FILED
SEP 29 1992
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 2-349 / 91-1657

STATE OF IOWA,

Appellee,

vs.

SHAWN DEAN FOSTER,

Appellant.

Appeal from the Iowa District Court for Linn County, Paul J. Kilburg, Judge.

The defendant, Shawn Dean Foster, appeals his conviction and sentence, following a jury trial, finding him guilty of arson in the first degree in violation of Iowa Code section 712.2 (1989). **AFFIRMED.**

Ronald L. Ricklefs of Ricklefs & Eganhouse, Cedar Rapids, for appellant.

Bonnie J. Campbell, Attorney General; Thomas S. Tauber, Assistant Attorney General; Denver D. Dillard, County Attorney; and Jerry Vander Sanden, Assistant County Attorney, for appellee.

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

DONIELSON, P.J.

The defendant, Shawn Foster, appeals his conviction and sentence, following a jury trial, finding him guilty of arson in the first degree in violation of Iowa Code section 712.2 (1989).

On November 20, 1990, Foster and his friend, Jennifer Larsen, decided to go out drinking and shoot pool at a bar in Cedar Rapids. During the course of that evening, Foster and Larsen went to several bars and drank approximately twenty beers each. Foster also had several mixed drinks and several "cherry bombs," cherries soaked in grain alcohol.

Later that evening, Larsen suggested they go to the home where she was housesitting. Larsen arrived at the home between 11:45 p.m. and midnight and Foster met her soon afterwards. They stayed up watching television until Foster passed out, at which time Larsen went to bed.

Some time later, Foster woke up, used the bathroom facilities and went to tell Larsen he was leaving. However, instead of leaving, Foster returned to the bathroom and took a can of hair spray he had noticed earlier. He took the hair spray into the living room and began igniting the spray in the air with his cigarette lighter. The effect of igniting the spray produced a stream of flame between a foot and a foot-and-a-half long.

Foster then directed the flaming spray toward the carpet near a sliding glass door. At trial, Foster

testified he did this to kill bugs which he saw on the floor near the door. The carpet initially caught fire, but Foster stamped it out. He then directed the flame towards one of the curtains which covered the sliding glass door. Foster watched the fire burn and saw a second curtain catch fire from the first curtain.

The fire on the first curtain eventually went out by itself. However, the fire on the second curtain continued to burn. Foster then left. At trial, he testified he believed the fire would just put itself out. About fifteen to thirty minutes later, a neighbor noticed the house on fire and called police. Although Larsen was asleep when Foster left, she escaped uninjured.

The next day, Foster was interviewed by Lieutenant Brockhohn of the fire department and by Detective Parr of the police department. Foster admitted using the hair spray can, but never made any mention to either of the investigators about trying to kill any bugs.

Foster was charged with arson in the first degree. Foster's trial counsel did not file a notice of intention to rely upon the defenses of intoxication or of diminished capacity defense. The jury found Foster guilty as charged. After the verdict, defense counsel sent a letter to the jurors requesting information as to whether the inclusion of instructions on diminished capacity and intoxication would have influenced the outcome. Two of the jurors returned the letter, indicating the verdicts would

have been different. The trial court denied Foster's motion for new trial and motion in arrest of judgment. Foster now appeals.

Foster argues the record does not contain sufficient evidence of illegal intent or knowledge to sustain his conviction of arson in the first degree. He also argues he was denied effective assistance of counsel on the grounds his trial counsel did not timely file a notice of intention to rely upon an intoxication defense or a diminished capacity defense. On our review, we affirm the district court.

I. **Sufficiency of the Evidence to Prove Arson in the First Degree.** Foster first argues the record does not contain sufficient evidence of illegal intent or knowledge to sustain his conviction of arson in the first degree.

Our standard of review is well settled. A 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).

Under Iowa Code section 712.2 (1989), arson can be committed in two ways: by causing a fire with the intent that the subject property be destroyed, or by causing a fire with the knowledge that the subject property will be destroyed or damaged. Here, the evidence produced at trial, taken in the light most favorable to the State, may reasonably lead to the inference that Foster committed first-degree arson under either alternative.

Under the knowledge alternative, this evidence includes proof that when Foster left the home, he knew the fire was continuing to burn. Foster saw the fire spread from one curtain to another. He also saw the damage the fire had already done to the carpet. We find Foster's own self-serving testimony that he thought the fire would extinguish itself was properly rejected by the jury and that testimony does not refute the sufficiency of this evidence.

There was also sufficient evidence to convict Foster under the intent alternative. In addition to the evidence set forth above, other evidence includes proof that Foster, knowing the fire was still burning, left the home without warning Larsen or alerting the authorities. Even though Foster saw the damage done by the fire to the first curtain, he never attempted to extinguish the fire on the second curtain. Finally, Foster started more than one

fire. All of this evidence suggests an intent to destroy property.

Therefore, we find there was substantial evidence to support the verdict of first-degree arson and the motions for new trial and in arrest of judgment were properly denied.

II. Ineffective Assistance of Counsel. Foster also contends he was denied effective assistance of counsel by his trial counsel's failure to file a notice of intention to rely upon the defenses of intoxication or of diminished responsibility. He relies upon a letter which defense counsel sent to the jurors requesting information as to whether the inclusion of instructions on diminished capacity and intoxication would have influenced the outcome. Two of these letters were returned by jurors who indicated their verdicts would have been different.

Where the record on direct appeal is not adequate to permit us to resolve the issue, we preserve the defendant's claim for postconviction proceedings so the facts may be so developed. State v. Koenighain, 356 N.W.2d 237, 238 (Iowa App. 1984). This also gives the allegedly-ineffective attorney the opportunity to explain his conduct. State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978).

We conclude there is an inadequate record for us to adjudicate Foster's claim without counsel's explanation for his conduct. However, Foster is reminded jurors may give

evidence of objective facts of what actually transpired in the jury room, but not as to what subjectively influenced their decision. Ryan v. Arneson, 442 N.W.2d 491, 494 (Iowa 1988) (citing Harris v. Deere & Co., 263 N.W.2d 727, 729-30 (Iowa 1978)). To the extent these letters attempted to impeach the verdict of the jury, this evidence would not be admissible.

We preserve Foster's ineffective assistance of counsel claim for a later proceeding.

The costs of this appeal are taxed to Foster.

For all the reasons stated, the judgment of the district court is affirmed.

AFFIRMED.