FILED
OCT 07 1977
CLERK SUPREME COURT

89

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Plaintiff-Appellee,)
vs.)
DONALD GUSTOFF,)
Defendant-Appellant.)

Filed October 7, 1977

290
60389

Appeal from Greene District Court, Paul E. Hellwege, Judge.

Defendant appeals his conviction of malicious injury to a building in violation of § 714.1, The Code 1975. - Affirmed.

John L. Timmons, of Ames, for Defendant-Appellant.

Richard C. Turner, Attorney General of Iowa, Richard H. Doyle IV, Assistant Attorney General, and Nicola J. Martino, Greene County Attorney, for Plaintiff-Appellee.

Submitted to Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

Defendant Donald Gustoff appeals his conviction of malicious injury to a building in violation of § 714.1, The Code 1975. We affirm.

The trial court ruled the evidence had generated a jury question regarding the issues of the maliciousness of Gustoff's action and the role intoxication may have played in his ability to form a malicious intent. Its ruling fully comports with State v. Overstreet, 243 N.W.2d 880, 883 (Iowa 1976). We must view this sufficiency of the evidence question in the light most favorable to the State. Id. at 884.

We find the jury could have found the following direct evidence bearing upon the element of malicious intent: 1) by Gustoff's own testimony he was nursing his anger from the prior evening's altercation with his nephew; 2) he was drinking, waving a wrench about, and menacing other bar patrons when the bar owner called his wife downstairs to calm Gustoff down; 3) Gustoff's supply of alcohol was cut off by the complaining witnesses, the bar owners; 4) upon returning to the bar, and being refused admittance, Gustoff propelled the wrench through the glass with the epithet "You've got to be shitting me!"; 5) the Johnson's faces were only inches away from the door glass when Gustoff so acted.

State v. Ocha, 244 N.W.2d 773, 776 (Iowa 1976) defines malice as being "prompted by an evil mind to destroy or injure the property." With this testimony before it, the jury could find that the State had amply established Gustoff was prompted by "an evil mind" to destroy the door glass. We are bound by such a finding. We affirm the denial of a directed verdict.

Alternatively, Gustoff argues the trial court erred in refusing to instruct the jury in Instruction 11 (dealing with voluntary intoxication) that when Gustoff offered some evidence of intoxication the burden shifted to the State to show the defendant was capable of forming the specific malicious intent. The trial court instructed in Instruction 11 that the burden imposed by Instruction 9 (burden upon the State to prove each element) remained on the State throughout the trial. We can find no reversible error in this instruction.

We think the practical effect of the Instructions 9, 10 and 11 required proof beyond a reasonable doubt by the State that Gustoff despite his claimed

intoxication maliciously broke the bar door glass. In order to conclude under the instructions that Gustoff acted with "an evil mind", the jury would have to have found that the State had disproven the defense of intoxication. Indeed, if the trial court had instructed as Gustoff requested, we think the instruction would have been confusing and contradictory.

> It is not consistent to give the State a burden, shift back part of it to the defendant, and then shift back to the State in the same set of instructions. State v. Buchanan, 207 N.W.2d 784, 792 (J. McCormick concurring.)

The trial court is affirmed in its refusal of Gustoff's instructions.

Affirmed.