

IN THE COURT OF APPEALS OF IOWA

No. 1999-583 (9-844) / 99-445
Filed March 15, 2000

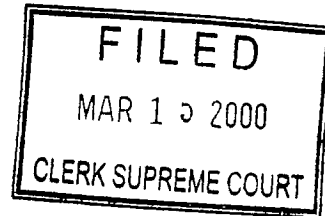
STATE OF IOWA,

Plaintiff-Appellee,

vs.

DIA MARIE MOREHEAD,

Defendant-Appellant.



Appeal from the Iowa District Court for Black Hawk County, Jon Fister,
Judge.

On appeal from her conviction for second-degree burglary, defendant
contends the court improperly instructed the jury on the "remaining on the
premises" alternative. **AFFIRMED.**

James T. Peters, Independence, for appellant.

Thomas J. Miller, Attorney General, Kristin Mueller, Assistant Attorney
General, and Thomas J. Ferguson, County Attorney, for appellee.

Considered by Huitink, P.J., and Streit and Miller, JJ.

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STREIT, J.

I. Background Facts & Proceedings.

'T was the night after Christmas and all through the house, not a creature was stirring . . . until Mary Coburn was awakened by someone banging on her door. Upon answering the door, Coburn found the defendant, Dia Morehead. Morehead asked if Coburn's boyfriend was home and if she could possibly use the restroom. Coburn told Morehead that her boyfriend was not home and hesitated at Morehead's bathroom request. Not waiting for a more definitive answer, Morehead pushed her way in and went to the restroom. Upon leaving the restroom, Morehead started taking Coburn's stereo and VCR. Morehead asked Coburn if she intended to stop her. Coburn said she did not, and Morehead fled with the loot.

The State charged Morehead with second-degree burglary in violation of Iowa Code sections 713.1 and 713.5 (1997) under two alternative theories of guilt. Under the first theory, the State alleged Morehead entered the house without permission with the intent to commit a theft; and under the second that Morehead remained in Coburn's house without authority to do so with the intent to commit a theft. At trial, Morehead testified Coburn voluntarily allowed her to come into the house and she only decided to take the items while on the way out of the bathroom. A jury found Morehead guilty.

Morehead appeals the conviction, claiming the court erroneously instructed the jury on the "remaining on the premises" alternative. She contends the instruction did not convey that the requisite intent to commit a theft must

occur simultaneous or subsequent to such time the defendant unlawfully remained on the premises.

II. Standard of Review.

We review the trial court's determination regarding jury instructions for errors at law. See Iowa R. App. P. 4; *State v. Breitbach*, 488 N.W.2d 444, 449 (Iowa 1992).

III. The Merits.

Although instructions to the jury must state the applicable rule of law, *State v. Marsh*, 392 N.W.2d 132, 133 (Iowa 1986), trial courts have broad discretion in the particular language chosen to express a specific legal notion. *Stringer v. State*, 522 N.W.2d 797, 800 (Iowa 1994). "If an instruction correctly states the applicable law it will be deemed proper even though an alternative wording is possible." *State v. Morrison*, 368 N.W.2d 173, 175 (Iowa 1985) (citation omitted). For error to result, the choice of words selected by the trial court must constitute an incorrect statement of the law. *Stringer*, 522 N.W.2d at 800.

An individual commits the crime of burglary if she remains in an occupied structure after her right, license, or privilege has expired with the intent to commit a theft therein. See Iowa Code § 713.1. The intent element of the offense must occur simultaneous or subsequent to the individual improperly remaining on the premises. See *State v. Dible*, 538 N.W.2d 267, 271 (Iowa 1995). Morehead claims the instruction employed by the court, a combination of two Iowa Uniform Jury Instructions, see Iowa Crim. Jury Instructions §§ 1300.5, .8 (1998), did not

intimate to the jury that her intent to commit the theft must be simultaneous or subsequent to her improperly remaining at the residence. The instruction read:

The State must prove all of the following elements of Burglary in the Second Degree:

1. On or about the 26th day of December, 1997, the defendant entered or remained in a residence at 727 Kern Street, Waterloo, Iowa.
2. The residence was an occupied structure as defined in Instruction No. 23.
3. The defendant did not have permission or authority to enter or remain in the residence.
4. The defendant did so with the specific intent to commit a theft.
5. One or more persons were present in or upon the occupied structure.

If the State has proved all of the elements, the defendant is guilty of Burglary in the Second Degree. If the State has failed to prove any one of the elements, the defendant is not guilty of Burglary in the Second Degree and you will then consider the charge of Attempted Burglary in the Second Degree as explained in Instruction No. 18.

The instruction properly states the law. The instruction first conveys, in paragraph one, to prove guilt it must be proved that Morehead remained in the residence. Paragraph three then communicates the need to show her remaining in the residence was without permission or authority. Paragraph four demands the State prove she “did so [remain without permission or authority] with the specific intent to commit a theft.” When the instruction is read in its natural progression, the jury is left with a proper statement of the law. Morehead’s objection appears to be critical of the use of the phrase “did so” in paragraph three, above, rather than restating she remained and her remaining was without permission or authority. Although interjecting such a restatement may very well

clarify that particular subsection, the instruction read as a whole properly conveys to the jury the elements of burglary. The conviction is affirmed.

AFFIRMED.

Huitink, P.J., concurs; Miller, J., concurs in the result only.

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