IN THE COURT OF APPEALS OF IOWA

No. 2-118 / 91-375

FILED
MAY 23 1992
CLERK SUPREME COURT

1172

STATE OF IOWA,

Appellee,

vs.

STAN FENSKE,

Appellant.

Appeal from the Iowa District Court for Poweshiek County, Richard J. Vogel, Judge.

Fenske appeals a judgment and sentence of the district court, following a jury trial, finding him guilty of one count of burglary in the first degree, one count of assault with intent to inflict serious injury, and one count of simple assault. **BURGLARY CONVICTION REVERSED.**

Linda Del Gallo, State Appellate Defender, B. John Burns, Assistant State Appellate Defender, and Stan Fenske, pro se, for appellant.

Bonnie J. Campbell, Attorney General, Thomas G. Fisher, Jr., Assistant Attorney General, and Michael Mahaffey, County Attorney, for appellee.

Heard by Oxberger, C.J., and Donielson and Schlegel, JJ.

SCHLEGEL, J.

In the early morning hours of June 20, 1990, Stan Fenske and a friend approached a house at 933 Center Street in Grinnell. Fenske was carrying a gun. The two men proceeded to enter the home though no one answe ɜd when they knocked. Fenske encountered Michael Bown sleeping on the couch. Bown was the former boyfriend of the owner of the house, Maurine Creamer. Fenske awakened Bown and demanded to know if Danelle Besco was home.[1] Bown told him she was not. Fenske and his friend proceeded upstairs, where they found Besco asleep in a bedroom.

According to Besco, Fenske awakened her by kissing her and caressing her face. Besco stated Fenske kissed her on the face, arm, hand, breasts, and stomach. Besco testified she insisted Fenske stop on four occasions. Fenske stopped briefly, but resumed shortly thereafter. Fenske finally stopped. After Fenske left, Besco testified she immediately got dressed and went to the police.

Fenske went back downstairs and yelled at Bown for lying to him about whether Besco was home. Fenske held the gun to Bown's head and stated, "I should shoot you for lying to me." Bown testified he had been asleep on the couch before Besco had arrived home and, therefore, did not

---

1. Since this incident occurred, both Besco and Creamer have changed their names. They are now Danelle Davis and Maurine Atkinson. We use their names as existed at the pertinent time.

know if she was there.

At trial Fenske claimed he had permission from Creamer to enter the house. Creamer testified she had forgotten to tell Besco that Fenske had permission to enter the house. On January 17, 1991, the jury returned a verdict of guilty against Fenske for one count of burglary in the first degree, assault with intent to inflict serious injury, and simple assault. Fenske was subsequently sentenced to a term of imprisonment not to exceed twenty-five years on the burglary charge, five years minimum, ten years on the charge of assault with intent to inflict serious injury, and thirty days for the simple assault charge. Fenske appeals.

Fenske maintains there was insufficient evidence in the record for a rational jury to find he did not have the right, license, or privilege to enter Creamer's house. He also claims his trial counsel was ineffective in failing to request a jury instruction limiting the use of Creamer's alleged inconsistent statements to impeachment. Fenske maintains Bown's testimony Creamer had called him and told him Fenske had no permission to enter her house should have been introduced only for impeachment purposes. Creamer denies making such a statement. Fenske next argues the district court erred in permitting the State to comment on the telephone call made by Creamer to Bown during its opening remarks, thereby prejudicing his case.

We address first Fenske's claim there was insufficient evidence in the record for a rational jury to find he did not have right, license, or privilege to enter Creamer's house. We review the evidence in the light most favorable to the State to determine if, when considered as a whole, a reasonable person could find guilt beyond a reasonable doubt. State v. Mulder, 313 N.W.2d 885, 888 (Iowa 1981) (citations omitted). We will uphold the verdict if there is substantial evidence in the record tending to support the charge. State v. Aldape, 307 N.W.2d 32, 39 (Iowa 1981). We note the ultimate burden is on the State to prove every fact necessary to constitute the crime with which a defendant is charged. State v. Gibbs, 239 N.W.2d 866, 867 (Iowa 1976) (citing In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073, 25 L. Ed. 2d 368, 375 (1970)).

Fenske was charged with first-degree burglary under Iowa Code section 713.1. That section defines a burglar as "[a]ny person, having the intent to commit a felony, assault or theft therein, who, having no right, license or privilege to do so, enters an occupied structure, such occupied structure not being open to the public . . . " Iowa Code § 713.1 (1991). At issue here is whether Fenske had right, license, or privilege to enter the Creamer home. See State v. Franklin, 368 N.W.2d 716, 718 (Iowa 1985) (lack of right, license, or privilege must be proven by State). Reviewing the record as a whole, we determine

no rational jury could find this element of burglary has been satisfied.

Creamer testified as follows at the trial:

> A. (Creamer): . . . I had to go to Las Vegas a number of times at this time. And Danelle, she needed a place to stay. She was having problems with her previous roommate, and she--She was staying there. But her sister had a tumor or something in her head, and she was going to be going back and forth to Oskaloosa.
> Q. (defense counsel): Danelle was?
> A.: Yes. And I didn't want the house to be left completely empty because it's a small town. It could be broken into easily. People know if you're out of town and it's empty. So I had my friends Debbie Brummel and Stan Fenske to check on the house frequently. . . .
> Q.: Did you specifically have any talks with Stan Fenske about what you wanted him to do about the house?
> A.: Yes.
> Q.: What was your understanding?
> A.: That he would check on the house, you know, if anything seemed strange or out of place, you know, that he would check on it and, if needed, contact me or whatever.
> Q.: On the night of this incident or any other night when you were gone, did Stan Fenske have permission as far as you were concerned to enter the residence?
> A.: Yes. It went along with the tasks that I asked--the favor that I asked--him to do.

Danelle Besco testified she did not give Fenske permission to enter the house. However, Creamer testified she neglected to communicate to Besco that Fenske had permission to enter.

The State argues Fenske had no right to enter the house because Besco did not give him permission. This argument fails because whether Fenske had right, license, or privilege to be in the house must be determined by an examination of his communications with Creamer, not by

Besco's understanding. It was within Creamer's, not Besco's, authority to issue such permission. Besco admitted she and Creamer had never discussed whether Fenske had permission to enter. Because Besco had no personal knowledge on the element of right, license, or privilege, her testimony was not evidence on this point. See Iowa R. Evid. 602.

In addition, the State contends Fenske's actions and Besco's actions prove Fenske committed a burglary. We disagree. First, as noted above, Besco's actions, with regard to this burglary charge, are irrelevant. Second, we find Fenske's actions once he entered a place he had a right to be are also irrelevant to the burglary charge. The State notes Fenske knocked on the door prior to entering. We note Creamer's testimony on this point:

> Q. (defense counsel): How often while you were still in town would Stan [Fenske] and/or his wife come over to the house?
> A. (Creamer): Probably three or four times a week.
> Q.: And how would they enter the house?
> A.: Maybe knock, open the door, kind of walk in, hello, what are you doing, is anybody there? . . .

In light of the adequate evidence supporting his right to enter, Fenske's behavior in this instance does not constitute evidence of any element of burglary.

The State also claims there is substantial evidence supporting the conviction due to Bow 's rebuttal testimony that Creamer called him after the incident and told him she had not given Fenske permission to be in the house.

reamer denies making such a statement. We determine, hile Bown's testimony may have been admissible for the imited purpose of impeachment, it was not competent to rove Fenske did not have the right to be in the house.

The use of inconsistent statements does not violate the earsay rule since they are "not offered as a testimonial ssertion to be relied upon." State v. Hill, 243 N.W.2d 67, 570 (Iowa 1976) (quoting 3A Wigmore, Evidence § 1018, t 996 (1970)). This being so, it is critical this type of vidence be admitted only for impeachment purposes and not s substantive evidence. State v. Schatz, 414 N.W.2d 840, 42 (Iowa App. 1987). Bown's testimony, therefore, does' ot constitute substantive evidence from which a rational ury might find Fenske had no right, license, or privilege o be in Creamer's house.

We find no rational jury could find all the elements of burglary in the first degree are established here. We everse only Fenske's burglary conviction and remand the ase with instructions that this charge against him be lismissed. Because of our result, we do not address the neffective assistance of counsel claims relating to the burglary charge.

BURGLARY CONVICTION REVERSED.

Oxberger, C.J., concurs; Donielson, J., dissents.

DONIELSON J. (dissenting in part)

I respectfully dissent to the majority's reversal of Fenske's burglary conviction. I disagree with the majority's holding the record lacks substantial evidence to support the jury's finding Fenske was without right, license or privilege to enter Creamer's house. I believe the State met its burden of proof on this element of the offense, and I would affirm.

Creamer's testimony establishes Fenske was given permission to enter the house for the purpose of periodically checking on it. The jury may very well have found Fenske's right, license or privilege to enter the premises was therefore limited. The limit would not have been defined in terms of time of day or length of stay, but rather, in terms of purpose. The jury did find that on the night in issue Fenske had entered the house not for the purpose of checking on it, but rather, for the purpose of committing a felo inside. As such, the jury certainly could have found Fenske, having exceeded the limits of his permission, was without right, license or privilege to enter the house.

I would affirm Fenske's burglary conviction.