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IN THE COURT OF APPEALS OF IOWA
CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

v.

SALVADOR RAMON SULANKE,

Appellant.

Filed April 28, 1978

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60771

Appeal from Marshall District Court - George F. Fagg, Judge.

Defendant appeals judgment and sentence following conviction for burglary.

Affirmed.

Curtis A. Ward, of Mowry, Irvine & Brooks, Marshalltown, for appellant.

Richard C. Turner, Attorney General, and Sandra J. Holien, Marshall County
Attorney, for appellee.

Submitted to Allbee, C.J., Snell, Oxberger and Carter, JJ.; Donielson, J., takes
no part.

PER CURIAM

Defendant appeals from judgment and sentence imposed following his conviction of the public offense of burglary (§ 708.1; 708.3; The Code 1975). His appeal presents two issues which he contends should be resolved in favor of a reversal: (1) whether the trial court erred in denying his motion to suppress evidence of admissions defendant made to a federal parole officer; and (2) whether there is sufficient evidence to sustain the jury's finding that the offense of which defendant was convicted was committed in the nighttime. We hold neither issue presents a basis for reversing the conviction and sentence and affirm the trial court.

I. Admissibility of Statements Made to Parole Officer. Defendant's motion to suppress the testimony of the parole officer was denied by the trial court following a pre-trial evidentiary hearing on that issue. The motion presented two grounds for excluding the statements made to his federal parole officer: (a) that he was not given *Miranda* warnings prior to the questioning which produced the admissions sought to be suppressed; and (b) that such admissions were involuntarily made. While similar considerations may be involved in determining these matters they present separate issues. *State v. Washington*, 257 N.W.2d 890, 395 (Iowa 1977); *State v. Snethen*, 245 N.W.2d 308, 311 (Iowa 1976); *State v. Hilpiper*, 242 N.W.2d 306, 309 (Iowa 1976).

Defendant's contention based upon the failure to give *Miranda* warnings concerns the testimony of a federal parole officer, under whose supervision defendant had been placed as a result of being convicted of a federal crime. This officer had been advised by state authorities that defendant was a suspect in the burglary. He was further advised that the suspect had a limp. After receiving this information, the parole officer, who had previously noticed that defendant had developed a limp, asked him how he acquired it. He was told by defendant that the latter "fell twelve feet from a sliding glass door." This statement, which was later offered as part of the State's case at defendant's trial, was significant because there was other evidence presented at the trial that a sliding glass door had been left open at the scene of the crime, which, because of an unfinished deck on the house, created a drop to the ground in excess of ten feet.

The incriminating statement sought to be suppressed was made by defendant in his own home. The evidence in no way discloses that this was a custodial setting, as contemplated by *Miranda*. Clearly the setting was less custodial than the police station

interrogation presented in *Oregon v. Mathiason*, 428 U.S. 492 (1977), where the Supreme Court held no *Miranda* warnings were required. We hold the trial court correctly determined that *Miranda* warnings were not required in the situation presented and did not err in denying the motion to suppress on this ground.

As to defendant's secondary contention that the statements were not voluntarily made, it is recognized that "a parolee is under heavy psychological pressure to answer inquiries made by his parole officer." *United States v. Deaton*, 468 F.2d 541, 544 (5th Cir. 1972). The *Deaton* case involved custodial interrogation by a parole officer. In the present case the issue is whether the psychological pressure of noncustodial questioning by the parole officer overcame defendant's capacity for self-determination. *State v. Snethen*, 245 N.W.2d 308, 315 (Iowa 1976).

The record does not support defendant's contention that he was compelled by his parole agreement to waive his constitutional right to not incriminate himself. Nor does the record in any way establish that if he had exercised such right such election on his part would have automatically established a violation of his federal probation. Absent compelled disclosure or automatic sanction for nondisclosure no per se violation of the fifth amendment is presented. See *Baxter v. Palmigiano*, 425 U.S. 308 (1976). The determination thus becomes whether upon our independent evaluation of the totality of the evidence, including the special relationship between defendant and his parole officer, the record establishes that defendant's statements were involuntary. *State v. Snethen*, supra at 311. Such review of the record on our part reveals no basis for concluding with respect to the incriminating statement in question that defendant's will was overborn or that his capacity for self-determination was impaired. We hold that the trial court correctly denied the motion to suppress. See discussion and cases cited in *State v. Snethen*, supra at 315.

II. Evidence of Breaking and Entering in the Nighttime. Defendant does not dispute that the evidence is sufficient to sustain the jury's verdict as to all elements of the crime of burglary except the time of the breaking and entering. As to the time element, he asserts the evidence fails to disclose that the offense was committed "in the nighttime." The trial court submitted this issue to the jury and presented it with the opportunity to find defendant guilty of the lesser offense of breaking and entering if it determined the evidence to be insufficient to establish that the offense occurred in

the nighttime. We conclude the trial court acted properly in so doing and that the jury's verdict finding defendant guilty of burglary finds support in the evidence.

As observed in 13 Am. Jur. 2d, Burglary § 45 at 349, such element "[seldom] can be proved by the direct and positive evidence of witnesses who have knowledge of the actual breaking and entering." Rather, such matters must be proved circumstantially. No contention is made that the trial court failed to properly instruct the jury as to the use of circumstantial evidence in this regard.¹

For purposes of the offense of burglary, our criminal law defines "in the nighttime" as that period between sunset and sunrise during which there is not enough daylight by which to discern a man's face. *State v. Billings*, 242 N.W.2d 726 (Iowa 1976). The evidence at defendant's trial, viewed most favorably to the verdict, discloses that when the residents of the dwelling house where the burglary was committed left their home at approximately 6:00 p.m. on February 14, 1977, the breaking and entering had not yet occurred, and when they returned at approximately 10:00 p.m. that evening it had been completed. There is evidence that at 6:00 p.m. the sun had set but one could still discern the shapes of neighbors in an adjacent yard. There was no evidence as to the ability to discern faces at this time. In addition, there was evidence that when the residents of the dwelling returned, a sliding glass door was open at least two feet on a cold windy night in February yet the temperature in the home was normal. There is also evidence of a hasty departure by the prowler leaving certain valuables untouched.

The court below took judicial notice of the fact that at 10:00 p.m., the time the residents returned, it would have been nighttime. We agree that this was proper. See *State v. Kittelson*, 164 N.W.2d 157, 161 (Iowa 1969). We further conclude that the jury could have inferred the hasty departure was caused by the residents return, occurred at the time of said return, and that therefore the crime was committed in the nighttime.

¹ The instruction given by the trial court on circumstantial evidence is in substance that contained in Uniform Jury Instruction (Criminal) no. 501.13 (1972).

In addition to the foregoing evidence, there was alibi testimony offered by defendant placing his whereabouts elsewhere between the hours of 6:00 p.m. and 8:00 p.m. on the night in question. This lends support to the jury's finding that if the defendant committed the crime it was after 8:00 p.m. Similar alibi evidence was held sufficient to sustain a finding that a breaking and entering was committed in the nighttime in *State v. Kittelson*, supra at 162.² For a collection of cases relating to establishing the "nighttime" element in burglary prosecutions by circumstantial evidence see Annot. 82 A.L.R.2d 643. We hold the evidence in the present case sufficient to support the jury's verdict.

We have considered all issues presented and find no basis for reversal.

AFFIRMED.

² To support this conclusion in *Kittelson*, the court was forced to conclude that the jury could believe part of defendant's alibi and disbelieve part, even though both parts were given by the same witnesses. In the present case the jury could fully believe the testimony of one alibi witness (Nutter) and reject that of the other witnesses and arrive at a finding fully accounting for defendant's time from 6:00 p.m. to 8:00 p.m., yet leaving him free to commit the house breaking after 8:00 p.m. It is submitted that this state of facts presents an even stronger case for upholding the verdict than was present in *Kittelson*.