iowa 1975).

II. Instruction on Circumstantial Evidence. Defendant concedes that the law set forth in State v. O'Connell, 275 N.W.2d 197, 204-205 (Iowa 1979), does not require submission to the jury of an instruction which might convey the impression that direct and circumstantial evidence are not equally probative. He, however, argues that this rule is inconsistent with the Iowa rules of appellate procedure. While there may be some merit in defendant's claim that there was an inconsistency

between the law set forth in O'Connell and Iowa R. App. P. 14(f)(16), as set forth in The Code 1979, any inconsistency was eliminated by the amendment to that rule which provides that direct and circumstantial evidence are equally probative. See Iowa R. App. P. 14(f)(16), The Code 1981. This rule now specifically adopts the language of O'Connell, 275 N.W.2d at 205. Since O'Connell and the new rules were in effect at the time of defendant's trial, trial court did not err in failing to adopt defendant's proposed instruction.

III. Arson in the Third Degree. Defendant argues that trial court erred in allowing the jury to consider evidence concerning the included offense of arson in the third degree and submitting it to the jury because the State did not set forth relevant evidence in its bill of particulars. He further asserts that arson in the third degree is not a lesser included offense of arson in the first degree. We find this analysis wholly without merit.

A. Bill of Particulars. Defendant claims that the State, in its amended bill of particulars, withdrew the contention that defendant committed an unlawful act by simply burning the blanket in the city jail. From our review of these documents, we conclude that the amended bill of particulars was an addition to the original bill and did not supersede any particular charge therein. Further, we note that the amended bill specifically referred to the property delineated in the original bill by use of the phrase "said property." We thus find no error by trial court in allowing the jury to consider evidence concerning the burning of the blanket.

B. Lesser Included Offense. Defendant also contends that arson in the third degree is not a lesser included offense of arson in the first degree and that trial court therefore erred in submitting arson in the third degree as an issue for the jury's consideration. First, we note that defendant failed to argue this claim in trial court and thus failed to preserve error for our review. See State v. Jump, 269 N.W.2d 417, 430 (Iowa 1980). Second, even if we assume that defendant

preserved this error, we find defendant's analysis unpersuasive on the merits. The elements of a lesser offense must be composed solely of some but not all the elements of the greater crime. State v. Sangster, 299 N.W.2d 661, 663 (Iowa 1980). Arson in the third degree, as provided by section 712.4, The Code, clearly meets this test; for arson, as defined by section 712.1, The Code, is an element of arson in the first, second, and third degrees. See §§ 712.2 and 712.1, The Code. Arson which lacks the additional elements of arson in the first degree and arson in the second degree is arson in the third degree. Section 712.4, The Code.

Trial court thus did not error in submitting the issue and evidence of arson in the third degree to the jury.

IV. Constitutionality of the Arson Statute. The defendant next argues that the arson statute is unconstitutionally vague. Defendant attempted to raise this issue in his motion for judgment of acquittal following the presentation of the State's case-in-chief. The motion for judgment of acquittal may not be used to attack the constitutionality of the statute. State v. Allen, 304 N.W.2d 203, 206 (Iowa 1981).

> "[I]n order to preserve for review any alleged error in ruling on the constitutionality of a statute, the party challenging the statute must do so at the earliest available opportunity in the progress of the case."

Allen, 304 N.W.2d at 206, quoting State v. Ritchison, 223 N.W.2d 207, 214 (Iowa 1974). "[D]efendant does not preserve error when he waits until the conclusion of the evidence to mount an attack on the facial validity of the statute." Allen, 304 N.W.2d at 206. We thus decline to consider this issue on review.

V. Sufficiency of the Evidence. When sufficiency of the evidence is challenged, we review the evidence in a light most favorable to the State, taking into consideration all evidence in the record. State v. Kern, 307 N.W.2d 22, 28 (Iowa 1981); State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980). The verdict will stand if there is substantial evidence in the record to support it. State v. Schrier,

300 N.W.2d 305, 306 (Iowa 1981). Substantial evidence is that evidence which would convince a rational factfinder that the defendant is guilty of the crime charged beyond a reasonable doubt. Robinson, 288 N.W.2d at 339. All legitimate inferences which may be fairly and reasonably deducted from the evidence will be accepted. Schrier, 300 N.W.2d at 306. Applying the principles to the evidence in the instant case, we conclude there was sufficient evidence to support the jury's verdict. As we stated above, under Iowa law direct and circumstantial evidence are equally probative. There was circumstantial evidence in this case which indicated that the defendant set fire to the blankets. He had access to the blankets, he had matches on his person, and the fire occurred outside his cell. The only other person in the area did not have this access. From this we believe a rational juror could conclude that defendant set fire to the blankets. The jury's verdict is thus supported by substantial evidence.

VI. Trial Court's Sentence. Defendant also argues that the two-year sentence imposed by trial court was excessive. Specifically, defendant contends that probation would have been the proper sentence considering all the circumstances. The granting of probation is a matter of trial court's broad discretion. State v. Killpack, 276 N.W.2d 368, 373 (Iowa 1979). "We will interfere only upon a finding of abuse of that discretion." Id. Pursuant to Iowa R. Crim. P. 22(3)(d), trial court noted that defendant had an extensive history of violent conduct and considered the indiscriminate and violent nature of the crime involved in the instant case. On this record, we cannot say there has been any abuse of discretion.

In conclusion, we affirm trial court's judgment in its entirety.

AFFIRMED.