FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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STATE OF IOWA,)

Appellee,) Filed April 26, 1979

vs.)

KEITH CLIFFORD SIEMANS,) 30
62031

Appellant.)

Appeal from Black Hawk District Court - Dennis Damsgaard, Judge.

Defendant appeals from jury conviction for breaking and entering alleging jury misconduct and insufficient evidence. AFFIRMED.

Paul Shinkle, Cedar Falls, Iowa, for appellant.

Thomas J. Miller, Attorney General of Iowa, and Thomas McGrane, Assistant Attorney General, for appellee.

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

PER CURIAM

Defendant-appellant, Keith Clifford Siemans, appeals from a jury conviction for breaking and entering in violation of section 708.8, The Code 1977. He contends that trial court should have granted his motion for directed verdict due to insufficient circumstantial evidence. He also contends that trial court erred in overruling his motion for new trial based on jury misconduct. We affirm.

I. Motion for Directed Verdict

Defendant alleges that the evidence presented at trial was insufficient to connect him with the crime and that trial court should have granted his motion for a directed verdict. Therefore, on appeal we must consider the evidence in the light most favorable to the state. State v. Overstreet, 243 N.W.2d 880, 883 (Iowa 1976). We examine the record to see if substantial evidence supports the charge; if so, the case was properly submitted to the jury. State v. McDaniel, 265 N.W.2d 917, 922 (Iowa 1978). Once rendered a jury verdict may be overturned only if contrary to the weight of the evidence. State v. Herndon, 257 N.W.2d 19, 22 (Iowa 1977); State v. Overstreet, 243 N.W.2d at 884. Circumstantial evidence may be sufficient to justify a jury verdict if wholly inconsistent with any hypothesis of innocence. State v. Overstreet, 243 N.W.2d at 883; State v. Jellema, 206 N.W.2d 679, 681 (Iowa 1973).

The fact is undisputed that a breaking and entering occurred on October 30, 1977, at the Payless Beauty Supply store in Waterloo, Iowa. The focus of defendant's argument is that his single fingerprint, found on an interior pane of glass in the Payless building, is insufficient circumstantial evidence to withstand a motion for a directed verdict. We disagree.

Fingerprints are admissible as evidence when proper procedures are followed. State v. Steffen, 210 Iowa 196, 200, 230 N.W. 536, 537 (1930). Here a qualified fingerprint expert lifted the print, testified that it had been made within a three-day period preceeding the crime and stated that one print was sufficient to identify a person. It was established that that defendant was known, if at all, in only the most casual manner by one employee of the business and that defendant was not a delivery person or someone who had regular access to the premises. A witness testified that the windows of the building had been washed within a month prior to the crime.

Because of these facts, the case is apposite State v. Sellers, 215 N.W.2d 231 (Iowa 1974), wherein homeowners left their house for a short while and upon return discovered

pry marks about window and door entrances. The defendant Seller's fingerprints were lifted from an interior pane of glass which had been recently washed. The homeowners did not know defendant, had not given him or anyone else permission to be on the porch where the prints were found. Additionally there was no way such prints could have been placed on the porch by a passerby. The supreme court found that the "evidence clearly supports the inference defendant had placed his hand upon the window during the unsuccessful attempt to enter the home from the [enclosed] porch." State v. Sellers, 214 N.W.2d at 232.

It has been stated that fingerprint evidence standing alone may be sufficient to sustain a conviction and that the decision will often turn on the extent to which the fingerprinted area was accessible to defendant. United States v. Carey, 470 F.2d 469, 471 (D.C. Cir. 1972). If the objects bearing the fingerprints were touched during the time of the crime and could not have been placed there at another time, a jury question will be raised. Borum v. United States, 380 F.2d 595 (D.C. Cir. 1967). Lack of legitimate access to the area where fingerprints are found is a strong link in the chain of circumstantial evidence. Stevenson v. U.S., 380 F.2d 590 (D.C. Cir. 1967) (companion to Borum v. United States).

In this case, substantial evidence existed to support the charge against defendant. The state's evidence included the unexplained presence of defendant's fingerprints in an area in which he denied ever being present and to which he had no legitimate access. Without any reference by police to fingerprints, defendant anticipated that any evidence against him would consist of fingerprints inside the building. Defendant's alibi defense was somewhat weakened by the testimony of his alibi witness, Georgia Johnson, on cross-examination who stated that it was possible defendant might not have been at her house and might not have stayed all night with her on the night of October 29, 1977.[1]

We find this evidence is sufficient to generate a jury question and thus withstand a motion for a directed verdict. We also find that the jury verdict is not sufficiently contrary to the weight of the evidence to warrant reversal.

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[1] The crime took place in the early morning hours of October 30, 1977.

II. Jury Misconduct

Defendant presented two allegations of jury misconduct in his motion for new trial which trial court overruled: (1) that a juror had twice attempted to discuss the case with another juror prior to submission of the case to the jury, despite being admonished by the court not to do so; and (2) that the jury discussed defendant's failure to testify in his own behalf. The first allegation of jury misconduct will not be addressed on appeal because it was not properly preserved in trial court. Mains v. Illinois Central R. Co., 234 N.W.2d 388, 395 (Iowa 1975). The record indicates that defense counsel was aware of the juror's communication prior to closing arguments to the jury. However, no objection was made at that time. We believe that failure to do so constitutes a waiver of the alleged error. If counsel viewed the matter as posing a serious threat to defendant's rights, he should have brought it to the court's attention to give the court an opportunity for redress if it was deemed necessary. Defendant is not free to await the outcome of the trial before electing to make an objection under these facts. See State v. Robinette, 216 N.W.2d 317, 318 (Iowa 1974).

The second allegation of jury misconduct came to counsel's attention posttrial and was timely raised in a motion for a new trial. Iowa R. Crim. P. 23(2)(b)(g) and (e). Trial court has broad discretion when considering whether alleged jury misconduct justifies a new trial. State v. Fedderson, 230 N.W.2d 510, 514 (Iowa 1975). The court's decision will be set aside only on a clear showing of abuse. State v. Houston, 209 N.W.2d 42, 44 (Iowa 1973). In making a decision, the court first must find that there was jury misconduct and then determine whether "the misconduct was calculated to and probably did influence the verdict." State v. Fedderson, 230 N.W.2d 510, 514 (Iowa 1975); State v. Kirk, 168 Iowa 244, 257, 150 N.W. 91, 95 (1914).

Defendant's second allegation of misconduct is the jury's discussion of defendant's failure to testify in his own behalf. Such evidence, clearly, cannot properly be considered by a jury. However, defendant must meet his burden of showing prejudice as a result. State v. Jones, 271 N.W.2d 261, 268 (Iowa 1978).

The Supreme Court of Iowa has said that "[j]urors undoubtedly discuss a variety of subjects in considering cases. As a practical matter, courts cannot be too strict on jury discussions or few verdicts would stand. The matter which jurors bring up and discuss in

the privacy of their room largely inhere in the verdict." State v. Lass, 228 N.W.2d 758, 771 (1975). In this case, the only statements available are from one juror who said that the discussion was a matter of curiosity only and that it was his belief that the verdict was based solely on evidence that had been presented at trial. We believe defendant has failed to establish that this misconduct resulted in prejudice warranting a new trial.[2]

Trial court's judgment is affirmed.

AFFIRMED.

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[2] The decision in this case does not involve the issue of the giving or failure to give an instruction which tells the jury no inference can be drawn from the defendant's failure to testify. The court in State v. Kimball, 176 N.W.2d 864, 869 (Iowa 1970), held that, absent a request by defendant for such an instruction, giving the instruction constitutes reversible error.