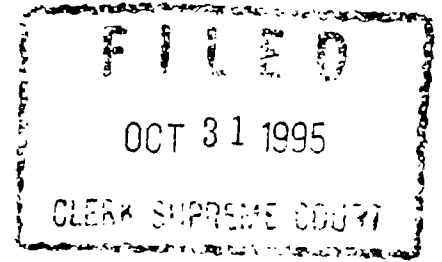


IN THE COURT OF APPEALS OF IOWA

No. 5-462 / 94-0774



STATE OF IOWA,

Appellee.

vs.

JAY FRED COTTRELL,

Appellant.

Appeal from the Iowa District Court for Hancock County, John S. Mackey,
Judge.

Cottrell appeals judgment and sentence, following jury trial, entered upon his
conviction of third-degree burglary. **AFFIRMED.**

Phillip Garland, Garner, for appellant.

Thomas J. Miller, Attorney General. Bridget A. Chambers, Assistant Attorney
General, and Ted Hovda, County Attorney, for appellee.

Heard by Hayden, P.J. and Habhab and Huitink, JJ.

HUITINK, J.

Cottrell appeals his conviction of burglary in the third degree in violation of Iowa Code section 713.1 and 713.6(A) (1993). Cottrell challenges the sufficiency of the evidence supporting his conviction and claims his trial counsel was ineffective. We affirm and preserve Cottrell's ineffective assistance of counsel claim for postconviction proceedings.

Donald Webner's rural residence was burglarized twice in February 1993. As a result the Webners', with the assistance of local law enforcement officials, installed a motion detector in their residence. At about 5 a.m. on February 26, Hancock County deputies responded to a silent alarm set off by the detector. Footprints discovered near the house led officers to a grove of trees where Cottrell and another man were found partially buried under the snow.

Cottrell was charged with third-degree burglary. At his arraignment Cottrell pled not guilty and waived his right to a speedy trial. The trial information was subsequently amended by adding two additional counts of burglary. Cottrell did not waive his right to a speedy trial as to the additional charges.

Prior to trial, Cottrell moved in limine to exclude evidence of his prior bad acts and evidence indicating Cottrell had been seen near Webners' residence prior to the February 26 burglary. After these motions were granted, the State dismissed the burglary charges included in counts II and III of the trial information.

At trial the State offered evidence of the break ins at the Webner residence that occurred during the week before February 26. The investigating officers also testified that the footprints they discovered led from a vehicle parked on a nearby road, through a grove, to the back porch of the Webner house. These witnesses also testified that the door adjacent to the back porch was broken and standing partially open. Additional footprints were found on the deck adjacent to an open sliding glass door. These footprints led away from the residence to the place where the defendant was found.

The jury found Cottrell guilty of burglarizing Webners' residence on February 26, 1993. He was sentenced to a term not exceed five years.

On appeal Cottrell argues the State failed to prove the entry element of burglary because there was no evidence Webners' house was entered on February 26, 1993. He also claims his trial counsel was ineffective. Cottrell cites counsel's failure to protect his speedy trial rights and counsel's failure to include *any* reference to prior burglaries of the Webners' residence in his motion in limine.

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. Bass*, 349 N.W.2d 498, 500 (Iowa 1984); *State v. Hall*, 371 N.W.2d 187, 188 (Iowa App. 1985). 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. *Bass*, 349 N.W.2d at 500; *Hall*, 371 N.W.2d at 188. Substantial evidence means evidence which would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. *State v. LeGear*, 346 N.W.2d 21, 23 (Iowa 1984); *Hall*, 371 N.W.2d at 188.

Contrary to Cottrell's contentions, we find the footprints leading to and away from the residence, the open doors, and the alarm provide sufficient evidence showing Webners' residence was entered on February 26. The fact finder was not obliged to accept Cottrell's alternate explanations of these facts. *See State v. Trammel*, 458 N.W.2d 862, 863 (Iowa App. 1990). We accordingly affirm on this issue.

Generally, ineffective assistance of counsel claims are preserved for postconviction to allow trial counsel an opportunity to defend the charge. *State v. Mulder*, 313 N.W.2d 885 (Iowa 1981); *State v. Nebinger*, 412 N.W.2d 180, 191-92 (Iowa App. 1987).

We find the record insufficient to resolve Cottrell's ineffective assistance of counsel claims on direct appeal. These claims are accordingly preserved for postconviction review. The judgment of the district court is affirmed

AFFIRMED.