

IN THE COURT OF APPEALS OF IOWA

FILED

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CLERK SUPREME COURT

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

DELMAR LEE CAMREN,)

Defendant-Appellant.)

9-126
88-1029

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Appeal from the Iowa District Court for Scott County
(No. 133281-01), James E. Kelley, Judge.

Defendant, who was charged with first-degree arson,
appeals his conviction by a jury of the lesser-included
offense of second-degree arson. **AFFIRMED.**

Stephen P. Wing of Dwyer & Wing, P.C., Davenport, for
defendant-appellant.

Thomas J. Miller, Attorney General; Sarah J. Coats,
Assistant Attorney General; and James D. Hoffman, Assistant
County Attorney, for plaintiff-appellee.

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

HABHAB, J.

Defendant-appellant Delmar Lee Camren appeals his jury conviction for second-degree arson, having been charged with first-degree arson. He contends the trial court erred by (1) denying his motion for a directed verdict of acquittal based on the insufficiency of the evidence; (2) failure to instruct the jury on the offenses of criminal mischief and reckless use of fire; and (3) refusing to submit special interrogatories proposed by defendant. He also makes allegations of jury misconduct contending the jury reached a compromise verdict and further that there was misconduct by prosecution witnesses who testified about a stabbing incident the trial court previously found to be irrelevant.

I. Sufficiency of the Evidence. Our standard of review for a sufficiency of the evidence challenge is well settled. The verdict will be upheld where there is substantial evidence to support the charge. State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984). Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. Id. The evidence is viewed in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the record. State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984). We consider all the evidence at trial,

not just the evidence that supports the verdict. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980).

Applying these principles to the trial evidence, we find the jury could reasonably have reached the following conclusions: On February 4, 1988, the defendant entered the apartment of Joyce Bennett. The defendant and Ms. Bennett had a personal relationship, but they had a violent argument approximately three days earlier, and she was staying with a friend. Six other apartments are contained in the same building as Ms. Bennett's apartment, and defendant was aware other persons were living in the building. While in the apartment, the defendant set fire to several articles of Ms. Bennett's clothes that were piled on the floor. Other property damaged by the fire included a badly burnt kitchen table and chair, a tablecloth, some scorching of a wall, and a burn on the floor. Soon after defendant left the apartment, Ms. Bennett arrived and observed smoke in the hallway. A neighbor called the fire department, and the fire was extinguished.

Although charged with first-degree arson, the jury convicted the defendant of second-degree arson. Arson is defined in relevant part as:

Causing a fire or explosion, or placing any burning or combustible material, or any incendiary or explosive device or material, in or near any property with the intent to destroy or damage such property, or with the knowledge that such property will probably be destroyed or damaged, is arson, whether or not any such property is actually destroyed or damaged

Iowa Code § 712.1 (1987).

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Arson in the first degree is defined as:

Arson is arson in the first degree when the property which the defendant intends to destroy or damage, or which the defendant knowingly endangers, is property in which the presence of one or more persons can be reasonably anticipated

Arson in the second degree is defined as:

Arson which is not arson in the first degree is arson in the second degree when the property which the defendant intends to destroy or damage, or which the defendant knowingly endangers, is a building or a structure, or real property of any kind, or standing crops, or is personal property the value of which exceeds five hundred dollars. Arson in the second degree is a class "C" felony. (Emphasis supplied.)

Iowa Code § 712.3 (1987).

It is clear that arson in the second degree is a lesser-included offense of arson in the first degree under the "legal" test set out in State v. Jeffries, 430 N.W.2d 728, 736 (Iowa 1988). State v. Royer, 436 N.W.2d 637, 641 (1989). As the lesser offense, arson in the second degree is composed solely of some but not all the elements of the greater offense, first-degree arson. Jeffries, 430 N.W.2d at 736. The greater offense cannot be committed without also committing the lesser. Id.

Defendant admits, in his brief, the circumstantial evidence presented at trial would have allowed the jury to convict him of arson in the first degree. An argument that the same evidence does not support a verdict of second-degree arson is without merit in light of the

principles set forth in Jeffries and the application of those principles to the crime of arson in the Royer case. The defendant admitted that he caused the fire in Bennett's apartment. It is undisputed that her apartment was housed in a building. Thus the only element remaining under arson in the second degree is whether the defendant caused the fire with the intent to destroy or damage the building ("or which the defendant knowingly endangers"). The record does contain sufficient evidence to support the jury verdict finding defendant guilty of second-degree arson.

II. Lesser-Included Offense Instructions. Defendant requested an instruction on criminal mischief, which is defined in Iowa Code section 716.1 (1987) as:

Any damage, defacing, alteration, or destruction of tangible property is criminal mischief when done intentionally by one who has no right to so act.

While the elements of this crime are somewhat similar to arson, criminal mischief requires the actual damage, defacing, alteration, or destruction of property, while the arson definition set out above does not require the actual destruction or damage of property to occur before the crime of arson is committed. Criminal mischief is not a lesser-included offense of first-degree arson under the legal test nor is it statutorily mandated to be such a lesser offense. See Jeffries, 430 N.W.2d at 737. This instruction need not have been given.

Although State v. Royer, 436 N.W.2d 637, 642 (Iowa 1989), holds reckless use of fire meets the legal test of being a lesser-included offense of arson in the first degree, defendant admits this instruction was not requested. Defendant has not preserved error on the district court's failure to give this instruction, and error regarding such failure is deemed waived. Jeffries, 430 N.W.2d at 737.

III. Special Interrogatories. Defendant requested and was denied submission of two interrogatories regarding whether the jury found (1) the defendant had attempted to put out the fire before he left the apartment and (2) whether the defendant believed the fire was out before he left the apartment. These interrogatories focus the jury's attention on defendant's subjective intent and knowledge after he started the fire. Defendant cites no authority to indicate he was entitled to such interrogatories. We find such failure to cite authority a waiver of this issue. Iowa R. App. P. 14(a)(13).

Further, under the circumstances here, the trial court was not required to submit special interrogatories to the jury. Special interrogatories are required "where the defense is an affirmative one, or it is claimed any witness is an accomplice, or there has been a failure to corroborate where corroboration is required," or "[w]here a defendant is alleged to be subject to the minimum sentence

provisions of section 912.7, The Code (use of firearms), and the allegation is supported by the evidence" Iowa R. Cr. P. 21.2. The defendant did not present any affirmative defenses, nor does he claim that any witness is an accomplice, or that there has been a failure to corroborate where corroboration is required. Thus, "[t]he limited mandate of rule 21(2) is not applicable in this case." State v. Gilroy, 313 N.W.2d 513, 520 (Iowa 1981).

We concluded the trial court did not err by refusing to submit the interrogatories.

IV. Compromise Verdict. Defendant argues on appeal the verdict of second-degree arson represents a compromise verdict. In support of this argument, defendant points to a post-trial letter to the parole board. The State has moved to strike the letter and all references to it in defendant's brief as not being a part of the record below. The State also points out defendant made no allegations of a compromise verdict in his motion for new trial, and the district court was not given an opportunity to rule on this issue. We will not consider grounds for reversal that the trial court has not had the opportunity to consider. State v. Martin, 385 N.W.2d 549, 551 (Iowa 1986).

Generally, a defendant's contention there is a compromised verdict is premised on the belief a jury, not adequately instructed on lesser-included crimes, will convict on insufficient evidence rather than acquit a

defendant they believe guilty of some crime. Jeffries, 430 N.W.2d at 733. In this case, the jury was instructed on the lesser-included offenses of second and third degree arson. We have already concluded there is sufficient evidence in the record to support a verdict of guilty for second-degree arson.

The record does not support defendant's assertion that the jury reached an unlawful verdict.

[T]o impeach a verdict on the basis of jury misconduct, three conditions must be met: (1) evidence from the jurors must consist only of objective facts as to what actually occurred in or out of the jury room bearing on misconduct; (2) facts or statements complained of must exceed tolerable bounds of jury deliberations; and (3) it must appear that the conduct was calculated to, and with reasonable probability did, influence the verdict.

State v. Cullen, 357 N.W.2d 24, 27 (Iowa 1984). The record in this case is devoid of any evidence whatsoever that the verdict was anything but unanimous.

Defendant's contention his conviction is the result of a compromised verdict is based on mere speculation as to what evidence the jury "must have" believed or disbelieved. He presented no jury member affidavits to indicate this was not a unanimous verdict. The record shows the jury was polled. The State's motion to strike the parole board letter is sustained, and we conclude defendant's argument regarding a compromised verdict to be without merit.

V. Witness Misconduct. Defendant contends two prosecution witnesses purposely continued making statements regarding a stabbing incident after he had objected to the testimony and the court sustained the objection on the ground the evidence was irrelevant and the trial court told the jury to disregard the testimony. Defendant contends he did not continue to object when the witnesses later made the statements in fear of drawing attention to improper evidence which was prejudicial to his client. The State contends repeated objections were necessary and failure to make such objections waives this issue on appeal. See State v. Atwood, 342 N.W.2d 477, 475 (Iowa 1984); State v. Johnson, 272 N.W.2d 480, 483 (Iowa 1979).

We cannot accept defendant's argument that a previously-sustained objection should be considered a standing objection just as overruled objections are for purposes of preserving error. See State v. Schmidt, 312 N.W.2d 517, 518 (Iowa 1981). Failure of defense counsel to continue objecting did not give the trial court opportunity to correct possible error by admonishing the jury or witnesses. State v. Atwood, 342 N.W.2d 474, 477 (Iowa 1984). This is particularly true in this case for the testimony complained of did not result from the questions asked by the prosecutor; rather, the comments were gratuitous comments made by the witnesses that passed without objection.

Even if we assume the witnesses' comments were improper and objections to the statements would have been sustained, defendant must prove admission of the statements was so prejudicial he was prevented from having a fair trial. State v. Brotherton, 384 N.W.2d 375, 381 (Iowa 1986). Defendant testified several times he and Ms. Bennett had frequent fights. This was not a case in which the person who started the fire was unclear. Defendant admitted starting the fire. In light of the evidence, admission of the statements, if error, was harmless and did not deny defendant a fair trial. Id. at 380. Defendant's conviction and sentence is affirmed.

AFFIRMED.