

IN THE COURT OF APPEALS OF IOWA

No. 0-561 / 89-1718

FILED

JAN 29 1991

CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

JOHN A. TORRES,

Appellant.

443

Appeal from the Iowa District Court for Woodbury
County, Joseph J. Straub, Judge.

The defendant appeals his conviction, following a jury
trial, for second-degree burglary. **AFFIRMED.**

Timothy T. Jarman of Baron, Sar, Goodwin, Gill, Lohr &
Jarman, Sioux City, for appellant.

Bonnie J. Campbell, Attorney General, Richard J.
Bennett, Assistant Attorney General, Thomas S. Mullin,
County Attorney, and Connie Anstey, Assistant County
Attorney, for appellee.

Heard by Schlegel, P.J., and Hayden and Sackett, JJ.

SCHLEGEL, P.J.

Defendant John A. Torres appeals his jury conviction and ten-year suspended sentence on one count of burglary in the second degree, violating Iowa Code sections 713.1 and 713.5. Torres contends that the evidence was insufficient to support his conviction and that the jury was improperly instructed. He also asks us to find that he was denied a fair trial because of ineffective assistance of counsel. We affirm the conviction and preserve the claim of ineffective assistance of counsel.

(1)

Torres and roommate Kevin Counter executed a six-month lease agreement to begin December 1988. The agreement specified that each would be liable for half of the total rent. Counter testified that sometime in late January 1989 he had personally witnessed Torres reading an eviction notice. Torres disputes having received any notice of eviction. (A copy of the alleged notice to quit was introduced into evidence.) Nevertheless, by January 30, Torres had removed his possessions from the apartment and did not sleep in the apartment thereafter. This may have been an accommodation for Counter's wife and two children who had moved in. It appears that by February 1 the landlord had changed the locks on the apartment.

Mrs. Counter turned Torres away early on February 1 when he went to the apartment to retrieve a radio and a

work uniform he had left behind. After spending several hours at a bar, Torres returned to the apartment at approximately 2 a.m. on February 2 with codefendant Richard B. Whitmore and a third person. When Counter unlocked and opened the door, the defendants pushed their way into the apartment. A room-to-room fist fight among the three ensued. The fight wound up in the bedroom where the three did battle with a piece of pipe and the butt end of Counter's unloaded rifle. Eventually, Counter escaped through a window and summoned police.

We take up defendant's assignments of error in a slightly different order to facilitate discussion. The principal question under consideration in the first two assignments of error is whether defendant had the "right, license or privilege," as defined in Iowa Code section 713.1, to enter or remain in the apartment. We have little assistance from our criminal case law.

(2)

Torres contends the district court gave the jury inadequate instructions on the landlord-tenant law applicable to the alleged termination of his tenancy. Jury instructions are designed to explain the applicable law to the jurors so the law may be applied to the facts proven at trial. State v. Freeman, 267 N.W.2d 69, 71 (Iowa 1978). The trial court's ruling will not be disturbed, however, absent an abuse of discretion. State v. Christensen, 323

N.W.2d 219, 222 (Iowa 1982); State v. Lewis, 391 N.W.2d 796, 798 (Iowa App. 1986). An abuse of discretion occurs when a trial court has exercised its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." Id. The burden of proving abuse of discretion lies with the defendant. Id.

A major point of contention both at trial and on appeal is instruction 24, which, in relevant part, reads as follows:

Evidence has been introduced that the landlord mailed a three-day Notice to Quit to John Torres. The three-day Notice to Quit does not in and of itself terminate the tenancy. The landlord must follow up with other legal procedures including a court hearing to effectively terminate tenancy for non-payment of rent. However, the tenant can terminate the tenancy after receiving the three-day Notice to Quit if he voluntarily removes himself from the premises. It is for you to determine whether or not John Torres terminated his tenancy by voluntarily removing himself from the apartment

At trial, Torres proposed to instruct the jury as to precisely what "other legal procedures" the landlord had to undertake to terminate Torres' possession. He argues the jury should have been instructed that he had not lost all claim of right to enter the apartment, absent formal legal process, unless he had "abandoned" or "surrendered" the apartment rather than merely "removing" himself from it. He argues the instruction used by the court permitted the jury to find that he had no authority to enter the apartment from which he had "removed himself," although he had not been subjected to any formal legal process by the landlord.

We hold that the trial court did not abuse its discretion in refusing the proposed instruction. The instruction makes a correct and adequate statement of the facts and the law with respect to the alleged attempt to terminate defendant's tenancy in the apartment. There is no reasonable inference that defendant lost his "right, license or privilege" by the "other legal procedures." A further listing of those procedures would not have been necessary here.

In fact, the essence of defendant's complaint on appeal is that the jury should have been instructed on the differences, if any, between the phrase "removing himself" and the words "abandonment" and "surrender." The latter words are used in Iowa Code section 562A.33, which governs when a landlord may recover possession of a dwelling unit. Although "appellant contends that there is a massive difference between merely 'removing himself' and the more permanent terms of 'abandonment' and 'surrender,'" he does not tell us, nor does he cite authority that would reveal to us, what he believes the critical difference is or how he was prejudiced. Furthermore, it appears that this underlying argument is being pursued for the first time on this appeal. It is well documented that we will not address arguments raised for the first time on appeal, see Shill v. The Careage Corp., 353 N.W.2d 416, 420 (Iowa 1984) (questions not presented to trial court cannot be reviewed on appeal; case theory on appeal must be same as at trial),

and that we are not obliged to address issues or argument for which no authority is cited, see Iowa R. App. P. 14(a)(3).

(3)

Torres challenges the sufficiency of the evidence to support the conviction. 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 beyond a reasonable doubt a rational trier of fact the defendant is guilty of the crime charged. Id. The evidence is viewed in the light most favorable to the State, including legitimate inferences and presumptions which fairly and reasonably may 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 hold there was substantial evidence to support the conviction.

Torres argues that his tenancy could only be terminated by ~~completed~~ termination proceedings, of which there was no evidence, or by surrender or abandonment, of which there was insufficient evidence. "Abandonment as applied to leases involves an absolute relinquishment of premises by a tenant, and consists of acts or omissions and an intent to abandon." Vawter v. McKissick, 159 N.W.2d 538, 540 (Iowa

1968) (citation omitted). There was considerable evidence in the record showing defendant's acts of relinquishment and his intent to abandon. Removal of possessions from the leased property, as occurred here, alone is a clear indication of intent to abandon. See id. There also was evidence that Torres had not physically occupied the apartment for several days. It is worth noting, moreover, that when a tenant is unlawfully deprived of possession, his or her remedy is an action for possession and damages, see Iowa Code §§ 562A.22, 562A.26, not a breach of peace.

Torres also argues the evidence failed to prove that he had the intent to commit an assault when he entered the apartment.

We note at the outset of our discussion that the element of intent in burglary is seldom susceptible to proof by direct evidence. State v. Furlong, 216 Iowa 428, 432, 249 N.W. 132, 134 (1933). Proof of intent will usually be a matter of circumstantial evidence and inferences drawn therefrom. Id.

So it is in this case. To convict defendant of burglary, the jury had to, and was allowed to, infer his intent to commit an assault from the circumstances of his entry and his subsequent acts.

State v. Olson, 373 N.W.2d 135, 136 (Iowa 1985). The supreme court has found this inference permissible and noted the issue could be rephrased as "whether it is more-likely-than-not that the inference drawn by the jury . . . was true." Id. at 137. The record shows that Torres and his codefendant threatened to kick the door in and immediately upon pushing their way into the apartment began

to assault Counter. We think it was more likely than not that the inference drawn by the jury was true and, therefore, hold that the evidence is sufficient to support the conviction.

(4)

Finally, Torres contends his trial attorney rendered ineffective assistance of counsel in numerous respects. He complains that the attorney failed to object to hearsay testimony, failed to make an adequate record on alleged prosecutor misconduct and juror misconduct, and failed to preserve a claim that a pretrial dismissal was required because the minutes of testimony stated insufficient evidence to support the charge.

Where the record on direct appeal is not adequate to permit us to resolve the issue, we preserve the defendant's claim for postconviction proceedings so the facts may be so developed. State v. Koenighain, 356 N.W.2d 237, 238 (Iowa App. 1984). This also gives the allegedly ineffective attorney the opportunity to explain his or her conduct. State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978). We conclude there is an inadequate record for us to adjudicate the issue of ineffective assistance of counsel. We therefore preserve defendant's ineffective assistance of counsel claim for a later proceeding.

AFFIRMED.