FILED
DEC 2 2 1988
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN THE INTEREST OF)
D.D., A Child,) 8-495
88-04
Appellant.)

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Appeal from the Iowa District (Juvenile) Court for Fayette County (890), James L. Beeghly, Judge.

A child appeals from an adjudication of delinquency and subsequent dispositional order. **AFFIRMED.**

Larry F. Woods, Oelwein, for appellant.

Thomas J. Miller, Attorney General of Iowa, and Charles K. Phillips, Assistant Attorney General, for the State.

Heard by Hayden, P.J., and Sackett and Habhab, JJ., but considered en banc.

HAYDEN, P.J. 18

A child appeals from an adjudication of delinquency and subsequent dispositional order placing him in a group home.

I.

In 1987 the State filed a petition asking the child be found delinquent due to the commission of four crimes, three of which are simple misdemeanors and are not at issue here. The fourth crime was second degree burglary, a class C felony. This crime allegedly occurred when the child entered a garage through an automobile door which was left open, and stole about $2 worth of redeemable cans and bottles

After a hearing, the juvenile court adjudicated the child to be delinquent due to the commission of four crimes, including second-degree burglary. In a subsequent dispositional order, the juvenile court directed the child be removed from his parents' home and placed in a group home. The child has appealed from these orders.

II.

The child contends the juvenile court erred by finding that he had committed the crime of second-degree burglary. He asserts the acts described above did not constitute the crime of burglary but instead constituted only the lesser-crime of criminal trespass. He argues the elements of the crime of burglary were absent because the garage was not an occupied structure and was open to the public; he

points out the fact that the garage's automobile door was usually left open and that the garage was connected to the attached house by a door equipped with a doorbell to let strangers announce their presence. The child also contends the juvenile court should have placed him in his parents' home rather than a group home setting. Our review of this proceeding is de novo. In Interest of Wheeler, 229 N.W.2d 241, 243 (Iowa 1975). Due process requires the standard of proof in a delinquency proceeding be beyond a reasonable doubt. Id.

III.

A. Burglary. D.D. does not contest a criminal act occurred. Instead, the child argues the court erred in adjudicating him delinquent of the crime of second-degree burglary, a felony. Instead, D.D. argues the juvenile court should have found him delinquent for criminal trespass, a misdemeanor.

For the court to find a burglary has occurred, the State must prove beyond a reasonable doubt three elements:

1. The actor must have an intent to commit a felony, assault or theft.

2. The actor must have had no right, license or privilege to do the act.

3. The actor must have entered an occupied structure which was not open to the public.

Iowa Code § 713.1 (1987); State v. Phillips, 378 N.W.2d 316, 317 (Iowa App. 1985).

To sustain a charge of criminal trespass, the court must find, under Iowa Code section 716.7(2)(a), a person (1) [entered] upon or in property; (2) without legal justification or the implied or actual permission of the owner, lessee or person in lawful possession; and (3) with the intent to commit a public offense. See State v. Sangster, 299 N.W.2d 661, 664 (Iowa 1980). Necessarily then, criminal trespass is a lesser-included offense of burglary. Id.

The child's argument, for the most part, focuses on his belief the final element of burglary was not established because the garage in question was not an "occupied structure" within the meaning of section 702.12 or, in the alternative, the child argues even if we determine the garage was an occupied structure, the area was open to the public, thus negating the final statutory element of burglary.

The Code defines an "occupied structure" as:

> [A]ny building, structure, appurtenances to buildings and structures, land, water or air vehicle, or similar place adapted for overnight accommodation of persons, or occupied by persons for the purpose of carrying on business or other activity therein, or for the storage or safekeeping of anything of value. Such a structure is a "occupied structure" whether or not a person is actually present. However, for the purposes of chapter 713, a box, chest, safe, changer or other object or device which is adapted or used for the deposit or storage of anything of value but which is too small or not designed to allow a person to physically enter or occupy, it is not an "occupied structure."

[Emphasis added.] Iowa Code § 702.12 (1987).

D.D. argues the automobile door of the garage was regularly left open and a doorway with a doorbell separated the home from the garage, and thus, the garage could not be a place for storage or safekeeping for anything of value. We disagree.

This question was decided by the Iowa Supreme Court in State v. Sangster, 299 N.W.2d 661, 663 (Iowa 1980). The Sangster court determined the garage in question was an "occupied structure" because it falls within the statutory definition of building used "for the storage or safekeeping of anything of value." The court relied on evidence which showed a car was stored in the garage in its determination the building was adapted for the storage of property having value. Id.

In this case, evidence indicates property of value was stored in the garage, including a lawn mower, outboard motor, and the pop cans which the child appropriated. Thus, we determine the garage here was adapted for storage of property of value and therefore, it was an "occupied structure" susceptible to burglary.

Likewise, we find no merit in D.D.'s second claim that the garage here was open to the public and, thus, not susceptible to burglary. The child asserts because the garage door was open and within the garage there was a door to the house with a doorbell, that the garage was open to

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Likewise, we find no merit in D.D.'s second claim that the garage here was open to the public and, thus, not susceptible to burglary. The child asserts because the garage door was open and within the garage there was a door to the house with a doorbell, that the garage was open to

the public because this interior doorbell invited people into the garage to announce their presence to the property owners.

The exact definition of "open to the public" has thus far escaped judicial definition in Iowa and apparently elsewhere. See People v. Taylor, 452 N.Y.S.2d 526, 528, 114 Misc.2d 680 (S.Ct. 1982). The appellant argues a 1966 Colorado case determining a phone booth was "open to the public" is analogous to the facts here. Macias v. People, 161 Colo. 233, 421 P.2d 116 (1966).

The State argues, and we agree, a phone booth bears little resemblance to a garage and, as a matter of common sense, a single-car garage attached to a private home cannot be considered "open to the public" whether the garage door is open or not. Our reading of section 713.1 leads us to the conclusion a garage of the type at issue here is susceptible to the crime of burglary.

D.D. next argues the juvenile court should not have considered itself bound to find the child delinquent of second-degree burglary, but instead should have used its discretion to choose between criminal trespass and burglary. Both parties agree support for either position is nonexistent, however we find the language of Iowa Code section 701.9 instructive:

> No person shall be convicted of a public offense which is necessarily included in another public offense of which the person is convicted. If the jury returns a verdict of guilty of more than one offense and such verdict conflicts with this

section, the court shall enter judgment of guilty of the greater of the offenses only.

We pass on the general question of whether the juvenile referee could have used his discretion to opt for the lesser charge. In this particular case, we find the principles of merger applied to jury verdicts found in section 701.9 persuasive. In any event, because we review juvenile matters de novo, we determine the State proved the necessary elements for second-degree burglary beyond a reasonable doubt and thus, we determine the juvenile court's findings of delinquency for burglary was proper.

B. Disposition. D.D.'s final argument centers around the juvenile court's decision to remove him from the home; he contends this was error under the facts presented here. Iowa Code section 232.51(1) provides guidelines for the disposition of a child found to have committed delinquent acts:

> Pursuant to a hearing as provided in section 232.50, the court shall enter the least restrictive dispositional order appropriate in view of the seriousness of the delinquent act, the child's culpability as indicated by the circumstances of the particular case, the age of the child, and the child's prior record. The order shall specify the duration and the nature of the disposition, including the type of residence or confinement ordered and the individual, agency, department or facility in whom the custody is vested.

The section goes on to provide the juvenile court with a number of options for actual disposition. Iowa Code

§ 232.52(2)(a-f) (1987). After evaluating the evidence, the juvenile court chose the option of placing the child in the custody of the First Judicial Department juvenile court services for placement in a group home.

In its order, the juvenile court acknowledged the crimes forming the basis for the delinquency adjudication were not heinous. However, it found several other factors coupled with the crimes, warranted out-of-home placement. The court noted D.D.'s numerous offenses or run-ins with the law, his lack of motivation to return to school or find other employment, and that he had failed to comply with earlier probation requirements. The court also noted a psychological report which linked the child's behavioral and motivational problems to the home setting, pointing out the parents had a tendency to minimize the child's problems. The juvenile court ruled out counseling, apparently because it felt it could not count on the cooperation of both parents. We determine from the record the juvenile court was justified in opting for out-of-home placement, and therefore affirm its decision.

AFFIRMED.

All judges concur except Sackett, J., who dissents.

SACKETT, J. (dissenting)

I respectfully dissent.

I would find an open garage that leads to an entry door where there is a doorbell is open to the public. I do not find the evidence supports a finding of second-degree burglary.