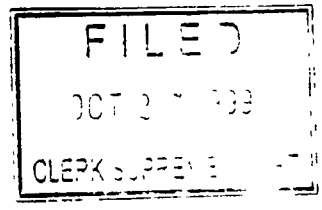
IN THE COURT OF APPEALS OF IOWA

No. 1999-249 (9-479) / 98-1224
Filed October 27, 1999



STATE OF IOWA,
Plaintiff-Appellee,

vs.

JAY DEE MITCHELL,
Defendant-Appellant.

Appeal from the Iowa District Court for Mahaska County, Annette J. Scieszinski, Judge.

Defendant appeals from the judgment and sentence entered on his convictions of second-offense domestic assault and criminal trespass resulting in bodily injury.

AFFIRMED.

Linda Del Gallo, State Appellate Defender, and Dennis D. Hendrickson, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, and Charles A. Stream, County Attorney, for appellee.

Heard by Sackett, C.J.; Huitink, Vogel, Mahan, and Zimmer, JJ.; and Schlegel, S.J.*; but decided by Sackett, C.J.; Huitink, Mahan and Zimmer, JJ.; and Schlegel, S.J.

* Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1999).

HUITINK, J.

I. Background Facts and Proceedings.

Mitchell was charged with burglary in the first degree, domestic assault causing bodily injury, assault causing bodily injury, and interference with official acts following altercations at Miranda Miller's Oskaloosa residence on January 10 and January 15, 1998. Mitchell pled guilty to assault causing bodily injury and interference with official acts.

Mitchell was tried on two counts of burglary and domestic assault causing bodily injury. The evidence indicates Mitchell and Miller began living together in December 1997. Following a January 7, 1998, altercation, Oskaloosa police officers, at Miller's request, ordered Mitchell to leave the residence he shared with Miller. Mitchell subsequently returned on three occasions during which the altercation resulting in these charges occurred.

The fighting issue at trial was whether undisputed evidence of Mitchell's possessory interest in a residence formerly shared with Miller precluded his conviction for burglary or the lesser-included offense of criminal trespass. The State claimed Mitchell's possessory interest ended when he left the residence on January 7 and his subsequent entries were without Miller's consent.

Mitchell's motion for judgment of acquittal advancing his claimed possessory interest was denied, and both burglary counts were submitted to the jury. Mitchell was acquitted of one count of burglary, convicted of domestic abuse causing bodily

injury, and criminal trespass resulting in bodily injury, a lesser-included offense submitted under the second burglary count.

Mitchell's posttrial motions were denied. The district court sentenced Mitchell to consecutive terms of incarceration for each count for which he was convicted or pled guilty. The sentencing court also fined Mitchell $500 in addition to the jail sentence imposed for domestic assault resulting in bodily injury.

On appeal Mitchell contends the district court erred by denying his motion for judgment of acquittal on the burglary counts and lesser-included offense of criminal trespass. He argues the evidence of his possessory interest in Miller's residence was undisputed and he accordingly could not be convicted of criminal trespass. Mitchell also argues the district court erroneously concluded the $500 fine was mandatory and failed to exercise any discretion in its imposition.

II. Criminal Trespass.

Our review of this issue is for errors at law. Iowa R. App. P. 4. Criminal trespass is a lesser-included offense of the entry alternative of burglary. *State v. Sangster*, 299 N.W.2d 661, 664 (Iowa 1980). The State was required to prove Mitchell (1) entered upon or in property (2) without legal justification or express or implied permission of the owner, lessee, or person in possession; or acted after being requested to leave by the person in possession, (3) with the intent to commit a public offense. Iowa Code §§ 716.7(2)(a)(b).

As noted earlier, Mitchell's argument is premised on his right to enter Miller's residence as a person entitled to possession. He cites evidence of his former occupancy and intent to return. Mitchell also cites Miller's testimony that Mitchell was welcome to return to the residence at any time and it was their shared intent to live together. She also testified that she understood Mitchell's absence was only temporary.

Contrary to Mitchell's assertions, the record includes evidence contradicting Miller's testimony. Mitchell's removal from the residence on January 7 was at Miller's request. Additionally, Mitchell was not living with Miller on the dates of the underlying altercations. There is also evidence that another man moved in with Miller after Mitchell left.

We believe the extent of Mitchell's possessory interest in Miller's residence presented a factual issue for the jury's resolution. Because the relevant facts were disputed, the jury was free to accept the version of the facts it found more credible. *State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993). Based on these facts, the jury could have reasonably concluded that Mitchell's possessory interest and attendant right of entry ended after he left the residence on January 7, 1998. The resulting altercations and intervention by authorities at Miller's request were sufficient to belie Miller's claim that Mitchell's entries on January 10 and January 15 were consensual. Moreover, the jury could have reasonably discounted Miller's testimony as an attempt to protect Mitchell. We affirm on this issue.

III. Sentencing.

We recognize that Iowa Code section 903.1(2), the sentencing provision at issue, does not contain any language which limits the sentencing court's discretion, and section 903.1(2) "must be read in *pari materia* with the Code's general sentencing provisions." *State v. Chana*, 476 N.W.2d 38, 39 (Iowa 1991) (stating that "our deference to legislative expression logically applies to fines as well as incarceration."); *see also State v. Hildebrand*, 280 N.W.2d 393, 397 (Iowa 1979) (the use of the word "shall" in a sentencing statute does not require the trial court to impose a jail sentence; rather the court must exercise its discretion whether to impose the minimum sentence).

At sentencing the district court stated:

> Well, the Court has considered all the sentencing options available to it, and specifically those authorized by Iowa Code Sections 903.1 and 901.5, and the Court's decision about the sentences appropriate in this case is based on those which would provide the most opportunity for Mr. Mitchell to be rehabilitated and at the same time protect the community from further offenses by him and by others.
>
> With regard to the conviction for Domestic Abuse Assault Causing Bodily Injury, an aggravated misdemeanor, the Court sentences the defendant to a term not to exceed two years in the state penitentiary. With regard to the conviction of Criminal Trespass Resulting in Bodily Injury, a serious misdemeanor, the Court sentences the defendant to one year. With regard to the conviction of Assault Causing Bodily Injury, a serious misdemeanor, the Court sentences the defendant to a term of one year. And with regard to the conviction of Interference with Official Acts, a serious misdemeanor, the defendant is sentenced to a term of one year.
>
> The Court directs that all of the terms of incarceration run consecutively, meaning one after the other, in the order in which they were imposed. The defendant shall be given credit for 161 days already served in the Mahaska County Jail, and the defendant is committed to the Director of the Iowa Department of Corrections for purposes of serving the time that has been

> imposed for incarceration. The defendant shall be transported by the Mahaska County Sheriff to the Iowa Medical and Classification Center at Oakdale, Iowa, for purposes of intake, and mittimus shall issue immediately.
>
> With regard to the statutory directives concerning fines, the Court imposes the following fines. With respect to the conviction for Domestic Abuse Assault Causing Bodily Injury, a fine of $500; with regard to the conviction of Criminal Trespass Resulting in Bodily Injury, a fine of $250; with regard to the conviction of Assault Causing Bodily Injury, a fine of $200 --or $250. Excuse me--and with regard to the conviction of Interference with Official Act, a fine of $250. To each of those fines there shall be a 30 percent statutory surcharge attached. The total amount of fines is $1,250 plus the 30 percent surcharge.
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> ***

Mitchell argues that the district court's statement "[w]ith regard to the statutory directives concerning fines" indicates the court thought imposition of the fine was mandatory. We disagree. Mitchell's argument misinterprets the district court's statements. In the absence of more definitive statements suggesting the court lacked discretion or was required to impose a fine, we are unable to say the court failed to exercise its sentencing discretion. We also affirm on this issue.

AFFIRMED.