

IN THE COURT OF APPEALS OF IOWA

FILED

AUG 26 1982

CLERK SUPREME COURT

STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed August 26, 1982

vs.

)

DOUGLAS RAY KUCHENREUTHER,

)

2-216
67078

379

Defendant-Appellant.

)

Appeal from Marshall District Court - Paul E. Hellwege, Judge.

Defendant appeals from his conviction of first degree burglary in violation of Iowa Code § 713.1, .2. **AFFIRMED.**

Jim R. Sween, Eldora, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Richard Cleland, Assistant Attorney General, for plaintiff-appellee.

Considered en banc.

Defendant appeals from his conviction of first degree burglary in violation of Iowa Code § 713.1, .2. We affirm.

Defendant contends that the court should have given his proposed jury instruction on criminal trespass as a lesser included offense of burglary, when he was charged under the "entering" alternative of the statute, even though the jury was instructed on the "breaking" alternative only. The State argues that there was no reversible error because there was no factual basis for submitting instructions on a lesser included offense, and the jury's failure to convict on the submitted lesser included offense of second degree burglary rendered the court's failure to submit a still lesser included offense harmless error.

Defendant was charged with first degree burglary after a police officer apprehended him and an accomplice leaving a Marshalltown building. The officer had seen that the glass pane in the locked door had been broken, and had seen movement inside the building. Defendant was captured carrying a paper bag with beer from the building in it.

Defendant testified that his companion was the instigator of the burglary and that defendant was only trying to talk him out of the crime. Defendant asserted that his companion had broken the glass in the door with his hand, and that defendant had put his tee-shirt around the wound to prevent him from bleeding to death.

When the court presented counsel with the proposed instructions, defendant asked that trespass be submitted as a lesser included offense of burglary. The court denied this request. The court also stated that it thought the evidence showed a "breaking" case rather than an "entering" one, and thus instructed the jury only on "breaking." Defendant had only been charged on the "entering" alternative, but did not object to the court instructing on only the "breaking" alternative. Defendant concedes that error was not preserved, but asks on appeal

that the fact that the court instructed only on "breaking" not be used to reject his claim that the jury should have been instructed that criminal trespass is a lesser included offense of burglary charged under the "entering" alternative.

Choosing not to rely on the fact that defendant did not preserve error on the court's having instructed on the breaking charge only, the State counters defendant's argument on two grounds. First, the State contends that the factual test for lesser included offenses is not met. And second, the fact that the jury was given a choice between first and second degree burglary, and chose first degree abrogates the necessity for having instructed on any lesser included offenses and is thus harmless error.

The State's first argument centers on what is called the "factual test" for included offenses. Under this test there must be an ad hoc factual determination that there is an evidentiary basis for submitting the lesser included offense to the jury. State v. Johnson, 291 N.W.2d 6, 7 (Iowa 1980). Defendant wanted the court to instruct on criminal trespass as a lesser included offense. If the court had instructed on the "entering" alternative, it is clear that criminal trespass should have been a lesser included offense. State v. Sangster, 299 N.W.2d 661, 664 (Iowa 1980). However, we do not need to reach the question of whether criminal trespass is a lesser included offense of burglary charged under the "breaking" alternative, because in this case, defendant, by his own testimony, and the police officer, by his testimony, have raised the State's allegations to a verity. State v. Donelson, 302 N.W.2d 125, 135 (Iowa 1981). A factual basis, therefore, does not exist for submission of criminal trespass under this record, and defendant's argument fails to meet the "factual test."

AFFIRMED.