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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

Plaintiff-Appellee,

vs.

RANDY LEE SCHUBICK,

Defendant-Appellant.

Filed April 29, 1980

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63345

Appeal from Muscatine District Court - Margaret S. Briles, Judge.

Defendant appeals conviction of burglary in the second degree, a violation of section 713.3, supplement to the Code 1977. Affirmed.

J. Michael Metcalf and William S. Beneke of Mealy, Metcalf & Conlon, Muscatine, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Kathy Krewer, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

DONIELSON, J.

Defendant, Randy Lee Schubick, appeals conviction of burglary in the second degree, a violation of section 713.3, supplement to the Code 1977. On appeal, defendant raises six alleged errors for reversal: Sufficient evidence to support guilty verdict did not exist; evidence regarding analysis of defendant's boot and a footprint found at scene of the crime was erroneously admitted into evidence because of a lack of proper foundation; boots were admitted into evidence erroneously because they were unconstitutionally seized; mistrial should have been granted due to prosecutorial misconduct; evidence of prior conviction should have been suppressed; and since facts of the crime fit both the offense of burglary in the second degree and criminal trespass, a verdict for the latter offense should have been rendered. We affirm.

I.

Defendant was charged by information on April 25, 1978, with burglary in connection with a break-in on March 30, 1978, of a doctor's office in West Liberty, Iowa. After trial, the jury returned a verdict of guilty of burglary in the second degree. Defendant was sentenced to ten years in prison and, subsequently, filed this appeal.

Testimony at trial established West Liberty police officers discovered on March 30, 1978, a possible break-in at the Palmer Clinic. Approximately at this same time, the police officers heard a vehicle "start up and leave at what sounded to be a high rate of speed from the vicinity" of a car they had checked on earlier that evening, after receiving a call concerning a "suspicious vehicle." The officer then had a dispatch put out over the police radio to watch for the vehicle as "it was wanted for questioning with reference to the possible break-in at the clinic." A deputy sheriff, hearing the broadcast, stopped the car and brought the occupants of the car, defendant and two other people, to the clinic.

At the clinic, the police officers conducted a search and found a broken window by which entry into the building was allegedly obtained. A potted plant near the window had been knocked over, scattering dirt on the floor. The officers found footprints in the dirt and going from the room into the hallway. Nothing was taken from the room, but there were indications the locked door to the medication room was kicked several times. The footprints observed by the officer were the type made by a work boot or

work shoe. The officers noticing the similarity between the footprints and the soles of defendant's shoes removed over his protest defendant's boots. After observing a small hole in the bottom of one of the shoes, the officers found a small piece of material among the debris lying on the floor where entry was made that seemed to fit in this hole. Subsequently, the boot and the piece of material were mailed to the Bureau of Criminal Investigation Crime Laboratory for analysis.

II.

Defendant contends trial court erred in failing to grant his motion for a directed verdict on the ground the evidence produced at trial was insufficient to sustain a verdict of guilty. Defendant's intent to commit a theft and connection with the scene of the crime were allegedly not sufficiently proven. We find trial court correctly denied defendant's motion.

A trial court may sustain a defendant's motion for directed verdict at the close of State's case, but is not required to do so; error cannot be predicated upon the court's failure to sustain that motion. State v. Rinehart, 283 N.W.2d 319, 320 (Iowa 1979); State v. Dahlstrom, 224 N.W.2d 443, 446 (Iowa 1974). Unless defendant's motion for directed verdict is renewed at the close of all evidence, it is deemed waived. Dahlstrom, 224 N.W.2d at 446; State v. Tokatlian, 203 N.W.2d 116, 119 (Iowa 1972), overruled on other grounds, State v. Robinson, 288 N.W.2d 337, 339-40 (Iowa 1980). In passing upon a motion for directed verdict the court views the evidence in the most favorable light to the State and accepts reasonable inferences from the evidence supporting the verdict. State v. McDaniel, 265 N.W.2d 917, 922 (Iowa 1978). If substantial evidence supports the charge, the court should submit the case to the jury for its determination. Id; State v. Beyer, 258 N.W.2d 353, 356 (Iowa 1977). The evidence must be sufficient to raise a fair inference of guilt and more than mere suspicion, speculation, or conjecture. State v. York, 256 N.W.2d 922, 927 (Iowa 1977); Dahlstrom, 224 N.W.2d at 448.

Reviewing the evidence presented, we find substantial evidence supported the charge and the trial court correctly submitted it to the jury. The general rule is that in the absence of an explanation, the jury may infer from the fact of defendant's breaking and entering the intent to commit larceny. State v. Morelock, 164 N.W.2d 819, 822 (Iowa 1969); see State v. Clay, 213 N.W.2d 473, 480 (Iowa 1973); State v. Fox, 159 N.W.2d 492,

494 (Iowa 1968). The fact that nothing was stolen is not dispositive since the intent to steal is sufficient for conviction. § 713.3, supplement to the Code 1977; see State v. Hinkle, 229 N.W.2d 744, 751 (Iowa 1975). We are unpersuaded by defendant's argument that intent may be inferred only when there is direct evidence of flight upon discovery. Once defendant's act of breaking and entering is proven, the act of flight is immaterial to the issue of intent. See Clay, 213 N.W.2d at 480. Combining the facts of defendant's presence in the vicinity of the break-in and the physical evidence (boots and footprints), substantial evidence existed linking defendant to the scene of the crime.

III.

Defendant contends the trial court admitted erroneously evidence concerning the analysis of defendant's boots and a footprint found at the scene of the crime because of lack of proper foundation. The basis of defendant's argument is that the necessary showing for identification of the specimens was not met, there was no complete chain of custody, and State's expert witness, Michael J. Peterson, was not shown to be qualified nor were the facts underlying his opinion sufficient.

State contends defendant failed to object at the proper time to the introduction of the actual evidence of the analysis: photographs showing the boot sole with the piece missing, a piece of cream colored rubber, and the piece of rubber inserted into the hole of the boot sole. These photographs represented the essence of Peterson's testimony. The record clearly shows defendant did not object to the introduction of the photographs. Objections to an evidentiary exhibit must be made when the exhibit is offered. State v. Pitlik, 247 N.W.2d 741, 743 (Iowa 1976). Although defendant objected to Peterson's testimony on the basis of lack of proper foundation for the specimens, these objections do not preserve for appeal the alleged error of admitting the actual physical evidence of the analysis of defendant's boots and the piece of boot sole. Pitlik, 247 N.W.2d at 742-43.

Further, we find in reviewing the evidence detailing the laboratory's handling procedures and compliance with these procedures that a complete chain of custody from the time of acquisition of the specimens to the time they were delivered to Peterson for analysis was established such that the tested specimens were the relevant articles and

in the same condition as when first acquired. See State v. Langlet, 283 N.W.2d 330, 336-37 (Iowa 1979); State v. Smith, 272 N.W.2d 859, 863 (Iowa 1978); State v. Bakker, 262 N.W.2d 538, 543 (Iowa 1978); cf. State v. Branch, 222 N.W.2d 423, 426 (Iowa 1974) (State need only prove it is reasonably probable that tampering or substitution did not occur for physical evidence to be admitted).

We also find to be without merit defendant's challenge to Peterson's qualifications or the sufficiency of evidence on which he based his testimony. Admission of opinion evidence rests largely in the sound discretion of the trial court and its ruling will not be reversed absent manifest abuse of that discretion to the prejudice of the complaining party. Ganrud v. Smith, 206 N.W.2d 311, 314 (Iowa 1973). The trial court's discretion ceases when the record shows as a matter of law the witness is not qualified or the facts on which the opinion is based are not sufficiently stated by the witness. Id. We are committed to a liberal rule on the admission of opinion testimony. Id. Peterson's education, training, and work experience are evidence of his qualifications in this area. Further, section 749A.2, supplement to the Code 1977 (now § 691.2, The Code 1979) creates a presumption that technicians working for the State Criminalistics Laboratory are experts. Smith, 272 N.W.2d at 862. As noted earlier, we find the specimens were supported by the proper foundational evidence and support Peterson's opinion testimony.

IV.

Defendant contends his boots were admitted into evidence erroneously because they were seized unconstitutionally. Defendant filed his motion to suppress on June 26, 1978. Defendant was arraigned on the charge of second degree burglary on May 5, 1978. The State contends defendant has waived this issue because a motion to suppress must be filed within thirty days after arraignment or prior to impanelment of the jury, whichever is sooner, unless the time is extended by the court for good cause. Iowa R. Crim. P. 10(4). Here, defendant's motion to file was not filed within thirty days after arraignment. We find, however, the State waived the application of Iowa R. Crim. P. 10(4). It did not claim at trial defendant's motion to suppress was untimely. Such silence on its part must be construed as a tacit admission good cause existed for the untimely filing. The State's conduct relieved defendant of the requirement of showing good cause on the record.

While we decline to reject defendant's motion to suppress on the basis it is untimely, we conclude said motion is otherwise inadequate. On appeal, defendant contends the boots should have been suppressed because they were seized in violation of his fourth amendment right against unreasonable searches and seizures. This contention was not asserted in the motion to suppress filed by defendant in the trial court or otherwise preserved. As a result, there is no trial court ruling upon which to posit error on the claim now made. See State v. Washington, 257 N.W.2d 890, 895 (Iowa 1977), cert. denied, 435 U.S. 1008, 98 S. Ct. 1881, 56 L. Ed. 2d 390 (1978).

V.

Defendant contends a mistrial should have been granted due to prosecutorial misconduct. Prosecutorial misconduct is grounds for a mistrial when it results in prejudice and prevents a fair trial. State v. Webb, 244 N.W.2d 332, 333 (Iowa 1976). We find defendant was not prejudiced by prosecutor's remarks and received a fair trial; motion for mistrial was correctly denied.

The specific conduct complained of occurred during cross-examination of defendant by the county attorney, as follows:

> Q. And you were convicted of breaking and entering two years ago, weren't you?
>
> A. Yes. You was my lawyer.
>
> Q. Which one of us has changed?
>
> THE COURT: Mr. Petersen, let's get on with it.
>
> Q. You were convicted, weren't you?
>
> A. Yes, you know that.
>
> MR. PETERSEN: No further questions.

Defendant claims this exchange prejudiced him because it conveyed to the jury the image of the defendant as an unchanging, habitual thief. Moreover, defendant contends, defendant's prior conviction was raised by defense counsel in direct examination and the prosecutor's questioning violated the trial court's admonitions not to dwell on defendant's prior conviction for breaking and entering.

A trial court possesses wide discretion in granting or denying a motion for mistrial. State v. Trudo, 253 N.W.2d 101, 106 (Iowa), cert. denied, 434 U.S. 903, 98 S. Ct. 299, 54 L. Ed. 2d 189 (1977). Reversal is justified when this discretion is abused. Id.

Abuse of discretion is shown only when defendant demonstrates such discretion was exercised on grounds clearly untenable or unreasonable. Id.; see State v. Wright, 274 N.W.2d 307, 315 (Iowa 1979); State v. Brewer, 247 N.W.2d 205, 211 (Iowa 1976).

We do not find trial court abused its discretion in denying the mistrial motion. The prosecutor was not barred from questioning defendant about his prior conviction. The allegedly prejudicial remark did not clearly characterize defendant as an habitual criminal. Defendant failed to establish prejudicial denying him a fair trial. See State v. Bradley, 254 Iowa 211, 215-16, 116 N.W.2d 439, 441-42 (1962), cert. denied, 374 U.S. 490, 83 S. Ct. 1886, 10 L. Ed. 2d 1047 (1963); State v. Harless, 249 Iowa 530, 535-36, 86 N.W.2d 210, 213-14 (1958).

VI.

Defendant contends trial court erred in its failure to exercise proper judicial discretion in determining whether to admit or suppress evidence of defendant's prior conviction for breaking and entering. Trial court possessed the discretion to admit evidence that defendant has been previously convicted of a felony only if the felony involved dishonesty or false statement and the court determined any danger of unfair prejudice did not outweigh the probative value of such prior felony conviction, taking into account: the nature of the conviction; its bearing on veracity; its age; and its propensity to influence improperly the jurors. State v. Conner, 241 N.W.2d 447, 454 (Iowa 1976); State v. Martin, 217 N.W.2d 536, 542 (Iowa 1974). We hold trial court properly admitted evidence of defendant's prior conviction.

A showing of prejudice is required to obtain relief on appeal. State v. Gilmore, 259 N.W.2d 846, 858 (Iowa 1977). Here, defendant introduced the evidence complained of during direct examination as a matter of trial strategy with the apparent hope of lessening the impact on the jury if the prosecution raised his prior conviction. Defendant cannot now complain such evidence violated his constitutional rights when he introduced it himself. State v. DeWitt, 286 N.W.2d 379, 383 (Iowa 1979); see Shorter v. United States, 412 F.2d 428, 431 (9th Cir.), cert. denied, 396 U.S. 970, 90 S. Ct. 454, 24 L. Ed. 2d 436 (1969); cf. State v. Hinkle, 229 N.W.2d 744, 749-50 (Iowa 1975) (defendant cannot complain of self-induced error).

On the merits, we find the trial court did not abuse its discretion in allowing in this evidence. The crime of breaking and entering is closer to dishonest conduct than

violent or assaultive conduct, and thus reflects on a person's honesty and integrity. Martin, 217 N.W.2d at 540-41 (quoting from Gordon v. United States, 127 U.S. App. D.C. 343, 347, 383 F.2d 936, 940 (1967)). The danger of unfair prejudice from introduction of this conviction here did not outweigh its probative value. We do not accept defendant's contention the trial court must enter into the record its balancing of the various controlling factors. See Martin, 217 N.W.2d at 544.

VII.

Defendant contends the trial court erred in failing to set aside the verdict of burglary in the second degree and rendering instead a verdict of guilty of criminal trespass. According to defendant, since the facts introduced at trial fit both the offense of burglary in the second degree and criminal trespass as described in the jury instructions, the court's failure violated defendant's equal protection rights as guaranteed by the fourteenth amendment of the United States Constitution. We hold defendant was not denied equal protection of the law.

In State v. Furnwald, 263 N.W.2d 751 (Iowa 1978), the supreme court held criminal trespass is not a lesser included offense of burglary. Id at 754. The essential distinguishing factor between burglary and criminal trespass was found to be that burglary is an offense against a secured building and criminal trespass is an offense against land or unsecured property. Id. Under the new criminal code burglary was amended, §§ 713.1, supplement to the Code 1977, but the essential distinguishing characteristic was retained. Burglary is committed against "an occupied structure or area enclosed in such a manner as to provide a place for the keeping of valuable property secure from theft or criminal mischief, such occupied structure or place not being open to the public . . . ." Id. Criminal trespass is committed by entering or remaining on property, including any "land, dwelling, building, conveyance, vehicle, or other temporary or permanent structure . . . ." § 716.7, supplement to the Code 1977.

The Legislature acting within its wide discretion in defining crimes and prescribing punishments, State v. Furman, 261 N.W.2d 475, 479 (Iowa 1978), could rationally decide societal interests in protecting enclosed, secured areas required harsher punishment than would be required to protect unoccupied property. Such a classification scheme bears a reasonable relationship to a rational state objective and

does not deny defendant of the equal protection of the law. See State v. Boothe, 284 N.W.2d 206, 208-09 (Iowa), aff'g, 285 N.W.2d 760 (Iowa Ct. App. 1979).

Trial court judgment is affirmed.

AFFIRMED.