

IN THE COURT OF APPEALS OF IOWA

FILED

APR 20 1988

CLERK SUPREME COURT

188

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

CHARLES RICHARD DeWITT,)

Defendant-Appellant.)

Filed April 20, 1988

7-465
86-1277

Appeal from the Iowa District Court for Mahaska County (No. CR 5249-9-424), Phillip R. Collett, Judge.

Defendant appeals his conviction of burglary in the first degree. **AFFIRMED.**

Charles L. Harrington, Chief Appellate Defender, and B. John Burns, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Lona Hansen, Assistant Attorney General; and Charles A. Stream, Mahaska County Attorney, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson and Schlegel, JJ.

OXBERGER, C.J.

189

Defendant, Charles DeWitt, appeals his convictions of burglary in the first degree in violation of Iowa Code sections 713.1 and 713.1 and of assault without intent to inflict a serious injury in violation of Iowa Code sections 708.1 and 708.2(2). He contends that he cannot be convicted of burglarizing his own residence and that a neighbor's testimony concerning comments made by the victim after the incident was prejudicial hearsay. We affirm.

On the night of February 23, 1986, DeWitt returned to his grandmother's apartment around midnight. DeWitt had been staying with his grandmother, Birdie Fields, since August of 1985. When he returned, Birdie refused to let him in. She unlocked the door but did not remove the chain. They began arguing and DeWitt shoved the door in, breaking the chain and striking Birdie in the face. DeWitt then shoved Birdie out of the way.

A neighbor, Michelle Hoyt, then returned to her apartment. DeWitt went over to her apartment and told her Birdie wanted to speak to her. When Hoyt arrived, she found Birdie sitting on the couch. Birdie then began to relate what had happened. She told Michelle that DeWitt broke into the apartment and shoved her. She also told Michelle about the continuing argument she and DeWitt were having concerning his romantic involvements. Birdie also complained of the pain she was in due to the injuries she suffered on DeWitt's entry. She eventually consented to go to the hospital.

DeWitt contends there is insufficient evidence to find that he entered the apartment without right, license or privilege. DeWitt claims the apartment was his home and that a man cannot be guilty of burglarizing his own home. While that may be true, we conclude the apartment was not his home. We review at law, view the evidence in the light most favorable to the verdict, and all legitimate inferences arising reasonably from the evidence will be indulged in support of the verdict. State v. Dows, 355 N.W.2d 874, 877 (Iowa 1984).

The record shows that the apartment was rented to Birdie Fields and she paid the rent. DeWitt was staying at the apartment on a part-time basis. He would stay there when he was not staying with one of his girlfriends. He did not have a key to the apartment. He paid no rent. He did, however, occasionally offer Birdie some money, which she sometimes accepted and sometimes refused. We hold therefore the evidence was sufficient to show DeWitt had no right, license, or privilege to enter the apartment. Since the apartment was not his home, once he was denied entry he had no right to enter without further permission. See State v. Franklin, 368 N.W.2d 716, 719 (Iowa 1985) (defendant entered apartment uninvited after being told to wait outside).

DeWitt also contends there was insufficient evidence to show he intended to commit an assault. DeWitt claims he did not intend to assault anyone but simply entered to retrieve some of his possessions.

The State had to prove that DeWitt intended to assault his grandmother when he entered the apartment. Intent is seldom susceptible to proof by direct evidence. State v. Olson, 373 N.W.2d 135, 136 (Iowa 1985). Proof of intent will usually be a matter of circumstantial evidence and inferences therefrom.

Id.

We believe that in view of defendant's violent entry into the apartment, his agitated mental state, his shoving Birdie, and the continuing dispute between them, the jury could rationally have found he intended to commit an assault when he entered the apartment. We hold the evidence sufficient to show DeWitt's intent.

DeWitt's final contention is that the trial court erred in admitting highly prejudicial hearsay testimony. He argues the testimony of Michelle Hoyt recounting the statements made by Birdie should not have been allowed since it does not fit a hearsay exception. The State argues the statements fall within the excited utterance exception and the existing physical condition exception.

Iowa Rule of Evidence 803(2) excepts from the hearsay rule a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." The exception applies generally to statements made under the influence of the excitement of an incident, rather than on reflection or deliberation. State v. Mateer, 383 N.W.2d 533, 535 (Iowa 1986); State v. Stevens, 289 N.W.2d 592, 596 (Iowa 1980). The admission of hearsay under this exception lies largely within the discretion of the trial court, which must initially determine whether the out-of-court statements were induced by the excitement caused by the startling event which is being described. Mateer, 383 N.W.2d at 535; State v. Ogilvie, 310 N.W.2d 192, 196 (Iowa 1981).

Several factors are considered in determining whether a statement is spontaneous. They include the lapse of time, the extent to which questioning elicited statements that otherwise would not have been volunteered, the age and condition of the declarant, the characteristics of the event being described, and the subject matter of the statements. Mateer, 383 N.W.2d at 535. Statements which are elicited by questions qualify as excited utterances if they are not calculated to elicit information which would otherwise have been withheld. State v. Watson, 242 N.W.2d 702, 704 (Iowa 1976); see also State v. Ogilvie, 310 N.W.2d 192, 196 (Iowa 1981).

The challenged conversation took place within thirty minutes after DeWitt broke in the door. Birdie was sitting on the couch moaning in pain from her injuries. She had just been in a violent argument with DeWitt and was still upset. She was trying to describe what happened to her that night, despite repeated interruptions by DeWitt. We conclude her statements were a result of the stress and excitement of the night's events and were admissible under rule 803(2).

Likewise, the statements Birdie made describing her physical condition and injuries are also admissible. These statements are admissible under rule 803(3). Statements that describe a person's then existing physical or mental state are exceptions to the hearsay rule and properly admissible. See Shaver v. Iowa Lutheran Hosp., 252 Iowa 706, 721, 107 N.W.2d 85, 94 (1961). She was in considerable pain and was describing her pain and injuries to Hoyt. We conclude the statements fall within the exception. We hold therefore the trial court did not abuse its discretion in admitting the statements made by Birdie that night.

The defendant's conviction is affirmed.

AFFIRMED.