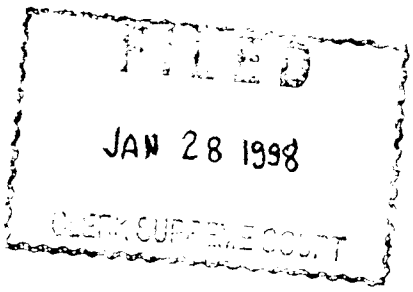
IN THE COURT OF APPEALS OF IOWA

No. 7-705 / 97-598

000373



STATE OF IOWA,

Appellee,

vs.

LANCE D. FLUIT,

Appellant.

Appeal from the Iowa District Court for Lyon County, Frank B. Nelson, Judge.

Lance D. Fluit appeals his conviction and sentence for third-degree burglary.

AFFIRMED.

Linda Del Gallo, State Appellate Defender, and John P. Messina, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, and Paul L. White, County Attorney, for appellee.

Heard by Cady, C.J., and Sackett, and Streit, JJ.

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CADY, C.J.

Lance Fluit appeals the judgment and sentence for his conviction of third-degree burglary. Fluit claims insufficient evidence existed to support his conviction and he received ineffective assistance of counsel. We affirm, and preserve the claim of ineffective assistance of counsel.

The events giving rise to this case began when Fluit and Robert Broesder, a friend, went to the home of Fluit's grandparents, Ward and Jean Espeland. Because the Espelands were not home and the doors were locked, Fluit and Broesder attempted to obtain a key to the home from a neighbor. When the neighbor did not provide them with a key, they gained entry to the residence through the bathroom window.

Broesder and Fluit testified they entered the home in order to call an auto parts dealer and repair Fluit's car which was in the Espeland's garage. At some point, Fluit stole $1500 from a filing cabinet in a bedroom. Broesder later saw Fluit with the money and Fluit told him he got the money from the Espeland's bedroom.

On appeal Fluit argues insufficient evidence existed to support his conviction. Specifically, he claims the State failed to prove he entered the residence with a felonious intent and he lacked the right, license, or privilege to enter the premises. He also maintains he received ineffective legal assistance by his counsel's failure to object to prior bad acts evidence and failure to object to error in the marshaling instruction.

I. Sufficiency of Evidence

Our standard of review for claims of insufficient evidence is well established. We review such claims for errors at law. *State v. Thomas*, 561 N.W.2d 37, 39 (Iowa 1997); Iowa R. App. P. 4. A verdict of guilty is binding on appeal unless no substantial evidence in the record exists to support it, or it is clearly against the weight of the evidence. *State v. Schrier*, 300 N.W.2d 305, 306 (Iowa 1981); *State v. Forsyth*, 547 N.W.2d 833, 834 (Iowa App. 1996). Substantial evidence means evidence that could convince a rational trier of fact the defendant is guilty beyond a reasonable doubt. *Schrier*, 300 N.W.2d at 306; *see also State v. Anderson*, 517 N.W.2d 208, 211 (Iowa 1994); *State v. Geier*, 484 N.W.2d 167, 170-71 (Iowa 1992).

In determining the sufficiency of the evidence, we view the record in a light most favorable to the State. *State v. Robinson*, 288 N.W.2d 337, 340 (Iowa 1980); *see also State v. McGrew*, 515 N.W.2d 36, 37 (Iowa 1994); *State v. Zahner*, 545 N.W.2d 337, 339 (Iowa App. 1996). All evidence is considered, not merely the evidence supporting the verdict. *Robinson*, 288 N.W.2d at 340; *see also State v. Walker*, 538 N.W.2d 316, 319 (Iowa App. 1995). We give the State the benefit of all legitimate inferences and presumptions which can fairly and reasonably be deduced from the evidence. *State v. Conyers*, 506 N.W.2d 442, 444 (Iowa 1993). Direct and circumstantial evidence is equally probative. Iowa R. App. P. 14(f)(16). Although a jury verdict can rest on circumstantial evidence, the evidence must raise a fair inference of guilt as to each element of the crimes. *State v. Casady*, 491 N.W.2d 782,

787 (Iowa 1992). Additionally, discrepancies in testimony do not, in and of themselves, preclude proof beyond a reasonable doubt. *See generally State v. Phanhsouvanh*, 494 N.W.2d 219, 223 (Iowa 1992) (jury could adopt evidence it found credible); *Forsyth*, 547 N.W.2d at 836 (jury's function to determine credibility and resolve conflicts in evidence).

Fluit claims the State failed to present sufficient evidence to prove he entered the house with the intent to commit the theft. He also asserts the State did not present sufficient evidence that he lacked the right, license, or privilege to enter the home.

A. Intent

A burglary occurs when "[a]ny person, having the intent to commit a felony, assault or theft therein, who, having no right, license or privilege to do so, enters an occupied structure..." Iowa Code § 713.1 (1995). Proof of the intent element in burglary is rarely susceptible to proof by direct evidence and typically depends upon circumstantial evidence and inferences drawn from such evidence. *State v. Finnel*, 515 N.W.2d 41, 42 (Iowa 1994). Further, a fact finder can infer intent from the circumstances of the defendant's entry into the premises and the defendant's acts preceding and following the entry. *Id.*; *see State v. Clay*, 213 N.W.2d 473, 480 (Iowa 1973) (intent may be inferred from defendant's entry into a building which contains things of value), *State v. Montes*, 445 N.W.2d 407, 407-08 (Iowa App. 1989) (sufficient evidence existed from which a jury could infer intent to commit theft

when defendant took items from home). Proof beyond a reasonable doubt is satisfied if it is more likely than not that the inference of intent is true. *Finnel*, 515 N.W.2d at 42.

Fluit claims he entered the home in order to call an auto parts dealer and repair his car. Jurors, however, could rationally find he entered the Espeland home to commit a theft. Fluit and Broesder had no money when they entered the home. The jury, therefore, could rationally have inferred Fluit entered the home with the intent to obtain money to pay for auto parts. Jurors could also logically conclude Fluit would not have broken into a home to order auto parts when he had no money to pay for them. Furthermore, the jury could infer the intent to commit a theft from the manner of Fluit's entry through the bathroom window and the commission of a theft once inside the home. Viewed in a light most favorable to the State, we find sufficient evidence existed to convince a rational trier of fact beyond a reasonable doubt that Fluit entered the Espeland home with the intent to commit a theft.

B. Unlawful Entry

The crime of burglary requires the defendant have no right, license, or privilege to enter an occupied structure. *See* Iowa Code § 713.1. In this case, the marshaling instruction substituted "unlawfully entered" for the "no right, license or privilege" language. Because Fluit did not object to the instruction, it became the law of the case. *See State v. Hepperle*, 530 N.W.2d 735, 740 (Iowa 1995).

Fluit claims insufficient evidence existed to prove beyond a reasonable doubt he lacked the right, license, or privilege to enter the Espeland's home. He asserts family members had the right to be on the premises and because he was a family member, he too had a right to enter the home. The Espelands, however, kept their home locked and did not provide Fluit with a key. Although they gave keys to some members of the family, it does not necessarily follow they intended to provide Fluit with a key. Thus, the jury rationally could have concluded Fluit lacked the right to enter the Espeland's home.

II. Ineffective Assistance of Counsel

Fluit claims he received ineffective assistance of counsel by counsel's failure to object to prior bad acts evidence and by counsel's failure to object to the marshaling instruction. Ordinarily, ineffective assistance of counsel proceedings are preserved for postconviction proceedings. *See State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). The record is insufficient for us to address this issue on appeal. Fluit must present his claims in an application for postconviction relief to permit his counsel an opportunity to explain his decisions. We preserve the claim for postconviction proceedings.

AFFIRMED.