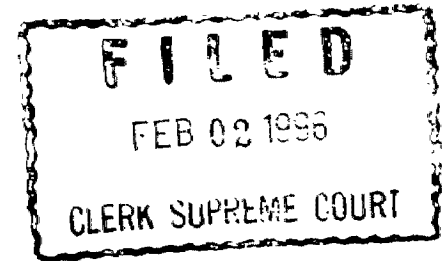


IN THE COURT OF APPEALS OF IOWA

No. 5-654 / 94-1742



STATE OF IOWA,

Appellee,

vs.

WENDELL HARRINGTON,

Appellant.

Appeal from the Iowa District Court for Polk County, Glenn E. Pille, Judge.

Defendant was convicted following a jury trial of third-degree burglary.

AFFIRMED.

Linda Del Gallo, State Appellate Defender, and James G. Tomka, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, John P. Sarcone, County Attorney, and George Kamas, Assistant County Attorney, for appellee.

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

HAYDEN, P.J.

On November 17, 1993, Wendell Harrington and Trent Lee were arrested after being found in possession of several items which were stolen the day before from the residence of Elizabeth Bergstrom. Harrington was tried and convicted of third-degree theft, being in possession of stolen property alternative.

The State then filed a trial information charging Harrington with third-degree burglary based on allegations he broke into Bergstrom's house with the intent to commit a theft. Harrington's motion to dismiss the charge on double jeopardy grounds was denied. The court found third-degree burglary and third-degree theft require proof of different elements and, therefore, successive prosecutions are not prohibited.

Harrington was sentenced as an habitual offender and now appeals. He contends (1) being prosecuted for burglary violated his double jeopardy rights; (2) his trial counsel was ineffective in several respects; and, (3) there was not sufficient evidence to sustain the conviction for third-degree burglary.

I. Double Jeopardy.

In the reply brief, Harrington takes the position our court and the United States Supreme Court should adopt the "verdict finality theory" proposed by Professor George C. Thomas III of the Rutgers University School of Law. Under this theory, Thomas equates "same offense" to "same culpability." Accordingly, once prosecuted to verdict, the theories of culpability stand as a barrier to reproving any of that

culpability. We respectfully decline appellant's invitation to adopt the Thomas proposal and, therefore, decide this case on current precedent.

A person cannot be put in jeopardy twice for the same offense according to both the Fifth Amendment of the United States Constitution and Article 1, section 12 of the Iowa Constitution. Iowa Code chapter 816 (1993) implements the Double Jeopardy Clause. The Double Jeopardy Clause affords a defendant protection against: (1) reprosecution for the same offense following acquittal; (2) reprosecution for the same offense following conviction; and, (3) multiple punishment for the same offense. *State v. Butler*, 505 N.W.2d 806, 807 (Iowa 1993). The Double Jeopardy Clause applies to state criminal trials though the Due Process Clause of the Fourteenth Amendment. *Id.* Harrington claims his Constitutional rights were violated because he was prosecuted for the same offense after conviction.

To determine whether a charge is the "same offense" for purposes of Double Jeopardy we have applied the same elements test articulated in *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932). *Butler*, 505 N.W.2d at 807.

Under the *Blockburger test*,

The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether *each provision requires proof of a fact which the other does not.*

Id. (Quoting *Blockburger*, 284 U.S. at 304, 52 S. Ct. At 182, 76 L. Ed. at 309) (emphasis added). In other words, *Blockburger* focuses on the elements of the two

crimes with which a defendant has been charged rather than the proof offered or relied upon to secure a conviction.

First, Harrington was charged with theft by exercising control over stolen property which requires the following elements be proven: (1) property was stolen; (2) the defendant exercised control over the stolen property; and, (3) the defendant knew at the time the property had been stolen. Later, Harrington was charged with third-degree burglary which requires: (1) the defendant entered a residence; (2) the residence was an occupied structure; (3) the defendant did not have permission or authority to enter the residence; (4) the residence was not open to the public; and, (5) the defendant entered the residence with the specific intent to commit a theft.

Each provision requires proof of facts which the other does not. Theft requires the defendant exercise control over stolen property, an element not required of a third-degree burglary conviction. Additionally, third-degree burglary requires the defendant enter a residence without permission, an element not required for a theft conviction. As such, the two crimes are not considered the “same offense,” and double jeopardy is not implicated.

II. Collateral Estoppel.

We have repeatedly held matters not raised in the trial court cannot be effectively asserted for the first time on appeal. *State v. Wages*, 483 N.W.2d 325, 326 (Iowa

1992). Our review of the record reveals Harrington did not raise his collateral estoppel argument at any time prior to this appeal. As such, we will not address this argument.

III. Sufficiency of the Evidence.

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

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); *Hall*, 371 N.W.2d at 188. 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.

We determine there is sufficient evidence which would convince a rational factfinder the defendant is guilty beyond a reasonable doubt of burglary in the third degree. At trial, Lee testified he accompanied Harrington, at Harrington's request, to a red pickup truck in an alley. In the bed of the pickup truck, under a tarp, were several items they then loaded into Lee's car. He testified he knew the items were stolen, and Harrington told Lee the items came from a burglary which occurred the night before. Lee testified, after they loaded the items into the car, they drove a short distance, were pulled over by police officers, and were arrested. The police officers found burglar tools in the car and in Harrington's possession including gloves, a screwdriver, and a flashlight. Additionally, property stolen from Mrs Bergstrom's home, including two TVs, was found in the car. A rational factfinder could have concluded this evidence implicated Harrington in the burglary, thus meeting the first element.

Additionally, a rational factfinder could have found the second, third, and fourth elements were established when Bergstrom testified her residence had been broken into and Harrington did not have permission to enter her home. Lastly, a rational factfinder could have properly concluded Harrington had the specific intent to commit theft because he picked up the stolen property the day after the burglary and he was found

in possession of burglary tools. As such, we determine the State presented substantial evidence on all elements of burglary.

IV. Ineffective Assistance of Counsel.

Appellant also claims he was denied effective representation of counsel. Established principles govern our review of appellant's Sixth Amendment claim his counsel was ineffective. When considering this claim, our ultimate concern is with "the fundamental fairness of the proceeding whose result is being challenged." *Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984). In deciding this we must consider whether "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686, 104 S. Ct. at 2064, 80 L. Ed. 2d at 692-93. "In examining counsel's conduct we review de novo the totality of relevant circumstances." *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987) (citations omitted). "Defendant bears the burden of proving by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted." *Id.* at 131-32.

Where, however, the record on direct appeal is not adequate to permit us to resolve the issue, we preserve the defendant's claim for postconviction proceedings so the facts may be so developed. *State v. Koenighain*, 356 N.W.2d 237, 238 (Iowa App. 1984). This also gives the allegedly ineffective attorney the opportunity to explain his

or her conduct. *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). We conclude there is an inadequate record for us to adjudicate defendant's claim without counsel's explanation for his conduct. We therefore preserve defendant's ineffective assistance of counsel claim for a later proceeding.

AFFIRMED.