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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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STATE OF IOWA,

Plaintiff-Appellee,

vs.

MARK FRANCIS STITT,

Defendant-Appellant.

Filed November 26, 1980

0-255
63737

Appeal from Black Hawk District Court - Dennis D. Damsgaard, Judge.

Defendant appeals from his conviction for burglary in the first degree in violation of section 713.2, The Code 1979, asserting that 1) the State failed to show he committed the act of breaking, 2) trial court erred in concluding as a matter of law that opening an outer screen door is a breaking, and 3) trial court erred in its reference to "entry" in its conclusions of law and in finding him guilty of burglary in the first degree. AFFIRMED.

Larry J. O'Connor, Waterloo, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Richard L. Cleland, Assistant Attorney General, for plaintiff-appellee.

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

Defendant, Mark Francis Stitt, appeals from his conviction for burglary in the first degree in violation of section 713.2, The Code 1979. He asserts that 1) the State failed to show he committed the act of breaking, 2) trial court erred in concluding as a matter of law that opening an outer screen door is a breaking, and 3) trial court erred in its reference to "entry" in its conclusions of law and in finding him guilty of burglary in the first degree. Defendant therefore contends his motion for directed verdict of acquittal should have been granted. We affirm.

At approximately 3:00 a.m., on August 25, 1978, a male, later identified as defendant, knocked on the front door of the residence of Mark J. Scoville. Bill Smith, one of Scoville's guests, opened the inside door; Scoville stood close behind. Both men saw defendant standing at the entrance with the opened screen door resting against his back. He was wearing a mask made from nylon stockings and holding a .45 caliber pistol in his right hand. Defendant reached inside the house, grabbed Scoville's right hand, and demanded "dope." When he was told that no one had any drugs, he demanded that a woman guest, Sherry Miller, leave the house with him; she declined. Defendant then cocked the gun and threatened to blow off Scoville's kneecap if Miller did not accompany him. A scuffle ensued between Scoville and defendant and the gun discharged. The bullet grazed Scoville's right wrist and entered his right thigh, shattering the thigh bone. The scuffle continued and both men ended up outside on the lawn. As others came outside, defendant dropped the gun and fled the scene. Scoville picked up the gun and fired at defendant but did not hit him. Defendant was later apprehended at his girlfriend's home. An automobile owned by defendant's father and used by defendant on the evening of August 24th and early morning of August 25th was found approximately one and one-half blocks from the Scoville residence. Defendant's father also owned the weapon used in the shooting.

Trial to the court commenced April 3, 1979. The court overruled defendant's motions for directed verdict of acquittal and found defendant guilty of burglary in the first degree. Defendant's motions for new trial and in arrest of judgment also were overruled. This appeal followed.

I. Scope of Review. Our review is for correction of errors at law. Iowa R. App. P. 4.

II. Sufficiency of Evidence of Breaking. Defendant contends that trial court erred in overruling his motion for directed verdict because the State failed to show that he did break an occupied structure by opening either the inside or the outside door. The

State claims defendant failed to preserve error to challenge the sufficiency of the evidence that he opened the outside screen door. We agree with the State.

On appeal, we will consider no ground in support of a motion for directed verdict that was not argued in trial court. State v. Rosewall, 239 N.W.2d 171, 173 (Iowa 1976). In this case, the record shows that defendant's counsel, in making his oral motion for directed verdict, conceded that defendant may have opened the screen door. Thus, we find defendant has not properly preserved error on this issue.

Nonetheless, in addressing the issue on the merits, we conclude defendant's motion was properly overruled. In passing upon a motion for directed verdict, we view all the evidence in the light most favorable to the State, regardless of whether it is contradicted or inconsistent; every reasonable inference that may be deduced must be considered to supplement the evidence. State v. Galvan, No. 61896, slip op. 9 (Iowa Oct. 15, 1980); State v. Jones, 281 N.W.2d 13, 18 (Iowa 1979). This test applies in cases involving circumstantial as well as direct evidence. Galvan, slip op. at 9; State v. Marti, 290 N.W.2d 570, 584 (Iowa 1980); State v. O'Connell, 275 N.W.2d 197, 204-05 (Iowa 1979). "If there is substantial support for the verdict in the record, the verdict is conclusive." Galvan, slip op. at 9 (quoting State v. Robinson, 288 N.W.2d 337, 338 (Iowa 1980)). Findings of fact in a criminal case tried to the court are given the same effect as a jury verdict. State v. Ozias, 136 Iowa 175, 176, 113 N.W. 761, 762 (1907).

With these principles in mind, we examine the evidence. Trial court heard testimony that Scoville, upon hearing a knock on his door at 3:00 a.m., followed Bill Smith to the door; testimony established that Smith answered the door. Scoville testified to seeing the opened door resting against defendant's back. Jackson J. Foreman, a visitor at Scoville's residence, testified to seeing a man leaning against the open screen door. Bill Smith said he opened the door and that the person outside had already opened the screen door. While no one directly observed defendant open the door, there is sufficient circumstantial evidence that defendant did open the outside door.

III. Breaking as a Matter of Law. Defendant next contends that trial court erred in concluding as a matter of law that opening an outer screen door is a breaking. We note that burglary within the meaning of section 713.1, supplement to the Code 1977, includes breaking or entering an occupied structure by a person having intent to commit "a felony, assault or theft therein. . . ." Case law defining breaking shows that breaking occurs when an intruder removes or puts aside some part of the structure relied on as an

obstruction to intrusion. 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). Defendant nonetheless argues that opening an outer screen door is legally insufficient to constitute breaking if it does not allow the intruder immediate access to the premises. We disagree.

In State v. Conners, 95 Iowa 485, 486, 64 N.W. 295, 295 (1895), the inner door was already opened, but the outer screen door, which closed with hinges and a spring, was in fact closed. There, the court noted "it has long been held that the raising of a latch and opening a door . . . is a breaking." Id.; see also State v. Henderson, 212 Mo. 208, 214, 110 S.W. 1078, 1079 (1908); State v. Moon, 62 Kan. 801, 806-07, 64 P. 609, 610-11 (1901).

While opening the outer screen door in Conners allowed immediate access to the building, we see no legal distinction between opening an outer screen door and entering through an already opened inside door as compared with opening an outer screen door and knocking in order to have someone inside open the inside door to permit entry, as occurred here, as long as the acts are accompanied with the requisite felonious intent. We do not read the cases to require that defendant remove the last impediment to entry. Consequently, we conclude trial court did not err in concluding a breaking under chapter 713 occurred.

Further, we agree with trial court's conclusion that there may also have been a constructive breaking sufficient to satisfy the requirement of section 713.2. Where one gains entrance by tricks, fraud, artifice, deception, or similar means, one constructively breaks. Brooks v. State, 25 Md. App. 194, 196, 333 A.2d 352, 354 (1975). The constructive-breaking doctrine, when fairly applied, satisfies the breaking requirement of the statute. In State v. Rodgers, 216 N.C. 572, 573, 5 S.E.2d 831, 832 (1939), the court held defendant guilty of a constructive breaking when he forced his way into the house at the point of a gun. Id. "[W]hether the offender gain[s] an entrance by open violence or by deceiving . . . and knocking at the door after the manner of a peaceable citizen, if the intent be felonious, the law implies a forcible breaking." Ducher v. State, 18 Ohio 308, 317 (1849).

The evidence in this case establishes that defendant gained final entrance into the Scoville residence by knocking, whereupon persons inside opened the door. At the time, defendant was wearing a mask and holding a gun. We conclude trial court properly could find a constructive breaking sufficient to constitute a violation of section 713.2.

IV. Errors in Trial Court's Conclusions of Law. Defendant finally contends that trial court erred in its repeated reference to "entry" in its conclusions of law and in finding him guilty of burglary in the first degree. We find defendant's argument is without merit.

Defendant was charged with burglary in the first degree in that he did "break into an occupied structure . . . with the intent to commit an assault and had in his possession a dangerous weapon . . . ." The court found a burglarious breaking and, in addition, that "there may also be a constructive breaking sufficient to support the crime of burglary." The court concluded that the State proved each and every element of the crime charged. After this finding the court also noted that the State went further and proved entry into the Scoville residence through defendant's acts of reaching in and grabbing Scoville by the arm while Scoville was inside the home. This finding is in addition to the finding that defendant committed burglary in the first degree by breaking.

To warrant reversal, defendant must prove prejudice by showing his rights have been injuriously affected or he has suffered a miscarriage of justice. State v. Massey, 275 N.W.2d 436, 439 (Iowa 1979). We find the court's reference to entry was superfluous and had no effect on the court's finding that the required elements of breaking had been proved. We therefore conclude no prejudicial error occurred by trial court's reference to "entry" in its conclusions of law. Trial court's judgment is affirmed.

AFFIRMED.