

IN THE COURT OF APPEALS OF IOWA

No. 9-281 / 88-1262

FILED

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CLERK SUPREME COURT

STATE OF IOWA,

Plaintiff-Appellee,

vs.

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MICHAEL TODD SCULLARK,

Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, George L. Stigler, Judge.

Defendant appeals his conviction on a jury verdict for the crime of burglary in the second degree in violation of Iowa Code sections 713.1 and 713.5. Defendant claims: (1) there was not sufficient evidence to support an inference he had no right, license, or privilege to be in the truck; and (2) the cab of a truck should not be considered an "occupied structure" under section 702.12. **AFFIRMED.**

Raymond E. Rogers, State Appellate Defender, and Shari Barron, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Sarah J. Coats, Assistant Attorney General; and Joseph Gunderson, Assistant County Attorney, for plaintiff-appellee.

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

DONIELSON, P.J.

Defendant Michael Todd Scullark was charged with burglary in the second degree in violation of Iowa Code sections 713.1 and 713.5. Scullark was observed by two police officers as he watched a Pepsi truck making deliveries. Scullark stood on the running board of the truck and reached into it through the open window on the driver's side of the vehicle. Two officers observed that the entire top half of his body was inside the truck. Scullark ran around to the other side of the truck and appeared to look into the window on the passenger side of the vehicle. He then ran away from the truck. Scullark was apprehended by police officers. The driver of the truck testified there was a safe in the truck under the driver's seat. Nothing was taken, but some things were moved around inside the truck. The truck driver testified he had never seen Scullark before. Scullark was found guilty of burglary in the second degree by a jury.

Scullark appeals his conviction. He contends there is not sufficient evidence to convict him of burglary in the second degree. One element of burglary under section 713.1 is that a person "having no right, license or privilege to do so, enters an occupied structure." Defendant points out the truck driver did not testify he lacked the right, license, or privilege to enter the truck. Defendant also argues the Pepsi truck was not an "occupied structure" within the definition set out in Iowa Code section 702.12.

Sufficiency of the Evidence. Scullark claims the State failed to provide sufficient evidence to secure his conviction for burglary. "Burglary" is defined in Iowa Code section 713.1 (1987). This section provides:

Any 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, or who remains therein after it is closed to the public or after the person's right, license or privilege to be there has expired, or any person having such intent who breaks an occupied structure, commits burglary.

Scullark argues the State failed to establish he had no right, license, or privilege to enter the truck. At the close of the State's case, Scullark moved for a judgment of acquittal based on the State's failure to establish this element of the crime. In denying this motion the court considered the police observations of Scullark's behavior before and after his entry into the vehicle; Scullark's attempt to flee from the police; and the fact that he was arrested in the presence of the truck driver, David Roche, and Mr. Roche testified he did not know Scullark.

When reviewing a motion for a directed verdict in a criminal case, the evidence is viewed in a light most favorable to the State. State v. Robinson, 288 N.W.2d 337, 338 (Iowa 1980). "[E]very legitimate inference that may be fairly and reasonably deducted therefrom must be carried to the aid of the evidence." State v. Overstreet, 243 N.W.2d 880, 883 (Iowa 1976). All of the evidence must be

considered when determining the sufficiency of evidence. Robinson, 288 N.W.2d at 340. Direct and circumstantial evidence is equally probative and either is sufficient to support a conviction. State v. Blair, 347 N.W.2d 416, 420-21 (Iowa 1984). However, the evidence presented must raise a fair inference of guilt; it must do more than create speculation, suspicion, or conjecture. Id. at 421.

The trial court's refusal to direct a verdict for Scullark will withstand challenge if there is any substantial evidence in the record tending to support the charge. State v. Aldape, 307 N.W.2d 32, 39 (Iowa 1981). Substantial evidence means such evidence as could convince a rational trier of fact that a defendant is guilty beyond a reasonable doubt. Robinson, 288 N.W.2d at 339.

The record in this case reveals the police had observed Scullark watching the Pepsi truck. They testified Scullark ran down a sidewalk and ducked behind a yellow house. The police then observed him "peeking" around the house and looking at the truck. This suspicious behavior prompted the officers to radio for backup assistance.

The officers entered the Silver Fox Restaurant and informed the driver of the truck they felt someone was watching his truck and it was possible he could be about to commit a crime. The officers then saw Scullark standing in the doorway of the Metropolitan Life Building; he was again watching the Pepsi truck. Scullark then entered the

restaurant where the driver and the plain-clothed officers were. Roche left the restaurant to continue his deliveries. Scullark left the restaurant and the police went to S & S Meats as Roche had told them it was the location of his next delivery. At S & S Meats, Roche observed Scullark looking at him and his truck. Shortly thereafter, the officers called as backup saw Scullark walking towards the truck and looking over his shoulder. They then observed him enter the truck through the open window. Scullark fled when officers attempted to apprehend him.

Scullark is correct that the lack of "right, license or privilege" to enter an occupied structure is an element of burglary which must be proven by the State. State v. Franklin, 368 N.W.2d 716, 718 (Iowa 1985); State v. King, 344 N.W.2d 562, 563 (Iowa App. 1983). The record in this case reveals there was substantial evidence from which a jury could conclude beyond a reasonable doubt Scullark did not have any right to be in the Pepsi truck. Roche, the truck driver, had been informed the police were observing a suspicious person who was watching his truck. Roche later observed the officers' suspect and did not inform the police that Scullark had a right to enter his truck. In fact, Roche testified that when he saw Scullark looking at his truck, "[I] just got my cart and acted like I didn't see him or just went about my business, and got my cart and

went into the store." The jury could conclude from this testimony that Roche would not have pretended not to see Scullark if Scullark indeed had a right to be in the truck. Roche also testified that after Scullark was apprehended, Officer Lake asked him if he had ever seen Scullark before to which he replied he had not. As Roche was the driver in possession of the truck, a jury could infer Scullark, who Roche did not know, would have no right, license, or privilege to be in the truck.

Aside from the testimony of the truck driver, Scullark's own actions prior to and after his arrest, indicated he had no right to be in the truck. His suspicious behavior while he watched the truck, his conduct in entering the truck through the window rather than opening the unlocked door, and the fact that he fled when the police told him to stop, all suggest he had no right to enter the truck. Finally, when Scullark was informed he was being arrested for burglary, he said, "what did I steal, what did I steal, show me what I stole." A jury could infer from such defensive statements that Scullark did not have a right, privilege, or license to enter the truck.

The issue of Scullark's right, license, or privilege to enter the truck could have been easily disposed of had the prosecution directly asked the driver of the truck, or even some other official from Pepsi, whether Scullark had the

authority to enter the truck. However, right, license, or privilege to enter an unoccupied structure is not always derived from direct evidence or express statements. A review of past case law reveals the factfinder may consider all of the circumstances of a case, including the conduct of both the defendant and others, to determine if one had the right, license, or privilege to enter a structure. See State v. Hoffer, 383 N.W.2d 543, 546 (Iowa 1986) (a jury could infer defendant lacked right to enter from the noise, the arguing, and defendant's statement that he presumed his codefendant had kicked in the door); Franklin, 368 N.W.2d at 719 (substantial evidence of a defendant's lack of right, license, or privilege to enter a home could be inferred from woman's testimony that she answered knock at door, said "just a moment," and before she could awaken her husband to tell him they had company, a group of men rushed into the apartment); King, 344 N.W.2d at 563 (implied consent to enter home could be inferred from friendly conversation and cordial behavior of the parties).

There was substantial evidence in this case from which a jury could conclude Scullark did not have the right, license, or privilege to enter the truck. The State sufficiently proved this element of its case.

Occupied Structure. Scullark contends that in light of the amendments to sections 702.12 and 713.1, a truck is not an "occupied structure" and he could not be convicted for

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burglary in this case. Scullark asserts the decision in State v. Williams, 409 N.W.2d 187, 188 (Iowa 1987) (holding that a topper-enclosed pickup truck is an "occupied structure"), fails to comport with the legislative intent of the amendments. Scullark argues the legislature would not have intended for a defendant to face a harsher sentence for entering a vehicle than for stealing it, which is a possibility in light of the Williams construction of "occupied structure."

This court has reviewed the record and concludes this issue has not been preserved for appeal. The only time this issue was alluded to during the trial was when the State requested that jury instructions refer to both buildings and vehicles as occupied structures. The State asserted it was undisputed a vehicle was an "occupied structure" and cited State v. Buss, 325 N.W.2d 384 (Iowa 1982). The judge denied the State's request to modify its instruction, apparently concluding that based on the facts of this case, reference to a building as well as a vehicle would confuse the jury. At no point did the defense contest that the Pepsi truck was an "occupied structure." No objection was ever made to the charge filed against Scullark, or to the prosecution's conclusion that the Pepsi truck was an "occupied structure."

An issue not raised before the trial court cannot be raised for the first time on appeal. State v. Hansen, 286 N.W.2d 163, 165-66 (Iowa 1979).

The orderly, fair and efficient administration of the adversary system requires the litigants not be permitted to present one case at trial and a different one on appeal. One reason is that the trial court's ruling on an issue may either dispose of the case or affect its future course. In addition, the requirement of error preservation gives opposing counsel notice and an opportunity to be heard on the issue and a chance to take proper corrective measures or pursue alternatives in the event of an adverse ruling.

State v. Tobin, 333 N.W.2d 842, 844 (Iowa 1983). As this issue has not been preserved for appeal, the court declines to address it.

AFFIRMED.