IN THE COURT OF APPEALS OF IOWA

No. 8-236 / 07-0990
Filed April 30, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ROBERT JOSEPH PREHM,
Defendant-Appellant.

Appeal from the Iowa District Court for Wright County, Kurt L. Wilke, Judge.

Robert Prehm appeals the sentence entered following a jury verdict finding him guilty of second-degree arson, second-degree burglary, and third-degree burglary. **AFFIRMED.**

Martyn S. Elberg of Elberg Law Office, Eagle Grove, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, and Eric R. Simonson, County Attorney, for appellee.

Considered by Huitink, P.J., and Zimmer and Miller, JJ.

HUITINK, P.J.

Robert Prehm appeals the sentences entered following a jury verdict finding him guilty of second-degree arson, second-degree burglary, and third-degree burglary. We affirm.

I. Facts and Prior Proceedings

Prehm's convictions arose from a fire set to a Clarion home on the evening of December 12, 2003. That same evening, Prehm told Patrick Dillon that he had set fire to the Clarion home. Later, with police listening via a recording device, Prehm told Dillon that he had set the fire in question.

Prehm was charged with second-degree arson, second-degree burglary, and third-degree burglary. A jury eventually found Prehm guilty on all three counts. The district court sentenced Prehm to two ten-year terms of incarceration to be served consecutively and a five-year term of incarceration to be served concurrently. Prehm appealed, claiming his trial counsel provided ineffective assistance and claiming the district court failed to state its reasons for imposing consecutive sentences. Our court found Prehm had failed to prove his ineffective assistance claim. However, we remanded the case for resentencing because the district court had failed to state any reasons on the record for the sentences imposed.

On remand, the district court sentenced Prehm to two consecutive ten-year terms of incarceration for the arson and second-degree burglary convictions and a five-year concurrent term for the third-degree burglary conviction. The court listed several reasons for the consecutive sentences.

In this second appeal, Prehm claims the district court abused its discretion when it imposed consecutive sentences. He also contends the sentences were illegal because the court should have merged the arson conviction into the second-degree burglary conviction pursuant to Iowa Code section 701.9 (2003).

II. Merits

A. Consecutive Sentences

Appellate review of the district court's sentencing decision is for an abuse of discretion. *State v. Laffey*, 600 N.W.2d 57, 62 (Iowa 1999). An abuse of discretion is found when the court exercises its discretion on grounds clearly untenable or to an extent clearly unreasonable. *Id.* A court considers all pertinent matters in determining a sentence including the nature of the offense, the attending circumstances, defendant's age, character, propensities, and chances of his reform. *Id.* Iowa Code section 901.5 also requires the court to determine which sentence "will provide maximum opportunity for the rehabilitation of the defendant, and for the protection of the community from further offenses by the defendant and others."

Prehm contends the district court abused its discretion in ordering the prison terms on each count to be served consecutively rather than concurrently. Prehm cites no reason why the reasons for sentencing were inappropriate. He only states that he "feels concurrent ten-year sentences would not diminish the seriousness of the convictions."

The district court listed the following reasons for imposing consecutive sentences:

> a. This Defendant has had a lengthy criminal history that extends back into the early 1980s.
> b. He has been favored with probation in the past which he has failed on certain occasions to complete and has had his probation revoked.
> c. Even though the Defendant was convicted after a trial and jury verdict, there is no appearance on his part as to any remorse or guilt.
> d. The nature of the charges of Arson in the Second Degree and Burglary in the Second Degree are of such a serious nature that this Court believes consecutive sentences are warranted, particularly since the Defendant's past criminal history shows no intent on his part towards rehabilitation. This Court believes that the consecutive sentences will offer protection to society from the Defendant's criminal acts and also afford the Defendant some extended time while incarcerated to seek the rehabilitation that he so desperately needs.

Additionally, the court stated "the situation has come to the point that by running the sentences concurrently in all regards, it diminishes the seriousness of the offenses for which Mr. Prehm was convicted."

The factors utilized by the district court were proper sentencing considerations. *See* Iowa Code § 901.5; *Laffey*, 600 N.W.2d at 62. Accordingly, we discern no abuse of discretion in the court's sentencing decision.

B. Merger

Prehm also contends the consecutive sentences entered on his convictions for second-degree burglary and second-degree arson violate Iowa's merger statute—Iowa Code section 701.9. We review an alleged violation of section 701.9 for a correction of errors at law. *State v. Belken*, 633 N.W.2d 786, 794 (Iowa 2001); *State v. Lambert*, 612 N.W.2d 810, 815 (Iowa 2000).

Iowa Code 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.

To determine whether one public offense is "necessarily included" in another public offense, we apply an "impossibility" test. *State v. Hickman*, 623 N.W.2d 847, 850 (Iowa 2001). Under this test, "[i]f the greater offense cannot be committed without also committing the lesser offense, the lesser is included in the greater." *Id.* Consequently, we focus on the legal elements of each offense to determine whether it is possible to commit the greater offense without also committing the lesser offense. *Lambert*, 612 N.W.2d at 815; *see also State v. Caquelin*, 702 N.W.2d 510, 511 n.1 (Iowa Ct. App. 2005) (stating the "legal elements test" is also referred to as the "impossibility test").

> The elements of second-degree burglary submitted to the jury were:
>
> 1. On or about the 12th day of December, 2003, the Defendant entered the house at 320 3rd Avenue SE in Clarion, Iowa.
> 2. The house was an occupied structure.
> 3. The Defendant did not have permission or authority to enter the house.
> 4. The Defendant did so with the specific intent to commit arson.
> 5. During the incident, the Defendant had possession of an explosive or incendiary device or material.

The elements of second-degree arson submitted to the jury were:

> 1. On or about the 12th day of December, 2003, the Defendant caused a fire, or placed a burning, combustible, or explosive material or device, in or near property.
> 2. The Defendant intended to destroy or damage the property, or knew the property would probably be destroyed or damaged.
> 3. The property was a building, structure, real property, or personal property.
> 4. The value of the personal property exceeded $500.00.

Prehm concedes neither offense is a "lesser offense" of the other. Instead, he argues that each offense is "totally included" in the other. Because the elements

for second-degree burglary require he "have the specific intent to commit arson" and the elements for arson allow a person to be convicted even if they do not successfully cause a fire, Prehm claims all of the elements of arson were included in the burglary instruction. Thus, under the intent to commit burglary alternative actually charged in this case, he claims "it is not possible to commit burglary without also committing arson."

We disagree. The differing elements in the offenses of second-degree arson and second-degree burglary establish that both offenses can be committed separately, without also committing the other.

In order to convict Prehm of second-degree burglary under the charged intent-to-commit-arson alternative, the State had to prove Prehm entered an occupied structure with the intent to commit arson and that, during the incident, he had possession of "an explosive or incendiary device or material." *See* Iowa Code §§ 713.1, 713.5. Conversely, in order to prove Prehm committed second-degree arson, the State did not have to prove Prehm entered the house with the intent to destroy it. Instead, the State had to prove he, with the intent to destroy the property, either (1) caused a fire or (2) placed a burning, combustible, or explosive material or device in or near the property. Iowa Code §§ 712.1, 712.3.

We find the element of entry of an occupied structure with the specific intent to commit arson is distinguishable from the element that he either caused a fire or placed the material or device in or near property with the intent to destroy the property. For example, had the State proved Prehm entered the house with the intent to commit arson (while he also had possession of an explosive or incendiary device or material), but Prehm proved he had subsequently

abandoned his plan and not had the intent to cause the fire or not placed the incendiary material in or near the property with the intent to destroy the property, then Prehm would have been guilty of only second-degree burglary. On the other hand, had Prehm proved he did not have the specific intent to commit arson when he first entered the house, but had at some later point caused a fire or placed incendiary material within the house with the intent to damage the property, he would be guilty of second-degree arson but not guilty of the crime of second-degree burglary because he did not enter the house with the intent to commit arson. Because it is possible to commit one offense without committing the other, these elements are distinguishable and section 701.9 is inapplicable. *See Hickman*, 623 N.W.2d at 850; *cf. State v. Daniels*, 588 N.W.2d 682, 684-85 (Iowa 1998) (holding elements of first-degree burglary conviction were not the same as elements of assault while participating in a felony and thus sentences did not violate merger statute).

In light of the foregoing, we conclude the district court did not err by failing to merge the convictions for second-degree burglary and second-degree arson. Therefore, we affirm the aforementioned convictions and sentences.

AFFIRMED.