

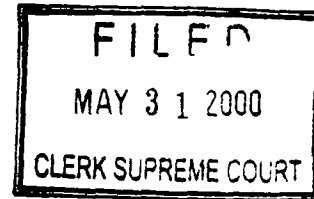
IN THE COURT OF APPEALS OF IOWA

No. 0-109 / ~~99-0888~~ 99-0887
Filed May 31, 2000

**STATE OF IOWA,
Plaintiff-Appellee,**

vs.

**CLARK EDWARD LUNDELL,
Defendant-Appellant.**



Appeal from the Iowa District Court for Plymouth County, John D. Ackerman, Judge.

On appeal from his conviction for second-degree burglary, defendant contends he received ineffective assistance of counsel because of his trial counsel's failure to move to dismiss based on speedy trial grounds. He also maintains the evidence is insufficient to support his conviction. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and James G. Tomka, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas W. Andrews, Assistant Attorney General, and John C. Beekman, County Attorney, for appellee.

Considered by Vogel, P.J., and Mahan and Miller, JJ.

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MILLER, J.

Defendant Clark Lundell appeals his conviction, following trial to the court, of burglary in the second degree, in violation of Iowa Code sections 713.1 and 713.5, contending (1) the trial court erred in denying his motion for judgment of acquittal, and (2) counsel was ineffective for failure to move to dismiss the charge based upon violation of the one-year speedy trial requirement. We affirm the conviction, but preserve his ineffective assistance of counsel claim for a possible postconviction relief proceeding.

I. Denial of Motion for Judgment of Acquittal.**A. Scope and Standards of Review**

Lundell contends the evidence is insufficient to prove he acted with the specific intent necessary to sustain a second-degree burglary conviction, and therefore the trial court erred in denying his motion for judgment of acquittal. Our review is for errors of law. Iowa R. App. P. 4; *State v. Mitchell*, 568 N.W.2d 493, 502 (Iowa 1997). Denial of a motion for judgment of acquittal is reviewed on a "substantial evidence" standard. *State v. Talbett*, 590 N.W.2d 732, 733 (Iowa App. 1999). The evidence is viewed in a light most favorable to the State. *Id.* The reviewing court must consider all of the evidence and not just the evidence which supports the verdict. *Id.* Substantial evidence is "such evidence as could convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt." *Id.* (quoting *State v. Robinson*, 288 N.W.2d 337, 339 (Iowa 1980)).

B. Factual Background

We are satisfied the record fairly reveals the following facts. Lundell met Brandy Loutsch while both were in outpatient treatment at Gordon Recovery in

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early 1995. At some point, the two went out on dates, usually in a group, and the relationship eventually became sexual in nature. Throughout this relationship, Lundell was only at Loutsch's home on two occasions, both times with other people present. The two never had sexual relations at Loutsch's home. By early April 1995, Loutsch had ended the sexual relationship, but continued her friendship with Lundell. On April 11, 1995, Loutsch signed a \$3,250.00 bond for Lundell in Monona County on an unrelated charge. Prior to April 15, 1995, Lundell never physically or sexually abused Loutsch or threatened to do so, never stole anything from Loutsch, and she did not feel threatened by him.

Around midnight on April 15, 1995, Lundell called Loutsch and told her he had been shot robbing a bank and was coming to her home. Loutsch told Lundell he was not welcome in her home at that time. Loutsch had no concern that he would come over, because he did not have a car. She was later awakened by a knocking on her door, and saw Lundell had secured a taxi and was at her door. Loutsch opened the door and Lundell barged in uninvited. Loutsch felt Lundell was drunk based on his slurred speech, loud tone, rude comments, his excited and agitated state, and his possession of some wine coolers. Lundell went to her living room and sat down, and Loutsch told him again he could not stay in her home. Loutsch indicated her son was sleeping and again asked Lundell to "please go." Lundell grabbed Loutsch's wrist and told her to sit down and listen to him, and when she refused, Lundell became more agitated. Lundell stated he just wanted to stay the night and sleep on her couch, but Loutsch repeated her request that he "just please leave" several more times. Loutsch suggested Lundell go to a bar about two blocks away that had a pay

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phone. Loutsch had become afraid of Lundell and was concerned that he might hurt her.

Lundell eventually did leave through the rear porch. Loutsch jammed a snow shovel under the door handle of the steel door on the outside entrance of the porch. She set the deadbolt lock on the kitchen door which led to the rear porch, to prevent Lundell from coming back in if he returned. Two minutes later she heard a bang on the rear porch, and believed it to be the shovel falling over. Lundell was at the kitchen door, even more agitated than before, and again yelled and cursed at her to let him so he could sleep on the couch. Loutsch told him to leave, and threatened to call the police. This did not seem to deter Lundell at all. At some point, Loutsch locked her child in a bedroom and armed herself with a golf club in case Lundell did gain access. Lundell did not leave and Loutsch called the police. She stayed on the phone with the communications center until police arrived.

Sergeant Bartolozzi arrived on the scene. When Bartolozzi entered the outside door of the rear porch, he observed Lundell had his arm inside one of the windowpanes, which had previously been broken and duct-taped shut, in an attempt to unlock the deadbolt. He also heard Lundell shout, "Open the fucking door." Bartolozzi aimed his flashlight and weapon at Lundell and ordered him to the ground. Lundell did not comply with Bartolozzi's demand and was very belligerent and angry. Lundell then picked up the shovel and lifted it as if he were going to hit Bartolozzi. Bartolozzi then grabbed Lundell and threw him to the ground. After some struggle, Bartolozzi was able to handcuff Lundell.

C. The Law

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A burglary is committed when "[a]ny person, having the intent to commit a felony, assault or theft therein, . . . enters an occupied structure not being open to the public. . . ." Iowa Code § 713.1 (1997). Lundell argues the evidence was insufficient to show he intended to commit an assault when he broke into the Loutsch's home.

Assault can be committed in several ways. The alternative most pertinent to the facts here provides, "A person commits an assault when, without justification, the person does any of the following: . . . (2) Any act which is intended to place another in fear of immediate physical contact which will be painful, injurious, insulting, or offensive, coupled with the apparent ability to execute the act." Iowa Code § 708.1(2) (1997).

"[T]he element of intent in burglary is seldom susceptible to proof by direct evidence." *State v. McFarland*, 598 N.W.2d 318, 320 (Iowa App. 1999) (quoting *State v. Finnel*, 515 N.W.2d 41, 43 (Iowa 1994)). Usually proof of intent will depend upon circumstantial evidence and inferences drawn from such evidence. *Id.* A jury may infer intent to commit an assault from the circumstances of the defendant's entry into the premises and his acts preceding and following entry. *Id.* The requirement of proof beyond a reasonable doubt is satisfied if it is more likely than not the inference of intent is true. *Id.*; *State v. Olson*, 373 N.W.2d 135, 137 (Iowa 1985).

D. Application of the Law to the Facts

Lundell argues he committed no more than criminal trespass, as he wanted nothing more than to get into the home so he could sleep on the couch. Our review of the record convinces us that a rational trier of fact could infer it was

more likely than not Lundell had the specific intent to commit an assault at the moment he broke into the home.

The evidence noted above makes clear Lundell knew when he left the house Loutsch was going to resist any more attempts on his part to enter Loutsch's home or stay the night. While in her home minutes earlier he had grabbed her arm, which she pulled away. He therefore clearly knew any touching of her would be considered offensive. It is also clear that Lundell would use whatever physical force necessary to get into the house despite the barriers Loutsch placed in his way. He broke through the outside porch door with enough force to discharge the shovel from its jammed position. To gain further entry into the house, he had to reach through a broken windowpane in order to unlock the deadbolt on the kitchen door. Neither of these barriers was in place when he left the house minutes earlier.

Both before and after he left the house, Lundell screamed various profanities at Loutsch. Loutsch's earlier resistance had progressively made Lundell more agitated and angry at her. Loutsch felt forced to lock her child in a bedroom and arm herself with a golf club to defend herself if necessary. Lundell was able to see she had taken steps to defend herself. She had, until that evening, a friendship and a prior sexual relationship with Lundell. Therefore, her reaction and fear may give some indication of Lundell's intent. Further, Lundell attempted to assault the arresting officer with the snow shovel. This is again somewhat probative of his intent at the moment he broke into the house to overcome any resistance by Loutsch by whatever force was necessary. Substantial evidence supports the trial court's findings that when Lundell returned

to Loutsch's home and broke into it he knew she would resist him entering and staying and he intended to use force against her to overcome her resistance. The trial court did not err in overruling Lundell's motion for judgment of acquittal.

II. Ineffective Assistance of Counsel

To establish an ineffective assistance of counsel claim, the applicant must show that "(1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom." *State v. Miles*, 344 N.W.2d 231, 233-34 (Iowa 1984). Such claims are usually reserved for postconviction relief actions in order to give defense counsel an opportunity to respond to the allegation that counsel failed to perform an essential duty. *State v. Laffey*, 600 N.W.2d 57, 60-61 (Iowa 1999).

Upon our review of the law and the record before us, we believe the present record is not adequate to allow this court to determine whether trial counsel failed in an essential duty.

Rule of criminal procedure 27(2)(c) provides:

All criminal cases must be brought to trial within one year after the defendant's initial arraignment pursuant to Iowa Rule of Criminal Procedure 8 unless an extension is granted by the court, upon a showing of good cause.

Once the one-year period has expired the State must show either a waiver on the part of the defendant or good cause for the delay. See *State v. Miller*, 311 N.W.2d 81, 83-84 (Iowa 1981).

The record reveals the following information. Trial information was filed on April 27, 1995, charging Lundell with attempted burglary in the second degree. On May 4, 1995, defendant appeared for a bond review. Bond was reduced to a \$5000.00 unsecured appearance bond. Lundell was removed from the Plymouth County Jail, and transferred to the Monona County Jail on an apparently

unrelated case. Lundell filed a written arraignment on May 15, 1995, in which he pled not guilty and "waive[d] my right to speedy trial pursuant to Rule 27." The next day, the district court filed an Order Fixing Dates After Arraignment, setting pre-trial conference for June 12, 1995 and trial for July 25, 1995. The next document in the record is another Order Fixing Dates After Arraignment, filed on August 7, 1996, setting pre-trial conference for September 3, 1996 and trial for September 19, 1996. There is nothing in the record to indicate why trial was not held within one year of the May 15, 1995 arraignment. Lundell claims to have been in the custody of various Iowa officials the entire time. The State asks us to preserve this claim for a possible postconviction relief proceeding so it may show either waiver or good cause. There may have been discussions or correspondence between defense counsel and the prosecuting attorney that are not a part of the record but would shed light on waiver, good cause, or both. There may also be other facts that have a bearing on the question. We conclude this claim of ineffective assistance of counsel should be preserved for a possible postconviction proceeding.

AFFIRMED.

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