

IN THE COURT OF APPEALS OF IOWA

No. 0-688 / 10-0332
Filed October 6, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DONALD KEITH OSTER,
Defendant-Appellant.

Appeal from the Iowa District Court for Woodbury County, Steven J. Andreasen, Judge.

Donald Oster appeals his conviction for neglect of a dependent person.

AFFIRMED.

Mark C. Smith, State Appellate Defender, and David Adams, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Elisabeth Reynoldson, Assistant Attorney General, Patrick Jennings, County Attorney, and James D. Loomis, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Doyle and Mansfield, JJ. Tabor, J., takes no part.

MANSFIELD, J.

Donald Oster appeals his conviction for neglect of a dependent person. See Iowa Code § 726.3 (2007). He argues the district court erred in refusing to instruct the jury on wanton neglect of a dependent adult, see Iowa Code § 726.8(1), as a lesser-included offense. We agree with the district court that wanton neglect of a dependent adult is not a lesser-included offense of neglect of a dependent person, and therefore affirm.

I. Background Facts and Proceedings

Paramedics were dispatched to a residence on April 23, 2008, in response to a call about a fallen injured party. Donald Oster met the paramedics at the door and allowed them to enter. Upon entering, the paramedics were immediately struck by an overwhelming odor of urine. They were directed by Oster to a back bedroom. As the paramedics made their way to the bedroom, the odor became stronger. Inside the bedroom, the paramedics found the carpet and walls covered in fecal matter and the mattress soaked in urine and feces. They discovered Oster's elderly mother Betty, lying on the floor next to her bed on the pile of fecal matter.

The paramedics attended to Betty, initially finding she was extremely dehydrated, very lethargic, and unable to answer questions except for her name. Her skin was yellowish in color and irritated to the point of rubbing off in areas. She also had redness, similar to that of a burn, on the perianal area of her body from frequent urination, and was covered in fecal matter. The paramedics assessed that Betty's physical health was in serious condition and quickly moved her to the hospital.

In a police interview the following day, Oster described how he lived with his mother and took care of her because she had several medical conditions which made it difficult for her to care for herself. Oster aided Betty in most aspects of her life, including getting her to doctor's appointments, picking up her prescriptions, and preparing her food. However, in the past month, Betty's condition had deteriorated such that she could no longer walk using a cane. Oster allowed Betty to go to the bathroom in her bed. He did not clean up afterwards. Oster also did not try to enlist any outside help for Betty's needs.

Approximately one week after being taken to the hospital, Betty died of metastatic carcinoma of the liver.

On February 25, 2009, the State charged Oster with neglect of a dependent person, a class C felony, in violation of Iowa Code section 726.3. On October 14, 2009, Oster filed a motion to add a lesser-included offense jury instruction for wanton neglect of a dependent adult, a serious misdemeanor in violation of section 726.8(1). There was no formal ruling on the motion. The case went to trial on November 5, 2009. During the jury instruction conference, Oster requested a ruling on his previously filed motion. The district court denied the motion. The court reasoned that the charged offense could be established by proving the defendant acted knowingly or recklessly, whereas the asserted lesser-included offense required proof the defendant acted knowingly. Therefore, in the district court's view, the latter could not be a lesser-included offense of the former. The jury subsequently found Oster guilty of neglect of a dependent person. Oster appeals.

II. Standard of Review

We review a refusal to submit a jury instruction for corrections of errors at law. *State v. Spates*, 779 N.W.2d 770, 775 (Iowa 2010).

III. Analysis

Oster asserts that the district court erred in refusing to give his requested jury instruction on wanton neglect of a dependent adult. In determining whether one crime is a lesser-included offense of another, Iowa applies the “impossibility” test, using a “strict statutory element approach” as outlined in *State v. Jeffries*, 430 N.W.2d 728, 740 (Iowa 1988). See *State v. Ondayog*, 722 N.W.2d 778, 783 (Iowa 2006); *State v. McNitt*, 451 N.W.2d 824, 825 (Iowa 1990). The rule established in *Jeffries* states: “[T]he lesser offense is necessarily included in the greater offense if it is impossible to commit the greater offense without also committing the lesser offense.” 430 N.W.2d at 740. This legal test focuses on the statutory elements rather than the charge or evidence presented. *Id.*

In applying the *Jeffries* test, we must look first to the elements of the two neglect statutes. Neglect of a dependent person contains the following elements:

- 1) a person having custody of any other person,
- 2) where that other person by reason of mental or physical disability is not able to care for one’s self, and
- 3) the person having custody knowingly or recklessly exposes such other person to a hazard or danger against which such person cannot reasonably be expected to protect one’s self.

See Iowa Code § 726.3.

Wanton neglect of a dependent adult has the following elements:

- 1) a caretaker,
- 2) knowingly acts in a manner likely to be injurious to the physical, mental, or emotional welfare of an adult, and
- 3) that adult is a dependent adult.

See *id.* § 726.8(1).

As the district court correctly found, the alleged “lesser-included offense” actually has a higher mens rea standard. Iowa Code section 726.3 makes it a crime to *knowingly or recklessly* expose the dependent to a hazard or danger, but section 726.8(1) requires the defendant to have *knowingly* acted in a manner likely to be injurious to the dependent. Thus, it is possible to commit neglect of a dependent person without committing wanton neglect of a dependent adult. The latter cannot be a lesser-included offense of the former.

Thus, we find the district court properly determined that wanton neglect of a dependent adult was not a lesser-included offense of neglect of a dependent person and correctly refused Oster’s instruction. Accordingly, we affirm.

AFFIRMED.