

IN THE COURT OF APPEALS OF IOWA

No. 0-337 / 89-1642

FILED

AUG 30 1990

CLERK SUPREME COURT

STATE OF IOWA,

Plaintiff-Appellee,

vs.

FREDRICK STEENS,

Defendant-Appellant.

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Appeal from the Iowa District Court for Polk County,
Harry Perkins, Judge.

Defendant appeals his conviction, following a jury trial, for burglary in the second degree. **REVERSED AND REMANDED.**

Raymond E. Rogers, State Appellate Defender, and Ahmet S. Gonlubol, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Ann E. Brenden, Assistant Attorney General, James Smith, County Attorney, and Dan Voogt, Assistant County Attorney, for appellee.

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

SACKETT, J.

Defendant Fredrick Steens was convicted of burglary in the second degree. He challenges the trial court's refusal to submit his requested instruction on the lesser included offense of criminal trespass. We reverse and remand for a new trial.

The defendant and a companion were arrested after breaking into a house. Defendant alleged he entered the house only because his companion claimed to know the occupants and claimed entry was permissible. The defendant was charged with second degree burglary.

A jury found defendant guilty of burglary in the second degree. He has appealed the resulting conviction.

The defendant contends the district court erred by refusing to instruct the jury on criminal trespass as a lesser-included offense of second-degree burglary.

Our scope of review is for the correction of errors at law. Iowa R. App. P. 4.

The paramount consideration in determining submissibility of lesser-included offenses remains whether the greater offense cannot be committed without also committing all elements of the lesser offense. State v. Turecek, 456 N.W.2d 219, 223 (Iowa 1990). The comparison of the elements of the greater and lesser crimes, sometimes referred to as the "elements tests," is only resorted to as an aid in applying the impossibility tests and is fully subsumed therein. Id.

It is well settled that simple trespass is a lesser and included offense of burglary when burglary is alleged and proved in its entry alternative, or when it is submitted in both the breaking and entry alternative. State v. Chase, 335 N.W.2d 630, 634 (Iowa 1983). The State in the present case chose to charge defendant with breaking and/or entering the premises. If the State elects to use only part of a statute in charging a public offense, then what the State charges is the statute for that case. State v. Wales, 325 N.W.2d 87, 89 (Iowa 1982).

The jury instructions set out the State's charge of burglary by either breaking or entering, however the other instructions indicated that the jury must find a breaking occurred in order to convict the defendant. We have no way of telling which alternative the jury adopted. There was evidence which supported either result. See Id. Applying these principles to the present case, we believe defendant's requested instruction should have been given to the jury as a lesser-included offense.

The State contends that the defendant failed to preserve error on this issue. We find this claim to be without merit. The State also contends that defendant was not prejudiced by any error in submitting the lesser offense because the jury convicted him of the greater. The Iowa Supreme Court recently addressed this harmless error argument in State v. Turecek, 456 N.W.2d 219 (Iowa 1990).

The court stated: "If we continue to adhere to the principle that the law of lesser-included offense requires that the jury be given an alternative, we must reject the State's claim of harmless error. Id. at 222. The alternative offered by the trial court only applies if defendant wrongfully used the property. The alternative requested by defendant would have required a finding that he intended to remove property. The second alternative fits these facts far better than the first and was certainly a viable alternative which should have been submitted to the jury.

We reverse and remand for a new trial.

REVERSED AND REMANDED.

Hayden, P.J., concurs; Habhab, J., dissents.

HABHAB, J. (dissenting)

I respectfully dissent. In doing so, it is necessary to briefly discuss the law in this area.

A criminal trespass instruction was given. That instruction was objected to by the defendant, and a requested instruction was submitted.

It is agreed that trespass is a lesser and included offense of burglary when burglary is alleged and proved in its entry alternative or when it is submitted in both the breaking and entry alternative. But criminal trespass is not a lesser-included offense of burglary if the breaking alternative is used. State v. Wales, 325 N.W.2d 87, 89 (Iowa 1982). The reasoning behind this is that "[u]nder the 'breaking' alternative, criminal trespass is not an included offense because all criminal trespass requires an entering upon the property, an element not required to commit burglary by breaking." Id. at 89.

As I read the State's brief and the defendant's brief, I believe, thus far, that both parties agree with what is set forth above. I believe it is also agreed that if the "entering" alternative is alleged that the defendant's requested instruction should have been given for it would have satisfied the legal test. State v. Sangster, 299 N.W.2d 661, 664 (Iowa 1980). I also believe that both parties are in substantial agreement that if the "breaking" alternative is the sole charge that neither the court's instruction nor the defendant's requested instruction

should have been given. For the resolution of this problem, we need examine the instruction.

I would focus on the marshaling instruction. While the introductory instruction mentions "entering," that was not the version on which the jury was instructed. The marshaling instruction informed the jury that it would have to find the defendant "broke into" the residence of Tony and Maria Alcoy. Thus, the burglary elements to be compared to those for criminal trespass are those involving a "breaking," not an "entering."

The defendant was not entitled to an instruction on the lesser offense of criminal trespass because it is not a lesser-included offense of burglary by breaking. I would not reverse because although the court erroneously submitted an instruction on criminal trespass, the defendant suffered no prejudice. The jury convicted defendant of the greater crime of burglary in the second degree. It never reached the erroneous instruction. The defendant has not been prejudiced by submission of the lesser crime. See State v. Hilleshiem, 305 N.W.2d 710, 717-18 (Iowa 1981).