

IN THE COURT OF APPEALS OF IOWA

No. 1-295 / 90-756

STATE OF IOWA,

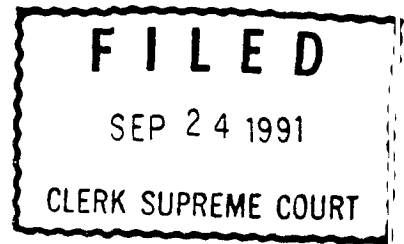
Appellee,

vs.

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RONALD EDWARD YARBROUGH,

Appellant.



Appeal from the Iowa District Court for Mahaska County,
Phillip R. Collett, Judge.

Yarbrough appeals from his convictions, following a jury trial, for second-degree burglary and first-degree theft. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Ahmet S. Gonlubol, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Sheryl A. Soich, Assistant Attorney General, and Charles A. Stream, County Attorney, for appellee.

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

OXBERGER, C.J.

Ronald Yarbrough allegedly entered without permission the partially fenced premises of Allied Gas and Chemical Company. After entering the Allied premises, Yarbrough and his companions removed a pickup truck, a quantity of copper tubing, and various tools.

Yarbrough was charged with burglary in the second degree and theft in the first degree. A jury found him guilty of both charges. Yarbrough has appealed from the resulting convictions.

Yarbrough contends his trial attorney rendered ineffective assistance by failing to object to the verdict forms. He argues the verdict forms improperly suggested that the two charges against him were linked, and that the jury was mistakenly led to believe they should either convict on both or acquit on both. The State responds that the verdict forms carried no such improper suggestion.

Yarbrough also challenges the sufficiency of the evidence to support either of the convictions.

In challenging his burglary conviction, Yarbrough contends the evidence failed to establish that the partially fenced Allied Gas and Chemical Company yard was an "occupied structure." He acknowledges that a fully fenced enclosure used for storing property of value can be an "occupied structure" under the burglary statute, but he argues that the same should not be true for an enclosure which is only partially fenced.

In challenging his first-degree theft conviction, Yarbrough contends the evidence failed to establish that the stolen pickup truck had a large enough dollar value to elevate the crime to first-degree theft rather than second-degree theft. In addition, he contends the evidence failed to establish that he intended to deprive Allied of the truck. In raising this last contention, Yarbrough asserts that one of his alleged companions made a comment suggesting that the group intended only to use the truck for the evening and then return it.

Our scope of review is on assigned error only. Iowa R. App. P. 4 The standard of review in challenging the sufficiency of the evidence is well established. State v. Lampman, 342 N.W.2d 77, 81 (Iowa App. 1982). We will uphold a verdict where there is substantial evidence in the record tending to support the charge. State v. Aldape, 307 N.W.2d 32, 39 (Iowa 1981).

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 that fairly and reasonably may 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 fact finder 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).

INEFFECTIVE ASSISTANCE OF COUNSEL: We find no basis on which to hold defendant had ineffective counsel. This holding is without prejudice to his right to raise the issue by application for post-conviction relief. By this, a full evidentiary hearing may be conducted and counsel will have an opportunity to respond to the defendant's charges. See State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978).

BURGLARY: Yarbrough asserts the district court erred in failing to sustain his motion for judgment of acquittal on the burglary charge. His sole challenge to the sufficiency of the evidence involves the "occupied structure" element of this crime. In State v. Hill, 449 N.W.2d 626 (1989), the Iowa Supreme Court considered whether a fenced enclosure behind an automobile parts store was an "occupied structure" in order to support a

conviction of burglary. The enclosure considered in that case was surrounded by a chain link fence topped with barbed wire, where parts were stored. The supreme court held that because some of the business activities of the parts store were carried on within the fenced enclosure, and the store used the enclosure to store parts of some value, the enclosure was an "occupied structure". Id. at 628.

In the case before us, Yarbrough chooses to focus solely on the fence. He argues, the enclosure he entered was not an occupied structure because a gap of approximately thirty feet was in the fence. He relies upon Hill to argue that an area which is not entirely "surrounded" by fence cannot be considered an appurtenance and therefore is not an occupied structure as contemplated in Iowa code section 713.1. The State argues that the gap in this locked fence did not alter the land's character as an appurtenance, and therefore the area was an occupied structure. We agree.

The fence in this case was six feet high, partially enclosing the premises, with the exception of an area between the garage and the company's shop building. The front two gates to this area are chained and padlocked every night. In determining whether the enclosure in Hill was an appurtenance, the court's focus was primarily upon whether the land falls within the definition of an

appurtenance as "standing in relation of an incident to a principal and is necessarily connected with the use and enjoyment of the latter". State v. Hill, at 628. In this case as in Hill, business activity occurred within the area, and some business property had been stored there.

We find the instruction given the jury to guide them in the determination of whether the area was an occupied structure was incorrect. Jury instruction number 14, in addition to other considerations, instructed the jury that when considering whether the area was an "occupied structure":

An area surrounded by a fence is an occupied structure only if it is entirely enclosed.

We find this is an inaccurate statement of the law. We do not interpret Hill to require that an area be entirely enclosed by fence to be considered an "occupied structure". Because the instruction was in favor of the defendant there was no prejudice to the defendant.

We find, however, applying the reasoning in Hill, that the question is whether reasonable minds would believe an area was sufficiently enclosed as to be incident to a principal and necessarily connected with the use and enjoyment of the latter. Where reasonable minds find the area is such, the next inquiry required by section 702.12 is whether the area was adapted for overnight accommodations of persons, occupied by persons for the purpose of carrying on business or other activities, or for

the storage or safekeeping of anything of value. We find, the area questioned in this case, was an occupied structure under Iowa Code section 702.12. Sufficient evidence existed to support Yarbrough's conviction for second degree burglary.

We next consider three specific sufficiency challenges Yarbrough makes with regard to his theft conviction. Yarbrough first asserts that the State failed to prove beyond a reasonable doubt that Yarbrough intended to deprive Allied of the truck. He argues his intent was to return the truck. This court has held that the "intent to deprive" used in the theft statute 714.1(1) required more than a temporary dispossessing of another's property, although a deprivation is not necessarily a permanent thing. State v. Berger, 438 N.W.2d 29, 31 (Iowa App. 1989). The definition of "deprive the other" which has been adopted by this court states:

Intent to "deprive the other" of the property means to permanently withhold, or cause it to be so withheld for an extended period of time, or under such circumstances, that its benefit or value is lost; or the property is disposed of in such a manner or under such circumstances, as to render it unlikely that the owner will recover the property. State v. Berger, 438 N.W.2d 29, 31 (Iowa App. 1989).

Yarbrough does not contend that the trial court's instruction number twenty failed to adequately define "deprive" in accordance with Berger.

Testimony was offered by Gary Tolles a friend who accompanied Yarbrough in the truck. That testimony indicated that Yarbrough intended to return the pickup truck to Oskaloosa. There was no evidence that Yarbrough had made any plans to leave for an extended period of time from Oskaloosa. There is no indication in the record that he had attempted to conceal the truck, repaint it, change the license plates or other acts indicating the intent to keep the truck for an extended period of time. No evidence was produced that the truck's benefit or value was lost in such a way that it was rendered unlikely that the owner would recover the truck. The vehicle taken was a four wheel drive, three quarter ton pickup which Yarbrough drove down the streets of his rural community and parked across the street where he lived.

The state argues evidence that Yarbrough and his friends were planning on taking a trip and then return to Oskaloosa does not constitute considerable evidence that Yarbrough did not possess the intent to permanently deprive the owners of the pickup truck.

The burden is upon the state to prove Yarbrough did intend to deprive, rather than Yarbrough to prove he did not.

Intent is seldom susceptible to proof by direct evidence; instead, intent must usually be proved by circumstantial evidence and the inferences to be drawn therefrom State v. Olson, 373 N.W.2d 135, 136 (Iowa 1985).

While the evidence cited by Yarbrough bears on the issue of his intent whether to deprive the owner of his vehicle or to merely "borrow" the vehicle, the question to accept or reject such evidence was for the jury to decide. The State's evidence that Yarbrough removed the vehicle from the owner's property and did not return the truck is sufficient evidence to submit the issue of intent to the jury.

VALUATION OF STOLEN PROPERTY: Yarbrough asserts the State failed to prove the value of the stolen property exceeded \$5,000. He claims that no evidence was presented to establish that J.D. Fleener was the owner of the business involved, or that Mr. Fleener knew the value of the truck. We find this claim without merit. We find the testimony of Mr. Fleener sufficient to establish that he was an owner of the company. Fleener was the original purchaser of the truck at issue in 1985. He noted that the original purchase price was \$13,702.08, and after adding a two-way radio, propane carburization, grill guards, bumpers and other items, the pickup truck's cost was about \$17,000. He testified he thought the current value was approximately \$6,500 to \$7,500. Generally, an owner may

testify as to actual value without a showing of general knowledge of market value. See State v. Savage, 288 N.W.2d 502, 504 (Iowa 1980) We find the testimony of the owner in this case was sufficient to support an appropriate valuation of the property. We affirm the trial court.

AFFIRMED.