

IN THE COURT OF APPEALS OF IOWA

No. 9-599 / 89-255

FILED

FEB 22 1990

CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

JOHN LOWELL PARGO,

Appellant.

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Appeal from the Iowa District Court for Polk County,
Rodney J. Ryan, Judge.

Defendant was accused of breaking into the apartment of a girlfriend, where he had also resided until approximately nineteen days before the incident. He appeals from his conviction, following a jury trial, for first-degree burglary. He contends the district court should have given an instruction on his theory of defense, which was that he was entitled to enter the apartment because he had not been given thirty days notice of termination of tenancy and therefore remained a presumptive tenant. **AFFIRMED.**

Don Nickerson of Babich, Bennett, Nickerson & Newlin,
Des Moines, for appellant.

Thomas J. Miller, Attorney General, Julie A. Halligan, Assistant Attorney General, and James Smith, County Attorney, for appellee.

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

DONIELSON, J.

John Pargo and Anne Packer lived together from 1979 until early August 1988. On October 30, 1987, the parties signed a lease to rent an apartment at 717 17th Street in Des Moines. The lease ran from November 1, 1987, until April 30, 1988. After May 1, 1988, the parties had a month-to-month tenancy. Packer asserts the relationship ended in early August and Pargo moved out of their apartment on August 7. Pargo responds that he continued to reside in the apartment until August 26; he explains the events of August 7 by saying he removed his personal items from the apartment to help Packer create the impression she was a single parent eligible for a rent subsidy.

After Pargo moved out and turned in his keys to the apartment to the landlord, Packer had the locks changed. On August 21, 1988, Pargo broke down the dead-bolted door to Packer's apartment and attempted to remove furniture. The police were summoned, and Pargo fled.

In the early morning hours of August 26, 1988, Pargo allegedly entered the apartment without Packer's consent and assaulted her and her guest. Pargo entered the apartment through the front door after receiving assistance from a friend who secured a ladder and entered through an apartment window. As a result of the incident, Pargo was charged with first-degree burglary. A jury found him guilty, and he has appealed from the resulting conviction.

Pargo contends the district court should have given the jury an instruction consistent with Iowa Code section 562.4, which provides in part as follows:

A person in the possession of real estate, with the assent of the owner, is presumed to be a tenant at will until the contrary is shown, and thirty days' notice in writing must be served upon either party or a successor of the party before termination of the tenancy.

Pargo asserts on August 26th he remained presumptively a tenant at will of the apartment because the building owner had not given him thirty days' notice of termination of tenancy. He contends he had a right to enter the apartment on the 26th, and he claims he was entitled to an instruction stating this theory of defense and incorporating the statutory principle on which it rests.

At the outset we note Pargo's reliance on Iowa Code section 562.4 was inappropriate. Section 562A.34 governs the termination of month-to-month tenancies in the leasing of residential units. As both statutes involve similar thirty-day notice requirements, we will address the merits of Pargo's argument.

Pargo contends the trial court's failure to give his requested theory of defense instruction resulted in a denial of due process and a fair trial. A proper theory of defense instruction is one which sets forth a set of facts which would preclude a finding of guilt. Conner v. State, 362 N.W.2d 449, 453 (Iowa 1985). To the extent a court is permitted or required to instruct that a given set of facts

precludes a finding of guilt as to the crime charged, that set of facts must indeed be incompatible with one or more essential elements of the crime. State v. Kase, 344 N.W.2d 223, 226 (Iowa 1984).

Pargo claims the requested instruction regarding thirty-day notice prior to termination of a tenancy was consistent with his defense that he was a legally-recognized tenant with a right to be on the premises. Without deciding whether there may be cases in which such an instruction would be warranted, this court finds this was not such a case.

Defendant admitted he had signed a notice to vacate prior to August 6, 1988. The effect of this notice to vacate was to terminate the month-to-month lease he and Packer had on their apartment and to enable Packer to execute a new lease on the apartment on August 5, 1988. The duration of the new lease was to be from August 1, 1988, to January 31, 1989, and Packer was to be the sole lessee.

Paragraph 15(e) of Pargo's original lease addressed termination of the rental agreement. It listed termination pursuant to thirty-day notice and by mutual agreement of the parties as alternative procedures for termination of the lease. By allowing Pargo to execute the notice to vacate, First Realty was mutually agreeing to let him terminate the lease. By signing the agreement to vacate by

August 6, 1988, Pargo voluntarily relinquished his right to thirty-day notice. Pargo was relieved of his liabilities under the lease without having to provide his landlord thirty-day notice as provided in section 562A.34.

Whatever his reasons for doing so, Pargo terminated his leasehold when he executed the notice to vacate. This mutual agreement to vacate abrogated any need for his landlord to provide him with thirty-day notice. Since no such notice was required in this case, Pargo had no right to his requested jury instruction.

The lack of right, license, or privilege to enter a structure is an element of burglary which must be proven by the State. Iowa Code § 713.1 (1987); State v. Franklin, 368 N.W.2d 716, 718 (Iowa 1985); State v. King, 344 N.W.2d 562, 563 (Iowa App. 1983). The issue of Pargo's right, license, or privilege to enter the apartment was appropriately submitted to the jury, and Pargo's conviction is affirmed.

AFFIRMED.