FILED
MAY 20 1977
CLERK SUPREME COURT

151

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Appellee,	)	Filed May 20, 1977
v.	)	
JIM (NMN) HENDRIX, JR.,	)	135/59708
Appellant.	)	

Appeal from Black Hawk District Court - Frank D. Elwood and Dennis D. Damsgaard, Judges.

Appeal from conviction for larceny in the nighttime and resulting sentence. Affirmed.

Stanford J. Patterson of Hoxie, Gottschalk & Patterson, of Waterloo, for appellant.

Richard C. Turner, Attorney General, J. Susan Carney, Assistant Attorney General, and David Correll, Black Hawk County Attorney, for appellee.

Submitted to Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

Defendant appeals his conviction for larceny in the nighttime as defined in section 709.4, The Code. Defendant's sole error assigned on appeal is the sufficiency of evidence to prove that the larceny occurred in the nighttime. Our standard of review is amply summarized by State v. Overstreet, 243 N.W.2d 880, 883-884 (Iowa 1976).

The statutory element of nighttime is defined as the period between sunset and sunrise during which there is not enough daylight by which to discern a person's face. State v. Billings, 242 N.W.2d 726, 729 (Iowa 1976); State v. Osborn, 200 N.W.2d 798, 807 (Iowa 1972); *see also* State v. Kittelson, 164 N.W.2d 157, 162 (Iowa 1969).

The witnesses, both for the State and the defense, testified that the larceny occurred between 5:00 a.m. and 6:30 a.m. on February 14, 1976. Most witnesses agreed the sun had not yet risen and described the time as "a little bit dark yet", "a little bit dark and a little light, dawn", "it was in early morning, it wasn't at night", "it was dark, it was starting to get light". This evidence was sufficient to generate a jury question whether the larceny occurred in the nighttime. *See* State v. Billings, supra; State v. Kittelson, supra; *see discussion in* State v. Osborn, supra at 809-810, McCormick, J., dissenting.

Defendant's motion to strike the first sentence of page four of the State's brief is sustained.

Trial court's judgment and sentence hereby are affirmed.