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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	
vs.	)	
JUAN RAMON MARTINEZ, BRYAN EDWARD VANDEBOE, and **ROBERT D. AGUINIGA,**	)	8-352 87-1091
Defendants-Appellants.	)	

Appeal from the Iowa District Court for Polk County (34733), Theodore H. Miller, Judge.

Defendants appeal from their convictions, following a jury trial, of second-degree burglary. **AFFIRMED.**

Raymond E. Rogers, Acting Chief Appellate Defender, and James F. Whalen, Assistant Appellate Defender, for defendants-appellants.

Thomas J. Miller, Attorney General; Mark J. Zbieroski, Assistant Attorney General; and Steven Foritano, Assistant Polk County Attorney, for plaintiff-appellee.

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

HAYDEN, P.J.

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Defendants Juan Ramon Martinez, Bryan Edward Vandeboe, and Robert D. Aguiniga appeal from their conviction of second-degree burglary in violation of Iowa Code sections 713.1 and 713.5 (1987). They contend the State failed to present sufficient evidence they intended to commit an assault when they entered the victim's home. We affirm.

I.

At about noon on February 26, 1987, defendants broke into an apartment inhabited by Don Derry. Upon entering, defendants shook Derry awake and asked him the whereabouts of his younger brother, Art. Art Derry, an associate of the defendants, was a juvenile who had escaped from police custody after being arrested for questioning regarding a burglary. During their search for Art Derry, the police had stopped defendants to determine if they knew his whereabouts. In turn, defendants told Don Derry they were looking for his brother because they were tired of being questioned by the police on his account. When defendants demanded an address where his brother might be found, Don Derry supplied them with false information. One of the defendants then said, "If it ain't the right address, we will be back." On the basis of this incident, defendants were subsequently arrested, charged with second-degree burglary, and convicted by a jury. Each received a ten-year sentence. Martinez's and Aguiniga's sentences

were suspended, while Vandeboe's sentence was to run concurrently with a sentence he received in an unrelated matter. All three defendants appeal the jury's verdict.

II.

Defendants contend the State did not offer sufficient evidence the trio intended to commit assault when they entered the Derry apartment, thus failing to prove a requisite for conviction under Iowa Code section 713.1. They urge shaking someone awake is not the kind of forceful or offensive touching that constitutes assault as defined in Iowa Code section 708.1 (1987).

Our scope of review is for the correction of errors at law. Iowa R. App. P. 4. Findings of fact are binding on us if supported by substantial evidence. Iowa R. App. P. 14(f)(1).

III.

To sustain a conviction of burglary, the State had to prove beyond a reasonable doubt: Defendants broke and/or entered Don Derry's apartment; they did so without his consent or acquiescence or any claim of right to so enter; they did so with the intent to commit an assault. Iowa Code § 713.1 (1987); see also State v. Sangster, 229 N.W.2d 661, 662-63 (Iowa 1980).

Principles governing a challenge to the sufficiency of evidence may be summarized as follows:

> When reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State, including legitimate

> inferences and presumptions which may fairly and reasonably be deduced from the evidence in the record. Direct and circumstantial evidence are equally probative so long as the evidence raises a "fair inference of guilt and [does] more than create speculation, suspicion, or conjecture. It is necessary to consider all the evidence in the record and not just the evidence supporting the verdict to determine whether there is substantial evidence to support the charge. Substantial evidence means evidence which would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. (Citations omitted)."

State v. Wheeler, 403 N.W.2d 58, 60 (Iowa App. 1987).

Defendants contend the State presented insufficient evidence to prove defendants intended to commit an assault after breaking into and entering Don Derry's home. Under Iowa Code section 708.1 (1987), assault may occur by either an act that was intended to place a person in fear of immediate physical contact or an act which was intended to result in the physical touching of the person in way that was insulting or offensive. The element of intent in burglary is seldom susceptible to direct proof, and necessarily it may be shown by circumstantial evidence. State v. Olson, 373 N.W.2d 135, 136 (Iowa 1985). Direct and circumstantial evidence are equally probative in establishing this requirement. Iowa R. App. P. 14(f)(16).

The trial court properly instructed the jury to draw reasonable inferences and deductions from the facts proved by the evidence in accordance with their common experience and observation, in order to determine whether the State had proven the intent to commit an assault at the time the defendants entered the apartment.

Evidence adduced at trial shows Don Derry was at home alone and had fallen asleep. While he slept, defendants broke and entered his home by forcing a storm window on an outer door and by reaching in and opening an inside door. Once inside, defendants shook Derry hard until he woke and "sharply" demanded to know the whereabouts of Art Derry. Although Don Derry recognized the three intruders as associates of his brother, he woke up "stunned, shocked and afraid." Fearing injury and not knowing whether they were armed, he gave defendants a false address hoping they would leave. Defendants left the premises saying in a sharp tone as though they meant it, "If it ain't the right address, we will be back."

From these facts, it is clear the jury could have inferred defendants broke and entered the home with the intent to assault Derry in order to intimidate and threaten him into telling the whereabouts of his brother.

Our decision in State v. Spears is controlling here. In that case, we determined the assault element of a robbery was supported by sufficient evidence when a bartender testified he felt the defendant touch him while the defendant was reaching into an apron pocket to steal money. From this testimony, we held it could be inferred this touching and taking was not desired by the bartender and was therefore offensive to him. State v. Spears, 312 N.W.2d 79, 80-81 (Iowa App. 1981).

Accordingly, we hold substantial evidence exists here to support the jury's conclusion the defendants intended to commit an assault at the time they entered Derry's apartment.

AFFIRMED.