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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-319 / 88-995

STATE OF IOWA,

Plaintiff-Appellee,

vs.

TIMOTHY HOWARD BECK,

Defendant-Appellant.

604

Appeal from the Iowa District Court for Black Hawk County (D7X012378), Peter Van Metre, Judge.

Defendant appeals his conviction, following a jury trial, of second-degree burglary, second-degree criminal mischief, and third-degree theft. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR A NEW TRIAL.**

Raymond E. Rogers, State Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Sarah J. Coats, Assistant Attorney General; and Scott Lemke, Assistant County Attorney, for plaintiff-appellee.

Considered by Oxberger, C.J., and Sackett and Habhab, JJ.

SACKETT, J.

Defendant-appellant Timothy Howard Beck appeals his conviction, following a jury trial, of second-degree burglary, second-degree criminal mischief, and third-degree theft. Defendant contends he was prejudiced by an incorrect instruction given to the jury and by the admission of a written statement he made to the police. He also claims the State did not prove all the elements of burglary beyond a reasonable doubt, and the trial court erred in allowing the State to amend the trial information. We affirm in part, reverse in part, and remand the case for a new trial.

In August 1987 defendant moved into a house in Dunkerton, Iowa with Sharee Feldman. While Feldman paid the first month's rent of $200, testimony at trial was that she and the defendant rented the house as joint tenants. Neither person signed a lease. Feldman received a rent receipt made out in her name alone.

Once the couple moved into the Dunkerton house, defendant was rarely home. He slept there approximately five times. After about two weeks, he gave Feldman his key to the house and told her he would be unable to see her for quite a while. He also asked for the title to her car, which she gave him. Feldman soon found out defendant had moved in with an ex-girlfriend of his. With police assistance, Feldman retrieved her car from the

ex-girlfriend's residence on August 29. While doing so, Feldman was verbally abused by the ex-girlfriend and the defendant. They threatened to "trash her house." Feldman left the Dunkerton house that night and went to stay with a friend. She left personal property belonging to her and personal property belonging to defendant in the house.

Feldman returned to the Dunkerton house on September 2 and discovered that someone had broken in, stolen several items, and damaged some of her personal property. Defendant later made a written statement to police officers in which he admitted responsibility for the break-in, and that he had no right to be in the house. Defendant's statement said that Donald Reuter had taken part in the crime, and Reuter also took part in other burglaries that same night.

Defendant was originally charged with second-degree burglary and third-degree criminal mischief. See Iowa Code §§ 713.1, 713.5, 716.1, 716.5 (1987). Before trial, the court allowed the State to add a count of third-degree theft, sections 714.1 and 714.2, and to increase the criminal mischief charge to the second degree, sections 716.1 and 716.4. A jury returned a verdict of guilty on all three counts: second-degree burglary, second-degree criminal mischief, and third-degree theft.

Defendant contends he was prejudiced by an instruction given to the jury during its deliberations. The jury sent a note to the court asking, "Is a verbal agreement legally binding?" The court replied, "A 'verbal agreement' is legally binding if money or some other thing of value has been paid in consideration for the agreement." Defendant objected to this answer, contending it was an incorrect statement of the law and might mislead the jury in their attempt to decide whether defendant was a tenant in the house at the time of the break-in. The court overruled the objection and submitted the answer.

Defendant contends the giving of the instruction was error. He argues since he did not help pay the August rent, the jury may have used the court's answer to conclude he was never a tenant in the house and thus did not have a "right, license or privilege" to enter the house. See Iowa Code § 713.1 (1987). The trial court's answer did not accurately state the law regarding oral leases. "Generally, to create the relationship of landlord and tenant, it is only necessary to identify the parties, provide a definite description of the property, and include a statement of the term and the amount of rent agreed to be paid. This may be done orally or by writing . . . ." McCarter v. Uban, 166 N.W.2d 910, 914 (Iowa 1969). An oral lease is created if it is shown the parties' intent is for one of them to divest himself of, and the other to come

into, possession of the property for a determinate time. Baie v. Nordstrom, 238 Iowa 866, 871, 29 N.W.2d 211, 214 (1947). Defendant could have been a legal tenant of the Dunkerton house, based only on the oral agreement, notwithstanding the fact that he paid no rent.

The trial court's incorrect instruction had the potential to affect the jury's verdict with regard to the burglary charge. If the jury incorrectly concluded defendant was never a tenant, the jury could have failed to reach the question of whether he was a tenant at the time of the break-in. Prejudice to the defendant is assumed when error is found. State v. Henze, 356 N.W.2d 538, 540 (Iowa 1984). The State has failed to overcome the presumption of prejudice. See id. The case must be reversed and remanded for a new trial on the burglary charge.

Defendant also alleges the State failed to present sufficient evidence to allow the jury to find that he had not been a tenant at the time of the break-in. We find there is conflicting evidence in the record as to defendant's right to be in the Dunkerton house at that time. The question of his tenancy was a question of fact and was properly submitted to the jury.

Defendant also contends the trial court erred in admitting an irrelevant and prejudicial portion of the statement he made to the police regarding the break-in.

Defendant objects to a portion of the statement that refers to other crimes allegedly committed by Donald Reuter on the night he and defendant broke into the house in Dunkerton. At trial, defendant objected to those portions of the statement as being irrelevant and more prejudicial than probative. We question the relevancy of such information to the State's case. Because of our holding, we need not decide whether the admission of this evidence was prejudicial.

Defendant's final contention is that the trial court erred in allowing the State to amend the trial information to add the charge of theft and increase the degree of criminal mischief charged. Amendment of a trial information is not allowed if it would prejudice substantial rights of the defendant, or if a wholly new and different offense is charged. Iowa R. Crim. P. 4(8); see State v. Williams, 328 N.W.2d 504, 505 (Iowa 1983) (both prongs of test must be satisfied). The amendment here added a charge of third-degree theft and increased the criminal mischief charge to second-degree. Defendant was originally charged only with second-degree burglary and third-degree criminal mischief.

The elements of second- and third-degree criminal mischief, as they apply to defendant, are identical, except for the dollar amount of property damaged caused. Compare Iowa Code § 716.4 with § 716.5 (1987). We find the

amendment increasing the degree of criminal mischief did not add a wholly new and different offense. Cf. State v. Sharpe, 304 N.W.2d 220, 223 (Iowa) (first-degree murder wholly new and different offense from second-degree murder due to difference in elements), cert. denied, 454 U.S. 834 (1981).

We also find the amendment did not prejudice defendant. No matter what the degree of criminal mischief charged, the defendant knew that evidence would be introduced by the State as to the value of the damaged property. Defendant's trial strategy would not vary with the degree of the offense charged; he had sufficient notice to allow him to prepare his defense. See State v. Schertz, 330 N.W.2d 1, 2-3 (Iowa 1983); State v. Williams, 328 N.W.2d 504, 506 (Iowa 1983); Sharpe, 304 N.W.2d at 224-25. Defendant's conviction for second-degree criminal mischief is affirmed.

We find the amendment adding the third-degree theft charge was improperly allowed by the trial court. Applying the clear language of Rule 4(8), we find theft to be an offense wholly new and different from both burglary and criminal mischief. See Sharpe, 304 N.W.2d at 223 (different offense if elements are different). Compare Iowa Code § 713.1 and § 716.5 with § 714.1 (1987). Defendant's conviction for third-degree theft is reversed.

This case is reversed and remanded for a new trial on the second-degree burglary charge. Defendant's conviction for second-degree criminal mischief is affirmed. His conviction for third-degree theft is reversed and remanded for dismissal.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR A NEW TRIAL.