IN THE COURT OF APPEALS OF IOWA

No. 9-277 / 88-1100

FILED
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CLERK SUPREME COURT

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STATE OF IOWA,

Plaintiff-Appellee,

vs.

JOEY LEE BOWMAN, SR.,

Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, John A. Nahra, Judge.

Defendant appeals from his conviction, following a jury trial, of first-degree burglary. **AFFIRMED.**

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

Thomas J. Miller, Attorney General; Mark Joel Zbieroski, Assistant Attorney General; and J. E. Toby III, Assistant County Attorney, for plaintiff-appellee.

Heard by Oxberger, C.J., and Hayden and Habhab, JJ.

HABHAB, J.

Defendant appeals his conviction, following a jury trial, for first-degree burglary. Defendant contends that the State failed to prove beyond a reasonable doubt that he had the requisite intent to commit an assault or theft. We affirm.

The State charged Joey Bowman with first-degree burglary after an incident in which a man wearing a ski mask broke down the door of a Davenport woman's house, demanded money, hit her in the head with a hammer, and ran away. Bowman, who has a long-standing alcohol problem, testified that he had been drinking that day and woke up the next morning with no recollection of what might have happened during the time in question. At the close of the State's case-in-chief, and again at the end of the trial, Bowman moved for judgment of acquittal. The trial court denied both motions, and a jury found Bowman guilty as charged.

Defendant's first argument is that the State was required to negate his intoxication defense beyond a reasonable doubt. In other words, the defendant argues, the State was required to prove beyond a reasonable doubt that he was sober enough to form the specific intent necessary to sustain a burglary charge.

As it relates to this contention the trial court gave the stock instruction on the issue of intoxication. A

reading of that instruction reveals there is no requirement that the State prove beyond a reasonable doubt that defendant was sober enough to form the specific intent necessary to commit burglary. We need not reach the merits of defendant's argument for we find that defendant did not preserve error on this issue because of his failure to lodge a timely objection to the jury instruction on intoxication. See State v. Taggart, 430 N.W.2d 423, 425 (Iowa 1988); State v. Burkett, 357 N.W.2d 632, 634-35 (Iowa 1984).

Defendant's failure to object also causes "the instruction, right or wrong, [to] become[] the law of the case." Froman v. Perrin, 213 N.W.2d 684, 689 (Iowa 1973). Thus, under that instruction, the State was not required to prove that defendant was sober enough to form the requisite intent. All the State had to prove was that the defendant was able to and did form the specific intent necessary to commit burglary.

Defendant next asserts that the State failed to present sufficient evidence to enable a rational fact finder to conclude beyond a reasonable doubt that defendant had the specific intent necessary to commit first-degree burglary. In reviewing this type of claim, we keep the following principles in mind:

> We review the evidence in the light most favorable to the State; all inferences that are fairly and reasonably deducted [sic] from the evidence are accepted; and all the evidence, not just that supporting the verdict, is considered.

> Furthermore, the verdict will be sustained if supported by "substantial" evidence, i.e., evidence which would convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt.

State v. Freie, 335 N.W.2d 169, 171 (Iowa 1983). We find the State presented sufficient evidence so as to enable the jury to conclude beyond a reasonable doubt that defendant had the specific intent necessary to commit first-degree burglary.

Edna Wales, a neighbor of the victim and also defendant's cousin, testified at trial that defendant informed her, upon retrieving a pair of nylons and a hammer from her home, that he and an accomplice had already broken into a house two houses down from Ms. Wales that morning and that he was going to return there because he believed that there was money in the house.

Jose Torres, defendant's accomplice, testified at trial that prior to their second break-in they went to Ms. Wales' house to ask her for certain items which they needed in order to perfect the second break-in. Upon securing from Ms. Wales a hammer, a knife, and some nylons, the two men returned to and broke into the victim's house. Torres further testified that defendant, using the hammer, gained entrance to the victim's house by breaking the door, and, upon entering, demanded money from the victim. While Torres did corroborate defendant's story about consuming alcohol on the day of the crime, he also stated that after

they had consumed their initial supply of liquor defendant was not "drunk drunk."

From the facts aforesaid, we find there was substantial evidence by which the jury could have determined that defendant possessed the intent to commit an assault or theft when he broke into the victim's house. The defendant's conviction is affirmed.

AFFIRMED.