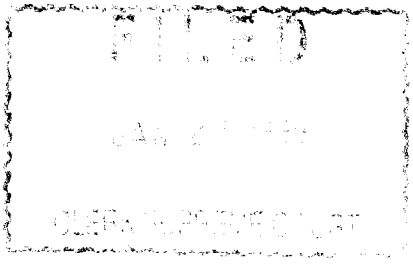
IN THE COURT OF APPEALS OF IOWA

No. 8-730 / 98-0597
Filed January 27, 1999



STATE OF IOWA,
Appellee,

vs.

JASON WALKER,
Appellant.

Appeal from the Iowa District Court for Black Hawk County, Stephen C. Clarke, Judge.

Jason Walker appeals from the judgment and sentence entered upon his conviction of first-degree burglary. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and David Arthur Adams, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and D. Raymond Walton, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Mahan and Zimmer, JJ.

HUITINK, P.J.

Jason Walker appeals from the judgment and sentence entered upon his conviction of first-degree burglary. We affirm.

I. Background Facts and Proceedings.

At trial, Brenda Hosea testified Walker entered her home without consent and attacked her. According to Hosea, Walker jumped on top of her, choked her with one hand while wielding a hammer in the other. She also testified her neck was red, her lip bloodied, and her back bruised during this attack.

Walker's testimonial version was dramatically different. According to Walker, he went to Hosea's home to discuss a personal problem. He claimed he knocked on Hosea's door and heard someone tell him to come in. Walker's testimony included these questions and answers:

> Q. Alright, did you sit on the couch?
> A. Yes.
> Q. What happened next?
> A. As soon as I sat on the couch she got up and said she would be back in just a minute and she went upstairs.
> . . .
> Q. And then what happened next?
> S. The next thing I knew she came downstairs with the tire iron, yelling leave her house.

Walker also testified he grabbed a hammer from a bench near the door as he fled the house and used it to block Hosea's blows with the tire iron.

The jury, over Walker's objection, was instructed on both the "entering" and "remaining over" alternatives of burglary. Instruction No. 12 stated read in pertinent part:

> The State must prove all of the following elements of Burglary In The First Degree:
>
> 1. On or about the 6th day of November, 1997, the defendant entered or remained in 370 California, Waterloo, Iowa, Black Hawk County;
> * * *
> 4. The defendant did not have permission or authority to enter or remain in 370 California, Waterloo, Iowa, Black Hawk County;
> 5. The defendant did so with the specific intent to commit an assault; and
> * * *

The jury found Walker guilty of first-degree burglary. Walker was sentenced to an indeterminate twenty-five year term of incarceration, including a mandatory minimum five-year sentence for using a deadly weapon. *See* Iowa Code § 902.7 (1997).

On appeal, Walker contends the State's evidence did not support submission of the "remaining over" alternative of burglary. He cites the absence of evidence indicating his right, license, or privilege to remain on Hosea's premises terminated. Walker argues Hosea's words and actions were only intended to end their altercation rather than requiring him to leave her home.

II. Standard of Review.

When jury instructions are challenged on appeal, we review them to determine whether they correctly state the law and are supported by substantial evidence. *State v. Predka*, 555 N.W.2d 202, 204 (Iowa 1996). Evidence is substantial if it would convince a reasonable person of the fact sought to be proven. *Id.* In determining whether there is substantial evidence to support submission of an instruction to the jury, we view the evidence in the light most favorable to the party requesting the instruction. *State v. Hogrefe*, 557 N.W.2d 871, 876 (Iowa 1996). In the instant case we view the evidence in the light most favorable to the State.

III. The Merits.

Walker correctly notes that the general verdict rendered in this case makes it impossible to determine which of the two alternatives of burglary submitted the jury accepted. The absence of sufficient evidentiary support for submission of the "remaining over" alternative would accordingly necessitate reversal and a remand for new trial. *See State v. Hogrefe*, 557 N.W.2d 871, 881 (Iowa 1996). Because we find sufficient evidentiary support for the district court's jury instructions, we affirm.

"Remaining over" for purposes of our burglary statute is a continuous event beginning with a decision to remain on the premises after the right, license, or permission to be on the premises terminates and ends only when the defendant leaves the premises. The requisite intent can be formulated at any time during this continuum. *State v. Dible*, 538 N.W.2d 267, 271 (Iowa 1995). On these facts the

jury could reasonably find Walker decided to remain on the premises and formed the required intent *after* Hosea expressly told him to leave. We accordingly affirm.

AFFIRMED.