FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-320 / 88-1012

473

STATE OF IOWA,

Appellee,

vs.

GREGORY ALLEN MURDY,

Appellant.

Appeal from the Iowa District Court for Scott County, Margaret S. Briles, Judge.

Defendant appeals his conviction, following a jury trial, of attempted burglary and possession of burglary tools. **REVERSED AND REMANDED FOR NEW TRIAL.**

Raymond E. Rogers, State Appellate Defender, and Shari Barron, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Sarah J. Coats, Assistant Attorney General; and H. J. Pries, Assistant County Attorney, for plaintiff-appellee.

Considered by Oxberger, C.J., and Sackett and Habhab, JJ.

PER CURIAM

Defendant Gregory Allen Murdy appeals his conviction, following a jury trial, of attempted burglary and possession of burglar's tools. We reverse and remand for new trial.

On January 2, 1988, someone broke into the Pro Shop of the Plaza West Bowling Center in Davenport undetected, apparently by standing on top of a toilet in a nearby men's room, removing a tile from the drop ceiling, then climbing up into the ceiling and from there into the Pro Shop. The police lifted and photographed footprints at the scene.

Then on January 24, about three weeks after the first break-in, the owner of the Pro Shop was working after hours when he heard a noise in the ceiling. He paged the store manager and the two went to the men's room that provided access to the ceiling above the Pro Shop. There they encountered the defendant, who denied having been up in the ceiling but whose jacket had white ceiling dust on it. A subsequent police search of the space above the ceiling uncovered a screwdriver and claw hammer belonging to the defendant. On these facts a jury found the defendant guilty of attempted burglary and possession of burglar's tools in connection with the January 24 incident.

On appeal, the defendant challenges the admissibility of evidence that he invoked his right to counsel. The testimony revealed that after a police officer held up one

of the defendant's shoes, then produced a picture of a shoe print left on a toilet lid in the men's room at the plaza, the defendant said he thought he should get a lawyer.

The State admits that admission of this testimony was error. See State v. Kyseth, 240 N.W.2d 671, 674 (Iowa 1976). Nonetheless, the State argues that submission of this testimony was not prejudicial. In order for this error to be deemed harmless, the State is required to prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." United States ex. rel Mason v. Yeager, 476 F.2d 613, 616 (3rd Cir. 1976) (quoting Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 828, 17 L. Ed. 2d 705, 710 (1967)).

The State has failed to sustain its burden in this case. The defendant's invocation of his right to counsel carried with it the clear implication that he had been caught in a situation which he could not explain, and therefore needed the assistance of counsel. Thus we cannot say beyond a reasonable doubt that this error did not contribute to the verdict obtained.

REVERSED AND REMANDED FOR NEW TRIAL.

All judges concur except Sackett, J., who dissents.

SACKETT, J. (dissenting)

I would affirm the trial court.