IN THE COURT OF APPEALS OF IOWA

No. 5-426 / 94-964

001093

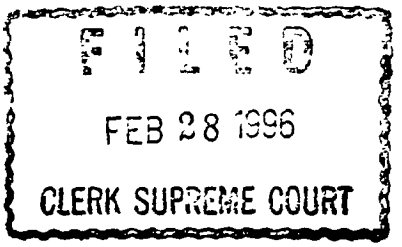
STATE OF IOWA,

Plaintiff-Appellee,

vs.

HOBART TRONG NGUYEN,

Defendant-Appellant.



Appeal from the Iowa District Court for Muscatine County, James E. Kelley, Judge.

Hobart Nguyen appeals his convictions and sentences, following a jury trial, for first-degree burglary, possession of an incendiary device, and assault while participating in a felony. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Andi S. Lipman, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, and Richard R. Phillips, County Attorney, for appellee.

Considered by Sackett, P.J., and Habhab and Huitink, JJ.

HABHAB, J.

On the evening of February 15, 1994, Hobart Nguyen was stopped by a security guard at Jack's Discount Store in Muscatine, Iowa. Nguyen admitted he had attempted to take a telephone from the store without paying for it. A police officer was called to the store and Nguyen was issued a citation for the theft. He was then escorted from the store.

That evening and into the early hours of February 16, 1994, Nguyen worried his brush with police would bring disgrace to his family. Nguyen lived with his family, who operates a restaurant in Muscatine. Nguyen decided to burn down the Muscatine Journal building in order to prevent any report of the shoplifting incident from being printed. He created a "Molotov cocktail" by filling a liquor bottle about one-third full of gasoline and putting a rag in the top. He also filled a gallon jug with gasoline.

Nguyen took the two containers to the Journal office. According to his testimony, when he arrived at the Journal office he changed his mind and decided not to burn the office. He stated that he instead decided to break into the office with the intent to destroy the police report of the shoplifting incident. He left the gallon jug of gasoline on the front step of the office.

Nguyen went to the back of the building and broke a glass window in order to gain entrance. He left the "Molotov cocktail" in the mail room. Nguyen was looking through some file cabinets when Patricia Safely, who was working late in the

computer department, heard him. She observed Nguyen take down a smoke detector and remove the battery.

Safely then turned on the lights and confronted Nguyen. Safely told Nguyen she was going to call the police because he did not have any right to be in the building. By placing his hand on the telephone, Nguyen would not permit her to complete the call. He stated he had already been in trouble with the police that day and did not want more trouble. Safely then stated she would call her boss. Nguyen grabbed her hands and would not permit her to call her boss.

Safely told Nguyen she would escort him from the building. However, at the front door, Nguyen refused to leave, stating he believed an alarm would go off. As she walked with Nguyen to the back door, Safely suddenly turned and ran to her office, locking the door behind her. Nguyen followed and tried to break down the door. He managed to break the door jam, but then left. Once she was in her office, Safely called the police.

After discussing the matter with his father, Nguyen turned himself in. He was charged with burglary in the first degree in violation of Iowa Code sections 713.1 and 713.3; arson in the second degree in violation of sections 712.1 and 712.3; possession of an explosive or incendiary device in violation of section 712.6; and assault while participating in a felony in violation of sections 708.1 and 708.3.

A jury found defendant guilty of burglary in the first degree, possession of an incendiary device, and assault while participating in a felony. The jury found him not

guilty of arson in the second degree. The district court denied his motion for new trial and motion in arrest of judgment. Defendant was sentenced to a term of imprisonment not to exceed twenty-five years on the burglary charge, a term of imprisonment not to exceed ten years on the possession of an incendiary device charge, and a term of imprisonment not to exceed five years on the assault charge. These sentences are to run concurrently. Defendant has appealed.

I. Defendant contends the district court erred in entering judgment on his conviction for burglary in the first degree and his conviction for possession of an incendiary device. He states possession of an incendiary device is a lesser-included offense of burglary in the first degree. Defendant believes that under section 701.9 the possession of an incendiary device conviction should be merged into his conviction for first degree burglary.

Section 701.9 provides:

> No person shall be convicted of a public offense which is necessarily included in another public offense of which the person is convicted. If the jury returns a verdict of guilty of more than one offense and such verdict conflicts with this section, the court shall enter judgment of guilty of the greater of the offenses only.

We conclude the facts of this case demonstrate the occurrence of two separate crimes in place and time. Under these facts, the offense of possession of an incendiary device took place at the time defendant had possession of and formed the intent to "throw the gallon jug filled with gas through the window" of the Journal building and to then ignite it. He did not do so, but did place the jug next to the building. This

constituted a distinct and separate offense from the act of burglary with the intent to commit theft, which later occurred.[1] *See State v. Holderness*, 301 N.W.2d 733, 740 (Iowa 1981) ("Under these facts, the sexual abuse which took place at the cemetery constituted a distinct and separate offense from the acts of kidnapping and sexual abuse which subsequently occurred. As such, the trial court did not err in convicting and sentencing defendant for both crimes."). *See also, State v. Spilger*, 508 N.W.2d 650 (Iowa 1993) ("Evidence was presented of at least five distinct acts by the defendant, also separate both in time and place. There is no merit in Spilger's claim that the offenses merged so that the lesser-included offense concept was implicated."); *State v. Constable*, 505 N.W.2d 473, 478 (Iowa 1993) (A defendant was charged with five sexual abuse crimes. He committed each of them during a single encounter with a child. Rejecting Constable's former jeopardy claim, our supreme court found that he "engaged in five distinct acts of physical contact; each contact alone met the definition of 'sex act' and each contact alone would be sufficient [for] one count of sexual abuse."); *State v. Riles-El*, 453 N.W.2d 538 (Iowa App. 1990) (two separate entries; two separate burglaries).

---

[1] We have reviewed our holding in *State v. Truesdell*, 511 N.W 2d 429 (Iowa App. 1993) and overrule any suggestion in that case that the mere filing of two charges as separate offenses avoids the provisions of section 701.9 We believe, to avoid the impact of that section, the facts must demonstrate the occurrence of two separate and distinct crimes as to place and time as we have held in the case at bar

001098

Defendant admitted he took the gallon jug of gasoline to the Journal office with the intent to burn down the building. This is all the State needed to prove in order to convict defendant of violating section 712.6, which provides:

> Any person who shall possess any incendiary or explosive device or material with the intent to use such device or material to commit any public offense shall be guilty of a class "C" felony.

Thus, defendant had committed the crime of possession of an incendiary device with the intent to use it to commit a public offense before he had decided to enter the Journal building.[2]

Defendant committed the separate crime of burglary when he broke into and entered the Journal building with the intent to take and destroy the police report of the shoplifting incident.[3] The crime was classified as burglary in the first degree because Safely was present in the Journal office at the time of the burglary and defendant had

---

[2] According to defendant's testimony, defendant no longer had the intent to commit arson when he decided to break into or enter the Journal building. The jury acquitted defendant on the arson count. This indicates the jury believed he had abandoned the intent to commit arson after setting the jug down outside the building.

[3] Burglary is defined in section 713.1:

> Any person, having the intent to commit a felony, assault or theft therein, who, having no right, license or privilege to do so, enters an occupied structure not being open to the public, or who remains therein after it is closed to the public or after the person's right, license or privilege to be there has expired, or any person having such intent who breaks an occupied structure, commits burglary.

possession of an explosive or incendiary device.[4] This latter element was satisfied for the "Molotov cocktail" was taken into and found in the Journal building.[5]

We conclude the district court did not err by refusing to merge defendant's conviction for possession of an incendiary device into his conviction for burglary in the first degree. Defendant's actions support his convictions for two separate offenses. Each conviction is supported by its own set of facts. We also note the district court charged the jury to consider defendant's guilt separately for each count.

II. We separately address the question of whether defendant should be sentenced for the crime of possession of an explosive device due to his claim it is a lesser-included offense of burglary in the first degree. Section 701.9 codifies the double jeopardy protection against cumulative punishments. *State v. Gallup*, 500 N.W.2d 437, 445 (Iowa 1993). The Double Jeopardy Clause protects against three things: (1) a second prosecution for the same offense after acquittal; (2) a second

---

[4] Section 713.3, regarding burglary in the first degree provides:

> A person commits burglary in the first degree if, while perpetrating a burglary in or upon an occupied structure in which one or more persons are present, the person has possession of an explosive or incendiary device or material, or a dangerous weapon, or intentionally or recklessly inflicts bodily injury on any person. Burglary in the first degree is a class "B" felony.

[5] The "Molotov cocktail" was in the Journal building. Defendant removed batteries from a smoke alarm. This combination of events provides sufficient evidence of defendant's intent to commit arson with the smaller bottle after having left the larger jug of gasoline outside the building. Thus, possession of the larger jug could be the basis of the section 712.6 violation and possession of the "Molotov cocktail" could separately support the element necessary for first degree burglary under section 713.3. The State also presented separate proof of defendant's burglary based on his intent to commit theft.

prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *State v. Wissing,* 528 N.W.2d 561, 565 (Iowa 1995).

The question of what punishments are constitutionally permissible is no different from the question of what punishments the legislature intended to be imposed. *State v. Aguiar-Corona,* 508 N.W.2d 698, 701 (Iowa 1993). Under the test articulated in *Blockburger v. United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed.2d 306, 309 (1932), where one offense is a lesser-included offense of another offense, punishment should not be imposed for each offense. *Wissing,* 528 N.W.2d at 566. However, if the *Blockburger* test shows the two offenses are not the same offense, there is a presumption the legislature intended multiple punishments for both. *Aguiar-Corona,* 508 N.W.2d at 702.

The test for lesser-included offenses is whether it is impossible to commit the greater offense without also including the lesser offense. *State v. Jeffries,* 430 N.W.2d 728, 740 (Iowa 1988). We apply this test by putting the offenses side by side and comparing the elements. *State v. Finnel,* 515 N.W.2d 41, 43 (Iowa 1994). If the lesser offense includes an element that is not required for the greater offense, the lesser is not included in the greater. *State v. Heacock,* 521 N.W.2d 707 710 (Iowa 1994).

The elements of burglary in the first degree are:

1. A person entered an occupied structure not open to the public, or remained after it is closed to the public, or broke into an occupied structure;

2. One or more persons are present in the occupied structure;
3. Having no right, license or privilege;
4. The person has the intent to commit a felony, assault or theft;
5. The person has possession of an explosive or incendiary device or material, or dangerous weapon, or intentionally or recklessly inflicts bodily injury on any person.

Iowa Code §§ 713.1, 713.3.

The elements of possession of an incendiary device are:

1. A person possesses any incendiary or explosive device or material;
2. With the intent to use such device or material to commit any public offense.

Iowa Code § 712.6.

Under one of the alternative means of committing burglary in the first degree, the two offenses share the element of possession of an incendiary or explosive device or material. However, the intent element of the two charges appears to be different. Burglary requires an intent to commit a felony, assault, or theft, while possession of an incendiary device requires an intent to use the device to commit any public offense. The burglary charge does not require any intent to use the incendiary device to commit a felony, assault, or theft, only that the person have possession of any incendiary device while committing a burglary. Thus, as in this case, a defendant could have possession of an incendiary device while committing a burglary, but have no intent to use the incendiary device to commit a public offense.

To make his point, defendant further alleges subtraction of elements one through three of burglary in the first degree will leave the necessary elements to prove

possession of incendiary device. "If, by subtracting one or more elements of a crime charged against a defendant, the remaining elements form the necessary elements of another crime, the latter crime is a lesser-included offense of the crime charged." *State v. Jackson*, 422 N.W.2d 475, 478 (Iowa 1988).

We disagree with defendant's contention. The remaining elements, four and five, of burglary in the first degree do not match the components of Iowa Code section 712.6: (1) defendant possesses any incendiary or explosive device or material; (2) defendant has the intent to use such device or material to commit any public offense.

As noted, element four of burglary in the first degree is satisfied by defendant's specific intent to commit a felony. This statutory delineation of the greater offense does not include the intent to use an incendiary device to commit a public offense as a necessary constituent. *See State v. Webb*, 313 N.W.2d 550, 552 (Iowa 1981)[6] (differentiating between "alternative enumerated definitions" of an offense and "alternative ways" to commit an offense; our supreme court concluded that assault is

---

[5] Although we look to the indictment or information to determine the enumerated statutory definition of a particular offense with which the defendant has been charged, alternative ways of committing a crime *within* an enumerated definition are not similarly treated. This is because the legal test for identifying lesser included offenses depends on the statutory definition of the greater offense rather than the evidence by which the offense may be proved in a particular case.
State v. Jackson, 422 N.W 2d 475, 478 (Iowa 1988).

not a lesser-included offense of manslaughter, even though it is one of the ways an element of the greater offense can be proven).

Finally, *State v. Jackson*, 422 N.W.2d 475 (Iowa 1988), sheds additional light on the questions before us. There, our supreme court stated,

> Clearly, murder may be attempted without soliciting another to commit the crime. For example, the "act" in attempted murder could be a direct one by the defendant such as shooting a gun at the intended victim. No other person need be involved. The statutory definition of attempted murder does not include solicitation as a necessary constituent. Removing any one of the elements of attempted murder does not leave the elements necessary to form solicitation to commit murder, nor is solicitation composed solely of some but not all of the elements of attempted murder. Solicitation, therefore, is not a lesser included offense of attempted murder and was not dismissed when the attempted murder charge against Jackson was dismissed.

Jackson, 422 N.W.2d at 478.

We conclude it is possible to commit the greater offense of burglary in the first degree without necessarily committing the lesser offense of possession of an incendiary device. Because we have concluded possession of an incendiary device is not a lesser-included offense of burglary in the first degree, then we may assume the legislature intended double punishment and such double punishment does not violate the Double Jeopardy Clause. *See Finnel*, 515 N.W.2d at 44.

III. Defendant claims the district court erred by improperly instructing the jury concerning the elements of burglary under an alternative not charged in the trial information. He stated the trial information listed only the entering alternative of burglary, while the jury instructions were based on the breaking alternative. He

claims he did not have sufficient notice to defend against this alternative, and asks to be granted a new trial.

The purpose of an indictment or information is to apprise the defendant of the crime charged so the defendant may have the opportunity to prepare a defense. *State v. Grice*, 515 N.W.2d 20, 22 (Iowa 1994). Generally, if the State specifies one way of committing a crime, the offense must be proved to have been committed the way charged. *Id.* at 22-23.

However, an information satisfies the constitutional requirement that the accused be informed of the charge against him where the crime charged is factually related to the crime of which he is convicted so as to allow him to prepare a defense. *State v. Taggert*, 430 N.W.2d 423, 427 (Iowa 1988) (*citing State v. Willis*, 250 N.W.2d 428, 430 (Iowa 1977)). The requirement the State prove an offense in the manner charged is not an end in itself, but merely a means of protecting a defendant from being misled by the charging instrument. *Grice*, 515 N.W.2d at 22.

In *Taggert*, the court found the defendant was not prejudiced because he admitted he had committed the acts which led to his conviction, even though he was not convicted of the crime charged in the indictment. *Taggert*, 430 N.W.2d at 427. We find defendant was not prejudiced here by the jury instructions. He admitted to breaking into the Journal building. We find no error in the jury instruction setting forth the elements of burglary.

IV. Defendant contends he did not receive the effective assistance of counsel. During the trial, when Safely took the witnesses stand, the following exchange occurred:

> DEBRA DUNCAN (Juror): Excuse me, Your Honor, I believe I know that witness.
>
> AMY BROCKERT (Juror): I do, too.
>
> THE COURT: Does that make a difference in your ability to be fair and impartial in this?
>
> DEBRA DUNCAN (Juror): Yes.
>
> THE COURT: Since no one asked you whether or not you knew any witnesses, that makes no difference at the present time.

Defendant believes he received ineffective assistance of counsel because his attorney failed to request disqualification of juror Debra Duncan after she indicated she could not be fair and impartial.

To establish a claim of ineffective assistance of counsel under the Sixth Amendment of the federal Constitution, the defendant must show: (1) counsel's performance fell outside the normal range of competency; and (2) the deficient performance so prejudiced the defendant as to give rise to a reasonable probability that, but for counsel's errors, the result in the proceedings would have been different. *State v. Heacock*, 521 N.W.2d 707, 710 (Iowa 1994).

We determine this issue should be preserved for postconviction proceedings. Immediately after this exchange the court held a discussion with the attorneys which

was not reported on the record. Because we do not know what took place at this sidebar conference, we conclude further proceedings are necessary before this issue may be resolved.

We affirm defendant's convictions. We reserve for postconviction proceedings his claim of ineffective assistance of counsel. Costs of this appeal are assessed to defendant.

AFFIRMED.

Huitink, J., concurs; Sackett, P.J., specially concurs without opinion.