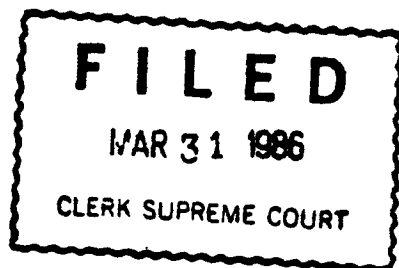


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,)
Plaintiff-Appellee,)
vs.)
RICHARD L. NEGRETE,)
Defendant-Appellant.)

Filed March 31, 1986

5-696
85-213

345

Appeal from the Iowa District Court for Pottawattamie County (CR 19602)

- Leo Connolly, Judge.

Defendant appeals from his conviction for second-degree burglary.

AFFIRMED.

Eric H. Leed, Council Bluffs, for defendant-appellant.

Thomas J. Miller, Attorney General, and Lona Hansen, Assistant Attorney General, and Drew H. Kouris, Assistant County Attorney, for plaintiff-appellee.

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

SACKETT, J.

Defendant Negrete appeals from his conviction of second-degree burglary.

Negrete claims: (1) there is insufficient evidence in the record to support the jury's verdict, and (2) prejudicial conduct by the prosecuting attorney tainted the in-court identifications of the defendant.

Our review is to correct errors at law. Iowa R. App. P. 4. A jury's findings of fact are binding upon us if supported by substantial evidence. Iowa R. App. P. 14(f)(1).

In determining sufficiency of the evidence, we view the evidence in the light most favorable to the state. State v. Doss, 355 N.W.2d 874, 877 (Iowa 1984). All inferences that are fairly and reasonably deducted from the evidence are accepted, and all the evidence, not just that supporting the verdict, is considered. State v. Blair, 347 N.W.2d 416, 418-19 (Iowa 1984). The jury verdict will be upheld if supported by substantial evidence, which is evidence that could convince a rational trier of fact the defendant is guilty beyond a reasonable doubt. Id. at 419.

The jury was instructed as to both joint criminal conduct and aiding and abetting. The record shows Negrete and his co-defendant were driving in Negrete's truck while they were looking for discarded items salvageable for resale. They stopped the truck in an alley adjacent to the property owned by the alleged victim of the burglary. There is evidence in the record both Negrete and his co-defendant got out of the truck. Negrete testified he worked on the truck's engine and then walked down the alley looking for items for possible salvage. He testified that shortly thereafter his co-defendant was driving the truck and picked him up along the alley. Within a few blocks of the alley, they were stopped by police and a bundle of copper wire was found in the back of

the truck. Negrete testified he did not know the copper wire was there. The jury could have chosen to disbelieve Negrete's testimony regarding his awareness of the stolen copper wire. See State v. Blair, 347 N.W.2d 416, 420 (Iowa 1984)(jury determines credibility of witnesses as the trier of fact).

Negrete argues the shed from which the wire was stolen was not an occupied structure enclosed in such a manner as to provide a place for the keeping of valuable property secure from theft. Iowa Code section 713.1 defines burglary:

Any person, having the intent to commit a felony, assault or theft therein, who, having no right, license or privilege to do so, enters an occupied structure, such occupied structure not being open to the public, or who remains therein after it is closed to the public or after the person's right, license or privilege to be there has expired, or any person having such intent who breaks an occupied structure, commits burglary. [emphasis added].

Section 702.12 (1985), defines "occupied structure" as:

[A]ny building, structure, appurtenances to buildings and structures, land, water or air vehicle, or similar place adapted for overnight accommodation of persons, or occupied by persons for the purpose of carrying on business or other activity therein, or for the storage or safekeeping of anything of value. Such a structure is an "occupied structure" whether or not a person is actually present. However, for purposes of chapter 713, a box, chest, safe, changer, or other object or device which is adapted or used for the deposit or storage of anything of value but which is too small or not designed to allow a person to physically enter or occupy it is not an "occupied structure". [emphasis added].

A shed clearly is an occupied structure under this definition. Viewing the evidence as a whole and in a light most favorable to the state, we find a reasonable juror could have concluded that Negrete had sufficient knowledge of the burglary. The jury's verdict is supported by substantial evidence in the record.

Negrete further argues the prejudicial conduct by the prosecuting attorney tainted the two witnesses' in-court identification of him. Negrete claims the prosecuting attorney himself made the identification rather than allowing the witnesses to independently identify the perpetrator based on his own recollection. To prevail on a prosecutorial misconduct claim, Negrete must prove misconduct and that he was prejudiced by it. State v. Love, 302 N.W.2d 115, 119 (Iowa 1981). Our review of the record finds the prosecuting attorney merely attempted to clarify the responses of the two witnesses. Negrete was not prejudiced or deprived of a fair trial by the prosecutor's attempts to clarify the record. See State v. Williams, 315 N.W.2d 45, 46 (Iowa 1982)(prosecutorial misconduct not so prejudicial as to deprive defendant of fair trial); State v. Trudo, 253 N.W.2d 101, 106 (Iowa 1977)(prejudice must reach such proportions that defendant's trial becomes an unfair one).

We affirm Negrete's conviction of second-degree burglary.

AFFIRMED.