FILED
DEC 27 1983
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed December 27, 1983
vs.	)	
ROBERT JOSEPH KELLEY,	)	3-377 / 83-67
Defendant-Appellant.	)	

531

Appeal from Johnson District Court - Ansel J. Chapman, Judge.

Defendant appeals from his conviction for burglary in the second degree. He contends the trial court should have instructed the jury that "mistake of fact" could be a defense to the crime charged. AFFIRMED.

Charles L. Harrington, Chief Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Lona Hansen, Assistant Attorney General, for plaintiff-appellee.

Considered by Snell, P.J., and Schlegel and Hayden, JJ.

PER CURIAM

The defendant Robert Joseph Kelley appeals from his conviction for burglary in the second degree. In his trial testimony the defendant admitted entering an apartment through a window and helping his companion, Olson, remove jewelry and a camera. However, he testified Olson had told him that the apartment was rented by Olson's brother, that Olson was welcome to enter the apartment at any time, and that the jewelry and camera belonged to Olson. Furthermore, the defendant testified that he had believed these alleged representations by Olson. None of the alleged representations was correct.

Based on the testimony sketched above, the defendant asked the trial court to give the jury a uniform instruction stating that "mistake of fact" could be a defense to the crime charged. The trial court refused to give such an instruction. The jury found the defendant guilty, and he was later convicted and sentenced.

On appeal, the defendant once again contends the jury should have been instructed that "mistake of fact" could be a defense to the crime charged. The State responds that the absence of such an instruction did not prejudice the defendant because his testimony was so incredible that no rational jury would have acquitted him on the ground of mistake of fact.

Our review is on assigned error.

The Iowa Supreme Court has recognized that "ignorance or mistake of fact, if reasonable and not due to carelessness or negligence, is a defense to a crime of intent." State v. Freeman, 267 N.W.2d 69, 70 (Iowa 1978). Where mistake of fact was the defendant's sole theory of defense, the supreme court has held that it was error for the trial court to fail to instruct on defendant's theory of mistake of fact. See id. at 71. The State asserts, however, that although the trial court may have erred in refusing to give the requested instruction, this error did not result in prejudice to defendant in this case and therefore does not warrant reversal. See State v. Jacoby, 260 N.W.2d 828, 836 (Iowa 1977). The State argues that the case

against defendant was so overwhelming that defendant could not have been harmed by the court's failure to give the instruction on mistake of fact.

Defendant requested an instruction which explained that when an act is committed by mistake of fact, the mistake must arise by reason of a good faith reasonable belief by the defendant, acting as a reasonably prudent person would act under the same or similar circumstances. Under the circumstances of this case, we believe that, had the requested instruction been given, the jury's decision in the case would have been the same. A reasonable jury would have had no doubt that a reasonably prudent person would not have acted as defendant did in this case. Thus, any error committed by the trial court was harmless error.

AFFIRMED.