

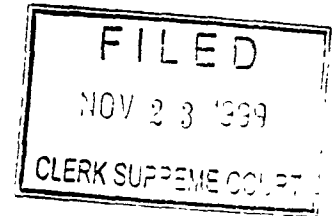
IN THE COURT OF APPEALS OF IOWA

No. 9-560 / 98-731
Filed November 23, 1999

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DENNIS LEE SANTEE a/k/a
DENNIS LEE DOERFLINGER,
Defendant-Appellant.



Appeal from the Iowa District Court for Linn County, Kristin Hibbs, Judge.

Defendant appeals from the judgment and sentence entered following his conviction of third-degree burglary as an habitual offender. **AFFIRMED.**

John A. Stitely, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, and Denver D. Dillard, County Attorney, for appellee.

Heard by Streit, P.J., Vaitheswaran, J., and Schlegel, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (1999).

STREFF, P.J.

A stranger found standing in a person's kitchen claims he had simply entered the house looking for the owners. Dennis Santee was convicted of third-degree burglary as an habitual offender after he was found in the home of Kenneth and Lois Robinson on a late-summer's afternoon. Santee now appeals, claiming the trial court erred in denying his motion for a judgment of acquittal as there was insufficient evidence of his intent to commit a theft or other felony in the Robinsons' home. Finding no merit to his claim, we affirm the conviction.

I. Background Facts & Proceedings.

Kenneth and Lois Robinson had just returned home from a matinee movie when they discovered the defendant, Dennis Santee, standing in the kitchen of their home. Not missing a beat, Santee immediately invited the Robinsons to come on in. The Robinsons did not know Santee nor had they ever seen him prior to his unexpected appearance in their kitchen. Santee explained his employer, Bill Thomas, dropped him off at the residence to do yard work and, after trying the door bell, entered the home through an unlocked door in search of the owners. Santee, however, did not possess any gardening tools, save the versatile crescent wrench; was unable to provide the address or phone number of his employer; and could not explain how he was to return home from the job. Compounding Santee's already questionable story, the Robinsons had not requested any assistance with the yard work. Disbelieving Santee's explanation, the Robinsons called the police. Santee was

eventually charged and convicted of third-degree burglary as an habitual offender. See Iowa Code §§ 713.1, 713.6A, 902.8 (1997). He received an indeterminate fifteen-year sentence to run concurrent with another third-degree burglary conviction.

Santee appeals, claiming the trial court erred in denying his motion for a judgment of acquittal as there was insufficient evidence of his intent to commit a theft or other felony in the Robinsons' home.

II. Standard of Review.

We review claims of insufficient evidence for errors at law. Iowa R. App. P. 4. A jury's guilty verdict is binding upon us unless we conclude the record lacks substantial evidence to support such a finding. *State v. Bush*, 518 N.W.2d 778, 779 (Iowa 1994). Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. *State v. Taft*, 506 N.W.2d 757, 762 (Iowa 1993). Substantial evidence does not, however, denote some elevated quantity of proof. *State v. Anderson*, 517 N.W.2d 208, 211 (Iowa 1994). Rather, the relevant question in our review of the case "is whether, after viewing all the evidence in the light most favorable to the prosecution, any rational trier of facts could have found the essential elements of the crime beyond a reasonable doubt." *Id.*

III. There Is Sufficient Evidence to Sustain the Conviction.

A burglary is committed when "[a]ny person, having the intent to commit a felony, assault or theft therein, . . . enters an occupied structure not . . . open to the

public." Iowa Code § 713.1 (1997). Santee claims there was insufficient evidence he intended to commit a theft in the Robinson home.

Evidence of specific intent "is rarely capable of direct proof and must usually be shown by circumstantial evidence." *State v. Delay*, 320 N.W.2d 831, 835 (Iowa 1982). The jury may rely on its common experiences and observations in inferring intent. *State v. Serr*, 322 N.W.2d 96, 101 (Iowa App.1982). They may rely on the circumstances surrounding the defendant's entry into the premises and his acts preceding and following entry. *State v. McFarland*, ___ N.W.2d ___ (Iowa App. 1999). The requirement of proof beyond a reasonable doubt is satisfied if it is more likely than not the inference of intent is true. *Id.* The intent to commit theft is not negated merely because the accused had not yet begun the pilfering. *See State v. Erving*, 346 N.W.2d 833, 836 (Iowa 1984).

Based on the circumstantial evidence, a rational trier of fact could infer Santee intended to commit theft in the Robinson home. Santee's explanation of his presence in the Robinson home reeked with inconsistencies. The Robinsons had not requested any assistance with their yard work. Santee was unable to provide an address or phone number for his alleged employer. Santee possessed no gardening tools to assist him in his assigned tasks. He had no means for returning to his place of employment. Disregarding Santee's explanation, the jury was left with an unknown and uninvited man standing in the Robinson kitchen in the middle of the afternoon with a crescent wrench. A rational trier of fact could reasonably infer Santee entered the Robinson

~~home to commit a theft.~~ The fact Santee had not yet begun relieving the Robinsons' of their ~~worldly~~ possessions does not obviate his intent. It is merely a testament to the Robinsons' good fortune. The conviction is affirmed.

AFFIRMED.

Vaitheswaran, J., concurs; Schlegel, S.J., dissents.

SCHLEGEL, S.J. (dissenting)

I respectfully dissent.

“Any person, having the intent to commit a felony, assault or theft therein . . . enters an occupied structure not . . . open to the public . . . commits burglary.”
Iowa Code § 713.1 (1997).

In this case, there is no doubt Santee entered an occupied structure (as the same is legally defined) which was not open to the public. However, there is no proof of his intent in entering that structure, except by conjecture and the thinnest kind of circumstantial evidence. It may have been sufficient to submit the case to the jury, had there been proper instructions to the jury.

In the case of *State v. Mesch*, 574 N.W.2d 10 (Iowa 1997), the Iowa Supreme Court stated:

[W]e hold that the attempt to commit a felony, assault or theft is an element of attempted burglary under section 713.2. The State is therefore required to specify the felony that the defendant intended to commit after the breaking and entering. To avoid confusion or speculation on the part of the jury, the district court must also instruct on the elements constituting the felony. Failure to do both is reversible error. See *State v. Gordon*, 460 N.W.2d 4, 6-7 (Iowa 1997) (holding court must leave to jury determination of elements of offense) [citation omitted].

***Mesch*, 574 N.W.2d at 14** (emphasis added).

So, it is apparent the court has a duty to instruct that the defendant entered the structure with the intent to commit a felony. It did so, in this case. In addition, however, the supreme court in *Mesch* held the district court was required to “instruct

on the elements constituting such felony.” *Id.* Its failure to do so constituted reversible error. *Id.* The supreme court further stated:

Requiring the State to specify the felony is not onerous. While the State may not know what the defendant *actually* intended to do inside the dwelling, the State knows very well what *evidence* of intent it has. If the State has evidence of intent to commit certain felonies, and not others, it should request instructions only on those the evidence supports. The district court cannot submit instructions on felonies for which there is no evidence. [citation omitted] *In addition, unless we require the State to specify the felony or felonies, Jo Ann and defendants similarly situated may be convicted on nothing more than proof of “who knows what she would have been up to had she entered.”*

Id. at 14-15 (emphasis added).

The court went on to state:

Unless the State limits its prosecution and requested jury instructions to theft or an assault under Iowa Code section 713.2, the State must specify which felony it believes an attempted burglar intended to commit. In addition the district court must instruct on the elements constituting such felony. Because the instruction given here failed to meet these requirements, the district court committed reversible error in giving it. Accordingly, we reverse and remand for a new trial.

Id. at 15.

To be sure, the *Mesch* case involved the alleged crime of attempted burglar, whereas we are dealing with a charge of burglary in the third degree. However, logic tells us that the same principles apply. In fact, the court’s discussion starts with the definitions of burglary and applies those elements to that case of attempted burglary. The requirements are certainly not less stringent for a case of burglary than they are for attempted burglary. The latter may be harder to prove in many cases, but the court

~~does not excuse the State's~~ obligation to seek instructions on the elements of the crime or crimes it relies upon for conviction. Neither should we, in an alleged burglary in the third degree.

The Santee court instructed the jury as follows:

The State must prove all of the following elements of Burglary in the Third Degree:

* * *

5. The Defendant did so with specific intent to commit a theft.

The court did not define the elements of "theft" in any instruction. The jury was left to decide on its own. Under the doctrine of *State v. Mesch*, that was reversible error.

I believe the evidence of Santee's intent is completely lacking in this case, aside from the fact that the jury was not instructed on how it should decide that issue. I believe Santee was entitled to a directed verdict of acquittal.

Trial counsel for Santee failed to object to the instructions or the lack of instructions on the elements of the alleged underlying crime. Since the issue of improper instruction was not preserved for appeal, under the record in the case, we will undoubtedly be faced with a claim of ineffective assistance of defense counsel. We should not be required to consider that case, and defendant should not be required to await justice until that case can move through the trial and appellate process. The public funding of that proceeding would better be spent for other purposes. There is no doubt that counsel was ineffective in failing to make proper record on the court's

~~erroneous instructions.~~ To require the exercise of a trial on ineffective assistance of counsel ~~and its~~ probable appeal is such a waste that it should be short circuited at this point.

I would reverse and remand for a new trial.