IN THE COURT OF APPEALS OF IOWA

No. 7-224 / 96-0881

000693

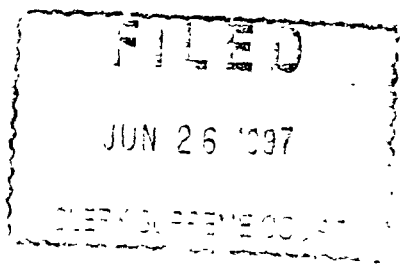
STATE OF IOWA,

Appellee,

vs.

EUGENE LITTLEWIND,

Appellant.



Appeal from the Iowa District Court for Woodbury County, Robert C. Clem, Judge.

Eugene Littlewind appeals from his conviction, following a bench trial, for third-degree burglary in violation of Iowa Code section 713.6A (1995). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Thomas S. Mullin, County Attorney, and Mark Campbell, Assistant County Attorney, for appellee.

Heard by Habhab, C.J., and Cady and Streit, JJ.

HABHAB, C.J.

Defendant Eugene Littlewind appeals from his conviction, following a bench trial, for third-degree burglary in violation of Iowa Code section 713.6A (1995). At his bench trial, Littlewind testified he broke into a dinner theater for the sole purpose of finding a warm place to sleep. He asserted he did not intend to steal anything at the time he broke in.

The district court stated the fighting issue was whether Littlewind had the specific intent to commit a theft at the time he broke into the dinner theater. The court found Littlewind guilty as charged. It concluded he did possess the requisite specific intent based on the time of day, the violent act of breaking the window, and his first action upon entering the building was committing the theft. The court found Littlewind was not credible.

Prior to sentencing, defense counsel stipulated Littlewind had two prior felony convictions from North Dakota. A presentence investigation was ordered. The district court sentenced Littlewind as an habitual offender to an indeterminate fifteen-year prison term.

Littlewind appeals. He contends the evidence did not show beyond a reasonable doubt that he entered the building with the intent to commit a theft. He asserts he formed intent to commit the theft after he entered the building and this later-formed intent does not support the burglary conviction. He also claims his trial counsel rendered ineffective assistance.

I. Sufficiency of the Evidence. When reviewing criminal convictions for sufficiency of the evidence, we review the evidence in a light most favorable to the verdict. *See State v. McGrew*, 515 N.W.2d 36, 37 (Iowa 1994). A conviction is reversed only if there is no substantial evidence in the record supporting the verdict or the verdict is clearly against the weight of the evidence. *Id.* at 37-38. Substantial evidence is evidence which could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. *Id.* at 38. A fair inference of guilt with respect to each element of the crime charged is sufficient to uphold a verdict. *Id.* We consider all of the evidence, not merely that supportive of the conviction, in determining the sufficiency of the evidence to support a guilty verdict. *State v. Robinson,* 288 N.W.2d 337, 340 (Iowa 1980).

The State presented substantial evidence of defendant's specific intent to commit the charged crimes. The burglary occurred in the very early morning hours of December 29, 1995. The record reveals Littlewind had only twenty-five cents in his possession at the time of the burglary. Littlewind entered the building by breaking a window with a large stick and crawling through it. Upon entering, he did not turn on any lights and immediately walked into another room and committed the theft.

Littlewind testified he only broke into the building to sleep and did not have the intent to commit the theft upon entering. The court found his testimony was not credible. The finder of fact is free to believe or disbelieve any testimony as it chooses

and to give weight to the evidence as in its judgment such evidence should receive. *See State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993).

In reviewing the evidence in the light most favorable to the verdict, we find there is substantial evidence to support Littlewind's conviction.

II. Ineffective Assistance of Counsel. Littlewind claims his counsel was ineffective in stipulating to the prior felony convictions and in failing to raise a defense of intoxication.

Generally, ineffective assistance of counsel claims are preserved for postconviction to allow trial counsel an opportunity to defend the charge. *State v. Pearson*, 547 N.W.2d 236,241 (Iowa App. 1996). We depart from this preference if the record on direct appeal is sufficient to evaluate the merits of a defendant's ineffective assistance of counsel claim. *Id.* If not, we preserve the claim for postconviction proceedings so the facts may be developed. *Id.* This also gives the allegedly ineffective attorney the opportunity to explain his or her conduct. *Id.*

We preserve Littlewind's ineffective assistance of counsel claim for postconviction proceedings as there is an inadequate record before us to adjudicate it at this time.

AFFIRMED.