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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Appellee,) Filed October 7, 1977 109
vs.)
ISOM DANIEL ROGERS II,) 220/58777
Appellant.)

Appeal from Johnson District Court - Clinton E. Shaeffer, Judge.

Defendant appeals conviction under § 708.8, The Code, breaking and entering, claiming, inter alia, that criminal trespass, §§ 729.1(1) and 729.1(2)(a), The Code, constitutes a lesser included offense of § 708.8, and, therefore, trial court erred in failing to give appropriate jury instruction.

REVERSED AND REMANDED.

Alan R. Bohanan, of Nolan, Lucas & Nolan, of Iowa City, counsel for appellant.

Richard C. Turner, Attorney General of Iowa, Shirley G. Steele, Assistant Attorney General, and Jack Dooley, Johnson County Attorney, counsel for appellee.

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

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DONIELSON, J.

Defendant-Isom Daniel Rogers II, appeals his conviction of breaking and entering with intent to commit a public offense, a violation of § 708.8, The Code. Defendant asserts here (1) that the trial court's error in allowing the jury to learn that the defendant was on parole and infer that defendant had been previously convicted was so prejudicial as to deny him a fair trial; (2) that the evidence adduced at trial was insufficient to support the verdict; and (3) that the district court erred in its instructions to the jury by failing to instruct that criminal trespass was a lesser included offense of breaking and entering. Our resolution of the third assignment of error renders consideration of the first two unnecessary.

In essence, Rogers argues that criminal trespass, specifically §§ 729.1(1) and 729.1(2)(a), The Code, is a lesser included offense of breaking and entering, § 708.8, The Code, and consequently, the trial court erred in refusing to give an appropriate instruction in that regard.

The law in Iowa regarding instructions on lesser included offenses is relatively well settled. In State v. Redmon, 244 N.W.2d 792, 796 (Iowa 1976), the court held that the jury must be instructed on lesser included offenses when

> "(1) the elements of the lesser offense are an elementary part of the greater offense (the legal test) and (2) there is a factual basis in the record for submitting the included offense to the jury (the factual test)."

Stated another way, the court in State v. Stewart, 223 N.W.2d 250, 252 (Iowa 1974) cert. denied, 423 U.S. 904, 96 S.Ct. 205, 46 L.Ed.2d 134 (1975), held:

> "The lesser offense must be composed solely of some but not all elements of the greater crime. The lesser crime must not require any additional element which is not needed to constitute the greater crime. The lesser offense is therefore said to be necessarily included within the greater." (emphasis added).

See also State v. Billings, 242 N.W.2d 726, 730-733 (Iowa 1976); §§ 785.5 and 785.6, The Code; Comment, "The Lesser Included Offense Doctrine in Iowa: The Gordian Knot Untied", 59 Iowa L.Rev. 684 (1974).

In State v. Hawkins, 203 N.W.2d 555, 556-558 (Iowa 1973), the court held that failure to include an instruction for a lesser included offense constituted reversible

error. In State v. Stergion, 248 N.W.2d 911, 912 (Iowa 1976), the court, citing State v. Redmon, supra, and State v. Smith, 223 N.W.2d 223, 225 (Iowa 1974), restated the analysis to be undertaken:

> "The question whether one offense is necessarily included in the other is resolved through a two-step process. The first focuses upon the legal or element test, and the second requires an ad hoc factual determination."

Consequently, in order to apply the foregoing rules, we must evaluate the elements of both offenses. In order to violate § 708.8, the breaking and entering statute, with regard to a shop or store, one must (1) break and enter (2) any office, shop, store, warehouse, etc., (3) with the intent to commit any public offense.[1] In order to violate § 729.1(1) and § 729.1(2)(a), the criminal trespass statute, one must (1) enter upon or in property (2) without legal justification or the implied or actual permission of the owner, (3) with the intent to commit a public offense or to use, remove therefrom, alter, damage, etc., anything animate or inanimate, without the permission of the owner, etc.

An analysis of the foregoing statutes leads us to conclude that criminal trespass is a lesser included offense of breaking and entering a store, shop, or warehouse, etc. Elements one and two of both offenses cause us no concern whatsoever. Element three however merits discussion. Breaking and entering requires an "intent to commit any public offense." Criminal trespass requires an "intent to commit a public offense or to use, remove therefrom, alter, etc. anything animate or inanimate, without the permission of the owner, etc." We must focus upon whether criminal trespass requires any additional element in this intent aspect which is not needed to constitute breaking and entering. State v. Stewart, supra at 252. "We seek a reasonable interpretation and construction which will best effect the purpose of the provisions and avoid absurd results." State v. Billings, supra, at 731. We interpret the intent element of § 729.1(2)(a) as not requiring an additional element not required by § 708.8. An additional element is

[1] In view of the language contained in State v. Billings, supra, at 731-733, we decline to include "at any time" as an element of the offense. The Billings majority implies that such a phrase is merely a descriptive one and does not constitute an element of the offense.

We further note that the daytime-nighttime distinction drawn in § 708.8 and discussed in Billings is not relevant here, because a dwelling house is not involved. Since a store or shop was the subject of this case, that portion of § 708.8 dealing with a store is the only relevant one requiring our consideration.

not required; merely an alternative means to satisfy the intent requirement is provided. Not only would a contrary conclusion lead to "absurd results," but would effectively transform the "or" into an "and" in the intent phrase of the criminal trespass statute.

Consequently, we decide that no additional element is required and hold that §§ 729.1(1) and 729.1(2)(a) constitute a lesser included offense of § 708.8 with regard to a shop or store. Since no instruction in this regard was given, we reverse the district court and remand for a new trial.

REVERSED AND REMANDED.