IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

Plaintiff-Appellee,

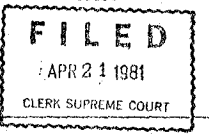
vs.

THEODORE RAYMOND REA,

Defendant-Appellant.

Filed April 21, 1981

1-011
64424



Appeal from Cass District Court. - Keith E. Burgett, Judge.

Defendant appeals his conviction of theft in the third degree, in violation of sections 714.1 and 714.2(3), The Code 1979. CONVICTION AFFIRMED. REMANDED FOR RESENTENCING.

Richard O. Habermann, Griswold, Ia., for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa and Mark R. Schuling, Assistant Attorney General of Iowa, for plaintiff-appellee.

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

PER CURIAM

Defendant appeals his conviction of theft in the third degree, in violation of sections 714.1 and 714.2(3), The Code 1979. The State seeks a remand of defendant's case for resentencing to a definite sentence. We affirm on defendant's appeal and remand for resentencing.

The theft charge stemmed from the discovery of plywood on defendant's truck at the time of his arrest on alcohol-related charges on June 6, 1979, and the reported theft of plywood from a construction site in Atlantic, Iowa. Following a jury trial, defendant was convicted of theft in the third degree and sentenced to a term not to exceed two years in the Fort Madison penitentiary. His appeal followed.

I. Scope of Review. Since this is an action at law, our review is on error only. Iowa R. App. P. 4.

II. Defendant's Assignments of Error. Defendant raises four issues on appeal. He contends 1) that testimony concerning statements he made while he was incarcerated was inadmissible: a) since the State failed to show that law enforcement officers properly informed him of his rights and b) since there could be no waiver of his Miranda rights because he was intoxicated; 2) that evidence concerning plywood found in his truck and its relationship to the plywood which was allegedly stolen was inadmissible since there was no proper showing of a chain of custody as to the pickup truck and the plywood; 3) that there should have been given an instruction on the effect of intoxication upon criminal intent; and 4) that there was insufficient circumstantial evidence to convict him.

Defendant, however, failed to preserve error on any of these issues. No objections or motions were made and no instructions were requested. Matters not raised in trial court or in post-trial motion will not be considered for first time on appeal. State v. Jump, 269 N.W.2d 417 (Iowa 1978). While it is the court's "... duty to instruct a jury fully and fairly, even without request, ... [the burden is on defense counsel] to make a proper record to preserve error, if any ... by requesting instruction ..." State v. Sallis, 262 N.W.2d 240, 248 (Iowa 1978). Even if defendant would have preserved error, we find no merit in any of his contentions.

III. Sentencing. Trial court sentenced defendant to a term not to exceed two years in the Fort Madison penitentiary. The State notes that defendant's sentencing was

improper due to the indefiniteness of defendant's sentence under State v. Welfort, 238 N.W.2d 781 (Iowa 1976). The State requests remand for resentencing in compliance with Welfort, 238 N.W.2d at 782. We agree. Third degree theft in violation of section 714.1 is an aggravated misdemeanor. Under Welfort, defendant's sentence must specify a definite term. Id. We therefore remand defendant's case for resentencing in accordance with Welfort.

Defendant's conviction is affirmed and remanded for resentencing.

AFFIRMED AND REMANDED.