DEC 23 1980
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

413

STATE OF IOWA,)

Plaintiff-Appellee,) Filed December 23, 1980

vs.)

WILLIE DEAN SMITH,) 0-355
64341

Defendant-Appellant.)

Appeal from Black Hawk District Court - Carroll E. Engelkes, Judge.

Defendant appeals from his conviction of second degree burglary in violation of section 713.13, The Code 1979, alleging 1) that trial court violated his constitutional right to due process by relying on an inference in its holding that he broke a store door with the specific intent to steal and 2) that trial court should have considered and ruled upon the question of whether defendant was guilty of any lesser included offense. AFFIRMED.

Alvin R. Davidson, Black Hawk County Assistant Public Defender, Waterloo, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Lona Hansen, Assistant Attorney General, for plaintiff-appellee.

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

PER CURIAM

Defendant, Willie Dean Smith, appeals from his conviction, following trial to the court, of second-degree burglary in violation of section 713.3, The Code 1979. He contends 1) that trial court violated his constitutional right to due process by relying on an inference in its holding that he broke a store door with the specific intent to steal and 2) that trial court should have considered and ruled upon the question of whether defendant was guilty of any lesser included offense. We affirm.

Defendant was charged on May 25, 1979, with burglary in the second degree. Witnesses observed defendant using a hammer to beat on the rear door of the Jenney Company in Waterloo, Iowa. He fled when police sirens were heard. The police, however, pursued and apprehended defendant. Trial to the court was held on August 14, 1979. Defendant moved for a directed verdict on the grounds that the State had failed to prove beyond a reasonable doubt that a "breaking" occurred or that defendant had the specific intent to assault, commit a theft or a felony required for a burglary conviction. Defendant presented no evidence on his behalf. Trial court's order finding defendant guilty was entered August 17, 1979. Defendant's appeal followed.

I. Scope of Review. Since this is an action at law, our review is on assigned errors only. Iowa R. App. P. 4.

II. Sufficiency of the Evidence on Burglary. Defendant contends that the evidence was insufficient to prove burglary beyond a reasonable doubt because neither specific intent nor breaking were proved. We disagree.

While we view the evidence in the light most favorable to the State, we must consider all the evidence to determine its sufficiency to support a guilty verdict. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980). Both direct and circumstantial evidence are equally probative for proving guilt beyond a reasonable doubt. State v. O'Connell, 275 N.W.2d 197, 205 (Iowa 1979). Determining the credibility of the witnesses and the weight of the evidence is for the factfinder. Robinson, 288 N.W.2d at 341.

In light of these principles, we agree with trial court's conclusion that each of the elements of burglary has been proven, including those at issue, "breaking" and "specific intent." Defendant's acts of opening the screen door and hammering a hole in the inner door large enough to reach through and unlock the door to gain final entry certainly constitute a "breaking." See State v. Furnald, 263 N.W.2d 751, 754 (Iowa 1978); State v. Clay, 213 N.W.2d 473, 480 (Iowa 1973); State v. Hougland, 197 N.W.2d 364, 365 (Iowa 1972).

Trial court further found that defendant had the requisite specific intent (to commit a theft) by basing its finding on an inference drawn from the evidence presented in accordance with the uniform jury instruction on intent. A similar intent instruction was found constitutionally sound in State v. Rinehart, 283 N.W.2d 319, 323 (Iowa 1979). We note that the instruction speaks of allowable inferences as well as the burden of proof remaining with the State to prove the specific intent. Thus we find no error in trial court's reliance on an inference.

Contrary to defendant's assertion, we also believe that State v. Morelock, 164 N.W.2d 819, 822 (Iowa 1969), is directly applicable. There the court noted the evidence was sufficient that a jury

> . . . could find defendants were attempting to gain entry illegally into a closed business establishment; that the attempt was carried on with some degree of force and by the use of several tools; that they had severely damaged the door and molding, had sprung the lock, and had almost effected entrance when the arrival of the police curtailed their activities.

Morelock, 164 N.W.2d at 822. The court went on to state that, in examining similar situations presented by other cases, the court each time had held ". . . an intent to steal may be inferred from the actual breaking and entering of a building which contains things of value or from an attempt to do so." Id.

Here trial court inferred the intent to commit theft from defendant's acts of hammering a hole in the door of a business establishment at night when the business was closed and in running from the scene when police cars approached. The court noted that the business kept many things of value. We find this evidence clearly sufficient to support the court's finding that defendant committed burglary in the second degree.

III. Lesser Included Offense. Defendant next contends that trial court had to consider and rule upon the lesser included charge of criminal mischief. The State argues that criminal mischief is not a lesser included offense of second-degree burglary. We agree with the State on this issue.

Two tests, the legal elements test and the factual basis test, are required for determining whether a lesser included offense exists and therefore should be considered by the factfinder. State v. Sanders, 280 N.W.2d 375, 377 (Iowa 1979). The legal elements test requires the elements of the lesser offense to be elements of the greater offense. Applying this test in the instant case, we find that the elements of section 716.1 (criminal mischief) are not elements of section 713.1 (burglary). In contrast to criminal mischief, burglary requires no "damages, defacing, alteration, or destruction of

tangible property." See Hougland, 197 N.W.2d at 365; State v. Conners, 95 Iowa 485, 486, 64 N.W. 295, 295 (1895). The legal elements test thus is not met. In light of this finding, we do not need to consider the factual basis test. Since we conclude that no consideration of criminal mischief as a lesser included offense of second-degree burglary was necessary, trial court committed no error on this issue.

We therefore affirm trial court.

AFFIRMED.