

IN THE COURT OF APPEALS OF IOWA

No. 2-121 / 91-749

FILED

APR 28 1992

CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

1200

vs.

CAREY HOLLANDER,

Appellant.

Appeal from the Iowa District Court for Johnson County,
Kristin Hibbs, Judge.

The defendant appeals a judgment and sentence of the district court, following a jury trial, finding him guilty of two counts of burglary in the second degree. **AFFIRMED.**

Mark C. Meyer of Kinnamon, Kinnamon, Russo & Meyer,
Iowa City, for appellant.

Bonnie J. Campbell, Attorney General, Bruce Kempkes,
Assistant Attorney General, J. Patrick White, County
Attorney, and Janet Lyness, Assistant County Attorney, for
appellee.

Considered by Hayden, P.J., and Sackett and Habhab, JJ.

HAYDEN, P.J.

Carey Hollander, the defendant, was convicted by a jury of two counts of burglary in the second degree. The convictions stem from the burglaries of Bud's Tap in Oxford, Iowa, and the home of Bud Zimmerman, the owner of the tavern.

Hollander, Harold Blakey, Donna Walker, and Julia Snyder were patrons of Bud's Tap on the evening of December 19, 1990. The members of this group came and went from the tavern that evening. After closing the tavern Zimmerman saw Walker, Blakey, and defendant get into a van and Snyder and Glick get into Glick's pickup truck. When Zimmerman arrived at his home he discovered his home had been burglarized. Missing were a coffee can filled with pennies and a loaded pistol.

Ronald Hummer, another bar patron, was sitting in his car after the tavern closed. He noticed defendant walk to the doorway of the tavern. At that time Walker drove the van alongside Hummer's vehicle and blocked his view of the tavern. Hummer left the area for a few minutes. When he returned he discovered the tavern had been broken into. He saw Walker and two male passengers driving away in the van without its headlights on. Hummer followed the van and reported the incident to the police from his car phone. While following the van Hummer did not observe anyone exit from or enter the vehicle. The police stopped the van in Tiffin. Inside were Walker, Blakey, and defendant. Also

inside the van were Zimmerman's handgun, the coffee can taken from his residence, and several items from the tavern.

Defendant testified he left the tavern alone around 1:30 a.m. and decided to walk home to Coralville. After walking for approximately one and one-half hours Blakey and Walker stopped and offered defendant a ride. Defendant accepted a ride. The van was then stopped by the police.

A jury found Hollander guilty of two counts of burglary in the second degree. Hollander appeals, raising the following issues: (1) the trial court abused its discretion by imposing a witness sequestration order and then allowing the State to present rebuttal witnesses who were present during the trial, (2) there is insufficient evidence to support the verdict for the burglary of Zimmerman's residence, and (3) the prosecutor committed reversible error by allowing a witness to commit perjury. We address each in turn.

Larry Betts and Bonnie Wenman, the owner of the van used in the burglary and Snyder's mother, were present in the courtroom while defendant testified. After defendant testified Wenman informed the prosecutor she and Betts had seen the defendant, Blakey, Walker, and Snyder at Snyder's home early in the evening of December 19, 1990. Their observation contradicted defendant's testimony he did not know Blakey or Walker prior to meeting them at the tavern. The district court granted the State's request and allowed

Wenman and Betts to testify in rebuttal concerning their observations. Defendant contends it was an abuse of discretion to allow them to testify in violation of the sequestration order.

The purpose of a sequestration order is "'to lessen the danger of perjury, or at least of a suggestion to following witnesses of what their testimony should be to correspond with that previously given'" State v Pierce, 287 N.W.2d 570, 574 (Iowa 1980) (quoting In re Will of Smith, 245 Iowa 38, 42, 60 N.W.2d 866, 869 (1953)). We hold the purpose of such an order was not violated in the present case. The rebuttal witnesses' testimony did not correspond to testimony previously given by defendant. Their testimony impeached defendant's testimony. A similar holding was reached in United States v. Shurn, 849 F.2d 1090, 1094 (8th Cir. 1988). In Shurn the court found no abuse of discretion when the trial court permitted the government's witness to testify even though the witness sat at the counsel table throughout the trial. Id. at 1094. The court held the sequestration order was not applicable because the witness's testimony was not cumulative, but simply impeaching. Id. We likewise conclude the trial court did not abuse its discretion in allowing Wenman's and Betts's testimony.

Hollander next contends there is not sufficient evidence to sustain the guilty verdict for the burglary of Zimmerman's residence. A verdict will be upheld where

there is substantial evidence to support the charge. State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984). Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. Id. The evidence is viewed in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the record. State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984). We consider all the evidence at trial, not just the evidence that supports the verdict. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980).

We find substantial evidence supporting the verdict. Hollander had the opportunity to be at Zimmerman's residence. The items stolen from Zimmerman's residence were found in the possession of Hollander in the van shortly after the burglary. We affirm on this issue.

Finally, Hollander contends the prosecutor committed reversible error by allowing a State witness to commit perjury. The alleged perjury occurred when the witness testified he had seen Hollander at his place of business four or five years prior to 1990. According to prison records, the defendant was incarcerated at that time, and the State knew of his incarceration.

A careful review of the record reveals the witness also admitted he did not know exactly when he had seen the defendant before 1990. The witness indicated it could have been more than four or five years prior to 1990. Thus, the

defendant would not have been in prison at that time. The witness did not commit perjury. We affirm on this issue.

AFFIRMED.