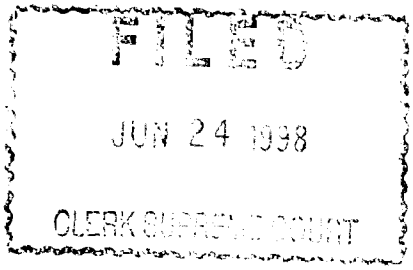
IN THE COURT OF APPEALS OF IOWA

No. 8-200 / 97-0825
Filed June 24, 1998



STATE OF IOWA,
Appellee,

vs.

WILLIAM A. HESKETT,
Appellant.

Appeal from the Iowa District Court for Polk County, Richard G. Blane, II, Judge.

William A. Heskett appeals from his convictions, following a jury trial, for first-degree murder and second-degree arson in violation of Iowa Code sections 707.1, 707.2, 712.1 and 712.2 (1995). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Dennis D. Hendrickson, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, John P. Sarcone, County Attorney, and Odell McGhee, Assistant County Attorney, for appellee.

Heard by Sackett, P.J., and Huitink and Streit, JJ.

STREIT, J.

Heskett appeals his conviction and sentence for first-degree murder and second-degree arson. He argues the district court improperly failed to define wilful injury to the jury. In light of the other instructions given to the jury and the evidence presented by the State, the court's failure to define wilful injury was not error.

I. Background Facts & Proceedings.

William Heskett shot his long-time girlfriend in the head after she told him to leave her home. After that, he set the house on fire. Heskett was tried for first-degree murder and first-degree arson.

The court instructed the jury on first-degree murder, but refused the State's submission of a felony murder instruction based on the felony of wilful injury. The court reasoned that wilful injury was "subsumed" within first-degree murder.

Among the instructions to the jury was the following instruction number twenty-four: "Malice may be inferred from the commission of wilful injury which results in death." Heskett objected to this instruction, arguing it would confuse the jury because wilful injury was not defined. The court overruled his objections, concluding the statutory definition of wilful injury was unnecessary because the jury would apply the common sense meaning of "wilful" and "injury."

The jury found Heskett guilty of first-degree murder and second-degree arson. He was sentenced to life imprisonment and a ten-year prison term. Heskett appeals.

II. Standard of Review.

Heskett argues his constitutional right to due process was infringed upon by the submission of instruction number twenty-four because it allowed the jury to convict him without requiring the State to prove malice or malice aforethought. Heskett did not make this objection at trial. Thus, his constitutional claim is not preserved for appeal. *See State v. Taggart*, 430 N.W.2d 423, 425 (Iowa 1988). At trial, Heskett did object that instruction twenty-four was duplicative and would be confusing to the jury. This objection was properly preserved. Review of submission of jury instructions is for errors at law. *State v. Bennett*, 503 N.W.2d 42, 45 (Iowa App. 1993).

III. Jury Instruction Twenty-Four: Malice Inferred from Wilful Injury.

Although Heskett did not properly preserve his constitutional claim, we address it in conjunction with Heskett's preserved objection to Jury Instruction twenty-four. The trial court in this case instructed the jury "malice may be inferred from the commission of wilful injury which results in death."[1] Heskett contends the instruction improperly permitted the jury to infer malice to support a conviction for murder if it found wilful injury was committed. The court did not define wilful injury.

Malice or malice aforethought may be implicit. Iowa Code § 707.1 (1995); *see State v. Veverka*, 271 N.W.2d 744, 747 (Iowa 1978). In *State v. Bennett*, 503 N.W.2d

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[1] This instruction was derived from Iowa Uniform Criminal Jury Instruction 700.9.

42, 46 (Iowa App. 1993),[2] a jury instruction was approved which stated: "Malice may be inferred from the commission of [a felony] which results in death." The forcible felony in that case was wilful injury. We concluded the instruction only allowed an inference of malice and did not relieve the State of its obligation to prove malice. *Id.* We acknowledge a finding of wilful injury does not necessarily establish malice. *See Ragland*, 420 N.W.2d at 794. However, the instruction in this case only created a permissible inference and did not require the jury to find malice based on a finding of wilful injury. It permitted the jury to infer malice from the acts of committing wilful injury resulting in death. Allowing a jury to draw this permissible inference does not merge the separate mens rea elements of murder and wilful injury. An inference is a permissible finding based on the existence of certain facts. *State v. Lewis,* 242 N.W.2d 711, 716 (Iowa 1976). Thus, to infer malice from the commission of wilful injury means to derive a finding of malice from the facts involved in committing wilful injury.

Heskett argues the statutory definition of wilful injury needed to be given to the jury. He argues without the statutory definition the jury was unaware there must be "specific intent to cause serious injury." However, the mens rea element of wilful injury was not relevant to this case. As the defendant himself points out, a finding of

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[2] The trial court also instructed the jury that malice aforethought may be inferred from the defendant's use of a dangerous weapon. The propriety of this inference was approved by the Iowa Supreme Court in *State v. Jespersen*, 360 N.W.2d 804, 807 (Iowa 1985).

wilful injury is not the equivalent of malice. *See Ragland*, 420 N.W.2d at 794. The jury was deciding whether malice existed to support a murder conviction, not whether the elements of wilful injury were satisfied. Thus, the court was correct to instruct the jury they could look at the facts involved in committing a wilful injury to infer malice.

Even if it was error not to define wilful injury to the jury, the error was harmless. There was overwhelming evidence the defendant fired a gun at close range into the head of his girlfriend, penetrating her brain. The jury could have properly inferred malice aforethought from Heskett's use of a dangerous weapon. "Dangerous weapon" was defined for the jury. In light of the evidence and the instruction regarding malice being inferred from use of a dangerous weapon, the failure to define wilful injury was harmless error. *See Seiler v. Thalacker*, 101 F.3d 536, 539-40 (8th Cir. 1996).

AFFIRMED.

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