FILED
MAY 31 1979
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff - Appellee,	)	Filed May 31, 1979
vs.	)	
RAYMOND FRANCIS BLAIR,	)	82 61793
Defendant - Appellant.	)	

Appeal from Webster District Court - Newt Draheim, Judge.

Defendant appeals conviction of burglary without aggravation alleging trial court erred by instructing the jury on two lesser included offenses. - AFFIRMED.

John P. Roehrick, Des Moines, and Fredrick E. Breen, Fort Dodge, for Appellant.

Thomas J. Miller, Attorney General of Iowa, Ann Fitzgibbons, Assistant Attorney General, Monty Fisher, Webster County Attorney and Allen L. Goode, Assistant Webster County Attorney, for Appellee.

Heard by Oxberger, C. J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendant Raymond Blair appeals conviction of burglary without aggravation in violation of section 708.3, The Code 1977. The sole issue on appeal is whether trial court erred when it instructed the jury on the lesser offenses of burglary without aggravation and assault during defendant's trial for burglary with aggravation. We affirm.

Most of the facts of the instant case are not disputed. In the early morning of February 1, 1977, Ronald and Sandra Hedeen were awakened by the sound of someone breaking down one of the doors to their home. Ronald armed himself with a shotgun intending to scare off the intruder. According to his testimony, he intercepted the defendant in an interior doorway of the house and defendant pushed him backwards approximately ten feet. Ronald then regained his balance and threatened to shoot defendant if he came any closer. Defendant was thus held at bay until the police arrived. According to defendant's testimony, he had drunk an excessive amount of beer on the night of the incident and had mistakenly entered the Hedeen residence thinking it was the home of his sister whom he was visiting. Defendant claimed that as he crossed the doorway he spotted the shotgun, fell to his knees and implored Mr. Hedeen not to shoot. He denied ever intentionally touching Mr. Hedeen.

Defendant was charged with aggravated burglary. Prior to trial, defense counsel filed a bill of particulars seeking to ascertain what public offense the defendant was alleged to have intended to commit. In its amended response, the State specified the offense of assault. Thus, in order to prove the charge against defendant, the State had to show that he (1) broke and entered the Hedeen residence, (2) in the nighttime, (3) with the intent to commit an assault, and (4) after entering did assault Ronald Hedeen. See §§ 708.1 and 708.2. At the conclusion of the trial, the court instructed the jury on the charge set out above as well as the lesser offenses of burglary without aggravation and assault. Defendant contended below and asserts on appeal that the giving of the latter two instructions was erroneous.

In State v. Rosewall, 239 N.W.2d 171 at 174 (Iowa 1976), the court held that a lesser included offense should be submitted when "(1) the elements of the lesser offense are an elementary part of the greater offense (the legal test) and (2) there is a factual basis in the record for submitting the included offense to the jury (the factual test)." Defendant concedes that burglary without aggravation meets the legal test set out above since the

elements of that offense are (1) breaking and entering the Hedeen residence, (2) in the nighttime, and (3) with the intent to assault. Defendant insists, however, that the factual circumstances did not support an instruction on this lesser offense. In other words, he contends the facts of the case were such that he either was guilty of the offense charged or was not guilty. Defendant's argument is as follows: if the jury found that defendant did assault Ronald Hedeen, the act itself would show that he had an intent to assault and he could then be convicted of aggravated burglary; if, however, the jury determined no assault occurred, then there was no other evidence which would show defendant had an intent to assault when he committed the break-in and he could not be convicted of burglary without aggravation.

We must examine the record, therefore, to determine whether the State presented any evidence of an intent to assault aside from the alleged act of assault itself. There was no evidence that defendant harbored ill will against, or that he even was acquainted with, any member of the Ronald Hedeen family. Defendant was unarmed when he entered the Hedeen's house. It appears that he gained entry by kicking or pounding on a back door and breaking its two locks. The State apparently concedes that defendant entered the Hedeen residence by mistake. It was the State's theory that defendant meant to break into the home of his ex-wife which was located across the alley from the Hedeen residence and that he intended to assault his ex-wife and/or her husband. In support of this theory, Donald Boelman testified that he was married to defendant's ex-wife, that in 1976 he had conversations with defendant at which time he asked defendant to leave the Boelman family alone, that there were ill feelings between him and defendant, and that he and his wife lived across the alley from Ronald Hedeen. We conclude that Boelman's testimony, when considered along with the violent manner in which defendant broke into the Hedeen residence, constitute sufficient evidence of defendant's intent to assault to warrant submission of the burglary without aggravation instruction.

Defendant also argues that trial court erred by instructing the jury on the crime of assault. The principle is well-established, however, that a defendant who is convicted of a greater offense is not entitled to object to an instruction on a lesser included offense. State v. Leahy, 243 Iowa 959, 965-66, 54 N.W.2d 447, 451 (1952). We see no reason to depart from this rule in the instant case. Defendant's conviction is affirmed.

AFFIRMED.