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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,) Filed December 17, 1987

vs.) 340

DONALD CHRISTOPHER LEHNER,) 7-398
86-1570

Defendant-Appellant.)

Appeal from the Iowa District Court for Linn County (No. CRF 9695), Lynne Brady, Judge.

Defendant appeals from his conviction of burglary in the first degree, in violation of Iowa Code section 713.3. **AFFIRMED.**

Michael L. Mollman and Steven E. Howes of Mollman, Gruhn & Wertz, Cedar Rapids, for defendant-appellant.

Thomas J. Miller, Attorney General; Roxann M. Ryan, Assistant Attorney General; and Jerry Vander Sanden, Assistant County Attorney, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson and Sackett, JJ.

DONIELSON, J. 341

Defendant appeals from his conviction of burglary in the first degree. We affirm.

Defendant Donald Lehner had previously lived with Mary Woodward; they had two children. Defendant and Woodward had separated, and Woodward went to live with her parents. Defendant would visit his children at the Woodward home, although there were hostile feelings about the visitation; defendant had filed contempt charges against Woodward. Woodward had a new boyfriend, Dennis Wallig, who defendant thought was vandalizing his property.

On February 11, 1986, at approximately 12:15 a.m., a large ice chunk was thrown through a window at defendant's house, and defendant saw Wallig outside. Defendant went to the police station to file a complaint. The police told defendant they would investigate later; defendant was frustrated with this response. Defendant was then advised the matter might be resolved by discussing it with Woodward and Wallig. At approximately 2:00 a.m. that same evening defendant went to the Woodward house. Defendant stated that he knocked on the door and then went in. Wallig and Woodward were engaged in sexual activity on the couch. Defendant spoke to them about the vandalism and the relationship between Wallig and Woodward. Woodward left the room to put on a nightgown. A fight started between defendant and Wallig. There is conflicting testimony concerning who struck the first blow and whether a baseball bat was involved. Wallig sustained injuries, including bruises, a cut which required stitches in his head, and a broken kneecap. Woodward asked defendant to leave, which he did. Defendant then turned himself in to the police.

Defendant waived a jury trial. After a bench trial he was convicted of burglary in the first degree in violation of Iowa Code section 713.1 and section 713.3. He appeals from the conviction.

Our scope of review is for the correction of errors at law. Iowa R. App. P. 4. Findings of fact are binding on us if supported by substantial evidence. Iowa R. App. P. 14(f)(1).

The elements of first-degree burglary, Iowa Code section 713.1 and 713.3 (1985), are as follows: (1) entry into a specific place; (2) the place is an occupied structure; (3) the entry was without right, license, or privilege; (4) the place was not open to the public; (5) the defendant had an intent to commit an assault; and (6) after entry the defendant inflicted an injury on the victim. II Iowa Uniform Jury Instructions No. 1302 (1984). See State v. Phillips, 378 N.W.2d 316, 317 (Iowa App. 1985).

Defendant claims there is insufficient evidence in the record to show (1) he had the intent at the time of his entry into the Woodward residence to commit a felony, assault, or a theft, or (2) that he had no right, license, or privilege to enter the residence.

Those principles governing a challenge to the sufficiency of the evidence may be summarized as follows:

> When reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the state, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the evidence in the record. State v. Hall, 371 N.W.2d 187, 188 (Iowa App. 1985); State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984). Direct and circumstantial evidence are equally probative so long as the evidence raises "a fair inference of guilt and [does] more than create speculation, suspicion, or conjecture." State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981). It is necessary to consider all the evidence in the record and not just the evidence supporting the verdict to determine whether there is substantial evidence to support the charge. Hall, 371 N.W.2d at 188; Bass, 349 N.W.2d at 500. Substantial evidence means evidence which would convince a rational factfinder that the defendant is guilty beyond a reasonable doubt. Hall, 371 N.W.2d at 188; State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984).

State v. Wheeler, 403 N.W.2d 58, 60 (Iowa App. 1987).

In applying those standards to the case at bar, defendant's challenge to the sufficiency of the evidence fails. Viewing the evidence in the light most favorable to the State, the trial court could reasonably conclude that the entry was nonconsensual and that defendant had the intent to commit an assault.

Defendant argues that his entry was consensual because (1) the door was unlocked; (2) he had on previous times entered the house without specific invitation; and (3) he left upon request. We find these arguments to be without merit. The testimony given by Woodward and her father reveals that defendant was not a welcome visitor in the home and that he knew he had no right to enter the home without invitation. He had previously been ordered to leave when he entered the house late at night without permission. Despite any alleged implied permission to enter the Woodward house in the distant past, defendant could not reasonably believe that he could enter the home without invitation at 2:00 a.m. on February 11, 1986. Cf. United States v. Kearney, 498 F.2d 61, 66 (D.C. Cir. 1974) ("Even with common law larceny, consent is not a defense where the burglar exceeds the scope of the consent"); State v. Pappan, 193 Neb. 80, 82, 225 N.W.2d 416, 418 (1975) (consent to enter for party did not imply permission to return after party had ended).

The intent to commit a felony, assault, or theft must be present at the time of the defendant's entry into the structure. State v. Olsen, 373 N.W.2d 135, 136 (Iowa 1985). The element of intent "is seldom susceptible of proof by direct evidence." Id. It may be shown by circumstantial evidence. Id.

Defendant argues he did not possess the requisite intent. He states in his brief that (1) he did not know Wallig was at Woodward's residence, and (2) he went to Woodward's residence to discuss with Woodward Wallig's vandalism of his property and visitation with his children. We find both of these arguments contradicted by the evidence in this case, including defendant's own testimony.

Defendant testified he saw Wallig's "car go down and park in front of Mary's mom and dad's," which was four blocks away from his house and that he "made sure that [Wallig] was at the residence" before he decided to file a complaint at the police station. He further testified that on the night in question after he walked into the residence, he said to Woodward, "He's fucked our kids over; he fucked my car over; he fucked my house over and now he's fucking you. I mean, what kind of a Christian thing is this?" Although defendant testified he only struck Wallig after he was first struck, we find this argument unpersuasive due to the facts already recited in this opinion. Defendant wrote in his statement to the police that he "went to Mary's to confront Mary and Dennis with what he did" to defendant's house and car. We find no evidence to support defendant's contention that he desired to discuss visitation; assuming arguendo that was his intent, 2:00 a.m. cannot reasonably be expected to be an appropriate time to do so. A police officer also testified that it was ten minutes between the time defendant left the police station after making his complaint about Wallig and the time of the assault, demonstrating further circumstantial evidence of defendant's intent to commit an assault.

In the circumstances presented here, the factfinder properly found the requisite intent to commit an assault. Viewing the evidence in the light most favorable to the State, defendant walked into the house without obtaining permission to enter, went directly to Wallig, expressed to Woodward his displeasure with Wallig, and then beat Wallig severely. Wallig and Woodward testified defendant used a baseball bat in the altercation. Defendant testified that he did not use a baseball bat, but only his hands. Defendant has a black belt in Tae-kwondo. No baseball bat was ever found. Defendant had just come from the police station where he had filed a complaint against Wallig; defendant was frustrated and dissatisfied with the disposition of the matter by the police;

defendant told police he saw Woodward and Wallig having sex. The injuries Wallig suffered were severe: he had a gash on the forehead that required six stitches to close; cuts and bruises all over the body; and a severely fractured kneecap that required wires, a screw, and twenty-three stitches to repair. The foregoing facts point to an intent to assault.

In conclusion, we find the evidence was sufficient for the factfinder to conclude defendant entered the Woodward home without permission and with the intent to assault the victim, Wallig.

AFFIRMED.