FILED
MAR 26 1985
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed March 26, 1985
vs.	)	5-72 84-1135
CHARLES E. WILSON,	)	
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Linn County - Harold J. Swailes, Judge.

Defendant appeals from his conviction of second-degree burglary. AFFIRMED.

Charles Harrington, Appellate Defender and Patrick R. Grady, Assistant Appellate Defender, for the defendant-appellant.

Thomas J. Miller, Attorney General and Steven K. Hansen, Assistant Attorney General, for the plaintiff-appellee.

Considered by Donielson, P.J., and Snell and Sackett, JJ.

SACKETT, J.

The defendant appeals from his conviction for second-degree burglary of a supermarket.

Defendant claims the burglary was prompted by hunger. The defendant and one Henson were apprehended after business hours at the Warehouse Market in Marion. There were garbage bags on the premises filled with numerous items, the majority of which were foodstuffs. Change, apparently from a pop machine, was found in Wilson's possession.

At trial defendant and an employee of the Department of Human Services testified that because of a postal mix-up defendant was one month late in receiving his food stamps. Defendant, also, testified he had been laid off his job and had used up his eligibility at the local Food Pantry. The defendant contended he had not eaten for four or five days and because of his hunger he participated in the burglary.

I.

The defendant requested an instruction on necessity. Defendant contends the trial court's refusal to give the instruction was error. The defense of necessity exists in Iowa. The defense does not negate any element of a crime. Rather, the defense of necessity arises only after it has been determined that a crime has occurred as an entirely independent inquiry. State v. Reese, 272 N.W.2d 863, 866 (Iowa 1978). The issue thus is whether there is substantial evidence in the record to generate a fact question sufficient that the defense should have been submitted to the jury. We determine there is not.

Defendant did not show that the threatened harm was imminent. The harm posited by defendant was that he would have starved to death, and defendant testified that he had not eaten for four days prior to the burglary. While any adult who has not eaten for four days could certainly be described as hungry, the threat of starvation to such a person is not "imminent."

In State v. Walton, 311 N.W.2d 113, 115 (Iowa 1981), the court said that the necessity defense does not apply except in emergency situations where the threatened harm is immediate and the threatened disaster imminent, and cited W. LaFave & A. Scott, Handbook on Criminal Law, §50 at 388 (1972). LaFave and Scott note, at p. 388, that a man in a lifeboat facing death by starvation cannot justifiably kill another if he can, without starving to death, wait a while longer, with a possibility of rescue during the interval of waiting.

Second, defendant did not show that he had exhausted all options. State v. Walton, 311 N.W.2d at 115 (defendant must be stripped of options). Defendant testified that he was unemployed, his food stamps were a month late, and that he had used up his eligibility at the local Food Pantry. This evidence falls short of showing that defendant exhausted all options.

The evidence presented by defendant showed that the harm he posited was not immediate and that he had not exhausted all possible options. This evidence thus not only failed to generate a fact question on necessity, it affirmatively disclosed that the defense was not available to him. The trial court was therefore correct in refusing to submit the requested instruction.

AFFIRMED.